

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2022] NZLCRO 030

Ref: LCRO 191/2020

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

QC on behalf of ABC LIMITED

Applicant

AND

VH

Respondent

DECISION

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

Introduction

[1] Ms QC, on behalf of ABC Limited, has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondent, Mr VH.

Background

[2] Ms QC was the sole shareholder and director of the company ABC Ltd (ABC).

[3] [ABC] was a franchisee of a [coffee] café.

[4] [ABC] became embroiled in a dispute with DEF Ltd (DEF), the franchisor.

[5] At the core of the dispute, was a disagreement as to the duration of the franchise agreement that governed the relationship between the parties, and dispute as to which of two conflicting franchise agreements that were in existence, held force.

[6] From 1 April 2018, [ABC] carried on business as an independent café in reliance on provisions in the franchise agreement which it contended was operative. This agreement provided that the relationship between [ABC] and [DEF] would end on 1 April 2018.

[7] It was [DEF]'s position that the franchise agreement which governed the relationship between the parties did not expire until 31 October 2022.

[8] In June 2018, [DEF] issued proceedings in the High Court. The court ultimately held that the version of the franchise agreement relied on by [ABC] prevailed, and that [DEF]'s claim for specific performance failed. [DEF] succeeded in its claim for recovery of outstanding franchise fees.

[9] [Law firm] represented [ABC] in the proceedings. Mr VH had overall responsibility for the carriage of the file.

[10] The proceedings advanced in three stages, at the conclusion of which [Law firm] issued fee invoices. Those stages were:

- (a) commencement and injunction – June to October 2018 – \$45,800 plus GST and disbursements; and
- (b) first substantive hearing – 18, 19 20 February 2019 – \$107,624.50 plus GST and disbursements; and
- (c) second substantive hearing – 6 September 2020 – \$32,000 plus GST and disbursements.

[11] [ABC] made complaint that the fees charged were not fair and reasonable.

The complaint and the Standards Committee decision

[12] Ms QC lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 25 March 2020. The substance of her complaint was that her company had been significantly overcharged for work involved in the preparation and conduct of a three-day trial. Ms QC contended that her view that she had been manifestly overcharged was supported by a senior Auckland barrister she had consulted.

[13] In advancing her complaint, Ms QC noted that her company had been invoiced a total of \$227,782.61, of which she had made payment of \$180,220.56. This left a balance outstanding of \$47,562.05. She advised that in her discussions with [Law firm], the lawyers had indicated a willingness to discount the balance owing in the sum of \$5,180.85.

[14] [Law firm] provided a comprehensive response to the complaint on 30 April 2020.

[15] It was submitted for the lawyers that:

- (a) Ms QC's complaint lacked merit; and
- (b) defending Ms QC's company's position engaged a "substantial piece of High Court litigation"; and
- (c) that litigation included the opposing of an application for interim injunction, a substantive trial and a further hearing; and
- (d) the matter was of significant importance to the company both in terms of financial implications, and addressing response to allegations made of dishonest conduct; and
- (e) the outcome had been successful for the company; and
- (f) a substantial amount of work had been involved in conducting litigation over the period June 2018 to September 2019; and
- (g) resolving the contested issues involved the production of detailed factual evidence, intensive witness briefing, a significant amount of legal research and preparation of detailed submissions; and
- (h) the proceedings had been characterised by the need to address a number of procedural matters;
- (i) the outcome achieved for the company was markedly successful; and
- (j) to the extent that the company's position had not been successful, the defence advanced had not been wasted and the specific issue (payment of franchise fees) consumed a minimal amount of hearing time; and
- (k) fees charged were supported by evidence of the work done, and time records; and

- (l) work involved relating to the second substantive hearing had not been contemplated, as the issue addressed in that hearing was one that had been identified as requiring further argument by the judge who had presided over the first hearing; and
- (m) fees charged were within the range of fair and reasonable and supported by reference to rule 9 and the fee factors in rule 9.1;¹ and
- (n) Mr VH was a highly qualified, skilled and experienced litigator and was supported primarily by Mr NM; and
- (o) in circumstances where work on the file was allocated to persons other than Mr VH or Mr NM, the lawyers selected to undertake the work were chosen with a view to the discrete tasks that were being undertaken; and
- (p) allocating tasks to additional staff did not engage any doubling up of time, a number of the lawyers engaged were equipped to carry out the tasks at a lesser hourly rate than would have been charged by Mr VH or Mr NM; and
- (q) [Law firm] had endeavoured to settle the dispute.

[16] The Standards Committee charged with conducting the investigation into the fee complaint understandably, in view of the quantum of fees involved, determined to appoint a cost assessor to provide the Committee with a report.

[17] Mr JP was requested to prepare a report. His report was promptly completed and made available to the Committee on 17 June 2020.

[18] On receipt of the cost assessor's report, both Ms QC and Mr VH were provided opportunity to comment on the report.

[19] Mr VH advised that he did not wish to comment. Mr GY, on behalf of Ms QC sought extensions of time for filing a response on grounds that circumstances relating to quarantine and lockdown were impeding his ability to discuss the report with the senior lawyer who had advised Ms QC that the fees charged were excessive.

[20] The Standards Committee granted extensions sought by Mr GY, but on 17 August 2020, advised Mr GY that the Committee wished to proceed with its inquiry. Advising that sufficient extensions had been provided, the Committee informed Mr GY

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), rr 9, 9.1.

that it considered options other than a face to face meeting were open to Mr GY to enable him to obtain input from the lawyer he was intending to consult.

[21] Mr GY provided a brief response on 20 August 2020. That response did not reference any information from the lawyer that Mr GY had intended to consult. His submission essentially reinforced argument advanced when the complaint was filed, that [Law firm]’s apportionment of tasks amongst a multitude of authors had likely contributed to inefficiencies and an escalation in costs.

[22] The Standards Committee delivered its decision on 15 September 2020.

[23] The Committee determined pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[24] In reaching that decision the Committee concluded that:

- (a) taking into consideration the r 9.1 factors, the fees charged were fair and reasonable; and
- (b) it agreed with the cost assessor’s conclusion that deploying a number of staff to work on the file had not resulted in a duplication of costs; and
- (c) areas identified by Ms QC where she had considered that time spent on specific matters was excessive were considered and conclusion reached that time recorded on those matters was reasonable in the circumstances.

[25] Considering the fees in the aggregate, the Committee reached similar conclusion to that of its experienced costs assessor that the time spent on the matter was reasonable.

Application for review

[26] Ms QC filed an application for review on 13 October 2020.

[27] She submits that:

- (a) she had been advised by a senior barrister that her company had been overcharged in the vicinity of around \$80,000 to \$100,000, this assessment taking into consideration the degree of complexity and costs incurred for a three-day trial and subsequent appearance; and

- (b) the barrister providing this advice wished to remain anonymous from fear of retribution from his colleagues; and
- (c) as a layperson, it was impossible for her to identify or quantify the amounts where she had been significantly overcharged, but she was hopeful that the LCRO would be able to “see through all of this”; and
- (d) she was concerned that the independent cost assessor was a [City]-based lawyer as [law firm] was a [City] based firm.

[28] Mr VH was invited to comment on Ms QC’s review application but elected not to do so.

Hearing

[29] A hearing attended by both parties proceeded on Thursday, 31 March 2022. [ABC] was represented by Mr GY, with Ms QC in attendance.

Nature and scope of review

[30] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[31] More recently, the High Court has described a review by this Office in the following way:³

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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

review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[32] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Discussion

[33] The issue to be considered on review is narrowly focused. Were the fees charged by [Law firm] fair and reasonable?

[34] Under the Act, complaints about fees are treated in the same manner as any other complaint about a lawyer's conduct. If a Standards Committee forms the view that a fee has not been fair and reasonable, then the lawyer's conduct constitutes unsatisfactory conduct in terms of s 12(c) of the Act by breach of r 9 of the Rules.

[35] It has been recognised that determining a reasonable fee "is an exercise in assessment, an exercise in balanced judgement, not an arithmetical calculation".⁴

[36] Attention then turns to the fee factors required to be addressed under r 9 of the Rules.

[37] Importantly, before addressing the specific fee factors, r 9 alerts lawyers to the requirement that their fee be both fair and reasonable for the services provided, and that the fee be calculated with regard to the interests of both client and lawyer as well as the factors set out in r 9.1.

[38] The fee factors set out in r 9.1 provide useful guidance to the matters to be considered, but inevitably some of the fee factors will assume more relevance than others.

[39] A commencing point is to consider the nature of the retainer, the fee customarily charged for the work involved, the skill and experience of the lawyer, and the time recorded on the file.

⁴ *Property and Reversionary Investment Corp Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 (CA).

[40] Those factors having been addressed; attention can then properly turn to a consideration of any remaining factors that present as of particular relevance to a particular case.

[41] But before a fee is examined by reference to the r 9.1 factors, it is understandably necessary to examine the basis on which the complainant has advanced argument that the fee charged has been unreasonable.

[42] Ms QC's specific concerns are identified at [27] above.

[43] Her submissions filed on review add little further to the concerns she identified when filing her initial complaint. In what presents as a frank and honest admission, Ms QC concedes that she has had difficulty identifying specific concerns with the fees charged, rather she invites the LCRO to examine the fees, and identify discrepancies which she considers will establish her argument that she has been grossly overcharged.

[44] On review Ms QC places considerable reliance (as she had at the Committee stage of the investigation) on advice she says she had received from a senior barrister, this advice to the effect that she had been overcharged in the sum of between \$80,000 to \$100,000.

[45] It is understandable that Ms QC would be perturbed that a senior barrister had considered that she had been significantly overcharged. It is understandable that provided with an opinion which undermined her confidence in the integrity of the fees charged, Ms QC became firmly convinced that there were serious issues with [Law firm]'s billing practices.

[46] The extent of the alleged overcharging is significant. If it was established that a lawyer had overcharged a client in the region of \$100,000, serious consideration would be given as to whether the conduct required referral to the Lawyers and Conveyancers Disciplinary Tribunal.

[47] But an obvious difficulty Ms QC has in placing reliance on what she had been told by a senior practitioner, is that she provides no evidence to substantiate the opinion she says she had been given.

[48] Ample opportunity was provided to Ms QC at the Committee stage of the investigation for her to produce evidence to support the serious claim made. She was unable to do so.

[49] On review, she explains that the barrister, who had provided advice on the fee, wished to remain anonymous from fear of "retribution" from his colleagues.

[50] I do not need to comment in detail on that response, except to observe that it could be reasonably expected of a senior barrister (and of members of the legal profession generally) that a preparedness to provide comment on a fee charged by a professional colleague in circumstances where the recipient of the comment was relying on that advice, could be expected to be supported and sustained by a willingness to commit the opinion to writing. I accept that commenting adversely on a colleague's conduct is a situation that many lawyers would not find themselves comfortable with, but a desire to avoid risk of criticism should not divert a lawyer from obligations owed to their client.

[51] I accept that the lawyer, of whom Ms QC makes reference, may not have been formally instructed by her, and that the opinion provided may have been given informally. But it could have been reasonably expected that the senior barrister had arrived at his or her view that fees charged were excessive, not simply by reference to what he or she considered would be an appropriate fee for time engaged in advancing the proceedings through the court, but by careful reference to the file, the pleadings, the submissions, the time records, and the judgments issued. Absent that analysis, any opinion provided on the fee could only be speculative.

[52] The advice provided to Ms QC has sustained her in the belief that she has been seriously overcharged. But that advice, for the reasons explained, can be accorded no weight in this review.

[53] In addressing the reasonableness of the fee charged, I have reviewed the Standards Committee file, the pleadings, the affidavit evidence, the submissions filed and the Court decisions. I have, in that examination, given particular weight to the report prepared by the cost assessor.

[54] I consider it significant that Mr JP brought to his assessment not only a broad understanding of the practice of litigation files, but also what he describes as an experience of "files similar to this".⁵ From that background, Mr JP felt comfortable in his conclusion that the time spent on the file was reasonable, and supported by the evidence of the time records. His observation that he was "not surprised" by the amount of work required was informed from the perspective of not only a familiarity with managing litigation files in general, but also his experience in managing files that had similarity to the one he was reviewing.

⁵ JP [Area] Standards Committee [X]: Cost Assessor's Report (17 June 2020) at [21.3].

[55] Mr JP pays particular attention to addressing the specific issues of complaint raised. He addresses concern that a number of authors had worked on the file and concludes that he found no evidence of duplication.

[56] This was complex litigation which, in the course of its progression, required the lawyers to attend to a number of tasks. I agree with Mr JP that it presented as both sensible and an effective use of resources, for lawyers of lesser experience than Mr VH to be tasked with attending to the more routine matters. That is common practice in litigation such as this.

[57] Ms QC identified some specific instances where she considered that the time records indicated that an excessive amount of time had been spent on a particular task. Mr JP examined, as have I, each of the concerns identified. I am satisfied that a close examination of the instances in which it was alleged that too much time had been spent on a particular task, confirms that the time spent on the particular matters was both required and adequately explained by Mr VH.

[58] Turning to the 9.1 rules of particular relevance, I am satisfied that Mr VH had the necessary skill and experience to conduct the litigation (r 9.1(b)).

[59] No criticism is made of the manner in which the litigation was conducted. When initially raising her fee concerns with [Law firm], Ms QC was gracious in acknowledging that Mr VH and his colleague had done “excellent work”. She noted that she was “delighted with the winning verdict”.⁶

[60] An examination of the pleadings, the submissions, and the lengthy decision issued by the court following the hearing on the substantive matter, support conclusion that this was complex litigation (r 9.1(f)).

[61] It is also clear that the issues engaged were of considerable importance to Mr VH’s client (r 9.1(c)). If the company had failed in its argument as to which of the franchise agreements was in force, there would have been significant financial consequences for the company. The company would have been compelled to incur the costs of meeting continuing obligations under a lengthy franchise agreement in circumstances where it had already taken steps to sever the franchisor/franchisee relationship, and incurred costs in setting up the café to operate independently of the franchisor.

[62] The litigation also carried reputation risk for the company and its director. Whilst the plaintiff did not specifically plead fraud in the proceedings, the argument advanced

⁶ Ms QC’s correspondence to [Law firm] (7 February 2020).

that the agreement relied on by the company was a contrivance and a sham, put the reputation of the company and its officers squarely to the forefront. This would inevitably have been an issue of considerable importance for Ms QC. Her business reputation was at stake.

[63] In summary, I am satisfied that:

- (a) the time records provide accurate account of the work completed on the file; and
- (b) the litigation was complex; and
- (c) Mr VH achieved a successful outcome for his client; and
- (d) the deployment of a number of lawyers to work on the file presented as reasonable considering the nature of the work undertaken; and
- (e) there was no evidence to support contention there had been a doubling up on work which had resulted in needless costs being incurred; and
- (f) the cost assessor's report provided a careful and informative analysis of the fees which took into account the relevant fee factors; and
- (g) no challenge was taken to the cost assessor's report despite abundant opportunity to do so; and
- (h) specific fee concerns identified by Ms QC were properly investigated; and
- (i) no weight could be accorded to the advice Ms QC had received from a senior barrister, absent any evidence to support that advice; and
- (j) a review of the material on the file referenced at [53] above reinforced my view that the fees charged were fair and reasonable.

Conclusion

[64] In the course of the hearing, I carefully traversed with Mr GY the limitations of a review application that placed almost exclusive reliance on an opinion which was unsupported by evidence. Mr GY was frank in acknowledging that neither he nor Ms QC had been able to identify any specific concerns with the accounts received. Their concerns were that the fees charged seemed to be "a lot of money".

[65] It was, but the question to determine was whether the fees charged were fair and reasonable.

[66] Mr GY accepted that more would be required to establish that the fees were unreasonable, than simple reference to argument that an unnamed barrister had considered the fee charged to be excessive.

[67] I see no grounds which could persuade me to depart from the Committee's decision.

[68] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 8th day of April 2022

R Maidment
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:

Ms QC, on behalf of ABC Limited, as the Applicant
Mr VH as the Respondent
Mr GY as the Applicant's Representative
Mr NM as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society