

LCRO 253/2015

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [Area] Standards Committee [X]

**BETWEEN**

**SL**  
Applicant

**AND**

**NA**  
Respondent

**DECISION**

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

Introduction

[1] Mr NA is a barrister. In 2011, Mr SL instructed Mr NA to act as counsel for his client, Ms EO.

[2] This review concerns Mr SL's liability for Mr NA's fees. It does not address the reasonableness of those fees, which was the subject of a separate complaint by Ms EO. The [Area] Standards Committee [X] was advised by Mr SL that Ms EO had applied for a review of the Committee's determination to take no further action on the complaint, but that advice was incorrect.

[3] A significant amount (\$126,366.20) remains unpaid.

**Mr NA's complaint**

[4] Mr NA was instructed by Mr SL to act as counsel for Ms EO, who faced a number of charges on indictment for trial in the [City A] District Court. Mr NA's instructions were completed on [Date] 2012 when Ms EO was sentenced.

[5] During the period of his instructions, Mr NA rendered eight invoices, the first four of which were paid by Mr SL. The remaining four invoices, totalling \$126,366.21, were not paid.

[6] Mr NA lodged his complaint with the Lawyers Complaints Service on 29 January 2014. His complaint was simply that Mr SL was in breach of r 10.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) for failing to pay the outstanding amount.

### **Mr SL's response**

[7] Mr SL's response to the complaint, dated 11 March 2017, included:

- "From the outset Mr NA knew that payment of his fees was based on the financial support of Mrs E EO (and her company EO Farms Limited) for her daughter, U EO".
- That Mr NA would charge at the legal aid rate of \$140 per hour "and [the total fee] would be \$40,000 plus GST and disbursements".
- His "understanding...was that our involvement would include covering Mr NA for fees to this extent...".
- He had not agreed to pay Mr NA's fees on an "unlimited or open-ended basis..." and considered he had "fully discharged" his obligations to Mr NA.

[8] Difficulties with payment of the outstanding invoices arose because Mrs EO withdrew her support for her daughter and Mr SL advised that Mr NA had been made aware of that as soon as it had occurred.

### **The Standards Committee determination**

[9] The Committee determined there was no evidence of an agreement between Mr NA and Mr SL that Mr SL would not be responsible to pay Mr NA's fees and that "the onus is on the instructing solicitor to ensure that there is a clear agreement to the contrary before the instructing solicitor will have no liability for payment of the barrister's fees".<sup>1</sup>

---

<sup>1</sup> Standards Committee determination, 21 October 2015 at [11].

[10] It also determined there was “no corroborative evidence” of an agreement by Mr NA to carry out the instructions for a fixed sum of \$45,000.<sup>2</sup>

[11] The Committee determined that Mr SL was in breach of r 10.7 of the Rules and made a finding of unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act). It ordered Mr SL to “rectify his error in failing to pay Mr NA’s outstanding fees”, but deferred the order pending completion of Ms EO’s complaint about the quantum of the fees.<sup>3</sup>

[12] Mr SL was ordered to pay costs of \$500 to the New Zealand Law Society.

### **Application for review**

[13] Mr SL’s supporting reasons for his application included:

- The Committee had “misinterpreted the effect of the [Rules] and ha[d] misdirected itself concerning [r] 10.7”. He contested that “an instructing solicitor must be able to withdraw from acting as such by advising the barrister that the instructing firm is no longer able to fund the brief” and asserted that “this is exactly what happened in the present case”. He submitted that Mr NA had chosen to continue with the brief “voluntarily”.
- He submitted that “the conduct in question amounted to an agreement to the contrary within the meaning of [r] 10.7”.
- He also asserted that “the fee proposed by Mr NA was \$45,000 which was the amount A/SL Law Limited agreed to protect Mr NA for” and that Mr NA had been paid in excess of that amount.

[14] The outcome sought by Mr SL was for it to be held that neither he nor his firm had any liability to pay the outstanding amount.

### **Procedure**

[15] This review has been conducted by Mr Vaughan, in the main in his capacity as a delegate to this Office.<sup>4</sup> The LCRO has delegated Mr Vaughan to report to me and

---

<sup>2</sup> At [12].

<sup>3</sup> At [16]. The Committee subsequently determined to take no further action with regard to Ms EO’s complaint as to the quantum of Mr NA’s fees.

<sup>4</sup> The file was assigned to Mr Vaughan during his term as Deputy Legal Complaints Review Officer, which expired in September 2016. Since that time Mr Vaughan has been acting as a delegate appointed pursuant to cl 6 sch 5 of the Act.

the final determination of this review as set out in this decision is made following a full consideration of all matters after receipt of Mr Vaughan's report and discussion.

[16] Mr LT QC has acted for Mr SL throughout.

[17] Completion of this review has been protracted and the Office apologises to the parties for the delays occurring. Further delays have been occasioned by Mr SL's ill health and adjournments following the hearing in person in February of this year.

[18] The parties have been encouraged to endeavour to resolve matters between them, but this has not been possible.

[19] A hearing in person took place in Auckland on 12 February 2019 and was adjourned to enable the parties to address a jurisdictional issue as to the recoverability of the outstanding amount.

[20] The hearing resumed by telephone on 10 April 2019, primarily to address how the review was to continue. Mr LT requested further time to provide submissions in response to Mr NA's submissions of 18 March 2019. These were received on 27 May 2019 and Mr NA's final submissions were received on 19 June 2019.

## **Review**

[21] In the course of this review Mr LT and Mr NA have provided extensive submissions.

### *A fixed fee?*

[22] Mr LT submitted that Mr NA had agreed to represent Ms EO at the trial for \$40,000 plus GST and that this constituted an "agreement" in terms of r 10.7.<sup>5</sup> This agreement "could only be amended by a further agreement between the instructing solicitor and the barrister".

[23] Rules 3.4 and 3.5 require a lawyer to provide certain information to a client "in advance". However, r 3.7 provides that these rules do not apply where the lawyer is instructed by another lawyer.

[24] In a letter to Mr NA on 28 April 2011, Mr SL said:

---

<sup>5</sup> In [12] of its determination, the Committee refers to the fee which Mr SF submitted had been proposed by Mr NA as being \$45,000. In his letter of complaint Mr SF says that Mr NA had agreed to act for \$40,000 plus GST. The rate of GST was increased to 15 per cent on 1 October 2010. The amount of GST on \$40,000 is \$6,000. Therefore, the fee which Mr SF says Mr NA agreed to would have been \$46,000.

Please also let us have an indication as to the likely costs that [Ms EO] will incur for your services and we will make arrangements for those funds to be held in our trust account on the usual basis (we appreciate that you may have to do some investigation before you can make any determination of what will be a realistic charge for your services).

[25] In his affidavit dated 27 May 2017, Mr SL deposes that Mr NA verbally advised that his fee would not exceed \$45,000. He does not say when that conversation took place, but Mr NA subsequently confirmed that fees were discussed at the meeting on 12 May 2011.

[26] In his letter of 27 May 2011, Mr NA refers to the meeting on 12 May 2011. He says:

At our meeting in [City] on 12 May I gave a preliminary indication as to counsel's costs ... Adopting an approximate mean between the legal aid rate of charges and the hourly recovery rate approved by Glazebrook J, the amount of \$200 per hour for attendances and \$75 per hour for travel expenses is estimated. That estimate is exclusive of GST, where the GST rate subsequent to 1 October 2010 is 15 [per cent].

[27] Mr LT submits that the content of this letter cannot be considered and that Mr NA's submission is "worthless" because Mr NA has not produced the letter. That principle is not applicable to a review conducted by this Office. The letter in question is on the Committee's file and it is the practice of this Office to obtain a copy of the file when an application for review is made. The content of the letter has been able to be verified and Mr NA's statements are correct.

[28] Mr NA's first invoice "covering the period from 28 April 2011 to 12 May 2011" was rendered on 27 May 2011 "at \$200 per hour" plus GST, calculated with reference to the number of "units" expended by Mr NA on the matter. The narration to the invoice concluded with the words:

My interim fee...

[29] The next invoice was rendered on 10 August 2011. This also was expressed as being for the period referred to and calculated with reference to the number of "units" devoted by Mr NA to the matter (826) at the same hourly rate. It too concluded with the words:

My interim fee.

[30] All invoices were completed in the same manner.

[31] If Mr NA had agreed to a fixed fee, it would have been expressed as an amount "on account", rather than being based on time and reference to the invoice being an "interim fee", which indicated that further invoices were going to be rendered.

There was nothing to indicate that they would be rendered on any basis different from those already provided.

[32] On 31 August 2011, Mr SL wrote to Mr NA advising that Ms EO had been served with additional charges and requested Mr NA to accept instructions to act on those. Even if Mr SL considered Mr NA had agreed to act for a fixed fee initially, he cannot have expected Mr NA would accept instructions to act on the additional charges and still continue to abide by the fixed fee calculated prior to the additional charges being brought. That was evidenced by the next part of his letter where he said:

We would appreciate it if you could accept instructions to act as Counsel representing Ms EO's interests in respect of those additional charges (i.e all charges that she currently faces before the Court).

We will make arrangements with Ms EO to cover your fees and would appreciate it if you could let us know what would be an appropriate sum to have paid.

[33] Subsequent invoices were rendered by Mr NA on 28 November 2011 and 16 January 2012 on the same basis as previous invoices, i.e. expressed to be for the period covered and calculated with reference to the number of units of time expended.

[34] The invoice rendered on 16 January 2012 covered the period from 8 September to 7 October 2011. In his covering letter with that invoice Mr NA reported that the trial was part completed on 9 December and was due to resume on 8 February 2012.

[35] By that stage, Mr NA's fees had reached \$60,214 (including GST) and if Mr SL considered that Mr NA was committed to a fixed fee of \$40,000 plus GST, it would be expected that he would have raised the issue at that time. However, all invoices were paid by SL Law without comment.

[36] The issue was raised by Mrs EO's lawyer, Mr MI. In a letter to Mr SL on 18 May 2012 Mr MI said:

In your letter to E EO of 27 April 2011 you refer to an expected budget of \$30,000 plus GST. Subsequently a figure of \$50,000 to cover U EO's case through to the end of trial was mentioned. To date including accounts dated 23 March 2012 and 30 April 2012 total costs invoiced are \$145,770.59 (including GST) – \$70,616.12 by SL Law and \$75,154.47 by barristers. This does not include the barrister's charges for the actual trial.

[37] Mr MI advised in his letter that Mrs EO would not be paying the "March and April accounts until this has been concluded".

[38] In an email to Mr MI following receipt of that letter, Mr SL says:<sup>6</sup>

It is appropriate that we discuss this, I have phoned you several times in the last month and left a message for you to call me.

Mrs EO did not discuss any of this with us at any time before her email to say “stop work” on her various files. Her email did not extend to her daughters file as she had always made it clear she would pay those costs for U EO (from trust funds held by her for the benefit of U EO and/or on the basis that U EO would be paying it back in the future). This needs urgent discussion as there is ongoing work relating to sentencing and preparation, including a psych report.

[39] The interaction between the parties referred to in the foregoing paragraphs does not support Mr SL’s contention that Mr NA had committed to a fixed fee.

*Was there an ‘Agreement’?*

[40] Mr LT submits there was an agreement between Mr NA and Mr SL that Mr SL’s liability for Mr NA’s fees was conditional on Mrs EO continuing to fund her daughter’s defence costs. That was the grounds for review included in Mr SL’s application.

[41] At [53] of his 18 March 2019 submissions, Mr NA refers to a comment in *Ethics, Professional Responsibility and the Lawyer*, where the author says:<sup>7</sup>

When a solicitor instructs a barrister, the solicitor is prima facie bound by the rules to meet the barrister’s fees regardless of whether the solicitor has been put in funds by the client for this purpose. The rule is displaced if the solicitor and barrister agree that the payment of the barrister’s fee depends on some other eventuality (such as payment by the client).

[42] In response, Mr LT says:

This is exactly the position in the present case because, as Mr NA acknowledges in his paragraph 23, the arrangement was that Mr NA would be paid from funds provided by the client’s mother and Mr SL’s firm agreed to make arrangements “for those funds to be held in the trust account on the usual basis”.

[43] In [23] of his submissions, Mr NA refers to his letter of 27 May 2011. Mr LT again makes the submission that Mr NA’s submission is “worthless” because he does not produce his letter of 27 May 2011. A copy of this letter is on the Committee’s file and Mr NA does not need to produce it to be able to rely upon it.

[44] In that letter, as noted in [26] of this decision, Mr NA discussed legal aid rates, and settles on the rate of \$200 plus GST per hour for attendances and \$75 plus GST

---

<sup>6</sup> Email SF to MI, 21 May 2012.

<sup>7</sup> Duncan Webb, Kathryn Dalziell and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [15.10.2].

for travel. There is no agreement, or acknowledgement, that the obligation imposed on Mr SL by r 10.7 was conditional upon Mr SL receiving funds from Mrs EO.

[45] In his application for review, Mr SL says that Mr NA continued to incur costs “voluntarily” after he had been advised by Mr SL that Mrs EO was no longer prepared to continue funding her daughter’s defence costs. In reply to this, Mr NA says:

Assuming it is correct that on 8 or 9.2.2012 counsel was informed that Mrs EO had ceased her obligation to fund the trial, by that stage counsel was in [City] for the purpose of making his closing address. Counsel had been previously told by the trial Judge leave would not be granted for counsel to withdraw. Counsel had no obligation other than to remain to make his closing address.

[46] Mr NA had no choice.

[47] It is acknowledged that Mr SL himself was caught unawares when Mrs EO reneged on her commitment to fund the trial. However, that did not relieve Mr SL of his obligation to Mr NA and there is no discretion to waive the application of the rule. If Mr SL had wanted to make sure his liability for costs had ceased, it would have been necessary for Mr SL to formally withdraw his instructions to Mr NA. He did not do that.

*Mr SL’s affidavit*

[48] In his affidavit sworn on 27 May 2019, Mr SL deposes:

It is my understanding that Mr NA sent a fax to Mrs E EO on or about 2 May 2011 which, amongst other things, confirmed his charge-out rate of \$140 per hour and a fee of up to \$45,000 to represent U EO in the up-coming trial.

[49] The first invoice was billed on an interim basis at the hourly rates referred to in Mr NA’s letter of 27 May 2011. If Mr SL was proceeding on the understanding that Mr NA’s hourly rate was \$140, then it would be expected that he would have objected immediately. There is no evidence of any objection by Mr SL.

[50] I concur with the Committee when it says at [11] of its determination:

The onus is on the instructing solicitor to ensure that there is a clear agreement to the contrary before the instructing solicitor will have no liability for payment of the barrister’s fees.

[51] There is no such evidence. Mr SL and Mr WN have both provided sworn evidence that Mr NA had sent a fax to Mrs EO in which he indicated his maximum fee would be \$45,000.<sup>8</sup> Mr SL deposes that he believes the fax may be held by Mr MI. No explanation has been provided as to why the fax cannot be produced.

---

<sup>8</sup> Mr WN accompanied Ms EO to a meeting in [Town C] with Mr NA.



[52] On the contrary, the evidence that is available would indicate that Mr SL himself did not proceed on the basis that there was a fixed agreement until Mrs EO and Mr MI raised objections to meeting further costs. It would seem that it was Mr SL who had given estimates of likely fees to Mr MI and Mrs EO without having corresponding advice from Mr NA.

[53] The determination of the Committee on this issue is confirmed.

*Precedent effect*

[54] Mr LT says that this decision “will form an important precedent for the legal profession”.

[55] He says:

It is no exaggeration to say that instructing solicitors in New Zealand would be appalled by the prospect that they could be held liable for unlimited fees in a situation where a barrister has egregiously failed to fulfil his obligations to provide fee information, in advance, when that information was expressly requested at least twice by the instructing solicitor.

[56] In many instances it would be impossible for a barrister to provide a realistic estimate of how much is going to be involved to complete the instructions. All lawyers face this difficulty from time to time.

[57] The instructing lawyer has a choice. If the barrister is obstructive or uncooperative in discussing likely fees, and how much the instructing lawyer should protect him or herself for, then there is the option, in the first instance, to request the barrister to share the risk by agreeing to waive the obligation imposed by r 10.7. If the barrister is not agreeable to that, then the lawyer has the option of suggesting a different barrister and/or declining to act at all.

[58] The instructing lawyer knows what the obligation imposed by r 10.7 is and must take steps to protect him or herself accordingly in whatever way he or she can achieve. The obligation is expressed in absolute terms:

A lawyer who, acting in a professional capacity, instructs another lawyer, **must** pay the other lawyer’s account promptly and in full unless agreement to the contrary is reached...

[59] There was no agreement reached between Mr NA and Mr SL.

*Personal liability*

[60] Mr LT submits that “Mr NA clearly accepted instructions on the basis that he was being instructed by an incorporated law firm”. He submits that liability for Mr NA’s fees lies with SL Law Limited.

[61] Section 17(2) of the Act provides:

**17 Liabilities of director or shareholder of incorporated firm**

...

- (2) Subject to subsection (1), a practitioner who is a director or shareholder of an incorporated firm is subject to all the professional obligations to which he or she would be subject if he or she were in practice on his or her own account.

[62] This establishes that Mr SL’s professional obligations are not negated by the fact that his practice was operated through the medium of a limited liability company.

[63] Mr SL has breached the professional obligation established by r 10.7.1. The consequence of the breach of this obligation is “unsatisfactory conduct or misconduct”.<sup>9</sup>

[64] The finding of unsatisfactory conduct is confirmed on review.

*Penalty*

[65] The Committee ordered Mr SL to “rectify his error in failing to pay Mr NA’s outstanding fees”.<sup>10</sup> The Committee did not specify that it made its Order pursuant to a particular section of the Act, but the Order reflects the wording of s 156(1)(h) of the Act.

[66] That is the only order that can follow a finding that there has been a breach of r 10.7. The order made by the Committee is confirmed on review.

*Costs*

[67] The Committee imposed an order for payment of costs in the sum of \$500. That is confirmed on review. In addition, an award for payment of the costs of this review is appropriate.

---

<sup>9</sup> Webb, Dalziel and Cook, above n 7 at [15.10.2].

<sup>10</sup> Standards Committee determination, 21 October 2015 at [16].

**Decision**

[68] Pursuant to s 211(1) of the Lawyers and Conveyancers Act 2006, the determination, including the orders made by the Standards Committee pursuant to s 156, is confirmed.

[69] Pursuant to ss 211(1)(b) and 156(3) orders for money are payable by 26 July 2019.

[70] Pursuant to s 210(3) of the Act, Mr SL is ordered to pay the sum of \$1,800 to the New Zealand Law Society in respect of the costs of this review by 26 July 2019.

[71] Pursuant to s 215 of the Lawyers and Conveyancers Act 2006, orders for money may be enforced in the District Court.

**DATED** this 28<sup>th</sup> day of June 2019

---

**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 SL as the Applicant  
Mr NA as the Respondent  
Mr LT as the Applicant's Representative  
[Area] Standards Committee [x]  
New Zealand Law Society  
Secretary for Justice