IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV 2017-004-00866
[2019] NZDC 6528

BETWEEN	ELIZABETH ANN ROBERTSON Plaintiff
AND	ALEXANDER CHARLES MASON Defendant

Hearing: 19 November 2018, 28 March 2019

Appearances: R Pidgeon for the Plaintiff
G Thwaite for the Defendant

Judgment: 10 April 2019

RESERVED JUDGMENT OF JUDGE M-E SHARP

Introduction

[1] Mr Mason engaged the services of Mr Robert Hacking, a barrister, to represent him in a Family Court proceeding brought under the Protection of Personal and Property Rights Act 1988. Mr Mason paid some of Mr Hacking's fees but refuses to pay the balance of $48,852 in which sum he is sued by Mr Hacking's instructing solicitor, Elizabeth Anne Robertson. Ms Robertson seeks summary judgment against Mr Mason for that sum plus interest and costs.

Summary Judgment applications

[2] The plaintiff must establish that there is no arguable defence to the claim. That is, "*an absence of any real question to be tried*".[1]

---

[1] *Pemberton v Chappell* [1987] 1 NZLR 1 at [3].

The defences raised

(i) Mr Mason had no contractual arrangement with Ms Robertson

[3] In his affidavit he says:

> [7] At the outset I visited the home office of the plaintiff to sign or deliver one or more documents. Otherwise, I had no contact with her.
>
> [8] She did not provide to me a written agreement as to her services.
>
> [9] She did not advise me on any part of the litigation. She never met with me to discuss the litigation.
>
> [10] She has never sent me an invoice.

[4] Interestingly, Mr Mason makes no mention of signing the letter of engagement between Mr Hacking and Ms Robertson in respect of attendances upon him.

[5] The uncontested evidence of Mr Hacking reveals the following course of events:

- on 4 November 2015, Mr Mason made email contact with Mr Hacking (a barrister sole) writing "*please arrange one of your solicitors to refer me*". Later that day, Mr Hacking emailed Ms Robertson, "*...I wonder whether I could look to you for instructions to advise Alex Mason who I've yet to meet*?". Ms Robertson then communicated her agreement;

- on 5 November 2015, Ms Robertson received from Mr Hacking a letter of engagement setting out the services to be provided to Mr Mason "*in relation to trusts/PPPR matters, what his fees would be, professional indemnity insurance, complaints, limitations of liability, acceptance*". Whilst not exhibited before the Court it is plain from Ms Robertson's affidavit and other evidence before the Court that she either signed the third page of the letter of engagement or in any event impliedly agreed its contents;

- on Friday 6 November 2015 Mr Mason emailed both Ms Robertson and Mr Hacking, attaching the third page of Mr Hacking's letter of engagement, containing Mr Mason's signature and date. That document along with the email attaching it, is an exhibit to Ms Robertson's affidavit of 1 October 2018 at pages 3 to 7;

- on 10 November 2015 Ms Robertson provided her trust account deposit slip to Mr Hacking who responded by email stating "*thank you Elizabeth. I gather that Alex Mason will be depositing $5,000 on account of my fees*"[2];

- on 14 November 2015 Ms Robertson received an email from a Joanne Moore on behalf of Mr Mason confirming that $5,000 had been paid to Ms Robertson's trust account that day, reference: Alex Mason, and that funds would be cleared 10pm Monday evening[3];

- Mr Mason deposited a further $5,000 to Ms Robertson's trust account on 26 November 2015, the receipt of which she confirmed by email to Mr Hacking on 27 November 2015[4];

- on 11 April 2016 emails passed between Mr Hacking and Ms Robertson about whether there was money in trust to meet the expert fees of Dr Jane Casey who was to be engaged for and on behalf of Mr Mason (the email exchanges exhibited at page 12 of the affidavit of Ms Robertson);

- on 13 April 2016 Mr Hacking received an email from Mr Mason saying:

> Dear Robert, please arrange payment from the Elizabeth Robertson trust account to the value of $5,000 against the attached invoice.

[2] Ms Robertson's affidavit at [4]
[3] Ms Robertson's affidavit, pg 10 at [5]
[4] Ms Robertson's affidavit at [6]

- on 14 April 2016 Mr Hacking informed Mr Mason that he had passed his email onto Ms Robertson[5];

- on 20 April 2016 Ms Robertson notified Mr Hacking that from funds held on behalf of Mr Mason she had paid the sum of $5,000 to him on account of his invoice as instructed by Mr Mason in his email of 13 April, the subject of which was Robert Hacking invoice 01486;

- on 11 June 2016 Ms Robertson received an email from Mr Mason instructing her to meet payment of Dr Casey's invoice;

- Ms Robertson paid it and on 13 June replied both to Mr Mason and Mr Hacking confirming that she had done so and that she was holding a balance of funds of $465.74 on Mr Mason's behalf [6].

[6] Ms Robertson has the burden to prove a contract of retainer[7]. A contract of retainer may be discernible by implication: an objective consideration of all the facts is required.[8]

[7] Mr Mason claims that Ms Robertson is unable to prove a contract of retainer between herself and him because she promised nothing to Mr Mason and delivered nothing (i.e. no correspondence, no meetings, no research, and no documentation). He submits that he promised nothing to her and delivered nothing (i.e. no fees). On behalf of Mr Mason, Mr Thwaite submits that Mr Hacking acted as if he was the contracting party: doing the work and sending out the invoices.

[8] Mr Mason claims that there was no intention to create legal relations between the parties to this proceeding, no consideration moving between the parties and no description of Ms Robertson's services.

---

[5] Mrs Robertson's affidavit at [8]
[6] Ms Robertson's affidavit at [9] & Exhibit at pg 15.
[7] *Hanson v Young* [2004] 1 NZLR 37.
[8] *Dean v Allin* [2001] 2 Lloyds Law Reports 249, 256.

[9] Without a contract, no retainer existed. Without a retainer, Ms Robertson can have no claim against Mr Mason either for her own fee or for Mr Hacking's fees as a disbursement against her.

Retainer

[10] The definition of a retainer is in the Lawyers & Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("LCCCR"), rule 1.2:

> **Retainer** means an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not the words *whether that agreement* etc, and whether payment is to be made by the client or not.
>
> [emphasis added]

[11] A contract of retainer can be implied from the actions and intentions of the parties.[9] The parties must be ad idem and "an objective consideration of all of the circumstances" must occur before an "intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties".[10]

[12] The law has an aversion towards ambiguously worded contracts (or ambiguous situations) which benefit the lawyer who understands legal complexities and the lay client who may not:[11] But, the words of Bryne J in *CF Equus Corp PTY Ltd v Wilmoth Field Warne (a firm) (NO 3)*[12]:

> The lay party in this case is an intelligent and experienced litigant who demonstrated himself to be well able to look after his own interests.

could well sum up Mr Mason who, after all had instructed lawyers before (see judgment of Fitzgerald J in *Triezenberg v Mason*[13] (discussed later in this judgment).

---

[9] Duncan Webb, Cathryn Dalziel & Kerry Cook, *Ethics, Professional Responsibility and the Lawyer (*3rd ed) LexisNexis, Wellington, 2016) at 156; GE Dal Pont Lawyers' Professional Responsibility (6th ed, Thomson Reuters, 2017) at 74; *MacLean v Annan & Co* HC Tauranga CIV 2009-470-868, 18 November 2011 at [35].

[10] *Dean v Allin & Watts* 2011 EWCA CIV 758 at 22

[11] See Delpont, above N4, at 76; *Anglo-Dutch Petroleum v Greenberg Peden* (2011) 352 SW 3d445 at 453.

[12] [2004] VSC 164 at 10

[13] [2019] NZHC 14

[13] This is a situation where clearly a barrister brought about a contract of retainer between the client (Mr Mason) and the instructing solicitor (Ms Robertson).

[14] In *New Zealand Tamil Society v Kiely Thompson Caisley* ("Tamil") Courtney J considered an appeal in a case where the circumstances were consistent with the present.[14]

[15] A barrister, Mr Gilchrist, had been approached by The Tamil Society. Mr Gilchrist arranged for Mr Kiely of Kiely Thompson Caisley to be the solicitor on record. Mr Kiely had no direct contact with The Tamil Society. At para [18] in dealing with the issue of whether there was a contract of retainer, Courtney J said:

> In my judgment the evidence relied on by the Judge did support a finding that the members of the society who consulted Mr Gilchrist were told that they required a solicitor and accordingly instructed Mr Gilchrist to arrange for KTC to assume that role, which he did. There was evidence from Mr Gilchrist that he would have discussed his hourly rate and the fact of oversight by the Law Society if counsel's fees in the event of a dispute meant that there was a mechanism for determining what a fair and proper fee would have been. In any event, given the clear intention to contract, the lack of specific agreement on matters such as the hourly rate or the time for payment would not preclude a contract of retainer being concluded …

[16] Courtney J concluded that on the evidence there was a contract of retainer between the Society and the instructing solicitor.

[17] Mr Mason asked Mr Hacking for a solicitor to "refer" him from the outset; he signed the retainer which mentions that he was Ms Robertson's client, and he used and instructed her to use, hold and disburse funds in her trust account. She advised him of the balance retained on his behalf in her trust account. At all times Mr Mason knew that Ms Robertson was to be the instructing solicitor for Mr Hacking and was to handle Mr Mason's monies for the purposes of meetings disbursements such as Dr Jane Casey and Mr Hacking. There was an intention to create legal relations between the parties. There was consideration. Given the facts here I find an implied contract of retainer between the parties.

---

[14] [2011] NZAR 722 (HC)

(ii) Letter of engagement

[18] Mr Mason submits that if Ms Robertson was in a contract with him, in terms of R 3.4 LCCCR she should have provided in writing to him information on the principal aspects of client service including:

> (a) the basis on which the fees will be charged …
>
> (b) the professional indemnity arrangements of the lawyers practice …
>
> (c) the coverage provided by the lawyers fidelity fund …
>
> (d) the procedures and the lawyer's practice for the handling of complaints by clients.

[19] Ms Robertson sent no letter of engagement to Mr Mason. She argues that its lack is not detrimental to a finding that there was a contract of retainer between the parties.

[20] Rule 3.5 LCCCR states:

> A lawyer other than a barrister sole must, prior to undertaking significant work under a retainer, provide in writing to the client the following:
>
> (a) a copy of the client care and service information …; and
>
> (b) the name and status of the person or persons who will have the general carriage of, or overall responsibility for, the work; and
>
> (c) any provision in the retainer that limits the extent of the lawyers or the practice's obligations to the client or limits or excludes liability
> …

[21] Whilst Ms Robertson did not provide in writing any of that information, at no stage did she ever undertake "significant work". Moreover, commentary on those rules has stated "*a failure [to execute chapter 3 requirements] will be a professional breach by the lawyer but will not affect the existence of legal obligations between the parties*".[15]

---

[15] Duncan Webb, Catherine Dalziel and Kerry Cook, Ethics, Professional Responsibility and the Lawyer, above n 9

[22] There is no express rule in the LCCCR as to what occurs in the absence of a letter of engagement. Viewed objectively, the lack of letter of engagement from Ms Robertson to Mr Mason does not affect the contract of retainer which I have found existed. I do not accept that providing a letter of engagement was a condition precedent to the validity of a contract nor do I accept the argument of Mr Mason that s 11 Arbitration Act 1996 and s 21F Property (Relationships) Act 1976 are comparable. Both expressly state the contractual agreements made under the respective acts are not enforceable unless the requirements in the sections are carried out. Rules 3.4 and 3.5 LCCCR do not state this.

[23] Mr Mason also argues that the lack of a letter of engagement means any existing contract will be illegal at common law. He cites s 71 Contract and Commercial Law Act 2017 which defines illegal contracts in New Zealand. There are examples provided under s 71 of the Act for guidance. These include a contract agreeing to the commission of a serious crime and a contract agreeing to use improper influence to affect the award of a public honour. The gravity of the situations which are cited as examples is far greater. This is not an illegal contract.

[24] Mr Mason further argues that the lack of a letter of engagement means any existing contract will be in breach of s 4(a) Lawyers and Conveyancers Act 2006. Even if I was to find that the contract of retainer between the parties was against the rule of law in the Lawyers & Conveyancers Act 2006, s 72 Contract and Commercial Law Act 2017 states that the contract would nevertheless be legal. It is possible that the lack of a letter of engagement was a professional breach by Ms Robertson, in which case Mr Mason could have made a complaint under the Lawyers and Conveyancers Act 2006.

(iii) Is Ms Robertson able to sue Mr Mason for Mr Hacking's fees when she has no legal obligation to pay them to him?

[25] Rule 10.7.1 and 10.7.2 LCCCR state:

> 10.7.1 Where the instructing lawyer and the lawyer undertaking the work have agreed that the instructing lawyer's client is to be solely responsible for paying the lawyer's account then (unless agreed otherwise) the instructing lawyer must use all reasonable endeavours

> to ensure the client pays the account. The instructing lawyer must promptly inform the instructed lawyer if it appears that the client will be unable or unwilling to pay the account.
>
> 10.7.2 A lawyer with a practising certificate as a barrister and solicitor may sue for and recover from the party chargeable any fees paid or payable by the lawyer to a barrister sole for work done or to be done on the instructions of the lawyer in relation to a client's affairs, if those fees are shown as a disbursement in a bill of costs rendered by the lawyer to the party chargeable.

[26] Because the letter of engagement between Ms Robertson and Mr Hacking expressly absolves Ms Robertson of responsibility or liability for Mr Hacking's fees, Mr Mason argues that r 10.7.1 and r 10.7.2 do not apply. Whilst there are no authorities on this point under the present legislation, there are older authorities relevant to s 104 of the former Law Practitioner's Act 1982, which continue to be instructive of this matter. In *Findlay v Webb Morice & Partners* the respondents were the appellant's solicitors.[16] The appellant instructed them to brief Mr MacLean to act as his barrister. Mr MacLean was owed $25,388.52 and asked Mr Masons to recover it for him. The appellant suggested the fees could not be recovered by Mr Masons because they had no obligation to do so but His Honour Robertson J had this to say on the subject:[17]

> [The client's lawyer] submits that …. not being responsible for the payment of any unpaid fees meant [the solicitors] had no rights to assist [the barrister]. I do not see why that follows at all. If they chose (as they did) to make the demand and to pursue [the clients] on [the barrister's] behalf because [the barrister] is precluded by an existing rule from doing so directly, that is their business. If they had said no, [the barrister] would have been left lamenting. But they did not say no.

[27] In reference to s 140 Law Practitioner's Act 1982 (now repealed but this section is framed in almost identical words to r 10.7.2 LCCCR) Robertson J said:

> If there is no money owing to the solicitor (as apparently there was not here) when there is money owing to the barrister, it makes a nonsense of the words to suggest that the barrister's fee never has to be paid because there is no solicitor's fee outstanding.

[28] Finally at para [5] the learned Judge said[18]:

> There was a set up between a barrister and a man that there would be direct financial arrangements between them. That was how [the client] initially

[16] HC Auckland, AP 82-SW99, 6 September 1999
[17] At [3] – [4]
[18] At [5]

> acted. He subsequently became disillusioned. I do not accept that the law is so silly that it creates a structure that because of the arrangement in place and operating, this disillusioned man can say he is not going to pay any more money on this sort of argument.

[29] In *Tamil* Courtney J went on to say on this subject:

> In the absence of any express arrangement [regarding payment of fees] a barrister can expect that the solicitor will take steps to ensure that the fee is paid. The fact that the barrister does not press for payment until the solicitor has obtained the funds from the client does not alter this position.

[30] Ms Robertson may claim Mr Hacking's fees from Mr Mason notwithstanding that she is not legally obliged to meet Mr Hacking's invoices.

(iv)Is the contractual relationship between Ms Robertson and Mr Mason a "sham"?

[31] Mr Mason submits that the supposed contractual relationship between himself and Ms Robertson is a sham – the reverse brief, the lack of collaboration between counsel and her and the lack of involvement from Ms Robertson meant that there was no genuine relationship between Ms Robertson and counsel, and therefore no retainer between Ms Robertson and Mr Mason.

[32] Mr Mason says Ms Robertson represented herself as a solicitor but never intended to undertake any services. In a barrister/instructing solicitor relationship like this, the instructing solicitor can be seen as a "post-box", to "ensure superficial compliance" but undertake no real work[19].

[33] I do not accept that the relationship between the parties was in essence a pretence,[20] nor that this was not a genuine solicitor and barrister relationship.

[34] Mr Mason argues R 14.15 LCCCR which provides that:

> Except where a barrister has accepted direct instructions under r 14.5:
>
> 14.15.1 A barrister sole must keep his or her instructing lawyer reasonably informed of the progress of the brief. A barrister sole should normally seek the consent of the instructing lawyer before interviewing the client or any witness.

---

[19] Webb, Dalziel and Cook, above n 9: although was criticised in *McDonald v FAI (NZ) General Insurance Co Limited*. [1999] 1 NZLR 583-590

[20] [2008] NZSC 115 at [33]

> 14.15.2 Correspondence between parties on matters relating to litigation should normally be carried out between the instructing lawyer.

[35] I find this was a legitimate contractual relationship albeit of a kind where Ms Robertson was required to do much less than might often be the case. She was required to undertake a service or services, none the least of which was the holding of monies for Mr Mason and the disbursing of them to Mr Hacking and others. There is no evidence from which I could or should deduce that Mr Hacking and Ms Robertson intended to use their retainer as an imitation of a real relationship. Just because this was a reverse brief situation, there is no reason to conclude that the retainer was a sham. The degree to which the instructing solicitor is involved in the work is not necessarily instructive of the legitimacy of the relationship. I discern no viable defence on this issue either.

(v) Applicant breached her obligation to Mr Mason by failing to or giving poor advice on certain matters

[36] In *Triezenberg v Mason* Fitzgerald J introduced her judgment at para [1] by saying:

> [1] The first defendant (Mr Mason now in his mid-80s) has had a dramatic and sad falling out with his two daughters, one of whom is the first-named plaintiff in these proceedings (Ms Triezenberg). Mr Mason has also fallen out with the second-named plaintiff (Mr Dodd) the family accountant since 1993.
>
> [2] The reason why these matters have become before the Court is because the plaintiffs and Mr Mason, together with Mr Mason's wife, the second defendant (Mrs Mason), have been the trustees of two family trusts settled by Mr and Mrs Mason some years ago. The falling out between the parties has compromised the operation of the trust. As a result, the plaintiffs apply to remove Mr Mason has trustee. They also seek orders for removing Mrs Mason as a trustee.
>
> [3] It is common round Mrs Mason ought to be removed. She has advanced Alzheimer's dementia and is subject to a property order made under the Protection and Property Rights Act 1988. Mr Mason vigorously opposes his removal as trustee. Indeed it became evident during the hearing that Mr Mason vigorously opposes the very nature and effect of the two trusts.

At para [5] FitzGerald J said:

> the rift in the family was triggered by Mrs Mason's admittance to Middlemore Hospital and then St Andrews Village (a residential care

> facility) in August/September 2015. Mr Mason blames Ms Trizenberg for these events. He blames Mr Dodd for the establishment of the trusts and he (i.e Mr Mason) now feels he has not lost control of his own assets. Mr Mason is also deeply hostile to Mrs Mason's property manager and welfare guardian (appointed by the Family Court in 2016) Mr Michael Allen. Much of the dysfunction in the trusts results from Mr Mason's objection to payment of various fees (including those of Mr Dodd and Mr Allen) and the costs of care for Mrs Mason (as overseen by Mr Allen).

[37] Between paras [10] and [65] the learned Judge set out the factual background to the dispute in respect of which Mr Hacking was briefed. For simplification the whole judgment is annexed to this decision because it reviews the Family Court litigation in which various lawyers acted, including Mr Hacking on behalf of Mr Mason.

[38] In essence, Mr Hacking's attendances initially focused on achieving a change to the PPPR Act enduring powers of attorney in the Auckland Family Court. Mr Hacking assessed that two trusts which prior legal/accountant advisors had set up, with $6,000,000 in assets needed to be addressed in the best interests of Mr Mason. Mr Hacking recommended that Mr Mason instruct Bill Patterson of Hopkins Patterson which he duly did albeit with Richard Thompson instructed as counsel (affidavit of Mr Hacking para 5, 6 and 11).

[39] Mr Hacking sought a hearing in the Auckland Family Court of, initially seven days with the goal of bringing Wendy Mason home. Eventually five days was settled on and Mr Hacking estimated a cost of $50,000 for the hearing.[21] Mr Patterson advised Mr Hacking that he expected the Trust would receive funds which would meet his fees including Mr Hacking's outstanding June 2016 invoice of $25,000.[22]

[40] The five day hearing in the PPPR matters was scheduled as back-up fixture on 31 October 2016, 4 November 2016 with a firm fixture scheduled for 3 April 2017.[23]

[41] Prior to the hearing Mr Mason advised Mr Hacking that a mediation had been set up with Ms Carol Powell as mediator. It was expressly stipulated to be in the

---

[21] Affidavit at [35]-[36]
[22] Mr Hacking's affidavit at [38]
[23] Mr Hacking's affidavit at [39]

absence of lawyers. It was held and a good outcome was obtained.[24] After the mediation occurred, an urgent conference was convened in the Auckland Family Court. Mr Mason and Mr Hacking attended. No issue was then raised with Mr Hacking's fees.[25]

[42] The Hacking invoices which are the subject of this proceeding were issued in October 2016.[26] The statement of claim in this proceeding was filed in April 2017 and served on Mr Mason on 2 May 2017 after which he filed a complaint with the New Zealand Law Society about the fairness of Mr Hacking's fees, his competence and timeliness and the result (or lack of) achieved. The Standards Committee determined that no further action should be taken on the complaint. Mr Mason had the right to seek a review of the standards committee's determination to the LCRO within 30 working days but he did not.

[43] Mr Hacking was instructed on behalf of Mr Mason as a specialist to render advice to and act for him in PPPR matters concerning his wife Wendy Mason. He wanted her returned to her home rather than cared for at St Andrews. That is what Mr Hacking worked diligently towards. That outcome was achieved, albeit after an agreement reached in a lawyer-less mediation. So I cannot see that even had Mr Hacking identified the:

> (i) invalidity of the supposed medical certificate of 10 August 2015, the outcome would have changed.

[44] In his affidavit, Mr Hacking deposes that he did review and give advice on the mediation agreement after it had been entered into. In light of the agreement reached at mediation, I cannot understand why consent orders were necessary as Mr Mason suggests. Mrs Mason came home as per the agreement. What Mr Hacking set out to achieve, occurred. Thus, even if Ms Robertson had the obligation pleaded, which is probably not so given that she instructed a barrister to handle the matter, those obligations were either met, or the outcome would not have changed in any event.

---

[24] Mr Hacking's affidavit at [41]
[25] Mr Hacking's affidavit at [43]
[26] Mr Hacking's affidavit at [32] & Exhibit A, [44]

(vi) Mr Hacking breached his obligation to Mr Mason by failing to give or giving poor advice

[45] It appears obvious to me that any invalidity of the medical certificate of 10 August 2015 would only have slowed down the course upon which Middlemore Hospital and the trustees had embarked in respect of Mrs Mason who by anybody's reckoning (from the evidence that I have read and the background set out in the judgment of Fitzgerald J in the High Court) was in a perilous state of mental health which Mr Mason was loathe to accept. It is also clear from Mr Hacking's evidence that he did give advice on the mediation agreement and he went before the Family Court to effect the mediated outcome. It should be remembered however that he had always advised Mr Mason prior to the mediation that it was unwise to participate in a mediation without legal representation. Mr Mason appears to be a man who has fallen out with many people including lawyers, his daughters, caregivers and medical practitioners for his wife. He is not new to legal representation and instructing solicitors or to litigation. I am satisfied that Mr Hacking worked diligently and ably to assist Mr Mason at all times. On a number of occasions until he terminated Mr Hacking's retainer, Mr Mason thanked him and assured him of his gratitude for his assistance. I am satisfied that Mr Hacking fulfilled his legal obligations to Mr Mason. There is no reasonably arguable defence here.

Quantum

[46] As the defences raised by Mr Mason in respect to quantum are the same as those traversed above, (plus one more), I shall not repeat my findings. However, I add: I have perused Mr Hacking's time sheets and carefully read his affidavit. It is clear that he was not only required by Mr Mason but actually put a huge amount of time and effort into Mr Mason's problem, as instructed. The problem was multi-dimensional and intricate. Mr Hacking cannot be criticised for anything that he did. Unfortunately Mr Mason appears to have a history of taking issue with his legal advisor's fees after he has curtailed their retainers and one could be forgiven for concluding that he is a hard person to satisfy. Neither the reasonableness of the fees charged by Mr Hacking nor the work that he carried out are challengeable. He carried

out all of his obligations to Mr Mason carefully and appropriately and cannot be criticised.

[47] The additional ground on which Mr Mason relies under quantum is that Mr Hacking was not entitled to charge for impermissible work such as:

(i) sending correspondence to the lawyer for the other parties;

(ii) sending correspondence to Mr Mason and/or;

(iii)filing documents with the Family Court.

[48] The reality is that if Mr Hacking did not carry out those activities, Ms Robertson would have had to. I note that r 14.12 and 14.13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides that correspondence between parties on matters relating to litigation should *normally* be carried out between the instructing barrister and solicitor.

[49] That appears not to be a hard and fast rule. Equally, there appears to be no rule preventing barristers from filing documents in the Court provided they do not show their own rooms or chambers as the address for service.

[50] I conclude that whilst Mr Hacking may have committed some small breach of these rules by corresponding with other parties on matters relating to the litigation (or their solicitors), that work was necessary. There would have been duplication of effort involved if it had been carried out by Ms Robertson, although first prepared by Mr Hacking. In other words it may have been more expensive for Mr Mason. A breach (should it be considered that there was one) of this kind by Mr Hacking is no grounds whatsoever for reaching a view that Mr Mason has an arguable defence on quantum, necessitating a trial.

Conclusion

[51] There being no serious question to be tried, of either liability or quantum, Ms Robertson is entitled to judgment against Mr Mason. Judgment is entered accordingly

in the sum of $48,852 and interest at 5% on each outstanding invoice rendered from 30 days of its date until today. Ms Robertson is also granted 2B costs and disbursements. I note that there is a small balance of funds paid in by Mr Mason pursuant to the retainer and still held in Ms Robertson's trust account. I direct that these funds may be disbursed by her to Mr Hacking on account of his unpaid fees.

Addendum

Issue estoppel

[52] At my instigation, in the hearing we spent considerable time discussing whether the doctrine of Issue Estoppel could apply to the decision of the Standards Committee on the alleged rule breaches by Mr Hacking, including the reasonableness of his fees. In the end I have concluded that Issue Estoppel does not apply because the Standards Committee did not make a final determination on Mr Mason's complaint. Unfortunately it did not certify the amount that was found to be due to Mr Hacking in respect of his bills.

[53] On all three of his grounds of complaint:-

(i) failing to advise Mr Mason of alternatives to litigation (that is, mediation) that were reasonably available;

(ii) failing Mr Mason in his legal representation, failing to achieve the desired outcomes; and

(iii) imposing or charging unfair and unreasonable fees, particularly taking into account the outcome.

the Committee decided pursuant to s 138(2) Lawyers and Conveyancers Act 2008 to take no further action. At [36] of its decision the Committee had this to say:

> The committee has the discretion under s 138(2) of the Act at any time, if it appears to the committee, that having regard to all the circumstances of the case, any further action is unnecessary or inappropriate. The committee considered it was appropriate to exercise its discretion in this case.

At [37] they note:

> While, given the exercise of its discretion, it was not necessary for the committee to conduct a full costs assessment in terms of r 9.1 of the RCC, the committee considered it appropriate to refer to some of the factors detailed in that rule. Such comments are set out below.

[54] Those paragraphs (and others) indicate clearly that the Committee saw nothing in Mr Mason's complaints to warrant further investigation but that appears not to be the same as a result under s 152 of the Lawyers and Conveyancers Act 2006 which permits a Standards Committee, after enquiring into a complaint and conducting a hearing with regard to it, to make one or more of a number of determinations. In making any of the determinations which are available under s 152 of the Lawyers and Conveyancers Act 2006 one would expect the Standard Committee to make firm findings after a full investigation.

[55] Indeed, in respect to a complaint as to the reasonableness of bills of costs rendered by a practitioner, s 161(2) states that where a Standards Committee makes a final determination on a complaint made under s 132(2), it must certify the amount that is found by it to be due to or from the practitioner or former practitioner or incorporated firm or former incorporated firm in respect of the bill and under the determination.

[56] The Standards Committee did not do that in respect of Mr Mason's complaint about Mr Hacking's fees. However, I do note that s 161(4) states that a complaint is finally disposed of –

> (a) if –
>
> (i) the standards committee has made a final determination on the complaint or has, under s 138, decided to take no action, or, as the case may require, no further action on the complaint; and
>
> (ii) the complainant has not, within the time allowed, applied to the Legal Complaints Review Officer for a review of the determination or decision

[57] For the sake of caution I therefore considered the reasonableness of Mr Hacking's fees and of his conduct of the case as if Issue Estoppel did not apply.

M-E Sharp
District Court Judge