

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [XX] Standards Committee

BETWEEN

MN QC

Applicant

AND

HT

Respondent

**The names and identifying details of the parties in this decision
have been changed.**

DECISION

Introduction

[1] Mr MN QC has applied for review of the determination by the [XX] Standards Committee (the Committee) that a bill of costs which included a trial cancellation fee of \$120,000 (the trial had been vacated due to Mr MN's client pleading guilty to charges) constituted unsatisfactory conduct pursuant to s12(b) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Mr MN was instructed by [Law Firm A] to act for Mr HT in defending charges laid against him by the... REDACTED.

[3] It was contemplated that the trial would continue for a period of eight weeks. However, following a sentencing indication by the Judge, Mr HT pleaded guilty to the charges and consequently the trial did not proceed as anticipated.

[4] The fee agreement with Mr HT included a term that if the trial did not proceed for eight weeks, then Mr MN would be entitled to charge an extra week, \$40,000, to compensate Mr MN for the time set aside for Mr HT's trial. However, the fee agreement did not contemplate the trial not proceeding at all.

[5] In his final account, Mr MN included a fee of \$120,000 which he termed "Trial fee". Mr HT raised a query about this, as he considered, and expected, that the situation was covered by the terms agreed, namely that Mr MN would be entitled to charge for one additional week. He accepted (and paid without dispute) the additional one week charge of \$40,000.

[6] Mr MN responded, noting that the fee agreement did not contemplate the trial not proceeding at all. He advised he considered the cancellation fee of \$120,000 was a fair and reasonable fee in the circumstances where he had set aside eight weeks for the trial, a commitment of close to 20 per cent of his working year.

The Standards Committee determination

[7] The Committee determined that a cancellation fee of \$120,000 was not fair and reasonable,¹ and made a finding of unsatisfactory conduct pursuant to s 12(b) of the Act. It ordered Mr MN to reduce his fee by \$80,000.

[8] The finding of unsatisfactory conduct pursuant to s12(b) of the Act rather than s12(c) is significant. The definition of unsatisfactory conduct in s12(b) is "conduct that would be regarded by lawyers of good standing as being unacceptable ...".

[9] The Committee's determination is comprehensive. The following comments in particular are noted:²

[20] ... A cancellation fee agreement will remain subject to the overriding criteria that it is fair and reasonable having regard to the interests of both client and lawyer and having regard to the fee factors in Rule 9.1. The Standards Committee does not consider that it is open to a lawyer to charge a cancellation fee only because, in retrospect, it seems to the lawyer to be justified by the circumstances of the particular case.

[21] ... The difficulty is that events did not turn out in the way they had expected or had addressed in their agreement. Consequently, the fee charged by Mr MN must be viewed in terms of one of two possibilities:

- (a) Whether it was open to him to charge the fee on a contractual basis, by implication drawn from the terms of the cancellation fee agreement;

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.

² Standards Committee determination, 25 August 2016 at [20]–[22], [26].

- (a) If not, whether it was nevertheless a fair and reasonable fee in terms of Rule 9 and the fee factors in Rule 9.1

[22] The Standards Committee does not accept that there was any contractual basis, by way of an implied term or otherwise, for the cancellation fee charged by Mr MN ...

[26] ... The Standards Committee is satisfied that a fee found to be excessive to that extent would be regarded by lawyers of good standing as being unacceptable, constituting unsatisfactory conduct under s12(b) of the Act and it determines accordingly."

Application for review

[10] Mr MN has applied for a review of the determination and on 21 November 2016, provided detailed submissions in support of his application:

- (a) The Committee was wrong to proceed on the implied assumption that the contingency fee (one week) was also to cover the possibility the trial would not proceed at all. He submits that "the one week cancellation fee is clearly in the context of the trial proceeding. Nothing else [was] contemplated".
- (b) There was no correspondence between Mr MN and Mr HT "that makes any mention of the trial not proceeding". He goes on to say that "the simple reason for the absence of any such documentation is that the trial proceeding was considered to be inevitable by all parties and certainly by" Mr MN.
- (c) "It is apparent from [Mr MN's] letter that the fee arrangement [was] ... proposed on the basis of the substantive trial proceeding and proceeding for a number of weeks. Importantly, that is the explicit basis for the discount in the preparation fee rate to be charged".
- (d) Mr HT did not raise the possibility that the arrangement covered a situation of the trial not proceeding at all and does not assert that he did raise it with Mr MN.
- (e) Mr HT "is asserting now (to his advantage) that an unstated and unrecorded 'understanding' (of his) should be seen as accurate. With respect, that is wrong and the committee was wrong to come to a conclusion that the one week cancellation fee applied to a situation where the trial did not proceed at all".

- (f) Mr MN submits there is effectively a two-stage process in determining fee complaints under the Act. He submits the first step is to determine whether a fee is fair and reasonable or not. If a fee is found not to be fair and reasonable, then, he submits, before a finding of unsatisfactory conduct can be made, the surrounding circumstances need to be considered and an assessment made as to whether or not the charging of the fee was reasonable in the circumstances. He argues in effect that his conduct was reasonable because the fee agreement did not include the possibility of the trial not proceeding at all and he had applied a discounted rate to his preparation time in anticipation of the trial proceeding.

The role of the LCRO on review

[11] Although “those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on a deference to the view of the Committee”,³ in this instance there is little purpose in repeating the views of the Committee albeit expressed differently. This is because, having considered all of the material provided by the parties to the Committee and on review, I have reached the same conclusion as the Committee.

[12] In the circumstances the Committee’s determination is endorsed subject to comments made in this decision.

Was there a contract between the parties?

[13] At various points in its determination the Committee has commented there was no contractual basis for the cancellation fee to be charged. Whether or not a fee is considered to be reasonable or not is affected by “any fee agreement ... entered into between the lawyer and the client”.⁴

[14] I agree with the Committee when it recorded it did “not accept that there was any contractual basis, by way of an implied term or otherwise, for the cancellation fee charged by Mr MN”.⁵ However, the enforceability or otherwise of an agreement between the parties is not determinative of this complaint.

Is the fee claimed fair and reasonable?

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 9.1(k).

⁵ Standards Committee determination, above n 2 at [22].

[15] The underlying premise in Mr MN's submissions is that there was no discussion between him and Mr HT as to the possibility of the trial not proceeding at all and the one week additional fee to be charged related only to the situation where the trial did not continue for eight weeks.

[16] For his part, Mr HT disagrees that it was not within contemplation that the trial would not proceed at all. In an email to Mr MN dated 30 March 2016, Mr HT says:

As I recall it the prospect of a late change in plan by the prosecution leading to a 'plea agreement' was discussed very early on in our meetings on this litigation.

[17] In any event, Mr MN's submission begs the question as to whose duty it was to raise the issue if he intended to make such a charge. Rule 3.4(a) requires a lawyer to provide a client with information as to the basis on which a fee will be charged. The onus was on Mr MN to be alert to the possibility of the trial not proceeding at all and inform Mr HT of his intention to include a trial cancellation fee if this situation arose.

[18] Mr MN submits that the fee agreement between Mr HT and himself did not allow for the situation where the trial did not proceed at all. Any fee agreement must be fair and reasonable and that is the fundamental issue to address.

[19] The fee factor on which Mr MN relies to make the additional charge of three weeks is "the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients".⁶

[20] The inference to be drawn from Mr MN's submission is that because he had set aside eight weeks for the trial, he was unable to accept instructions for which he would have otherwise earned \$120,000.

[21] That is a difficult proposition to accept. Mr MN has not provided evidence of work he was obliged to turn away because he had committed himself to the trial and not everything undertaken by a barrister demands attention within an immediate timeframe.

[22] Mr MN's stance also discounts the possibility that new work may have been presented to him in the weeks that the trial would have taken up and if it had, or was, Mr MN would be paid doubly for that period of time. That possibility is certainly unfair and unreasonable.

⁶ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 9.1(h).

[23] It is inescapable that if the fee is supported, it constitutes support for a proposition that a lawyer can be paid for no work at all. That also is not fair and reasonable.

[24] Mr MN's fee is based on his daily rate of \$8,000. Other instructions which he may have been able to accept, may not necessarily have involved court appearances for which he would not have been able to charge his daily court rate. Even a full week, 40 hours, at Mr MN's hourly rate of \$800 would have rendered him \$32,000, not \$40,000 as charged by him.

[25] There are many variables in the working week of a barrister that means it is not fair and reasonable to expect a client to pay for a full week at the top rate of return. There is no guarantee the lawyer would otherwise have had the work or had instructions which could be billed at the barrister's daily court rate for a continuous period of three weeks.

[26] The discussion in this matter has focussed on the single factor provided for in r 9.1(h). The other fee factors Mr MN refers to in his submissions are reflected in his hourly rate.

[27] If Mr MN wished to pursue contractual liability, he could have done so through the court, but he himself has acknowledged that the fee agreement did not relate to the circumstances which developed. In the complaints and disciplinary context, the issue is whether the fee charged is fair and reasonable.

[28] A decision as to whether or not a fee is fair and reasonable is necessarily subjective to some extent and it is in this regard that the views of the Committee may most helpfully be taken into account. Mr MN refers to this as an "unsubstantiated value judgment." Members of the Committee include lawyers familiar with the work undertaken and relationships between a barrister and his or her client. The Committee will also have included at least one lay member. In this regard, it is reasonable to take the Committee's view into consideration.

A two-stage approach?

[29] Mr MN argues that the first enquiry to be undertaken by the Committee is "whether the fee is justified." He submits that "if it is not, then the issue of whether the charge amounts to unsatisfactory conduct in the circumstances has to be addressed."

[30] In the terminology of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), the test is whether or not the fee was fair and reasonable rather than “justified” as submitted by Mr MN, but nothing turns on the difference in terminology. What Mr MN overlooks, is the fact that if the finding is that the fee is not fair and reasonable, then, ipso facto, that constitutes unsatisfactory conduct pursuant to s12(c) of the Act. Given that I agree with the Committee that the fee of \$120,000 as charged, is not fair and reasonable, the determination of the Committee will be modified to include a finding of unsatisfactory conduct pursuant to s 12(c).

[31] It is somewhat difficult to follow Mr MN’s submission at [27] he argues:

[T]he [X]SC had to initially consider whether the basis upon which I charged the fee was fair and reasonable. If a fee is charged, but found to be not payable it does not mean there has been any irresponsibility or indeed unsatisfactory conduct.

[32] Mr MN seems to equate a finding that a fee is not fair and reasonable, with the outcome that the fee is not payable. That submission discounts altogether a finding of unsatisfactory conduct pursuant to s 12(c).

[33] A finding that a fee is not fair and reasonable does not go to liability.

[34] In the present instance, the Committee made a finding pursuant to s 12(b) of the Act, and it is assumed that this is predominantly what Mr MN objects to. The finding of unsatisfactory conduct pursuant to s 12(c) of the Act follows a finding that the fee is not fair and reasonable.

[35] I agree with Mr MN’s submission that whether or not a finding that a fee is not fair and reasonable constitutes unsatisfactory conduct pursuant to s 12(b) does involve a two-stage process. Although the Committee has not set its determination out in such a clear manner, it has addressed the additional factors to be taken into account when determining whether or not the finding should be pursuant to s 12(b). For example, in paragraph [27] of its determination, the Committee has noted the extent to which the fee exceeds what a fair and reasonable fee would be.

[36] The Committee, and Mr HT, accept that a cancellation fee of \$40,000 was fair and reasonable. Mr MN’s fee was three times that amount. A fee which is three times a fair and reasonable charge begins to fall into the category of misconduct, and hence referral to the Lawyers and Conveyancers Disciplinary Tribunal. As the amount in question is a specific element of Mr MN’s bill only, there is no question of

consideration being given to referral to the Tribunal, but it does provide some justification for the finding pursuant to s 12(b) of the Act.

[37] It is not proposed to further identify or add to the reasons of the Committee for its finding pursuant to s 12(b). The finding of unsatisfactory conduct pursuant to s 12(c) has been made, and there is little to be gained from an extensive and further consideration of the differences between the two findings.

Discounted hourly rate

[38] Mr MN argues that he applied a discounted hourly rate for preparation time only on the basis that the trial was going to proceed. If that was Mr MN's rationale for the reduction of his hourly rate, then that should have been made clear to Mr HT and it was not. Mr MN is a senior lawyer and it is not unreasonable to expect that if conditions were to be attached to the application of the reduced hourly rate, then this should have been communicated to Mr HT. Mr MN must accept the consequences of his own lack of foresight in this regard.

Summary

[39] In summary, I concur with the finding of the Committee, that rendering a fee for \$120,000 for a period within which Mr MN carried out no work at all for Mr HT, constitutes unsatisfactory conduct pursuant to s12(b) of the Act. It far exceeds what is fair and reasonable to impose in reliance on r 9.1(h) of the Rules. If Mr MN wanted to charge a fee for time allocated to a trial that did not proceed, then the onus was on him to recognise the possibility of that event occurring, however remote, and to advise Mr HT of his intended billing practice in that regard.

[40] In addition, Mr MN's conduct in rendering the fee constitutes unsatisfactory conduct pursuant to s12(c) of the Act.

Decision

[41] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed but modified to include a finding of unsatisfactory conduct pursuant to s12(c) of the Lawyers and Conveyancers Act 2006 by reason of a breach of rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Costs

[42] Where an adverse finding is confirmed on review, an order for costs follows in accordance with the Costs Orders Guidelines of this Office. Pursuant to s210(1) of the Lawyers and Conveyancers Act 2006 Mr MN is ordered to pay the sum of \$900 by way of costs to the New Zealand Law Society by no later than 22 December 2017.

[43] As required by s 215(2) of the Act, it is noted this order is enforceable in the Auckland District Court.

DATED this 27th day of November 2017

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr MN as the Applicant
Mr HT as the Respondent
[XX] Standards Committee
The New Zealand Law Society