



LAWYERS, CLIENTS AND THE BUSINESS OF LAW

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Costs in a disciplinary context: charging excessive costs in connection with the practice of law

David Edwards
Principal Legal Officer, Legal Services Commission

It may come as little surprise to learn that at a minimum, 15% of all complaints investigated by the Legal Services Commission involve costs. The true figure is actually much higher, as the 15% mentioned relates only to those complaints dealing primarily with costs. Many more complaints involve costs together with other issues.

Those who have been in practice for any substantial time will know that client concerns over costs can be the bugbear of any practice.

Costs are under scrutiny

For the profession, there is every sign that their charges will be the subject of increased scrutiny from clients and regulators. A recent study prepared by London firm Cost Auditing Ltd examined costs claims submitted by lawyers to insurers. The firm reportedly found that 23.5% the costs claimed were unwarranted¹. The press release publicising the report noted:

“In a recent case a solicitor and own client bill was reduced by £274,000 from a total of £970,000. The bill contained some very interesting heads of charging, in addition to the normal camel train of lawyers each to do the same job otherwise known as structured and layered charging, was a new concept of “making of time available to work on a case” as an actual chargeable time unit!”

Yet, despite those concerns and general community disquiet² about the level of costs charged by legal practitioners, there is little in the way of decided case law as to which billing practices are acceptable and which are not.

The solicitor’s “advantage”

Much of that concern arises from what has been described as the “position of advantage” the lawyer enjoys when it comes to charging clients. The point was taken up by Justice Mahoney of the NSW Court of Appeal in the case of *Veghelyi v. Law Society of New South Wales*³. In that case, his Honour observed:

“Solicitors are informed or are in a position to inform themselves of what work may be required and what are fair and reasonable charges. They are in that sense in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of that advantage. It is, I am inclined to think, the fact that an advantage has been misused which may in a particular case warrant what the solicitor does being categorised as professional misconduct.”

Legislation

In Queensland, the starting point for considering the ethical and disciplinary implications for practitioners of their charging practices is s.420 of the Legal Profession Act 2007⁴. That section sets out in an inclusory fashion, certain types of conduct that are capable of amounting to unsatisfactory professional conduct or professional misconduct. The relevant part of the section reads:

¹ “Study of 7000 UK law firms finds gross overcharging”

<http://www.prnewswire.co.uk/cgi/news/release?id=87471>

² See, for example, “Charges, wounded bulls and other legal sophistry” Richard Ackland, Sydney Morning Herald, 7 March 2008

³ Unreported, 6 October 1995

⁴ Its predecessor was s.246 of the Legal Profession Act 2004, which was relevantly in identical terms

“The following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct—

(a) ...

(b) *charging of excessive legal costs in connection with the practice of law...*”

The definition is perhaps more interesting for what it does *not* say, rather than what it does. The first point to note is that it talks only of “charging” excessive legal costs, not “deliberately charging” such costs. Secondly, it speaks only of “excessive” legal costs, not “grossly” or “manifestly” excessive costs.

One is tempted to conclude, given that those more expansive terms were well-known and long-established within the profession prior to 1 July 2004, that the decision to frame the definition without reference to them is deliberate.

Certainly, if indeed it is the case that Parliament intended that unsatisfactory professional conduct or professional misconduct could be established by proof that a practitioner charged (without needing to prove deliberately charging) excessive legal costs (without needing to prove that the costs were grossly or manifestly excessive), then many of the concerns⁵ arising out of the decisions in *Nikolaidis v Legal Services Commissioner*⁶ and *Legal Services Commissioner v Galitsky*⁷ would be relatively simply overcome.

As yet however, the scope of s.420(b) has not been tested before Queensland’s Legal Practice Tribunal.

Roche’s case

For some guidance on the approach of Queensland courts to what constitutes charging excessive costs, the most apposite recent case is *Council of the Queensland Law Society v Roche*⁸.

The disciplinary charges arose out of a retainer to act (on a “no win, no fee” basis) for a brain-injured person (of course, the instructions came via a litigation guardian, Mr Arthur). Mr Arthur had retained the firm in August 1996 and signed a formal retainer agreement in November 1998. The agreement provided for fees to be calculated on a graduated hourly rate, from \$250 per hour for partners and accredited personal injury specialists to \$100 per hour for paralegals. The firm could charge an additional amount of up to 30% of the other fees for care and consideration. The agreement allowed the firm to increase the hourly rates by no more than 10% once per year, but only after giving Mr Arthur 30 days’ advance notice of the proposed new rate.

The firm presented a second retainer agreement was signed in October 2000. That agreement provided for an increase in the fees chargeable, to \$300 per hour applicable to all the partners and employees of the firm, together with the 30% “care & con” premium.

Mr Roche called Mr Arthur into his offices to discuss a mediation of the claim scheduled for December 2000. At that time, Mr Arthur was in financial difficulties and was anxious to continue with his daughter’s claim, and he wanted the firm to take on a similar claim in respect of his son. When presented with the suggested increase in fees, Mr Arthur was of the view (erroneously) that most of the legal costs had already been incurred, so that the proposed increase would have little overall effect on the amount payable in respect of his daughter’s claim.

⁵ Op. cit.

⁶ [2007] NSWCA 130

⁷ [2008] NSWADT 48

⁸ [2004] 2 Qd. R. 574

About half of the work that had been done on the matter to that time was performed by paralegals. This was significant because under the proposed new arrangement, the amount chargeable for their work per hour would triple. The matter was put to Mr Arthur on the basis that Mr Roche would agree to take on Mr Arthur's son's claim at \$300 per hour, rather than the \$500 per hour his firm would ordinarily be charging, but only if Mr Arthur agreed to the higher rate of \$300 per hour in respect of the daughter's claim.

The Tribunal found that Mr Roche failed to draw Mr Arthur's attention to the provisions of the first retainer which limited the capacity of the firm to increase the fees payable, failed to provide an estimate of the likely impact of the proposed increase on the fees payable overall, and failed to advise Mr Arthur that he should obtain independent legal advice before signing the new agreement.

As a result, the Tribunal found that Mr Roche had failed to afford Mr Arthur "the opportunity to make an informed decision with respect to a contract which fundamentally affected his rights," amounting to "serious breach of his fiduciary duty."

When the matter was finalised, the firm's professional costs amounted to \$350,000. This was calculated on the basis of time recorded of \$280,000, plus a 25% allowance for "care & con".

The bill included what were described as "mundane" items for:

- Attempts to make telephone calls, but which calls were unanswered;
- Attempts to telephone persons who were unavailable to take the call and for whom messages were left to return the call;
- Photocopying of an account received by the firm;
- Drawing a form requesting the firm's accounts department to draw a cheque in respect of an account;
- Diarising an appointment;
- Telephoning Directory Enquiries or using the telephone directory in order to obtain a telephone number;
- Searching for documents and files in the firm's possession which were unable to be located readily;
- Typing of formal letters by staff performing secretarial duties;
- Arranging accommodation for counsel;
- Internal telephone calls and emails.

It is worth noting that the Tribunal had found a charge based on the inclusion of those items to be established; although it was not convinced that the amounts levied for unanswered phone calls were "substantial".

Perhaps more disquieting were some of the more outrageous examples cited by the Tribunal, including:

"12 minutes of charged-for time spent wrapping a box of chocolates to be given to a reporting doctor's secretary by way of thanks for facilitating the correcting of a report, and another 12 minutes spent discussing arrangements for the purchase of the gift – for which momentous engagements the respondent was on my calculation billed \$156."

With outlays including counsels' fees, the total bill was close to \$600,000.

Mr Arthur requested an itemised account, which was prepared by a costs assessor for the firm (and for which Mr Arthur was charged a further \$45,000). The itemised account came to a total (including outlays) of around \$226,000 on the indemnity basis; which included a 75% allowance for care and consideration.

Both the Tribunal and the Court of Appeal noted the long-established principle that a difference between a costs assessment and a bill to a client does not necessarily prove

“gross overcharging”. The Chief Justice (delivering the leading judgment for a unanimous Court of Appeal) however observed⁹:

“While it is true that a solicitor is not bound to charge a client no more than would be assessed on the indemnity basis, one would nevertheless hope that such assessments would provide a reasonable view of the broad bounds within which recovery might reasonably be sought. But the Tribunal said only that these discrepancies did not “necessarily” establish gross overcharging. It was correct in noting that the focus must rest on the bill as delivered.”

Mr Roche was found guilty of professional misconduct, a finding upheld on appeal.

Relevance of the costs agreement

In *Roche*, the Chief Justice helpfully set out several “additional views” on the issues raised by the case, which he collected under the heading “The ethical approach”¹⁰.

One of those concerned the relevance of the retainer agreement. Of course, the position of such agreements is enshrined in legislation¹¹ and they form an integral part of modern legal practice.

The Chief Justice appears to be addressing the argument (albeit not set out in the judgment) that practitioners who have charged in accordance with an agreement signed by their clients cannot be found guilty of overcharging. As a response to that (implied) suggestion, the Chief Justice said:

“The circumstance that a solicitor’s right to exact certain charges is enshrined in an executed client agreement will not necessarily protect the solicitor from a finding of gross overcharging. For example, as here, the client may not have given his or her “fully informed consent” to the agreement; or the very extent of the particular charges may itself evidence inexcusable rapacity. It is repugnant to think of a solicitor withholding detail from a client, precedent to an agreement, to the solicitor’s advantage and the client’s disadvantage.

It is useful to refer here to some statements made in the New South Wales Court of Appeal in Foreman [12], per Kirby P (p 422):

‘Litigants look to this Court, ultimately, to protect them from over-charging by legal practitioners where this is so high as to constitute professional wrongdoing. The courts of other Australian jurisdictions have begun to deal determinedly with gross over-charging by legal practitioners where this is proved to amount to professional misconduct ... No amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging where it goes beyond the bounds of professional propriety. Time charges have a distinct potential to result in overcharging ...’

and per Mahoney JA (p 437):

‘... if costs agreements of this kind are to be obtained from clients, it is necessary that the solicitor obtaining them consider carefully her fiduciary and other duties, that she be conscious of the extent to which the agreements contain provisions which put her in a position of advantage and/or conflict of interest, and that she take care that, by

⁹ At para. 20 of the judgment

¹⁰ At para 32

¹¹ See s.48 Queensland Law Society Act 1952 (since repealed) and Part 3.4 Div 5 Legal Profession Act 2007

¹² *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408

explanation, independent advice or otherwise, the client exercises an independent and informed judgment in entering into them.”

If any reinforcement were needed on that point, it may be found in cases of *D’Alessandro v Legal Practitioners Complaints Committee*¹³ and *Re Law Society of the Australian Capital Territory and Roche*¹⁴; the latter of which coincidentally concerned the brothers of the respondent in the Queensland case.

In the ACT matter, the practitioners were also found to have been guilty of impropriety in procuring clients to enter into agreements that authorised excessive charging.

Accordingly, the mere entering into of a costs agreement that allows excessive charging may, in itself, be capable of amounting to unsatisfactory professional conduct or professional misconduct.

The unreasonableness of a costs agreement however does not, in itself, prove that the practitioner has been guilty of “gross overcharging”.

The undercharging “defence”

One of the matters that arose in the (Queensland) *Roche* case concerned an argument that the charges levied were not excessive because there were other matters for which the practitioner could have charged but chose not to.

The argument was given short shrift by the Chief Justice¹⁵, who stated:

“...it does not lie in the respondent’s mouth to reply, to a finding that the charges he did specifically levy were grossly excessive, that there were others he chose to forego. Levying grossly excessive charges to this extent amounts to professional misconduct whether or not other charges for work have been foregone.”

Time costing

The *Roche* case raises some interesting questions for those practitioners who calculate their fees on a time costing basis. In the Tribunal at first instance¹⁶, Mr Roche had argued that there was “genuine confusion in the legal profession about the proper remuneration or basis of charging for difficult matters”.

If that was the case at the time (and the Tribunal made no finding on that particular point), it is probably fair to say it remains the case. While time costing remains a popular, if not universal, method of calculating fees, anecdotal evidence that has come to the Commission’s notice suggests many practitioners do not appreciate what can and what cannot be charged for.

As an example, in a recent matter in which the Commission was involved, a firm appeared to be charging to clients many of the “mundane” items identified in the *Roche* case. When this was brought to the firm’s attention, their response included a concession that the partners had directed staff to record literally everything they did on a file, no matter how “mundane” and no matter how tenuous its connection to the prosecution of the matter. They explained that they required this approach as a means of managing their human resources issues.

That management of a firm should want to be fully informed of what their staff members are doing is entirely understandable; but such a situation could easily lead to clients being charged for work they should not be charged for.

¹³ (1995) 15 WAR 198

¹⁴ (2002) 171 FLR 138

¹⁵ At paras 28-29

¹⁶ See www.lsc.qld.gov.au/documents/roches.pdf

While it is beyond the scope of this paper to explore the pros and cons of time costing as opposed to other methods of calculating costs, it is apposite to note some of the criticisms of time costing. A commendably brief summary is provided by the Law Reform Commission of Western Australia in its review of the Criminal and Civil Justice System (1999)¹⁷.

The report noted¹⁸ that time based costs agreements:

- are likely to involve a conflict between the duty of solicitors to their clients and their own self-interest;
- are apt to reward the inefficient;
- lack anything that shows the appropriateness of the person for the work – for example, a more junior practitioner may well have been able to adequately complete the task; and
- may encourage lawyers to ‘over-lawyer’.

It continued:

“The obvious concern with a system based on billable hours is that it provides an incentive to undertake unnecessary work and to maintain inefficient ways of doing necessary work.”

It might be added that, in addition, it provides an incentive for lawyers (and indeed, their staff members) to:

- “pad” timesheets to show more time spent on a matter than was actually the case;
- duplicate work so as to boost the billable hours of those involved in the case (the so-called “camel train” effect); and
- invent ever more creative ways of “working” on a file (e.g. a file becomes too big and the cover splits – the client is charged for the time spent in replacing the split cover¹⁹).

Blended rates

A particular issue involving time costing is the use of so-called blended rates, where all staff members’ work is charged at a supposedly median rate, rather than varying higher and lower rates.

This became a particular focus in the *Roche* case. The Chief Justice addressed the issue squarely:

“A careful explanation should ordinarily be offered for what have, in this case, been termed “blended” rates. A client would usually be astonished to think he or she had to pay for the solicitor’s secretary or clerk at the same rate as for the solicitor. Cases like this one should cause careful clients to be circumspect about entering upon blended fee arrangements. A solicitor proposing such an arrangement should offer a most careful justification for what is proposed, to assure the client he or she is not being disadvantaged, and to inform the client appropriately so the client may make the requisite fully informed decision whether or not to agree to the proposal.

As observed by Gleeson CJ in New South Wales Crime Commission v Fleming and Heal (1991) 24 NSWLR 116, 126, ‘to allow a simple, flat, hourly rate as the basis for charging for anything, of whatever character, done by any solicitor of whatever seniority and experience in relation to the matter, is difficult to justify.’ I add, even more so, where the rate extends to work done by employees without legal qualification.”

¹⁷ See www.lrc.justice.wa.gov.au/092-FR.html

¹⁸ Ibid. Ch 36

¹⁹ This is a real-life example seen by the Commission

Increasing reliance by legal firms on paralegals and other non-qualified staff poses particular challenges for the profession. As the *Roche* case illustrates, the combination of heavy reliance on non-qualified staff, time costing and blended rates is a recipe fraught with danger for both clients – and practitioners.

What is the test for overcharging in Queensland?

Having outlined the issues facing the profession and some of the relevant principles, the question remains as to what test should be applied to determine whether overcharging (of the type that might amount to unsatisfactory professional conduct or professional misconduct) has occurred.

As mentioned at the outset of this paper, the starting point is to look to s.420 of the Legal Profession Act, which speaks of the charging of excessive legal costs in connection with the practice of law.

Under the principles enunciated in the common law cases, for a practitioner to be found to have committed a disciplinary breach in relation to charging costs, the disciplinary body had to find that the fees charged were “grossly excessive”. The fact that fees allowed on taxation might have been lower than the amount charged did not, of itself, prove gross overcharging. To use the words of Justice Carr in *De Pardo v Legal Practitioners Complaints Committee*²⁰, the issue was “to see whether or not there is a gross overcharge, not just an unreasonable fee that would not be allowed on a taxation”.

This required an overall consideration of the bill (not just particular items in it) and questioning whether the amount charged was “substantially above what any reasonable solicitor would contemplate as being a proper charge”²¹.

The requirement to prove “gross overcharging” set the bar rather high for professional regulators (and, in turn, for the clients whose complaints prompted them into action). A practitioner could be found to have overcharged, but if the overcharge was not “grossly excessive”, then disciplinary action was bound to fail.

Does s.420 change the position? That question remains open, as the precise scope of s.420 has not yet been tested.

Serious questions have to be answered in relation to the section, including:

- Does “excessive” in s.420 mean the same as “grossly excessive” in the common law cases? Is the absence of the word “grossly” from the section significant?

My personal view is that it probably is. If the legislature had intended to translate the common law concept of “gross overcharging” into the statutory regime of the Legal Profession Act, it would have been a simple matter to use the same terminology. The fact that the terminology is different is most likely of significance.

- How does a practitioner “charge” fees? Is it enough for the practitioner to “sign off” on a bill prepared by an employee (qualified or not) of the firm?

The term “charge” is rather imprecise. There is a sense in which anyone who has anything to do with preparing a bill is “charging” the fees to the client. To found a disciplinary charge however, one would think that more is required. For example, simply processing a bill through accounting software would not seem to amount to “charging”.

²⁰ (2000) 170 ALR 709

²¹ Roche at para 16

However, by the same token, it would seem to be open to conclude that a practitioner who signs off on a bill or sends it to a client is “charging” the client. Such actions appear to indicate an intention to hold the client responsible for the fees set out in the bill.

- Does s.420 include an element of “deliberateness”? Does the practitioner in question have to prepare and send the bill; or is it sufficient that the practitioner supervises the person who did?

Again, it is tempting to think that the absence of any reference to “deliberate” charging in the section is intentional. If that is correct, then decisions such as *Nikolaidis v Legal Services Commission*²² may not present the difficulties for disciplinary action alluded to above.

The mere act of sending a bill is, in itself, “deliberate” of course. The practitioner must be taken to be holding the client responsible for fees in the amount stated in the bill. Whether the practitioner “deliberately” intended to overcharge is, in my opinion, irrelevant to the scheme established by the Act.

These are questions for another day, but I hope they will provide some guidance on the issues posed by the Act and the regulatory scheme it establishes so far as they relate to overcharging.

²² Which, it should be noted, was decided on different – and repealed – NSW legislation