NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 20
LCDT 021/10

IN THE MATTER	of the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982
BETWEEN	**AUCKLAND STANDARDS COMMITTEE NO. 1** Applicant
AND	**BARRY JOHN HART** of Auckland, Lawyer

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms C Rowe

Ms M Scholtens QC

Mr P Shaw

Mr B Stanaway

HEARING at Auckland on 16 and 17 July 2012

APPEARANCES

Mr P Collins for the Applicant

Mr N Cooke for the Practitioner (for first half day only)

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] This decision concerns the hearing of four charges brought against the practitioner Mr Barry Hart, two of which were framed in the alternative. The charges are annexed as Schedule 1.

Procedure

[2] This three day fixture was the fifth that had been set for the hearing of this matter. (We wrongly recorded it as the fourth in our adjournment decision of 16 July).

[3] As had occurred prior to a previous fixture, there was activity on Mr Hart's part late on the Friday preceding the Monday morning commencement date. At 4.20 pm the Registry received an email to the effect that Mr Hart was unwell. This was accompanied by a medical certificate which gave little detail, no diagnosis and stated that Mr Hart was not fit for work, in particular court work.

[4] The Registry promptly informed Mr Hart that the Tribunal may wish to cross-examine the Doctor (in respect of the medical certificate).

[5] At the commencement of the hearing Mr Cooke, instructing solicitor on the record throughout these proceedings, appeared to seek an adjournment on Mr Hart's behalf on the grounds of his client's ill health. A further medical certificate was provided which simply stated that Mr Hart had been reviewed and one of his symptoms had not improved. He was said to be unfit to attend his scheduled appearances that week. It was not clear whether the Doctor understood the nature of the appearance which had been scheduled for Mr Hart. Mr Cooke said that the Doctor was not prepared to attend Court. This was despite the Tribunal indicating that certain conditions, which the Doctor had sought, would be met by the Tribunal.

[6] On two occasions leading up to the hearing it had been necessary for the Tribunal Chair to clearly state that, given the number of previous adjournments and delays which had been encountered in the course of this proceeding, the fixture must proceed. The Chair had reminded Mr Hart of the critical comments of Her Honour Justice Winkelmann in February of this year, concerning the delays which had occurred in this proceeding.

[7] The Tribunal reached the view that, following the departure of Mr Hart's last counsel, on 27 June, Mr Hart did not intend to engage in these proceedings. We formed that view because it is clear none of his witnesses were told they were required for cross examination (because the only one who appeared did so at the specific request of the Tribunal following the first day). Furthermore, despite numerous requests to provide the Tribunal with information about the video conference which had been approved for the cross examination of Mr Hart's expert witness, who was overseas, Mr Hart did not respond or indicate to the Tribunal how these arrangements had been made. Furthermore, Mr Hart did not engage new counsel. On the adjournment application he was simply represented by his instructing solicitor who was without further instructions or knowledge of the file.

[8] The decision to proceed to hear the Standards Committee's case undoubtedly imposed a greater burden on counsel representing the Standards Committee and on the Tribunal in the absence of the respondent. The Tribunal was at pains to examine and carefully consider the evidence provided by the respondent and the Standards Committee.

[9] The Standards Committee's expert witness, Mr Billington QC, was examined by the Tribunal at some length.

[10] Ms D Murray, a deponent on behalf of the respondent, was called by the Tribunal to be cross examined because of what appeared initially to be a stark conflict between her evidence and the evidence of one of the complainants.

[11] In addition a number of areas of the defence had been signalled by Mr Hart's previous counsel, both Mr Katz QC (at the hearing concerning the application to amend Charge 4), and Mr G King who appeared for Mr Hart in December 2011.

During the December hearing, which was unable to proceed substantively because of Mr Hart's last minute judicial review application, we were able to deal with a number of preliminary issues in two of the days which had been allocated. Thus we had an opportunity of hearing many of the aspects of Mr Hart's defence argued and have undertaken a thorough consideration of the evidence filed by him.

Charges 1 and 2

[12] In this matter Mr D, the complainant, had been engaged by Mr Hart to provide private investigation services in connection with a legally aided client facing criminal charges. Mr D alleged that Mr Hart had failed to inform him that payment of his account was subject to approval by the Legal Services Agency ("LSA") and might not be approved entirely or in part. Mr D indicated that he had been told that legal aid had been sought and that this might lead to a delay in payment of his account by a month or so.

[13] In fact legal aid was declined and Mr D's invoices for $4682.36 rendered in mid-2008 were not paid by Mr Hart. It is his evidence that Mr Hart paid half of this amount at a point when Mr D had complained to the Law Society in April 2009. Mr D then sought payment of the balance through a Disputes Tribunal claim and the balance was paid prior to that hearing in January 2011.

[14] There is a dispute on the evidence because Mr Hart says:

> "When I instructed Mr D I made it clear to him that payment for his work was subject to the LSA accepting his quote. I never told him that he would be paid within a month of invoice as set out in paragraph 3 of his affidavit."

[15] He went on to confirm that the client had no financial resources and therefore there was never any prospect of an alternative arrangement for payment having been made.

[16] Because of Mr Hart's non-attendance at the hearing he was not available for cross examination on this conflicting evidence. Mr Hart also filed an affidavit from Mr D Gardiner. Mr Gardiner confirms that the events had happened three and a half years prior to the swearing of his affidavit (on 5 December 2011, the scheduled first

day of one of the previous fixtures). He confirms he does not have "*a precise recall as regards what occurred ...*" but had refreshed his memory by referring to his timesheets.

[17] Mr Gardiner recalls Mr Hart explaining to Mr D that the client was on legal aid and that the work he would undertake would be covered by that. He goes on to say:

> "I believe that it should have been clear to Mr D that any invoice he submitted would need to be approved by the Legal Services Agency."

[18] He did not recall discussion about the timing of payments.

[19] Mr Gardiner had been required for cross examination but did not appear. In any event his recollection is admittedly faulty. His assumption as to Mr D's understanding of the LSA payment arrangements is unsupported and speculative.

[20] Against Mr Hart and Mr Gardiner's evidence, apart from the clear statements of Mr D the complainant, is the logical point, submitted by Mr Collins for the Standards Committee, that there is no reason why Mr D, a total stranger to the legally aided client, would agree to undertake work on a *pro bono* basis. Had he not been assured about payment he undoubtedly would have refused to undertake the work.

[21] We prefer Mr D's evidence to that of Mr Gardiner's and Mr Hart's.

[22] The Standards Committee rely on Rule 7.03 of the Rules of Professional Conduct for Barristers and Solicitors, which applied at the time. In summary that Rule places responsibility upon a practitioner who engages another person to provide services for a client to be liable for prompt payment for the fee of that person. The Rule goes on to specify that where the matter is funded on legal aid:

> "... the practitioner must inform the instructed person of that fact at the outset and advise the instructed person of all the requirements as the consequence of the grant of legal aid, including the requirement that any fee over the amount of the estimate approved by the Legal Services Agency cannot be paid unless an amended estimate is submitted for approval before the matter is finally determined ..."

[23] Mr Hart was cavalier in his professional responsibility to this complainant and in doing so brings the profession into disrepute.

[24] Whilst we consider this to be in the category of misconduct, as an abuse of the privileges of practising as a lawyer[1] we accept it is at the lower end of misconduct. It is however, in our view, more serious than "conduct unbecoming", which is pleaded in the alternative. As this Tribunal has indicated in the past we expect very high standards from lawyers undertaking work on a legal aid basis in respect of all of their professional obligations.

[25] That Mr Hart finally paid the account does not minimise the seriousness of the behaviour. It was "on the steps of" the Disputes Tribunal and thus effectively a forced payment. We find Charge 1 proved and do not therefore need to consider Charge 2.

Charge 3 - Obstruction

[26] In summary this charge alleges that Mr Hart refused to disclose his file relating to a former client Mr W, having been required to do so by the Auckland District Law Society Complaints Committee No. 2 ("ADLS") and the s 356 Standards Committee, which took over responsibility for the investigation pursuant to the transitional provisions of the Lawyers and Conveyancers Act 2006 ("LCA"). It is alleged that this constitutes misconduct in his professional capacity.

[27] The chronology of events concerning this Charge is set out in the evidence of Mr Garreth Heyns, team leader of the Lawyers Complaints Service of the NZLS. The background to this matter has largely been set out in our decision of 16 December 2011 at page 4 as follows:

> "**21 November 2006**
>
> [8] Mr Tomlinson, a new lawyer for Mr W, made a complaint to the Auckland District Law Society ("ADLS") requesting a costs revision.

[1] *Pillai v Messiter (No 2) (1989) 16 NSWLR 197*

18 May 2007

[9] The practitioner and the client settled their costs dispute by private arrangement. It is noted in minutes of a meeting of Complaints Committee No. 2 dated 14 October 2008 that prior to the settlement having been reached Mr Tomlinson had inquired of the Law Society whether a settlement would preclude a professional misconduct investigation in respect of overcharging. It is recorded that Mr Tomlinson was informed that it would not. Mr Tomlinson then indicated to the Society that his client was now back in China and "did not want to take the matter any further". Mr Tomlinson's further comments are noted as "Mr Tomlinson stressed that it was now up to the Law Society to decide whether to take the matter further as a matter (sic) professional misconduct". It seems that this discussion with Mr Tomlinson took place in about August of 2007.

26 May 2008

[10] Complaints Committee No. 2 resolved pursuant to s 99 of the Law Practitioners Act 1982 ("LPA") to investigate the fees charged. On 30 June 2008 that resolution was advised to the practitioner.

1 August 2008

[11] The Lawyers and Conveyancers Act commenced and the transitional provisions came into effect."

[28] On 17 July 2008 the respondent solicitor had requested more time and this was granted until 12 August 2008.

[29] On 12 August a further extension was requested, and granted, on 13 August, until 2 September. On 5 September new counsel for Mr Hart requested yet a further extension which in turn was granted until 19 September (the ADLS reminding of the two earlier time extensions).

[30] On 25 September 2008 counsel for Mr Hart requested a further extension, referred to Mr Hart's illness and pressure of work and also raised a "jurisdictional question". This request was met with what is referred to as a "final extension" until 10 October 2008.

[31] When Mr Hart or his counsel failed to respond or provide the file by 10 October, counsel was notified on 6 November 2008 of a resolution pursuant to s 101(3)(d) and (e) LPA requiring production of the file.

[32] The response to this, in a letter dated 18 November 2008, was the advice of Mr Hart's counsel that Mr Hart had *"... been working on a detailed response but I*

have not had the opportunity to discuss the implications of your letter with him ...". This letter went on to express the expectation that Mr Hart would be able to provide a response by Friday 5 December 2008. In turn a further "final extension" was granted until Friday 5 December. On 4 December 2008 a letter from Mr Hart's chambers to the Standards Committee explained that *"... collation of the documentation required by the Society is proceeding to completion and most of the components are in place ...".* There was reference made to documents being required from the Court and from Immigration Services and an extension was sought until 19 December. Then on 5 December 2008 Mr Hart's counsel also sought a further extension of time. The response by the Standards Committee was to grant "an absolute final extension" of 19 December 2008.

[33] Mr Hart wrote personally on 19 December 2008 seeking an extension to the end of January 2009 and apologising. This was followed by further correspondence in January and early February. Mr Hart, in a letter of 17 February said: *"I stress that I am not refusing or failing to comply with requests"*. He was granted a further extension until 13 March 2009.

[34] We regard this date of 13 March 2009, being the last date which the Standards Committee was prepared to tolerate for the provision of the file, as the trigger date for the conduct complained of.

[35] No response was received on the date in question and on 15 May 2009 the Standards Committee resolved to investigate the non-compliance by Mr Hart as an own motion inquiry. This investigation was notified to Mr Hart on 25 May, and a response sought from him by 11 June 2009.

[36] On 12 June 2009 Mr Hart responded raising "an unresolved issue on jurisdiction" (that issue not elaborated upon). The letter was ended with the words *"I trust this resolves the matter"*.

[37] The file had still not been produced. A further request that Mr Hart respond to the own motion inquiry no later than 30 June 2009 was made by letter of 16 June. The Standards Committee then notified Mr Hart on 31 July 2009 that there would be a hearing to consider the matter on 18 September 2009. Mr Hart's response to this

by letter of 8 September asserted absence of jurisdiction. The hearing had to be delayed and Mr Hart was advised that it would occur on 16 October 2009. On 14 October 2009 Mr Hart asked for the hearing to be adjourned. For other reasons the hearing was delayed and Mr Hart was therefore asked to provide submissions by 28 October 2009.

[38] On 23 October 2009 Mr Hart once again requested an adjournment because of difficulties he was experiencing in instructing counsel. He was notified that the final time for filing submissions was 5.00 pm on 29 October. Mr Hart requested an oral hearing and indicated he would be represented by senior counsel. On 30 October Mr Hart was notified that the hearing was adjourned until 20 November and submissions were sought by 9 November (for a hearing on the papers). Finally, Mr Hart's new counsel provided submissions on 9 November and the hearing was held by the Standards Committee on 20 November 2009. On that date the Committee resolved to refer the matter of obstruction and delay to the Disciplinary Tribunal through the Charge which is now under consideration.

[39] The elements of the Charge are as follows:

(1) That there was a proper request for information by the Standards Committee and subsequently the Transitional Committee.

(2) That the lawyer was considered to be providing regulated services.

(3) That there was a failure to comply with that request.

(4) That the failure was a deliberate act.

(5) That in consequence the Professional Standards Body was obstructed in its business.

[40] And that as a consequence the definition of misconduct contained in s 7(1)(a)(i) or (ii) has been met.

(1) Request

[41] In seeking a written explanation concerning a complaint which had been made into possible overcharging, as it did on 17 July 2008, the Standards Committee was certainly making a proper request. It did so at that time under the provisions of the Law Practitioner's Act ("LPA").

[42] The behaviour complained of covers a period which began before the commencement of this Act, continuing to the present time. Thus it is caught by the transitional provisions of the LCA, specifically s 353. Whilst we have found that the trigger date for the misconduct occurred after the commencement of the Act (namely March 2009), the lawful request made of the practitioner initially was made pursuant to s 101(3)(d) and (e) of the LPA.

(2) Lawyer Providing Regulated Services

[43] It is submitted on behalf of the Standards Committee that Mr Hart was providing regulated services at the relevant time to fit within the definition of s 7(a)(i) and (ii) LCA through the following chain of reasoning (quoting from Mr Collins' submissions):

(a) Misconduct in those categories is "*conduct of the lawyer ... that occurs at a time when he or she is providing regulated services*";

(b) The term of "regulated services" means, among things, "legal services";

(c) In turn "*legal services" means "services that a person provides by carrying out legal work for any other person*"; and

(d) "Legal work" includes defined categories of work including the reserved areas of work, advice in relation to legal or equitable rights and the preparation of legal documents and "*any work that is incidental to that work ..."* s 6.

[44] Mr Collins submitted therefore that the conduct of a lawyer responding to a complaint or own motion inquiry by a Standards Committee, which itself relates to legal work, must be work that is incidental to that work. He submits:

> "It is an incident of professional life, and an incident of a particular engagement to provide legal services, that a lawyer might be required to respond to a complaint or own motion investigation arising out of that work."

[45] We find that Mr Hart was providing regulated services, when met with the Standards Committee request. This conduct is capable of falling with the provisions of s 7(1)(a)(i) and (ii).

[i] Relates to conduct which *"... would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable".*

[ii] Relates to conduct *"that consists of a wilful or reckless contravention of any provisions of this Act or of any regulations or rules ... relating to the provisions of regulated services".*

(3) Failure to comply

[46] Neither the W file or any other documents relating to the practitioner's charges to this client, have yet been provided to the Standards Committee. We find the failure element of the offending proved, on the balance of probabilities to the high standard required in matters of such a serious nature of this.

(4) Deliberate Act?

[47] As to whether this failure is deliberate, we refer to the chronology outlined as to the practitioner's statements, both directly and through his various counsel. Following the request in July 2008 numerous extensions were sought by him during which time he referred to *"working on a detailed response", "... collating Mr Hart's files for the purpose of the investigation ...",* and, apologising personally in December 2008 for the time taken to respond.

[48] It is not until February 2009 that the question of client confidentiality was first raised. We note that this can never be a proper reason for failure to respond where

a client has made a complaint about a lawyer's behaviour; such contains an implied waiver of confidentiality in order to investigate the matter.[2] However, even after the Standards Committee sought and obtained the client's specific waiver the file was not provided and new issues of jurisdiction were raised during 2009.

[49] In September 2009, the self serving statement by Mr Hart that he was not refusing or failing to comply with the s 101 resolution lacks credibility given the lapse of 14 months at that point and the subsequent failure to produce.

[50] Mr Hart has alleged in various correspondence that he has a "*lawful justification or excuse*",[3] and he produced to the Society as part of his submissions on 9 November 2009 the opinion of Dr Harrison QC. The response of the Standards Committee to this opinion setting out the impact of the transitional provisions and thus establishing that the opinion was misconceived, ought to have been accepted by Mr Hart and acted upon since it removed the jurisdictional impediment upon which he relied. He was always at liberty to reargue that issue (and indeed did so in December of 2011 before this Tribunal). The Tribunal similarly found that the jurisdictional impediment argued by Mr Hart was incorrect and that the Standards Committee did have the authority to investigate and bring the Charges now faced.

[51] Notwithstanding that decision Mr Hart has filed no further evidence or submission in relation to this Charge.

(5) Obstruction

[52] If practitioners are not compelled to comply with the lawful requirements of their professional body as to its inquiries into professional standards and complaints, the entire disciplinary process would be frustrated. This would put the public and the reputation of the profession at risk. It would not meet the purposes of the LCA,

[2] See *G E Dal Pont* "Lawyers' Professional Responsibility" 4th ed. at 10.85 and 10.90.
[3] Exhibit BB2, affidavit of Garreth Heyns, 7 December 2010.

referred to by Cooper J. In *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2)*[4]:

> "The purposes of the Lawyers and Conveyancers Act include maintenance of public confidence in the provision of Legal Services, protection of consumers of Legal Services and recognition of the status of the legal profession. To achieve those purposes the Act provides for what is described as "a more responsive regulatory regime in relation to lawyers and conveyancers". The provisions of Part 7 of the Act dealing with complaints and discipline are central in Part 7 to achieving the purposes of the Act. I consider that legal practitioners owe a duty to their fellow practitioners and to the persons involved in administrating the Act's disciplinary provisions (whether as members of a Standards Committee or employees of the New Zealand Law Society) to comply with any lawful requirement made under the Act. There must also be a duty to act in a professional, candid and straightforward way in dealing with the Society and its representatives ... the duties to which I have referred to do not exist to protect the sensibilities of those involved in administrating the Act's disciplinary provisions. While courtesy is a normal aspect of professional behaviour expected of a practitioner, it is not an end in itself. The purpose of the disciplinary procedure is to protect the public and ensure there is confidence in the standards and probity met by members of the legal profession. It is therefore actually a matter that practitioners must cooperate with those tasked with dealing with complaints made, even if practitioner's consider that the complaints are without justification ... "

[53] Counsel for the Standards Committee referred us to two Australian cases which also have relevance to this matter. Firstly in relation to the conduct expected of lawyers in relation to disciplinary institutions of their profession is discussed in *re: Veron;* ex parte Law Society of New South Wales[5]:

> "The jurisdiction is a special one and it is not open to the respondent when called upon to show cause as an officer of the Court to lie by and engage in a battle of tactics as was the case here, and to endeavour to meet the charges by mere argument."

[54] And further in *Johns v Law Society of New South Wales*[6]:

> "The obligation to inform and assist has always been regarded as resting upon a solicitor or barrister whose conduct is the subject of an inquiry whether by the Court or the Committee, as appears in the Court's observations on numerous occasions ..."

[55] Mr Hart's actions in failing to provide the W file has prevented a proper investigation of the own motion complaint of the Standards Committee and thus we find that he has obstructed the Committee in its proper business.

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[4] High Court Hamilton, CIV-2010-419-1209, 20 December 2010 at [108]-[109], Cooper J.

[56] We regard this as an extremely serious breach of professional standards and most certainly reaches the level of professional misconduct.

Charge 4 - Overcharging

Background

[57] In summary this Charge alleges that in charging his client's family $35,000, Mr Hart grossly overcharged in relation to the services provided to the client and his family. Furthermore the Charge alleges that the practitioner breached Rule 3.4 of the Conduct and Client Care Rules 2008 by failing to provide them with information about the basis of charging, hourly rates and the nature and extent of legal services covered by particular fees. On the basis of the Charge and related behaviour it is alleged that professional misconduct occurred.

[58] The sums sought from Mr A's family occurred in three stages. On the first day of meeting a sum of $10,000 was sought and paid the following day prior to a Court appearance which was to seek interim name suppression and to file a standard form bail appeal. That was 14 November 2008. The family were asked to pay a further $15,000 on 19 November 2008, in advance of the bail appeal hearing, and finally, on 15 December 2008 prior to a District Court appearance to seek electronically monitored bail and continuation of interim name suppression by consent, a further $10,000 was paid.

[59] The primary background evidence for the Standards Committee was given by Ms T, the sister of the accused who Mr Hart represented, and the family spokesperson. It was supplemented by the evidence of Ms Thode, who had at the time been working in Mr Hart's chambers and according to her evidence, undertook most of the preparation of the affidavits and submissions required for this case. Evidence for Mr Hart was in the form of affidavits from himself and Mr Haskett and Ms Murray both of whom worked in his chambers at the time and had dealings with this case although to a lesser extent than Ms Thode.

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[5] (1966) 84 WN (NSW 136, at 141-142) Court of Appeal of New South Wales.
[6] [1982] 2 NSW LR 1 at 6 (Court of Appeal of New South Wales).

[60] Evidence as to the quantum of the fees account was given for the Society by Mr John Billington QC and for Mr Hart affidavits were filed by Mr R Burcher, Mr J C LaHatte, Mr C S McKenzie and Mr P Williams QC.

[61] Despite requests none of Mr Hart's witnesses appeared for cross examination except Ms Murray who was specifically asked by the Tribunal to attend. Ms Murray's attendance was required because a clear conflict between her evidence and the evidence of the complainant about the advice as to hourly rates. As it transpired following Ms Murray's cross examination the matter was more easily resolved.

[62] Mr A, the client for whom Mr Hart was engaged to act, was a young man of 19 years appearing on his first criminal charge, that of aggravated robbery. Thus the situation was an extremely serious one and the family were described as distressed and extremely anxious to obtain bail for their boy. They had heard of Mr Hart through another family member and approached him directly. This occurred shortly after Mr A had been denied bail in the District Court, having had the assistance of a duty solicitor. Mr A had in fact been granted legal aid, however for reasons set out in our 16 December 2011 decision, the legal aid aspects of this matter are not under consideration and it is common ground that the family approached Mr Hart on a private retainer basis.

[63] In order to comply with the Intervention Rule, at least in a literal sense, Mr A was asked to sign a waiver in respect of the instructing solicitor Mr Nigel Cooke.

[64] After an initial brief meeting with Mr Haskett on behalf of Mr Hart Ms T, her cousin and the accused's girlfriend attended a meeting with Mr Hart, and another lawyer of the chambers Esma Brown. Ms T's evidence, which is not disputed in this regard, is that the first meeting focused largely on bail rather than the longer term processes. Ms T says she specifically asked about fees, Mr Haskett in the preliminary meeting had indicated that this was a matter for Mr Hart to discuss with her. Ms T says Mr Hart was "quite evasive" about fees. She goes on to say "he did not provide any clear guidance at all and certainly did not give an estimate or indication of fees for particular stages of work or anything like that". He asked however about family assets and was told that the parents had a freehold home.

[65] Mr Hart requested $10,000 before beginning work without indicating what it was indicated to cover or what particular activities would be undertaken nor what hourly rates would be charged. Nor was there any discussion about the division of work within the chambers. Ms T borrowed the money from a relative in Samoa and gave Mr Hart a bank cheque the next day when she met him at the North Shore District Court. Ms T's evidence that there was a great deal of waiting around that day at Court and that they were there for most of the day, from 10.00 am to 3.00 pm.

[66] On this occasion Mr Hart appeared himself. During the waiting time he clearly had discussions with the family, indeed he had lunch with the family. He successfully sought interim name suppression pending the next call of the matter. He also completed by hand the standard bail appeal form and filed this with the Court.

[67] The Court records which were subsequently obtained at the request of Mr Billington QC disclosed that the actual appearance time was three minutes 20 seconds.

[68] In his time records which were subsequently disclosed, Mr Hart has charged a total of seven hours at $1000 per hour for this day, including two hours for preparation.

[69] There is no evidence as to why Mr Hart simply did not hand the Registrar a note to have his matter called promptly after 10.00 am for this very routine appearance, nor any explanation why such an experienced practitioner would require two hours to prepare.

[70] The second meeting which Mr Hart had with the family was a meeting on 17 November, taking place in the evening when a large number of family members could be present. At this meeting the forthcoming appeal against bail was discussed and the concept of surety. There was also mention of electronically monitored bail ("EM bail"). Ms T's evidence is that all of these concepts were unfamiliar to her and indeed that this was the first occasion on which she had engaged the services of a lawyer at all. The family was instructed to provide

information about assets and discuss who would be available to be a surety in respect of the High Court bail application. Ms T was advised she needed to pay $15,000. Ms T was not told what that payment would cover or the hourly rates of those who might be involved in the work.

[71] On the other hand the affidavit filed by Ms Davina Murray sets out her version of the meeting of 17 November (which she recalled as the first meeting with the family). She was present and took notes at the meeting and initially (in her affidavit evidence) said that the family were told of the hourly rate of $1000. She went on to say that the structure of the chambers with junior counsel working on components of the client's matter in order to reduce costs was discussed with the family. She said that *"no one from the A family asked for a budget nor was any indication of a budget given to them by Mr Hart, save that he asked for (words to the effect) an initial $10,000 and the A family committed to provide that sum".*

[72] The discrepancies between Ms Murray's and Ms T's evidence were canvassed with both witnesses in cross examination and by the Tribunal. The seeming inaccuracies, when put against other evidence of Ms Murray's recollection were put to her, namely that this was not the first meeting between Mr Hart and the A family (and therefore fees arrangements which would normally be discussed at the first meeting were not so likely to have happened). Secondly, that the "initial payment" of $10,000 which she records Mr Hart as having requested had already been paid some three days previously. A payment of $15,000 was requested at this meeting. The discussion about land owned by the family, particularly in Apia, was raised in relation to the evidence required for sureties rather than in relation to a sale of the land, as put forward by Ms Murray to support her contention that the family clearly knew that the costs were going to be "*several tens of thousand dollars*".

[73] By the conclusion of her evidence Ms Murray conceded that what she had stated as a fact in her affidavit was not from clear recollection. Her memory in many respects was quite unclear. In particular the advice as to $1000 per hour she said was likely to have been given because that was standard practice and not because she recalled that actually having occurred. *"Well, at the time I swore this affidavit ... last December, what I relied on was the common practice we have."* Furthermore

when asked to describe the family's reaction to the figure of $1000 per hour being mentioned, she was unable to do so. Ms Murray further conceded she must have been in error about the $10,000 figure.

[74] In relation to this meeting there was also evidence about the family's attitude to costs, which Ms Murray described as not being of concern to the family who wished Mr Hart to do simply whatever he could to ensure that A had the "*best legal result possible*".

[75] Ms T agreed with Ms Murray that they had certainly conveyed to Mr Hart that they wished A to receive "*good quality legal representation*" but did not convey the impression that costs posed no object. Ms T says in her affidavit "*I had asked Mr Hart to tell me how much it would cost and ... he was non committal and vague about that"*. Ms T went on to point out how desperate the family were and in what a distressed state they all were following the arrest of this young man. She points out that they were generally aware that lawyers were expensive but did not "*have limitless resources and we were not given any indication of how much it was going to cost. We did not even have any idea what the reasonable costs might be."*

[76] In relation to the family's knowledge about likely fees the evidence of Mr Haskett (who did not appear for cross examination) is also relevant and in conflict with that of Ms T. In summarising his initial conversation with Ms T, Mr Haskett has said in an email to Mr Hart of 11.02 am *"(Ms T) said she knows how much SA (another client of Mr Hart's) paid and there is no problem with that or more if needed.*" Ms T denies there was such a discussion. She did not know SA, who although he shared the same surname, was not in any way related to the family. He was simply a person represented by Mr Hart who was known to Ms T's cousin. Ms T's evidence was that Mr Haskett had put off the question of fees when she had first spoken with him, asking that she speak with Mr Hart later that day when they were to meet. There is also an email attached to Mr Haskett's affidavit purportedly from Mr Hart but at 10.44 am on 13 November. It sets out the position of the potential client and at the end says "*money is no option (sic)."* Ms T was unable to explain how this email came into being because she had not met Mr Hart until the afternoon meeting that day, but denied ever indicating that money was no object.

[77] On 25 November 2008 the appeal against refusal of bail was heard before His Honour Justice Hansen in the High Court. Mr Hart did not appear, having informed the family shortly before that, one of his associates in the chambers, a Mr Malik, would appear with Ms Thode as junior counsel. All of the documents prepared for the appeal, specifically the submissions and seven affidavits concerning sureties were drafted by Ms Thode. At this time Ms Thode had been admitted to the Bar for a mere two months. Mr Malik had been admitted some eight years.

[78] There was considerable work done by Ms Thode in terms of despatching and receiving back the affidavits from the seven or eight family members seeking to provide surety. In some cases (possibly up to three) the deponents were unable to leave work to swear the affidavit and this was done by Ms Murray travelling to them. That was the only involvement Ms Murray had in the case, other than the note taking referred to for the meeting of 17 November.

[79] The bail appeal was unsuccessful, however His Honour indicated to counsel that if an application for EM bail were submitted to the District Court there was a reasonable prospect of success. The total sitting time for this hearing including delivery of the oral decision was 59 minutes. However counsel was required to be at Court for half a day.

[80] Following this hearing Ms Thode was able to reuse the contents of the affidavits and submissions which had been prepared for the High Court, in order to support the application for EM bail and for continued interim name suppression at the District Court. Ms Thode undertook liaison and negotiations with the authorities required to prepare the reports for the EM bail and clearly did an excellent job of this because the consent of the Police was indicated in advance of this application. Similarly the continuation of interim name suppression was agreed when the further substantive evidence and submissions were filed.

[81] Despite this consent, Mr Hart has recorded in his time records a total of four hours 55 minutes in the three days leading up to and including the appearance for the consent orders. This time is recorded as “preparation” and “review”.

[82] Although Mr Hart does not specifically state in his evidence, it is likely that some of the review work (two and a half hours and 45 minutes respectively claimed on 12 December) is alleged to relate to the checking of Ms Thode's document which she had prepared using precedents available to her in Mr Hart's office. Although Ms Thode's evidence is that she is not aware of Mr Hart checking her work and certainly did not personally spend time with him reviewing documents, this cannot be excluded. Ms Murray's evidence suggests that Mr Hart did review the District Court submissions because she filed as an exhibit a draft which she says has Mr Hart's handwritten notations upon it. This document appears with the word "draft" as a large watermark across the entire document. There is no way of establishing when this document was produced but Ms Murray said in her evidence that she would have retrieved it from word processing records in Mr Hart's chambers.

[83] However, when this draft was put to Ms Thode she indicated that she had never seen it, nor Mr Hart's alleged notations. Furthermore she said it is not the document which was prepared by her because she did not have the practice of printing out with the "draft" watermark across the document. In any event in evidence as to the length of time a highly experienced practitioner would take to review documents, Mr Billington was of the view that it would take a mere matter of minutes and thus the four hours 55 minutes recorded by Mr Hart is still puzzling to say the least.

[84] It was shortly after this third appearance on behalf of Mr A by Mr Hart's chambers that the family decided to instruct new counsel for Mr A and subsequently complained directly to Mr Hart about his charges and then laid a complaint with the Law Society.

Expert evidence as to the level of charging

[85] In order to assess the "grossly excessive costs" aspects of the misconduct charge, it is necessary to consider Rules 9 and 9.1 of the Conduct and Client Care Rules. It is common ground that these apply.

"A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in Rule 9.1

Reasonable fee factors

9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:

(a) the time and labour expended;

(b) the skill, specialised knowledge, and responsibility required to perform the services property;

(c) the importance of the matter to the client and the results achieved;

(d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client;

(e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved;

(f) the complexity of the matter and the difficulty or novelty of the questions involved;

(g) the experience, reputation, and ability of the lawyer;

(h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients;

(i) whether the fee is fixed or conditional (whether in litigation or otherwise);

(j) any quote or estimate of fees given by the lawyer;

(k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client;

(l) the reasonable costs of running a practice;

(m) the fee customarily charged in the market and locality for similar legal services."

[86] Mr John Billington QC was asked to review the material relied upon by Mr Hart, - including the evidence of Mr Burcher, - after another witness was disqualified. Mr Billington is one of the most senior Queen's Counsel at the Auckland Bar, has been a Queen's Counsel since 1996. He has a great breadth of experience but, importantly for this matter, almost 30 years of a significant criminal law practice, followed by a further 12 years acting as defence and prosecution counsel in serious fraud and regulatory prosecutions.

[87] Mr Billington was asked to look at what had been charged for what was done in the Mr A case, the subject of Charge 4, and to report on the reasonableness

and/or appropriateness of the fees charged. Mr Billington filed two affidavits on behalf of the Auckland Standards Committee 1 ("ASC"), and appeared in person at the hearing where he was questioned by Counsel for ASC and members of the Tribunal.

[88] Mr Burcher's starting point for analysis of what constitutes a reasonable fee was the amount of time and labour expended at the established hourly rate for Mr Hart and other practitioners. He had then offered his opinion on the various factors to be given weight in accordance with the Principles of Charging referred to at paragraph [85].

[89] Mr Billington's approach was somewhat different. While agreeing with Mr Burcher that the time spent on a job at the relevant hourly rate would tell you what the job cost you, he argued that it does not tell you what the job is actually worth. To find that out, he said you need to assess the value of what you are doing for the client, and that relates to your charge-out rate and what the client requires of you.

[90] Mr Billington deposed in his affidavit of 4 May 2012 that in respect of any retainer, criminal or civil, the practitioner should:

[a] Ascertain the nature of the instruction and determine what outcome the client seeks; and

[b] Advise the client as to the possible outcomes and the cost to be incurred.

[91] Elaborating on this responsibility at the hearing, Mr Billington placed significant emphasis on the provision of information to clients early in the process so that they know what is ahead of them and what it is likely to cost. He argued that this step was particularly important where clients may not have dealt with lawyers before and were perhaps less sophisticated than commercial clients who were more likely to ask the practitioner about costs.

[92] Mr Billington added that where clients are in an unfamiliar and stressful situation, as in this case, their judgment is likely to be impaired, and the practitioner

has a particular obligation to ensure they fully understand what they are embarking on in every sense.

[93] Mr Billington said while putting the scope of work in writing to clients was clearly the best way to do it, not all barristers did so, and they were not required to give letters of engagement to clients. He said it was easy to espouse perfection. The important thing was to explain in terms the client understands what is required of them, what you can do for them, and whether the expectations can be met. He added that most complaints about lawyers are about lack of clarity in communication.

[94] Mr Billington stressed that all private clients have finite means. Ability to pay was and always is a key issue. It is a key part of the practitioner's job to advise his client on how to conserve limited resources so that the end goal is possible. This involved a discussion beyond the immediate goal, ie: Bail - to look at conserving resources for the ultimate trial. Typically, and in this case, Senior Counsel would attend the first hearing and the last.

[95] In approaching his task Mr Billington worked backwards, not simply from time records of Mr Hart and other practitioners, but from what was actually done in the Mr A case. This approach led him to acquire records of relevant Court sitting times, which were compared with the time charged, and the level of experience of the person charging.

[96] Mr Billington observed the following in relation to the appearances that Mr Hart and other practitioners attended to in the Mr A case:

[97] On 14 November 2008 Mr Hart was successful in obtaining interim name suppression for Mr A. His total appearance time was three minutes 20 seconds.

[98] On 25 November two more junior practitioners were unsuccessful in a High Court appeal against an earlier refusal of bail. Their total appearance time was 59 minutes.

[99] On 15 December Mr Hart appeared in a consented application to the North Shore District Court for EM bail and for continued name suppression. His total appearance time was 16 minutes and 39 seconds.

[100] Mr Billington acknowledged that name suppression applications can be tricky, but he argued that such applications are routinely based on well established legal authorities, and would not require significant time from an experienced senior counsel. So, while the papers in this case were well prepared and achieved the required result, this was not work which was sufficiently complex for the time and charge ($10,000) attributed to it by Mr Hart. Mr Billington agreed it was important that Mr Hart appear personally at this first hearing, but not that his additional time waiting or sitting in court should be charged at his normal $1000 per hour charge out rate, which it was. He added that it is commonplace for Judges to offer Senior Counsel the opportunity to have their cases heard early in the day to aid efficiency.

[101] The unsuccessful bail appeal was appropriately handled by other much less experienced practitioners whose charge-out rates were significantly less than Mr Hart's, but whose preparation time was considerable because of inexperience. The EM bail application was again well prepared and had the consent of the Police before reaching the Judge, but was not a particularly complex matter, and the records show that the work was largely done by more junior practitioners than Mr Hart. The evidence as to his degree of supervision was equivocal. Neither application was opposed.

[102] Against this background Mr Billington considered from his own extensive experience in the criminal jurisdiction what was a reasonable amount of time to allocate to these reasonably routine matters. He included what he assessed as reasonable time for prison visits and normal ongoing communications with members of the client family.

[103] Mr Billington's conclusion was that Mr Hart could have estimated in advance that three half days would be required for two half day appearances in the District Court and one appearance in the High Court. At $4000 a half day, being Mr Hart's hourly rate, the costs could have been estimated to be $12,000 plus GST. Mr Billington allowed a further three half days to deal with client attendances,

preparing relevant documents and preparation for the hearings. This would increase the estimated total time engaged to be six half days, which at Mr Hart's hourly rate would amount to $24,000 + GST. Mr Billington regarded this figure as the maximum reasonable fee **if all work had been done by Mr Hart**, which it was not. In his opinion, a good proportion of this work should have been done by one of the junior lawyers working with Mr Hart. In other words he estimated $24,000 + GST should be discounted by the work which Mr Hart did not do (the High Court Appeal at an estimated half day), plus the significant preparation for that which was "recycled" for the EM bail application and was carried out by junior lawyers.

[104] As the lawyer records accessed by Mr Billington show, apart from Mr Malik who was admitted in 2000, all the other practitioners engaged in the file were junior practitioners. In the case of Ms Thode who was significantly involved in the case, she had been admitted just two months before the Mr A brief. While she was charged at an hourly rate of $175.00 per hour, her hourly cost to Mr Hart was apparently $20.00 per hour.

[105] Having regard to the experience of the other lawyers engaged in the matter, a reasonable fee (as assessed under Rule 9 and its factors) was between $15,000 and $16,000. Mr Billington concluded his evidence with the comment:

> "I think there are a number of people who would happily do this for $15,000 and do it well".

[106] Mr Billington responded to the affidavit of Mr Peter Williams QC. He referred to the unique quality of criminal law in that typically fees are charged in advance because if the outcome is unsuccessful the client is usually in prison and unable to meet the bill of costs. The lawyer is accordingly required to make an informed estimate of the appropriate fee, in a similar way to that described at paragraph [102] above. The estimate is based on time likely to be involved and the importance of the matter to the client. Mr Billington said it was standard practice in such situations for senior Counsel to avoid engaging in appearances which were not relevant to the outcome, such as sitting around for a remand. The real time and effort is reserved for contested matters.

[107] Mr Billington disagreed with Mr Williams about the communications with the client about costs. Mr Billington said he would be surprised if a senior criminal lawyer ever acted for a client without first informing the client what he was going to charge and the basis on which he would be charging:

> "the distinguishing feature of this case is that although the client chose Mr Hart as counsel, the client was not informed in advance as to what the fees would be. As Mr. Hart did not so inform the client he is driven back to justifying his fee at an hourly rate of $1,000. When one analyses what was done by Mr. Hart in this case it is difficult to see how he could justify the fees charged to the client. That is where Mr Williams and I reach a different conclusion."

[108] While Mr Billington stopped short of criticising Mr Hart wishing to be paid $1,000 per hour because of his seniority. He added:

> "What it does do, it indicates I guess that the market is prepared to pay Mr Hart that sum of money for certain things. But whether it is reasonable he charges that hourly rate for everything is not just a matter between Mr Hart and the client, it engages the rules, and whether it's reasonable, and that's why we're sitting here."

Evidence for the Practitioner

[109] In addition to Mr Burcher's evidence the Practitioner has submitted five affidavits touching on the quantum of fees charged or chargeable from:

[a] The respondent Barry John Hart sworn 9 March 2011

[b] Davina Valerie Murray Affirmed 2 December 2011

[c] JC LaHatte in support Affirmed 30 November 2011

[d] Charles Stewart Veitch McKenzie Sworn 2 December 2011

[e] Peter Aldridge Williams QC Sworn 26 June 2012

[110] Mr Burcher's evidence was clearly the primary source relied upon by Mr Hart. The other supporting witnesses added little to the assessment required to be

undertaken by this Tribunal. For this reason we put Mr Burcher's affidavit, in all important respects, to Mr Billington at the hearing for comment.

Matters traversed by the various deponents relative to Charge 4

[111] Mr Hart confirms that he was instructed by Mr A's family to represent him on serious charges of aggravated robbery and grievous bodily harm. He states that the family wished to obtain suppression of Mr A's name and bail. He summarised the scope of work undertaken for and billed to Mr A in the following terms:

(a) Appearance and application for name suppression and bail;

(b) Dealing with prison authorities on general welfare following beating;

(c) Appeal to High Court for bail;

(d) Application for EM bail;

(e) Consultation with and advising Mr A including prison visits, telephone discussions and meetings.

[112] Mr Hart states that the total value of time recorded in his billing system was $45,455.91 against the file and he confirms that the total amount charged and paid was $35,000. Much of the balance of Mr Hart's affidavit responds to evidence that is not available to this Tribunal and forms no part of these proceedings. Mr Hart deposed that his charges were "*totally justified and reasonable*" and concluded his affidavit:

> "My colleagues and I spent significant time dealing with the issues which arose from Mr A's case and his welfare in prison. In this regard he was suffering health issues and received a beating which meant he had to be segregated. I believe that we supported Mr A and his family through this and ultimately achieved the best interim outcome possible - interim name suppression and EM bail."

[113] Mr Hart was silent on the issue of whether he had told his client's family that he would be charging $1000 per hour, including for waiting and travelling time.

[114] Mr LaHatte, admitted to the Bar in 1978 has practised in a mixture of criminal, civil and family litigation. He commented on and supported the opinions expressed in Mr Burcher's affidavit and those expressed by Mr McKenzie.

[115] Mr McKenzie is an experienced Barrister and Solicitor employed currently as an administrator. He has produced a document prepared as an Excel spread sheet wherein he has purported to complete a retrospective costing of the file in the Mr A matter. Mr McKenzie considers that by applying his methodology he arrives at a total number of chargeable hours that could have been incurred in relation to the file as 145.30 hours and has calculated a total fee that could have been charged as $63,595 by applying the charge out recorded in Mr Hart's time records for each professional. Mr LaHatte records that Mr McKenzie is "currently engaged as a law clerk for Barry Hart". As such we do not consider his evidence to be independent. His evidence largely fails to address the central issue of value of the work or reasonable levels of the charges, in relation to the type of work undertaken. We give it little weight.

[116] Mr Burcher described himself as an expert providing opinion evidence on the pricing of legal services. He is not an experienced criminal barrister. The Tribunal had granted permission for Mr Burcher to appear for cross examination by video link, with special sitting times arranged, because he was overseas. However, no arrangements were made for this appearance, despite more than one request by the Tribunal. Thus we were denied an opportunity to have Mr Burcher's evidence tested, or his responses to Mr Billington's evidence.

[117] In his affidavit Mr Burcher referred to *Property and Reversionary Investment Corporation v Secretary of State for the Environment*[7] which was decided under provisions as to charging virtually identical to the predecessor of Rule 9.1:

> "The object of the exercise, whether a solicitor is preparing a bill of costs in relation to non-contentious business, or the Law Society is certifying such a bill, or the Court is taxing it, is to arrive at a sum which is fair and reasonable, having regard to all the circumstances, and in particular, to the matters specified in the numbered paragraphs of Article 2 of the Order. It is an exercise in assessment, an exercise in balanced judgment, not an "arithmetical calculation ...".."

[7] *[1975] 2 All ER 436* Donaldson J.

[118] This approach was endorsed by Barker J in *Gallagher v Dobson*.[8]

[119] We were also referred to comments by Priestly J in *Chean & Luvit v Kensington Swan*.[9]

> "... and that is the obligation, which is clear from a number of authorities, for a practitioner who is using time and attendance records to construct a bill to take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the clients means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out."

[120] Mr Burcher assessed the time records which he considered were *"... a true and reasonably accurate reflection of the time and labour expended by the various professionals ..."* He also opines that the "*charge out rates for each of the professionals who worked on the file are appropriate*."

[121] What Mr Burcher did not say was whether the time expended was reasonable having regard to the type of work undertaken. No doubt that might have proved difficult for a practitioner lacking experience in this field, and may have been omitted because it was beyond his expertise. Unfortunately, that is a serious omission because that is one of the central issues to be determined in this case.

[122] He gave closer consideration to Mr Hart's charge out rate of $1000 per hour and concluded that *"Any residual doubt about the appropriateness of Mr Hart's hourly charge rate is I think, more than adequately addressed by the amount of billable time that has been written off*." That is not a justifiable view if the billable time is objectively excessive for the task performed.

[123] Mr Burcher's evidence addressed, in turn, each of the factors set out as required to be taken into account under Rule 9.1. His view on each of these factors was then put to Mr Billington, by the Tribunal, at the hearing.

[124] Mr Burcher concluded, having weighed the various factors and looked at the fee "in the round":

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[8] [1993] 3 NZLR 611.
[9] [2006] BCL 962.

> "One would expect Mr Hart's fees to be at the highest end of the pricing continuum for all the reasons that have already been traversed in detail in this report. That expectation does not obviate his obligation to demonstrate that the fees he has charged are fair and reasonable but I am satisfied on balance that his fees meet that test in this instance."

[125] For reasons already outlined Mr Burcher's evidence was unable to be properly tested and we were left with question marks over some aspects of it. Given the particular expertise lacking in this field of legal practice, where the evidence of the experts differ, we prefer the evidence of Mr Billington. We also consider the evidence to be flawed in not examining the reasonableness of time taken for particular tasks.

[126] The affidavit of Mr Williams QC did not touch on the fees actually charged or the actual time spent to provide legal services to Mr A and only alludes to *Anecdotal evidence regarding high rates of remuneration spoken about in the profession as being attracted by the top-echelon criminal lawyers* and we have referred to his evidence when discussing the evidence of Mr Billington.

Affirmative defence - does Rule 3.4 apply to Barristers?

[127] Rule 3.4 of the Rules requires that:

> A lawyer must, in advance, provide a client with information in writing on the principal aspects of client service including the following:
>
> (a) the basis on which the fees will be charged, when payment of fees is to be made, and whether the fee may be deducted from funds held in trust on behalf of the client (subject to any requirement of regulation 9 or 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008) …

[128] The Standards Committee says that Mr Hart breached this requirement in that he failed to provide full information to members of his client's family, who he knew were assuming responsibility for paying his fees, information in writing or otherwise concerning principal aspects of the client service, and in particular information about the basis on which the fees were to be charged, the relevant hourly rates which would apply, and the nature and extent of the legal services covered by any particular fees.

[129] The Standards Committee submits that Mr Hart's lack of disclosure to A and his family is evidence of an "exploitative attitude" on the part of Mr Hart towards a family's desperation and ignorance of process, and demonstrated contempt for a vulnerable client.

[130] In an earlier hearing, Counsel for Mr Hart challenged whether r 3.4 of the Rules could apply to a barrister in Mr Hart's circumstances.[10] It was submitted[11]

> The Client Care Rules apply to lawyers as defined and it is accepted that a barrister is within the definition. However, the Client Care Rules in Rule 3.4 require that a lawyer provide the requisite information to 'a client'. The word 'client' is not defined but in light of the intervention Rule it is clear that the 'client' in the case of Mr A was the instructing solicitor, Mr Cooke. Indeed it had to be, otherwise the lawyer would be acting in breach of the intervention Rule.

[131] The Standards Committee, however, says that in the circumstances there was only superficial compliance by Mr Hart with the intervention rule, and that in reality Mr Cooke was acting as a "post box" solicitor. Mr A had signed a standard form document in which he excluded Mr Cooke from any liability, and acknowledged that he was responsible for paying Mr Hart's fees directly. The proforma nature of the document and the limitations of Mr Cooke's involvement can be readily seen from its contents. It reflects an intention of the parties to deal directly with Mr Hart[12].

[132] Accordingly, the Standards Committee submits, Mr Hart's interpretation of r 3.4 would not reflect the reality of the situation, in which Mr Hart dealt with Mr A directly as a client and Mr Cooke had only minimal involvement as instructing solicitor.

[133] The Tribunal considers that the Standard Committee's interpretation of r 3.4 is to be preferred, and Mr A, supported by his family, were the clients to whom Mr Hart owed a professional duty to disclose the basis upon which his fees would be charged.

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[10] At the hearing of the application to amend charges on 19 June 2012.
[11] Footnotes omitted.
[12] See form, at Schedule B.

[134] Similarly, although r 3.7 says that where a lawyer is instructed by another lawyer rule 3.4 does not apply, the Tribunal considers that this exception was not intended to capture situations such as the present case.

[135] It is important that rules made for the protection of the public are not read down in a manner that would defeat their intent. The term "client" as used in r 3.4 is not defined in the Rules or the Lawyers and Conveyancers Act. A strict interpretation would suggest that, as required by the intervention rule, a barrister's client to whom he or she owes obligations of fee disclosure is only his or her instructing solicitor. But the Tribunal believes such an approach is unduly technical, and does not give effect to the legislative purpose. As Mr Collins submitted, it would be a serious failure of consumer protection if the lawyer in Mr Hart's position was relieved of any obligation to advise the person or persons he knows to be paying fees, concerning the principal aspects of client service relating to the basis on which his fees would be charged, in advance.

[136] The meaning of an enactment must, of course, be interpreted in light of its purpose according to s 5 of the Interpretation Act 1999. Sections 94 and 95 of the Lawyers and Conveyancers Act require the New Zealand Law Society to create rules providing for a code of professional conduct and client care, including the duties of lawyers to their clients. In creating those Rules pursuant to s 95, it is to be presumed that the New Zealand Law Society intended those rules would comply with the general purposes of the Lawyers and Conveyancers Act. Those purposes are outlined in s 3 of the Act. They include:

1. To maintain public confidence in the provision of legal services and conveyancing services;
2. To protect the consumers of legal services and conveyancing services;
3. To provide for a more responsive regulatory regime in relation to lawyers and conveyancers;
4. To state the fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services.

[137] Section 4 also provides that a fundamental obligation on every lawyer is to protect, subject to his or her overriding duties as an officer of the High Court and under any other enactment, the interests of his or her clients.

[138] In the Tribunal's view, those fundamental purposes would be undermined if, in circumstances where a barrister is in reality dealing with and receiving fees directly from a client, and where the instructing solicitor has at best minimal involvement in a matter, a barrister can seek to rely on the interposition of an instructing solicitor to evade his or her professional obligations.

[139] The maintenance of a client's confidence in his or her lawyer and the protection of the client as a consumer of legal services are promoted where the general rate and method of calculation of fees for which the client will be liable is known by the client in advance. That includes fees owed to a barrister for services rendered.

[140] In the absence of explanation in advance to the client of the fee regime, the lawyer in control of the billing is effectively at liberty to set whatever level of fees he or she pleases. The client is unable to consent to the engagement of his or her lawyer on an informed basis.

[141] That is precisely what happened here. Mr Hart set the fees during his direct dealings with Mr A's family, and required lump sum payments for his services. This is not a case where the instructing solicitor billed the client separately for services, or received money from the client towards payment of his or her legal fees or the barrister's. Mr Hart controlled the rate at which his fees were set, the amount of work carried out in Mr A's service, and the person or persons who undertook that work. Mr A's family simply paid what he demanded.

[142] The instructing solicitor had no control or influence over the level of fees charged, and was not in a position to provide that information to the client. The agreement signed by Mr A effectively reduced Mr Cooke's involvement in the case to nothing while still maintaining technical compliance with the intervention rule. As the Standards Committee submitted to the Tribunal, it cannot have been intended

that a client in the circumstances of Mr A, and his family, would be deprived of the consumer protections in the Act and the Rules simply because the lawyer they were instructing, and with whom they had all their direct dealings, was a barrister.

[143] This is not the appropriate forum for a general exploration of the function of the intervention rule and how that rule operates, or should operate, in practice. The New Zealand Law Society is in fact in the process of reviewing the intervention rule and whether or not it should be retained, as required by r 14.5.

[144] However, the Tribunal's view is that where a barrister is involved in an arrangement where he or she receives money directly from a client, and where the barrister has effective control over the fees billed to a client, a lawyer's obligation under r 3.4 to provide full advance disclosure of fee information to his or her client remains notwithstanding the technical interposition of an instructing solicitor. Any other interpretation would fail to reflect the reality of the situation, and thus fail to uphold in practice the fundamental principles and purposes of the Lawyers and Conveyancers Act.

[145] Mr Hart was required when first engaged by Mr A's family to outline the rate at which he would be charging for his services, the basis on which they would be charged, and the nature and extent of the services to be charged for. His failure to do so constitutes misconduct under s 7(1)(a)(ii) of the Act in that Mr Hart wilfully or recklessly contravened r 3.4 of the Conduct and Client Care Rules.

Discussion

[146] Looking at the work overall carried out for this client it is clear that there were a number of prison visits and discussions with prison authorities concerning Mr A's conditions. There was a considerable amount of preparation work for the appeal, which was able to be reused in the later District Court application, but this work, we are satisfied was largely carried out by a very junior member of the Chambers using standard precedents for what is a routine application and thus would have required very little oversight on Mr Hart's part. The actual Court appearances conducted by Mr Hart himself were of a standard nature which, for a practitioner of his experience,

ought to have been achieved with considerable ease. The first appearance involved less than four minutes of Court time, with no reason being given for the waiting or preparation time. The final appearance was by consent and again only occupied 16 minutes of time. Once again there is no explanation in the evidence for the large waiting period or preparation time.

[147] The bail appeal was not a matter in which Mr Hart appeared, rather two more junior members of Chambers appeared. Their joint hourly rate was $675.

[148] Where there is any conflict as to the services undertaken, we prefer the evidence of Ms Thode, who was a careful and measured witness and who was intensely involved in the matter, in preference to Ms Murray, who had very little involvement and her recollection was unclear. We did not find her a particularly insightful or clear witness.

[149] Indeed, we were most concerned with one of her passages of evidence where, in response to the issue of whether the family was aware of the $1000 hourly rate she described them as “desperate” and thus willing to pay anything. She did not appear to understand that this level of vulnerability in clients imposes a significantly greater obligation upon a lawyer to be very clear in explaining the level of charges and how they are incurred. By contrast Ms T’s evidence, which is more accurately supported by the documentary evidence available, was also much more genuine and straightforward. Ms T had good recall and was an impressive witness. It had been her first experience of dealing with a lawyer. We contrast her straightforward answers to the vagueness and immoderate comments which characterised Ms Murray’s evidence. Ms Murray appeared to see her role as an advocate for Mr Hart.

[150] It should be said however that the factual differences between Ms Murray’s and Ms T’s evidence diminished as Ms Murray was examined on various aspects. In particular, her own file notes demonstrate that demand was made for a sum of money without there being any reference to the hourly rate having been discussed, or the chambers structure, although the file note is considerably detailed in relation to other matters. Ms Murray made concessions that her memory was imperfect, having had put to her the inconsistencies between that evidence and her own

contemporaneous file notes, i.e. the reference to the land in Samoa being noted in relation to sureties rather than Ms Murray's initial evidence that it was talked about in terms of sale to pay the fees. We note that her affidavit was sworn on 2 December 2011, only the day before the (third allocated) fixture was to proceed on 5 December. It was clearly prepared in somewhat of a rush.

[151] We prefer the evidence of Ms T that there was no discussion about the $1000 hourly rate with her or other members of her family, and, as noted in the background account above, Ms Murray conceded that she included this evidence because that was her current standard practice (to advise of the $1000 hourly rate) rather than because she could actually recall as a fact that it had been discussed.

[152] In summary we consider that $35,000 does constitute gross overcharging for the very standard form of criminal work involved in this file, despite its seriousness to the client. We accept that a senior lawyer, as Mr Hart is, is entitled to charge at a high rate for his services in acting for a first time offender facing very serious charges. However we accept the evidence of Mr Billington that this work could have been comfortably carried out even at Mr Hart's very high hourly rate for between $15,000 to $16,000. This would include allowances for the work of junior barristers to support Mr Hart. We consider $1000 an hour for this type of work as probably not justified, however it is not necessary to finally rule on that matter because even at that rate the amount by which the Hart fee exceeds a reasonable fee for the work done (excluding GST) is between 95 percent and 107 percent. We consider this to be gross overcharging.

[153] We certainly cannot see how Mr Hart could justify seven hours at $1000 per hour for the first attendance at the District Court, nor indeed the "preparation and review" of almost five hours charged at that rate, in addition to the hours for the actual appearance on 15 December. We consider that charging such an excessive fee in itself would constitute professional misconduct, but if we are wrong in that when combined with Mr Hart's actions in failing to properly advise the clients about his hourly rate and the attendances for which they would be charged, professional

misconduct is certainly made out. For example Ms T's evidence was that many family members were telephoning Mr Hart's chambers to ask questions, sometimes in a repeated fashion. She said that had they known they were going to be charged for telephone calls they would have coordinated their actions carefully and thereby sought to minimise the costs. They were completely ignorant as to the manner of charging and this speaks of extremely poor client communication on the practitioner's part.

[154] We find the charge of professional misconduct established.

Penalty

[155] We invite counsel for the Standards Committee and for Mr Hart, or Mr Hart personally, to file submissions in relation to penalty and costs by 17 August 2012.

Suppression

[156] All references to complainants names are suppressed pursuant to s 240 LCA.

DATED at AUCKLAND this 2nd day of August 2012

Judge D F Clarkson
Chair

Schedule A

In the New Zealand Lawyers and Conveyancers Disciplinary Tribunal

In the Matter	of the Lawyers and Conveyancers Act 2006
And	
In the Matter	of Barry John Hart, lawyer

Disciplinary Charges
Laid by Auckland Standards Committee 1, including Charge 4 as amended with reference to Decision [2012] NZLCDT 15

Dated 27 June 2012

New Zealand Law Society
Auckland Branch
PO Box 4417, DX CX10008
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Disciplinary Charges Laid by Auckland Standards Committee No.1

Auckland Standards Committee No.1 charges **Barry John Hart** of 15-17 Jervois Road, Ponsonby, Auckland, with misconduct (or, in the case of charge 2, expressed in the alternative to charge 1, conduct unbecoming) in his professional capacity:

Charge 1

On or about 9 May 2008 he engaged a private investigator, Mr D, to provide investigation services to him in connection with a legally aided criminal client and he:

(a) Failed to inform Mr D that the payment of his account was subject to approval by the Legal Services Agency and may not be approved, in whole or in part;

(b) Failed to inform him of any alternative arrangement for payment in the event that the Legal Services Agency did not approve and pay his account in whole or in part; and

(c) Failed to honour the full payment of his account in circumstances where he was required to do so by reference to Rule 7.03 of the *Rules of Professional Conduct for Barristers & Solicitors* which applied at the time.

And he is thereby guilty of misconduct in his professional capacity.

Charge 2 – Alternative to Charge 1

On or about 9 May 2008 he engaged a private investigator, Mr D to provide investigation services to him in connection with a legally aided criminal client and he:

(a) Failed to inform Mr D that the payment of his account was subject to approval by the Legal Services Agency and may not be approved, in whole or in part;

(b) Failed to inform him of any alternative arrangement for payment in the event that the Legal Services Agency did not approve and pay his account in whole or in part; and

(c) Failed to honour the full payment of his account in circumstances where he was required to do so by reference to Rule 7.03 of the *Rules of Professional Conduct for Barristers & Solicitors* which applied at the time.

And he is thereby guilty of conduct unbecoming a barrister.

Charge 3

In relation to a complaint by a former client Mr W, he refused to disclose his file, initially to the Auckland District Law Society Complaints Committee 2 and subsequently to the Auckland s.356 Standards Committee, and thereby obstructed the Complaints Committee and the Standards Committee in the course of their investigations:

(a) On 6 November 2008 Auckland District Law Society Complaints Committee 2 notified Mr Hart that he was required to produce for inspection all his files in relation to the matter in which he had acted for Mr W, and to provide information in relation to that file, pursuant to s.101(3)(d) & (e) of the Law Practitioners Act 1982;

(b) He did not comply with the requirement notified to him by Complaints Committee 1 and did not subsequently comply with the requirements of the s.356 Standards Committee which assumed responsibility for the investigation of the complaint from the Standards Committee following the repeal of the Law Practitioners Act.

And he is thereby guilty of misconduct in his professional capacity.

Charge 4

In relation to a criminal client named Mr A for whom he acted in the period 13 November to 15 December 2008, he grossly overcharged that client having regard to the interests of both the client and the lawyer, contrary to Rule 9 of the *Conduct and Client Care Rules 2008*:

(a) During the period 14 November to 15 December 2008 he charged fees to Mr A in the sum of $35,000 including GST in relation to criminal attendances; and

(b) Those fees were grossly excessive by reference to the services provided to Mr A.

And he failed to provide members of the client's family who instructed him and who he knew were assuming responsibility for paying his fees, information in writing or otherwise concerning principal aspects of the client service in connection with his fees, as required by Rule 3.4 of the *Conduct and Client Care Rules 2008*. In particular he failed to provide information concerning:

(i) The basis upon which fees would be charged;

(ii) Any relevant hourly rates which would be applicable;

(iii) The nature and extent of the legal services covered by any particular fees.

And he is therefore guilty of misconduct in his professional capacity with reference to s.7(1) of the Act and Rule 3.4(a) of the *Conduct and Client Care Rules 2008*.

Schedule B

Mr Nigel Cooke
Barrister and Solicitor
PO Box 47 016
PONSONBY

Dear Sirs

I/We authorise and direct you as my/our Solicitor to instruct Mr Barry Hart, Barrister of Auckland to act for me in relation to a charge / charges of:

.....

In so doing, I/We acknowledge that I/We will have no claim against you arising out of any act, error or omission in the course of your professional duties or business to us.

I/We acknowledge that payment of Mr Hart's account is my/our responsibility.

Full Name: .....

Address:...

.....

.....

Phone: Res: ..... Bus: .....

Mob: .....

Email: .....

Other contact:.....

Yours sincerely

..... (SIGN)

00127
MB

Date: .....