IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA638/2017
[2018] NZCA 184

BETWEEN	JEREMY JAMES MCGUIRE Appellant
AND	NEW ZEALAND LAW SOCIETY Respondent

Hearing: 24 May 2018

Court: French, Ellis and Woolford JJ

Counsel: Appellant in person
P N Collins for Respondent

Judgment: 6 June 2018 at 3.00 pm

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr McGuire is a lawyer. A former client made a complaint against him to the New Zealand Law Society. The complaint was considered by the Canterbury Westland

Standards Committee.[1] It upheld the complaint and found Mr McGuire guilty of "unsatisfactory conduct" pursuant to s 152(b) of the Lawyers and Conveyancers Act 2006. "Unsatisfactory conduct" is relevantly defined under that provision as "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".[2] The Committee also imposed various penalties including a reduction in the fees Mr McGuire had charged the client.

[2] Mr McGuire sought judicial review of the Committee's decision in the High Court. Justice Courtney held that of the 20 grounds of challenge raised by Mr McGuire, only one which she identified as relating to the reduction of the fees could succeed.[3] She therefore allowed the judicial review application in part and remitted the matter of the fee reduction to the Committee for reconsideration.

[3] Mr McGuire now appeals Courtney J's decision.

Background

[4] In 2013 Mr McGuire was instructed by a Mr Menear-Gist to act in a personal grievance unjustifiable dismissal claim before the Employment Relations Authority. Mr Menear-Gist had been dismissed by his employer for alleged dishonesty. The Authority found the dismissal unjustified. It awarded Mr Menear-Gist lost earnings and compensation but declined his application for reinstatement due in part to unsatisfactory aspects of his own conduct and the breakdown of the working relationship.[4]

[5] Prior to the investigation meeting before the Authority in November 2013, Mr McGuire had issued Mr Menear-Gist an invoice for fees of $1,065. That account was paid. Then, after the Authority released its decision in January 2014, Mr McGuire rendered Mr Menear-Gist a second invoice for his fees amounting in total to $25,005.

---

1 The High Court had earlier set aside a determination of the complaint by the Manawatu Standards Committee for breaches of natural justice: *McGuire v Manawatu Standards Committee* [2015] NZHC 2100. The Court ordered the complaint be reconsidered by a Standards Committee from a branch other than the Manawatu.

2 Lawyers and Conveyancers Act 2006, s 12(a).

3 *McGuire v New Zealand Law Society* [2017] NZHC 2484.

4 *Menear-Gist v Foodstuffs North Island Ltd trading as Toops* [2013] NZERA Wellington 4 at [38]–[41].

The legal costs were more than the amount awarded by the Authority which after allowing for tax was $22,756.

[6] Mr McGuire advised Mr Menear-Gist to appeal the decision to the Employment Court and in the meantime to seek urgent interim reinstatement.[5] After obtaining a second opinion, Mr Menear-Gist terminated Mr McGuire's retainer in February 2014. Mr McGuire then rendered him a further account for $6,441.21 for the work undertaken in relation to the proposed appeal.[6]

[7] Mr Menear-Gist refused to pay the January and February 2014 invoices and complained to the Law Society about the quality of the advice he had received from Mr McGuire. The essence of the complaint was that Mr McGuire had given him an unrealistic assessment of the prospects of success.

[8] As mentioned the Committee found Mr McGuire guilty of unsatisfactory conduct. It did so on two grounds. First it found that he had failed to provide Mr Menear-Gist with a competent appraisal and advice of the rewards and risks of the proceeding. Secondly it found the costs rendered to be unreasonable given the outcomes achieved.

[9] Having made a finding of unsatisfactory conduct, the Committee went on to consider penalties. It held the appropriate sanctions were that:

(a) Mr McGuire be censured.

(b) The costs incurred in relation to the Authority proceedings were to be reduced to a figure of $10,000 plus GST and disbursements.

(c) The bill rendered in relation to the appeal proceedings was to be remitted in full, the costs incurred in relation to the appeal being unwarranted.

---

5 The appeal in the Employment Court would have been by way of a rehearing and is technically known as a de novo challenge.

6 This work included filing an application for urgent interim reinstatement pending appeal, researching the law in relation to the application, and preparing affidavits in support.

The High Court decision

[10] In the High Court, Mr McGuire raised multiple and overlapping grounds of review. These were usefully summarised by the Judge:

> [5] The grounds of challenge of the substantive determination can be summarised as being that the determination was:
>
> (a) erroneous in law and fact because:
>
> (i) Mr Menear-Gist never asked Mr McGuire for an estimate of legal fees meaning Mr McGuire was not required to provide him one;
>
> (ii) Mr Menear-Gist breached the retainer when he unilaterally and suddenly terminated it;
>
> (iii) the Committee wrongly held that an experienced employment lawyer or advocate is aware that awards from the ERA and Employment Court are "generally reasonably modest".
>
> (b) unfair and unreasonable because the Committee failed to take into account that:
>
> (i) Mr Menear-Gist succeeded in his personal grievance claim and was awarded costs;
>
> (ii) reinstatement is a discretionary remedy;
>
> (iii) the [Authority's] decision could have been successfully appealed;
>
> (iv) Mr McGuire represented Mr Menear-Gist competently and in accordance with his instructions.
>
> (c) unfair and unreasonable on process grounds because the Committee:
>
> (i) misstated the nature of the complaint against Mr McGuire;
>
> (ii) did not raise aspects of the complaint with Mr McGuire in breach of natural justice;
>
> (iii) failed to conduct a proper rehearing as directed by the High Court.
>
> [6] The grounds of challenge to the costs determination can be summarised as being that the decision was:
>
> (a) erroneous in law and fact because the Committee has no power to "remit" a bill;

(b) unfair and unreasonable because:

(i) the reduction of the [Authority] fee to $10,000 plus GST was arbitrary and unsupported by reasoning;

(ii) the remittance of fees rendered for attendances in the Environment Court was arbitrary and unsupported by reasoning.

[11] The Judge rejected most of these arguments. For the purposes of the issues advanced on appeal, the relevant key findings were as follows:

(a) Even if Mr Menear-Gist did not ask for an estimate of the costs, that did not relieve Mr McGuire of his obligation to advise him of the likely cost.[7]

(b) The fact the personal grievance claim was successful did not in itself address the issues at the heart of the complaint, namely that due to inadequate advice about the probable size of the award in comparison with the likely costs, Mr Menear-Gist was not in a position to make an informed decision whether to proceed.[8]

(c) Mr Menear-Gist had a weak claim to reinstatement which made the cost–benefit analysis on the personal grievance claim all the more important.[9]

(d) There was an evidential basis for Mr McGuire's assertion that Mr Menear-Gist's primary concern was reinstatement. The evidence in question, a letter from Mr McGuire, should have been addressed by the Committee.[10]

(e) The process by which the Committee reached its decision to reduce the January 2014 account to $10,000 was flawed for two reasons. First, the figure of $10,000 was not explained and secondly the Committee failed

7 *McGuire*, above n 3, at [39]–[45].
8 At [58].
9 At [58].
10 At [56].

> to take into account the possibility that even if Mr Menear-Gist had been properly advised reinstatement was so important to him he may nevertheless have chosen to proceed in any event.[11]

[12] The Judge set aside the Committee's order reducing the fee to $10,000 and remitted it to the Committee for further consideration of Mr McGuire's assertion that his client's primary concern was reinstatement and, if that was or was likely to have been the case, the effect of it on the decision as to Mr McGuire's fee.[12]

Grounds of appeal

[13] Mr McGuire said he advanced three main grounds of appeal, namely that the judgment was made in error of law, the judgment was made in error of fact and the judgment was wrong for reasons relating to Courtney J's finding that all but one of the grounds of challenge failed.

[14] We address each of these in turn. Before doing so, we also record that Mr McGuire applied to have further evidence adduced on appeal. For reasons which will become apparent, we consider the proposed further evidence to be irrelevant and therefore decline the application.

Analysis

Alleged errors of law and fact

[15] Mr McGuire submitted that Courtney J failed to take into account several relevant considerations, namely: the absence of any challenge to his itemised schedule of attendances and the absence of any costs revision, the complaint being essentially an application for a costs revision; the fact he was instructed to take all the actions he did; and that he had an ethical obligation to do so, there being no proper reason to refuse to take the case nor to question Mr Menear-Gist's denials of wrongdoing.

---

11 At [74].
12 At [76].

[16] In our view, these submissions miss the point. It was never suggested for example that Mr McGuire did not do the work for which he charged or that he was acting unilaterally. That was not the issue. The issue was whether he properly advised his client about litigation risk and the financial implications of the intended proceeding. The evidence before the Committee clearly established he had not. To have given such advice would not have been inconsistent with his ethical duties to accept the instructions. Nor would it have meant he disbelieved his client. The point is simply that Mr Menear-Gist was entitled to be giving his instructions on an informed basis, fully aware of all the risks.

[17] It follows that we also reject a further contention made by Mr McGuire that the Judge's reliance on cost–benefit analysis was an error of law. It is correct as submitted by Mr McGuire that the phrase "cost–benefit analysis" does not appear anywhere in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. But of itself that does not mean the Judge erred. The Rules do require a lawyer to act competently, to protect the interests of their client and to advise their client about any matter which would be important to the client in the context of the retainer.[13] There can be no doubt that in order to discharge those duties a practitioner is required to advise a client of any litigation risk and the possibility that litigation might result in disproportionate costs exceeding or substantially consuming any financial recoveries.[14] We agree with the Judge that the chances of Mr Menear-Gist obtaining reinstatement on appeal were slim.

[18] A further argument raised by Mr McGuire was that both the Committee and the High Court failed to appreciate and take into account that representation in the Authority and the Employment Court had different retainers. In particular there was a failure to appreciate that Mr McGuire represented Mr Menear-Gist in the Employment Court under a conditional fee (no win, no fee) agreement, thereby rendering a cost–benefit analysis unnecessary.

[19] Mr McGuire characterised the Judge's failure as both an error of law — failure to take into account a relevant consideration — and an error of fact. A related

---

13 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 3, 6, and 7.
14 In this we agree with Courtney J's reasoning in *McGuire*, above n 3, at [42].

submission was that it was Mr Menear-Gist who was himself responsible for the outcome in the Employment Court by unilaterally discontinuing the application for an interim reinstatement order.

[20] According to the Law Society, this is the first time in these judicial review proceedings that Mr McGuire has raised an argument that his February invoice was unobjectionable because it was consistent with a conditional fee agreement. It is also claimed that at least in the early stages of the complaint proceedings Mr McGuire expressly eschewed any suggestion of a conditional fee agreement. This was disputed by Mr McGuire.

[21] It is not necessary for us to resolve that matter for the following reason. The fee agreement relied upon by Mr McGuire does not comply with all the requirements of a valid conditional fee agreement under r 9.10 of the Rules. Those requirements included an obligation to advise Mr Menear-Gist there was a significant risk he would lose the appeal and although he would not be required to pay any legal fees of his own should that happen, he would very likely be required to make a significant contribution to the costs of his employer. There was no evidence of any such advice being given.

[22] As regards Mr Menear-Gist being responsible for the appeal failing, we assume that Mr McGuire has raised this argument in response to the Committee's finding that the costs rendered by Mr McGuire were unreasonable given the outcomes achieved. However, the reason Mr Menear-Gist withdrew the appeal was because of a second opinion which, it is reasonable to infer, provided the advice that Mr McGuire should have given. In those circumstances, we consider the Committee was entitled to make the finding it did.

[23] Similarly, we reject Mr McGuire's argument that because Mr Menear-Gist was the successful party in the Authority, the outcome there was a good one and incapable of justifying a finding of unsatisfactory conduct. Again this is, in our view, to overlook the fundamental point. The costs were not proportionate to the "win" and Mr Menear-Gist was never alerted to that possibility before embarking on the claim.

Miscellaneous ground of appeal — [76] of the High Court judgment

[24] Under the heading of miscellaneous ground of appeal, Mr McGuire took issue with [76] of the judgment where Courtney J stated:

> All but one of the grounds of challenge fail. The challenge to the order reducing the fee to $10,000 succeeds and that order only is set aside. That aspect is remitted to the Committee for further consideration of Mr McGuire's assertion that Mr Menear-Gist's primary concern was reinstatement and, if that was or was likely to have been the case, the effect of it on the decision as to Mr McGuire's fee.

[25] Mr McGuire submitted the Judge was wrong to say he had succeeded in only one of the grounds of challenge. In fact he had succeeded in two. The Judge found that the Committee had failed to consider or consider sufficiently carefully Mr McGuire's assertions that Mr Menear-Gist was desperate to be reinstated. She also found that the Committee had failed to give adequate reasons for reducing the costs to the figure of $10,000. Accordingly, in Mr McGuire's submission, the fact of there being two breaches of natural justice should have been sufficient in itself for the censure order to be set aside.

[26] We do not accept that necessarily follows at all. Both errors on the part of the Committee were found to bear on the same specific issue, namely the amount of the reduction. The Judge considered that the figure of $10,000 needed explanation and that a factor to be taken into account was the possibility Mr Menear-Gist was so desperate about reinstatement, he would have proceeded anyway even if he had received the proper advice.

[27] We were unsure whether Mr McGuire was also raising a more fundamental argument, namely that the Judge erred in treating the issue of Mr Menear-Gist's desire for reinstatement as bearing solely on penalty. That is to say, we were unsure whether it was being argued that, correctly analysed, the issue also bore on the question of whether Mr McGuire could be guilty of unsatisfactory conduct in the first place. This was not the way Mr McGuire had put it in his written submissions, but he confirmed before us that was part of his argument.

[28] Justice Courtney however dealt with that point. She held it was insufficient to challenge the finding of unsatisfactory conduct to say Mr Menear-Gist would have proceeded anyway with the claim and the appeal. The issue was the quality of the advice he received about the risks and his right to be able to make an informed decision.[15] We agree and would add that his conduct in withdrawing the appeal after obtaining a second opinion tends to suggest he was not hell bent on reinstatement whatever the risks.

Application to adduce further evidence

[29] The further evidence which Mr McGuire wishes to adduce consists first of affidavit evidence from the hearing in the Authority. This evidence he contends supports his submission that all Mr Menear-Gist wanted was reinstatement and therefore there was no duty to undertake a cost–benefit analysis. However, not only is this not fresh evidence but for the reasons traversed above it is irrelevant. A second item of further evidence consists of correspondence with counsel for the Law Society regarding an exchange in court. In response to a question from the Judge, Mr Collins reportedly said that if Mr McGuire had only charged $5,000 then they would not be there. That does not however assist us with the issues on appeal. Two further items, an email to the Committee from Mr McGuire dated 14 October 2017, and an email from the Committee to Mr McGuire and Mr Menear-Gist dated 15 November 2017, are similarly irrelevant.

Outcome

[30] The application for leave to adduce further evidence is declined.

[31] The appeal is dismissed.

[32] As regards costs, Mr McGuire told us that if he lost the appeal and costs were awarded against him, he would be "finished" financially. However, that is not a sufficient reason to displace the ordinary rule that costs should follow the event.

---

15 *McGuire*, above n 3, at [51].

[33] The appellant is therefore ordered to pay the respondent costs for a standard appeal on a band A basis together with usual disbursements

Solicitors:
New Zealand Law Society, Wellington for Respondent