OVERCHARGING

Are there different rules for solicitors and barristers?

By Maxine Evers

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'Disciplinary issues involving costs and allegations of overcharging by legal practitioners is a notoriously difficult area and besides its own experience as a specialist Tribunal, the Tribunal is entitled to the benefit of any opinion, including expert evidence properly brought forward that deals with the practice of, inter alia, costs assessing.[1]
– *Legal Services Commissioner v Bechara*

Allegations of gross deliberate overcharging by a legal practitioner are taken very seriously, not only because they have grave consequences for both the client and lawyer, but also because they go to the heart of conduct that is considered 'disgraceful or dishonourable'. Overcharging that is found to be gross and deliberate is not only a costs issue – it is an ethical one that may result in a professional misconduct finding.

At first glance, the recent decision of the NSW Administrative Decisions Tribunal in *Legal Services Commissioner v Bechara* [2009] NSWADT 145 suggests that there is a different set of rules and duties for solicitors than there is for barristers in relation to disclosure and fees. In *Bechara*, the Tribunal made a finding of professional misconduct for deliberate charging of grossly excessive costs against the solicitor whereas, a little over 12 months earlier, the Tribunal dismissed an application by the Commissioner, for the same allegation, against a barrister in *Legal Services Commissioner v Galitsky* [2008] NSWADT 48.

These decisions have relevance for all jurisdictions and, in particular, in personal injury cases involving more than one plaintiff against the same defendant where the claims are heard together. The different outcomes in these two matters, both of which arose from acting for the same clients against the one defendant during a hearing, raise several questions. Are solicitors and barristers treated differently in relation to fees? Was the different outcome due to the preparation and presentation of evidence to the Tribunal? Did the applicant Legal Services Commissioner learn from the earlier unsuccessful case against the barrister?

The reasons for the different outcomes provide a lesson for both arms of the profession. For solicitors, there is a dual lesson. The first lesson is shared with counsel and relates to the general principle of remuneration for fair and reasonable work undertaken for each client. The second lesson is one confined largely to solicitors;[2] that is, the duty to communicate clearly and comprehensively to the client.the practitioner's intentions in relation to the ultimate charging and recovery of fees.

THE FACTS IN *BECHARA*

The solicitor took instructions to act for the three plaintiffs, Toufika Hussein, Fatemah Hussein and Mohamed Hussein, being members of the one family and tenants of a NSW Land and Housing Corporation property at Punchbowl, Sydney. On separate occasions, the plaintiffs sustained injuries in similar circumstances that were alleged to be caused by the negligence of the defendant Corporation.

The solicitor gave evidence that 'standard' fee disclosures were made to each client. She also advised the Legal Services Commission, during its investigation, and the Tribunal, during the hearing, that the claims were considered separately, each with their own evidence, particularly in relation to quantum, and with the intention that they would be heard separately.

Counsel was briefed to appear for the three plaintiffs and the matter was listed for hearing on 13 November 2001. Prior to the commencement of the trial before Judge Walmsley, it was agreed that the cases be heard together[3] and that evidence in each matter would be evidence in the other matters. The hearing took six days and resulted in a judgment for each of the plaintiffs in the sums of $98,005 for Toufika Hussein, $35,050 for Fatemah Hussein and $27,446.45 for Mohamed Hussein, together with costs.

There was no agreement as to the party/party costs. The solicitor filed an application for assessment of the party/party costs in all matters. In the course of conducting the party/party assessment, the costs assessor called for and considered the solicitor's conditional costs agreements and the solicitor/client bills of costs. The costs assessor noted that:

> 'My examination of the solicitor/client bill of costs in each matter suggests that the solicitor and the barrister may have engaged in conduct which involves the deliberate charging of grossly excessive amounts of costs. There were numerous examples in the bill of costs where each client had been separately charged at the full agreed rate for attendances which were carried out simultaneously. For example, the total time spent at court by the solicitor for the plaintiff instructing counsel on the hearing was not divided by the three cases. The same applied to counsel's fees. This resulted in the solicitor charging amounts up to $6,000 for one day in court. The barrister also charged the three clients on the same basis.'[4]

He subsequently referred the matter to the Legal Services Commissioner in accordance with s208Q(1) of the *Legal Profession Act* 2007 (LPA),[5] which provided that:

> 'If a costs assessor considers that any conduct of a barrister or solicitor involves the deliberate charging of grossly excessive amounts of costs >>

or deliberate misrepresentations as to costs, the costs assessor must refer the matter to the Commissioner.'

SIMILARITIES IN THE DECISIONS

Both the solicitor and barrister were experienced in personal injury common law litigation and charged in accordance with what was considered to be the usual practice in these types of matters under the 1987 LPA. Both had disclosed to the clients that their fees would be conditional on a successful outcome, with 25 per cent uplift.

The same complaint, namely 'deliberately charged grossly excessive amount of costs' by the Legal Services Commissioner, was made against the solicitor and barrister.

The basis of the complaint against the barrister and, substantially against the solicitor, was that the barrister charged $6,000 a day ($2,000 per client) and the solicitor charged $750 an hour ($250 an hour per client) firstly, without any regard for the fact that the three matters were heard together and, secondly, without any acknowledgement that the barrister's daily rate and the solicitor's hourly rate should be apportioned.

Both practitioners relied on the fact that the charges were in accordance with the costs disclosure made to each client. The final similarity was that the plaintiff clients did not complain about the fees charged to each of them.

THE ISSUE

The main issue for the Tribunal was whether the practitioners had charged grossly excessive costs and, if so, if such charging was deliberate. It was necessary for the Tribunal to inquire as to the requirements on practitioners under the general law and statute in relation to disclosure and the calculation, charging and recovery of fees. The Legal Services Commissioner submitted that disclosure of an hourly or daily rate did not take precedence over the duty to charge a fair and reasonable amount which, in this case, meant either apportioning the costs among the three matters on the basis of time spent on each claim or, if that was too difficult, by way of equal division.

Costs agreements must be fairly applied in cases where work is being carried out concurrently for different clients.

The finding in *Galitsky*

The Tribunal dismissed the Commissioner's application for a finding that the barrister was guilty of professional misconduct on the ground that he deliberately charged grossly excessive fees. In considering the complaint, the Tribunal noted that the costs assessor did not assess the solicitor/client bills and that the 'standards and considerations' used in a party/party assessment are not necessarily the same as a solicitor/client assessment.[6] Further, the Tribunal raised a concern as to whether the referral by the assessor was a valid one, given that he formed the view that the barrister 'may' have engaged in overcharging.

The Tribunal found that the affidavit evidence of the Commissioner and the costs assessor did not contain sufficient evidentiary material to support the allegation of deliberately charging grossly excessive costs. It also found that the costs assessor's observations could not be considered as expert evidence.[7] He was not properly qualified to provide evidence of the solicitor/client issue of overcharging, nor did his affidavit meet the test for an expert report. No evidence as to an appropriate alternative method of charging was submitted on behalf of the applicant. Nor did the applicant rebut any of the expert evidence relied on by the respondent barrister. The Tribunal noted that the expert opinions given on behalf of the respondent were 'persuasive' and were given by 'highly qualified costs experts'.[8]

The finding in *Bechara*

The Tribunal determined that the solicitor was guilty of professional misconduct for the deliberate charging of grossly excessive fees. The evidence of the applicant Commissioner given by the cost assessor and a costs expert was accepted.

The Tribunal noted the solicitor's evidence that she had no intention of overcharging the clients and that she treated each client individually with the matters being kept separately and the clients conferred with individually. However, the Tribunal also noted that, in the party/party assessment, the solicitor conceded in her general response to the defendant's objections that 'certain claims in the bills of costs should be apportioned as between the related proceedings'.[9] Furthermore, the solicitor had indicated that she was prepared to reduce her costs, not as a result of the Commission's investigation and findings, or as an acknowledgement that the costs should have been apportioned, but because it was her usual practice to base the amount she ultimately asked for from the clients on the quantification of the party/party costs.

DIFFERENCES IN THE DECISIONS

A reading of these cases highlights two of the essential requirements in administrative decision-making and in general litigation. In *Bechara*, the Tribunal noted that the Commissioner, anticipating difficulties as a result of the *Galitsky* decision, filed further particulars and sought leave to rely on expert evidence from an independent costs consultant.

(a) Further particulars

In *Galitsky,* the particulars relied on by the Commission in its application referred to the hearing of the matters together, the failure to apportion costs common to the cases and the failure to charge each client a portion of the total hearing fees. In *Bechara,* the Commission provided these same particulars, together with expanded particulars setting out the total fees in the solicitor/client bills; specific items charged in the solicitor/client bills and

the cumulative total of such charges; the contractual requirements, set out in case law, of charging for work carried out; the statutory obligations to charge a fair and reasonable fee for work done; the degree of responsibility taken by the solicitor in finalising the bills and the recognition of the excessiveness of the bills evidenced by the advices concerning the party/party assessments provided to the clients.

(b) Expert evidence

The Tribunal in *Bechara* distinguished the determination in *Galitsky* on the basis that, in the earlier decision, the Tribunal did not accept the costs assessor as an expert and the 'views that he expressed did not expose any real expertise or valid basis for the opinion he had formed'.[10] The evidence relied on by the applicant in *Galitsky* did not comply with the rules of evidence and the practice and procedure of the jurisdiction. Nor was there evidence given as to the 'appropriate fees structure in similar situations'.[11]

In *Bechara*, the Tribunal accepted that the expert 'was eminently qualified to express opinions about the practice of cost-assessing, including the context of contested costs in a solicitor/client costs assessment and what costs were professionally acceptable or unacceptable',[12] and that her report clearly set out the basis for her opinion.

An interesting issue arising from the decisions was the difference in the treatment of the cost assessor. In *Galitsky*, the Tribunal noted that the costs assessor's affidavit did not state whether he had determined any solicitor/client assessments nor set out any prior experience in such assessments.[13] In *Bechara*, the costs assessor was acknowledged as being 'a very experienced practitioner and costs assessor'.[14]

The question arose as to whether the cost assessor must form the view that the charging was deliberate. In *Galitsky*, the Tribunal noted that he should. However, in *Bechara*, the Tribunal accepted that the role of the cost assessor 'was to express a considered opinion'[15] as to the overcharging and that, in this case, the referral was valid.

CONCLUSION

> 'Having regard to these judgments it is clear that the existence of a costs agreement will not operate to exclude investigation of the costs actually charged by a practitioner and will not prevent a finding of professional misconduct for the charging of grossly excessive costs.'[16]

The decision in *Bechara* confirms the general principle of charging individual clients only for work performed exclusively on their matter. Put simply, 'a lawyer could not charge the same unit of time more than once'.[17] It is worth noting that the obligations concerning disclosure and charging set out in the 1987 (and presumably 2004) *Legal Profession Act* remain and are subject to scrutiny, irrespective of whether the client complains about the solicitor's conduct or whether there is a costs agreement that appears fair and reasonable.

Although it may be a solicitor's usual practice to accept the amount recovered on a party/party assessment in satisfaction of the solicitor/client costs, rendering a bill of costs to a client that claims grossly excessive fees, that would be recovered if not challenged, is not acceptable.

In determining that the application should de dismissed in *Galitsky*, the Tribunal noted the Commissioner's 'ill conceived and ill prepared'[18] case, However, it did acknowledge that counsel has 'singular obligations'[19] to each client. In contrast, the obligation of the solicitor was to not claim fees, more than once, for work done at the same time. It is not the case that there is a different set of rules for solicitors and barristers. But the obligation on solicitors, rather than barristers, to disclose fees to the client comprises not only the method of charging fees, including counsel's fees, but should also include intentions with regards to the final recovery of fees. Given that the solicitor is still substantially at the 'coalface of fee recovery',[20] the obligation not to mislead the client or to profit unjustly could be said to be more onerous for solicitors.

Possible options for reducing the risk of complaints either from a costs assessor, the Legal Services Commission or a client include ensuring that the costs agreement is fairly applied in cases where work is being carried out concurrently for different clients, maintaining the practice of charging a unit of time only once and communicating honestly and clearly to the client what the intention is with recovery of fees. The issue of apportionment of costs when acting for more than one client in the same or similar matter must be addressed at the time of the retainer and diligently monitored throughout the duration of the retainer. ■

Notes: **1** *Legal Services Commissioner v Bechara* [2009] NSWADT 145 at [57]. **2** Except in cases of direct access or direct brief circumstances. **3** There is a discrepancy in the reporting of how it was determined to hear the matters together. In *Galitsky's* case, the judgment notes that Walmsley J determined that the three matters would be heard together. In *Bechara's* case, the judgment notes that the defendant proposed that the cases be heard together. **4** *Legal Services Commissioner v Bechara* [2009] NSWADT 145 at [7]; *Legal Services Commissioner v Galitsky* [2008] NSWADT 48 at [8]. **5** The equivalent section in the current 2004 Act is s393(1). **6** *Legal Services Commissioner v Galitsky* [2008] NSWADT 48 at [27]. **7** *Ibid* at [59]. **8** *Ibid* at [32]. **9** *Legal Services Commissioner v Bechara* [2009] NSWADT 145 at [66]. **10** *Ibid* at [16]. **11** *Legal Services Commissioner v Galitsky* [2008] NSWADT 48 at [31]. **12** *Legal Services Commissioner v Bechara* [2009] NSWADT 145 at [42]. **13** *Legal Services Commissioner v Galitsky* [2008] NSWADT 48 at [42]. **14** *Legal Services Commissioner v Bechara* [2009] NSWADT 145 at [24]. **15** *Ibid* at [28]. **16** *Ibid* at [37]. **17** *Ibid* at [92]. **18** *Legal Services Commissioner v Galitsky* [2008] NSWADT 48 at [69]. **19** *Ibid* at [47]. **20** Except in cases of direct access or direct brief circumstances. See also s310 *Legal Profession Act* 2004.

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