

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CIV-2019-485-165  
[2019] NZHC 2748**

UNDER the Judicial Review Procedure Act 2016

AND Part 30 of the High Court Rules 2016

BETWEEN J J McGUIRE  
Applicant

AND NEW ZEALAND LAW SOCIETY  
Respondent

Hearing: 18 July 2019

Appearances: Applicant in Person  
P N Collins for Respondent

Judgment: 29 October 2019

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**JUDGMENT OF CLARK J**

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**Introduction**

[1] The applicant, Mr McGuire, was censured by the Central Standards Committee 3 (the Standards Committee) for non-payment of invoices rendered by an Auckland barrister, Mr Twist. In this application for judicial review, Mr McGuire seeks to have the Standards Committee's determination declared invalid and set aside.

[2] The issue raised by the proceeding concerns a lawyer's duty to pay a barrister's fees, costs and expenses in circumstances where that lawyer instructed the barrister on behalf of a client.

## Background

[3] Mr McGuire is a barrister and solicitor practising mainly in Palmerston North. In November 2017, he was representing a client (“W”) in a relationship property matter.<sup>1</sup> The client instructed Mr McGuire to obtain a second opinion. Having approached Mr Twist, Mr McGuire then sent him a memorandum on 17 November 2017, summarising the facts and legal issues for Mr Twist’s opinion.

[4] On 21 November 2017, Mr Twist provided an estimate of the cost of an opinion and confirmed that, in accordance with his agreement with Mr McGuire, the time he had spent to that point would not be charged. The final paragraph of Mr Twist’s letter stated:

As you know my fee is \$300 plus GST per hour and disbursements. I estimate that my opinion would take about 10 hours work, so your client should deposit \$3,600 in your trust account. Once you have advised me that he has deposited this sum in your trust account and you have sent me the other documents requested, I will begin work.

[5] On 11 December 2017, Mr McGuire instructed Mr Twist to commence work on the opinion:

I just met my client and convinced him of the merits of a second opinion. I have funds of \$3,600 (GST inclusive) to pay for it, assuming you still want to give one. I have attached my client’s authority and also an amended statement of claim from Friday for you to consider. Please advise if you need any other information.

[6] The client authority attached to Mr McGuire’s 11 December email was in the following terms:

I agree to pay a barrister in Auckland legal fees of \$3,600 (GST inclusive) for a second opinion on my legal proceedings with [V] after discussions with Jeremy McGuire.

[7] On 13 December 2017, Mr Twist accepted the instruction from Mr McGuire.

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<sup>1</sup> During the hearing, Mr McGuire asked that his client’s name be anonymised to protect his privacy. The request related to a discussion about whether his client had waived privilege. Mr McGuire assured the Court his client was aware of the matter and privilege had been waived.

He wrote the following email:

I have received what I understand is the whole file. I accept instructions to write the opinion.

I shall try to get an opinion to you before Xmas, but I shall see how I go and let you know.

[8] On 15 December 2017, Mr Twist wrote to confirm an aspect of the fee arrangement:

Although your client has agreed to pay me legal fees of \$3,600 (GST inclusive) for an opinion, could you please confirm that you are holding funds of \$3,600 in your trust account for this purpose?

[9] Mr McGuire replied on the same day:

I have your agreed fee.

[10] On 18 December 2017, Mr Twist emailed Mr McGuire:

I should be able to get you an opinion by Friday 22 December 2017, but I would have to insist on payment being made the same day you get the opinion. Please confirm!

[11] Mr McGuire replied a few minutes later:

No problems Peter.

[12] On 22 December 2017, Mr Twist emailed his opinion to Mr McGuire:

Please find attached my opinion dated 22 December 2017 to you in this matter. I have also attached a copy of my letter dated 21 November 2017 to you, which is referred to in the opinion.

I will send you an invoice shortly, so you can pay me today (as agreed).

[13] Some 20 minutes later, Mr Twist emailed his invoice to Mr McGuire:

Please find attached my account dated 22 December 2017 to you in this matter.

I actually spent 13.5 hours on my opinion (i.e \$4,050 plus GST and disbursements) but I have charged you only for 10 hours in accordance with my estimate.

[14] Mr McGuire replied on 22 December 2017 some 15 minutes following Mr Twist's emailed invoice. The unredacted portion of Mr McGuire's email is his concluding sentence:

I look forward to your views. Your opinion needs to address these other issues.

[15] Mr Twist replied some 15 minutes following Mr McGuire's assertion the opinion needed to address other issues:

It would be impossible for me to look at the further issues raised in your latest e-mail before the close of business today. Be that as it may, I expect to be paid for my opinion by the end of the day as I have done the work.

I just want to reiterate that I agreed to provide an opinion for you on the basis that I would be paid on the same day as you received the opinion. This agreement is in writing. You have received the opinion. I understand that you have trust funds held for that purpose. Could you please make payment direct to my bank account (as agreed) by 5pm today.

After you have paid me, we can address the further issues raised by you in your latest e-mail next year.

[16] Mr McGuire replied on the evening of 22 December 2017:

Peter, I am now at home. I think we didn't allow enough time to fully ventilate all of the issues. We should review things next year ...

I am not being difficult or dogmatic. I was a bit disappointed with the lack of reasoning and legal sophistication in today's letter. Once and after all of the issues have been carefully and thoroughly considered then an opinion can be said to have been given.

[17] On 9 January 2018, Mr Twist emailed Mr McGuire asking once again for payment:

I do not accept your view in your e-mail dated 22 December 2017 (6:03 pm) to me that I have not completed my opinion. You are asking me to do extra work without payment when I have already completed my opinion and given your client 3.5 extra hours without charge. I hope you have forwarded a copy of my opinion to your client?

I do not want a long diatribe in response from you. All I want to know is whether or not you are going to pay my account by the close of business tomorrow. This is simply a yes or no answer.

[18] Fifteen minutes later Mr McGuire replied:

I got my file back thanks and I hope you copied it. I haven't received your opinion yet.

You do not communicate well.

[19] On 24 January 2018, Mr Twist wrote to Mr McGuire. Mr Twist:

- (a) noted his account dated 22 December 2017 had still not been paid;
- (b) reminded Mr McGuire of his obligation under r 10.7 of the Lawyers and Conveyances Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules);
- (c) reminded Mr McGuire he held \$3,600 in his trust account deposited for the purpose of paying for Mr Twist's opinion;
- (d) attached an account for the disbursement (\$41.90) incurred for returning Mr McGuire's file to him by courier as requested by Mr McGuire and in respect of which he had undertaken to pay; and
- (e) asked once more for Mr McGuire's confirmation that he had disclosed Mr Twist's opinion to his client.

[20] Numerous emails were exchanged on 24 and 25 January 2018 about the disbursement invoice, \$35.40 of which Mr McGuire paid. On 1 February 2018, Mr Twist emailed:

I note that, when I checked my bank account earlier today, you had still not paid my invoice dated 22 December 2017 (no. 17032) to you for my opinion.

I note that you have also not paid the balance of \$6.50 owing on my invoice dated 24 January 2017 (no. 17033) to you for disbursements.

[21] Mr McGuire replied three hours later:

Peter, why are you sending me these emails?

[22] Mr Twist wrote to Mr McGuire again on 5 February 2018:

Our agreement is that I provide you with an opinion and you would pay me on the same day as you receive the opinion ...

I am sending you these e-mails because you have not paid me \$3,474.26 due on my invoice dated 22 December 2017 (no. 17032) in accordance with our agreement. Accordingly, you are in breach of our agreement and also of your obligation under cl.10.7 of the Lawyers Conduct and Client Care Rules 2008 to pay my account.

[23] Mr McGuire replied on the morning of 5 February 2018. The unredacted part of his email reads:

I assume you photocopied the file. You could have sent me a different opinion if you wished but you didn't. It is too late now.

You can take this further if you wish but, on principle, I do not think this large invoice of yours is justified.

However I am prepared to consider your response to this email which I will then refer to my client for his instructions.

[24] Mr Twist's final email communication to Mr McGuire was on 12 February 2018:

1. I considered your memorandum of 17 November 2017 to me and responded by e-mailed letter on 21 November 2017 (copy attached) setting out the six questions needing to be answered.
2. I did not receive any response from you as to those six questions.
3. Your client deposited \$3,600 in your trust account on or about 11 December 2017 for payment of my fee.
4. In my opinion to you dated 22 December 2017, I answered all of those six questions and others, and so completed my opinion.
5. Accordingly, I provided you with a completed opinion as I was bound to, but in not paying me you have not met your side of the agreement. The agreement to pay me was not conditional on your view of the merits of the opinion.
6. Payment of my two invoices is overdue.

[25] Mr McGuire responded within five minutes:

Peter, I disagree.

[26] On 11 April 2018, Mr Twist complained to the Lawyers Complaints Service (LCS) that McGuire had breached r 10.7 of the Rules by failing to pay:

- (a) his invoice of 22 December 2017 (\$3,474.26 including GST); and
- (b) the balance of the invoice dated 24 January 2018 (\$6.50).

[27] On 19 June 2018, Mr McGuire formally objected to the Standards Committee considering the complaint against him on the basis the Standards Committee had made two determinations adverse to Mr McGuire both of which were being challenged in court proceedings.

[28] On 20 September 2018, the Standards Committee rejected Mr McGuire's objection and upheld the complaint. The Standards Committee determined Mr McGuire's breach amounted to unsatisfactory conduct pursuant to s 12(b) and (c) of the Lawyers and Conveyancers Act 2006.

[29] On 25 March 2019, the Standards Committee censured Mr McGuire who was ordered to apologise to Mr Twist, to pay a fine of \$5,000 and costs of \$2,000, and to pay Mr Twist's fees immediately.

### **Standards Committee decision**

[30] On the preliminary issue of Mr McGuire's objection to the Standards Committee's consideration of the complaint on the basis he had "issued legal proceedings against the NZLS in the District Court because of recent decisions made by it", the Standards Committee determined there were insufficient grounds to warrant disqualifying itself. On the basis of the material before it, and applying *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)*, the Standards Committee was satisfied:<sup>2</sup>

... a fair-minded lay observer would not reasonably apprehend that the Committee might not bring an impartial mind to the resolution of the complaint before [it].

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<sup>2</sup> *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.

[31] The Standards Committee noted it was not a party to the proceedings commenced by Mr McGuire and that it is not uncommon for a standards committee or other decision-making body to be subject to appeal or other form of challenge:

If such a body ... was required to disqualify itself on every occasion that such a challenge was made, then the administration of justice could become frustrated.

[32] In relation to the substantive issue, the Standards Committee accepted Mr McGuire's contention he could not release funds held on trust without authority from his client. But the Standards Committee considered that, having instructed Mr Twist on behalf of his client, Mr McGuire was personally responsible for the payment of Mr Twist's fee in accordance with r 12.2 of the Rules.

[33] If Mr McGuire was critical of the quality of Mr Twist's opinion and contested therefore that Mr Twist's fee was payable, it was incumbent upon Mr McGuire to dispute Mr Twist's fees through the "proper professional channels" such as through an appropriate disputes resolution process or through the LCS, as required by r 10.7:

It was unacceptable for Mr McGuire to simply refuse to pay Mr Twist's fee on the sole basis of his/his client's criticism of the work undertaken by Mr Twist. This is especially the case as Mr Twist is a barrister and therefore unable to sue for his fees.

[34] In support of its conclusion the Standards Committee drew support from *Atkinson v Pengelly*<sup>3</sup> and *Ethics, Professional Responsibility and the Lawyer*.<sup>4</sup>

[35] The Standards Committee concluded Mr McGuire's non-payment of Mr Twist's invoice amounted to a breach of r 10.7 of the Rules. The Standards Committee was satisfied:

- (a) there was no agreement between Mr McGuire and Mr Twist to bring Mr McGuire within the exception to r 10.7; and

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<sup>3</sup> *Atkinson v Pengelly* [1995] 3 NZLR 104 (HC).

<sup>4</sup> Duncan Webb and others *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [15.10.2].

- (b) “there was no agreement between the parties that Mr McGuire’s client was to be solely responsible for paying Mr Twist’s account”.<sup>5</sup>  
(Standards Committee’s emphasis)

### **Grounds of review**

[36] Mr McGuire seeks judicial review of the Standards Committee decision on three principal grounds:

- (a) The Standards Committee erred in finding there was no agreement between the parties that Mr McGuire’s client would be solely responsible for the payment of Mr Twist’s fee.
- (b) The Standards Committee erred in fact and law in holding that Mr Twist was entitled to be paid his fees despite Mr McGuire’s dissatisfaction with the opinion.
- (c) The Standards Committee’s determination was “bad for bias”, in breach of natural justice and resulted in a miscarriage of justice.

[37] I deal first with Mr McGuire’s third ground of review.

### **Bias**

[38] Mr McGuire submitted he did not want to dwell too much on this issue as he regarded it as comparatively minor. As Mr McGuire framed it, the question is whether two recent determinations about him by the Standards Committee, in addition to the legal proceedings he has commenced largely because of those determinations, constitute a sufficient basis for Mr Twist’s complaint to be considered by a different committee because of “apparent bias, predisposition or other general impropriety that suffices to be unfair or unreasonable (or both)”.

[39] For the reasons that follow, I have concluded Mr McGuire advances no tenable basis for arguing the Standards Committee was biased or exhibited bias towards him.

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<sup>5</sup> At [25].

[40] During the hearing I asked Mr McGuire whether he had been the subject of any complaints that were investigated by this same Standards Committee that had not been upheld. Mr McGuire replied he had not been.

[41] The day after the hearing, counsel for the respondent, Mr Collins, filed a memorandum in order to place before the court correct information responding to my query.

[42] Mr McGuire had been the subject of two decisions by Central Standards Committee 3, the committee responsible for the determination that is the subject of this judicial review proceeding. Both complaints were dismissed, one in 2016 and one in 2017. It is unnecessary that I recite here the particular decisions. Mr Collins provided the details in his memorandum and Mr McGuire has taken no issue with the contents of that memorandum.

[43] That being the case, the factual underpinning of this ground of review falls away.

[44] As to Mr McGuire's District Court proceeding against the Law Society concerning Central Standards Committee 3, I note it was filed in June 2018 some two months after Mr Twist's complaint, not, as Mr McGuire submitted in oral argument, well before the complaint. It appears Mr McGuire formally objected to the Standards Committee hearing the complaint against him four days after he filed his statement of claim in the District Court.

[45] In oral submissions, Mr McGuire said he knew for a fact there was a degree of fluidity in relation to the committees allocated to hear complaints and that for this Standards Committee to have heard the complaint against him indicated a lack of judgement. Mr McGuire maintained he did not get a fair hearing and he would have been far more comfortable with a decision from a different body.

[46] The nature of Mr McGuire’s objection is similar to that dismissed by Toogood J in *Stiassny v Siemer*:<sup>6</sup>

[12] Mr Siemer’s reference to having appeared before me in other proceedings contained the implication that, because on at least one other occasion I had found against him and that on another I had an outstanding judgment, in some way I was biased against him. I pointed out to Mr Siemer that the judgment on the interlocutory application involving the Official Assignee in other proceedings was due to be delivered later that day or the following day. I considered that the proposition that a Judge must be incapable of giving a litigant a fair hearing, or being seen to do so, because the Judge has ruled against the litigant on a prior occasion or occasions ignores the force and significance of the Judicial Oath and without more could not possibly meet the *Saxmere* test.

[47] Finally, Mr McGuire submitted the position was exacerbated by the fact this application for judicial review was filed on the 25 March 2019 and the Standards Committee released its penalty decision later that same day. This, he submitted, could suggest retaliation, and bias towards him can be inferred.

[48] The short point is that the determination presently challenged by Mr McGuire was issued 10 months before Mr McGuire filed his proceeding in the District Court. The suggestion that the penalty decision was in retaliation is far-fetched and improper. Mr McGuire has not established the Standards Committee was biased and his arguments do not come close to meeting the test for apparent bias authoritatively stated by the Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)*.<sup>7</sup>

**Was there an agreement that the client would be solely responsible for payment of Mr Twist’s fee?**

[49] Mr McGuire’s position is that “there was absolutely clear agreement between the parties in [the] email correspondence that the client was solely responsible for paying Mr Twist’s account”. Mr McGuire deposed to “never agree[ing] to pay Mr Twist’s legal fees and that it was never even discussed between [them]”.

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<sup>6</sup> *Stiassny v Siemer* [2013] NZHC 154 (footnote omitted).

<sup>7</sup> *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*, above n 2, at [3] per Blanchard J and [127] per Anderson J.

*Rule 10.7*

[50] Before turning to the evidence, it is necessary to understand the nature of the obligation that an instructing lawyer bears under the Rules. The Rules are based on the fundamental obligations of lawyers set out in s 4 of the Lawyers and Conveyancers Act. They set minimum standards that lawyers must observe and are a reference point for discipline. A charge of misconduct or unsatisfactory conduct may be brought and a conviction may be obtained despite the charge not being based on a breach of any specific rule, nor on a breach of some other rule or regulation made under the Act.

[51] Rule 10.7 is located in chapter 10, “Professional dealings”. By r 10, “a lawyer must promote and maintain proper standards of professionalism in the lawyer’s dealings.”

[52] Rules 10.7 and 10.7.1 provide:

**Fees of other lawyers**

10.7 A lawyer who, acting in a professional capacity, instructs another lawyer, must pay the other lawyer’s account promptly and in full *unless agreement to the contrary is reached*, or the fee is promptly disputed through proper professional channels. This rule applies to the accounts of barristers sole and foreign lawyers.

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.

(Emphasis added)

[53] Rule 12.2 provides:

12.2 Where a lawyer instructs a third party on behalf of a client to render services in the absence of an arrangement to the contrary, the lawyer is personally responsible for payment of the third party’s fees, costs, and expenses.

[54] Unless Mr McGuire is able to show he reached “agreement to the contrary” and thereby brought himself within the exception to the application of r 10.7, he was

obliged by r 10.7 to pay the fee of the barrister he had instructed. Rule 10.7 reflects what is a long-established obligation. As the Standards Committee highlighted, the importance of the obligation arises from the nature of the relationship between solicitor and barrister, namely that a barrister cannot sue for her or his fees and must rely on the instructing solicitor for payment.

[55] Except in the context of disputes about costs, r 10.7 does not appear to have been the subject of discussion in the senior courts. Helpfully, the commentary in *Ethics, Professional Responsibility and the Lawyer*, cited by the Standards Committee, outlines the nature of a solicitor's obligation in relation to barristers' fees.<sup>8</sup>

When a solicitor instructs a barrister, the solicitor is prima facie bound by the rules to meet the barrister's fee regardless of whether the solicitor has been put in funds by the client for that purpose.

The rule is displaced if the solicitor and barrister agree that the payment of the barrister's fee depends on some other eventuality (such as payment by the client).

In the absence of such factors, it is unsatisfactory conduct or misconduct for a solicitor to fail to pay the professional fees of a barrister whom he or she has instructed.

[56] The leading Australian text on legal professional responsibility, *Lawyers' Professional Responsibility*, explains that (unless otherwise agreed) a lawyer contracts with a third party as a principal, not as an agent for the client. The same general principle applies when instructing a barrister although in this context a barrister looks to the instructing solicitor for payment but cannot in general force a claim in contract. The instructing solicitor's obligation is seen as one of honour, not debt. It is for this reason that a solicitor's refusal to pay a barrister's fee has always entailed professional consequences.<sup>9</sup> The approach is the same in New Zealand.<sup>10</sup> That a barrister cannot sue for her or his fees is the rationale for r 10.7, as the footnote to r 10.7 makes clear.

[57] If solicitors wish to effectively contract out of the responsibility to pay a barrister's fees, they must do so explicitly and with the barrister's consent. Merely

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<sup>8</sup> Webb and others, above n 4, at 418 (footnotes omitted).

<sup>9</sup> Dal Pont *Lawyers' Professional Responsibility* (Lawbook Co, Sydney, 2017) at [21.95] (footnotes omitted).

<sup>10</sup> *Atkinson v Pengelly*, above n 3, at 110.

communicating that the client will be paying the fee (whether directly or indirectly), as Mr McGuire did here, is insufficient to constitute an “agreement to the contrary” for the purposes of r 10.7.

[58] Mr Collins cited numerous authorities from various Australian jurisdictions in which solicitors have been found professionally culpable for failing to pay fees to barristers or third parties. The case law suggests it will be particularly egregious for a solicitor to receive funds into a trust account for the purpose of paying a barrister or third party but fail to do so.<sup>11</sup> For instance, in *Legal Practitioners Conduct Board v Wharff*, the Supreme Court of South Australia upheld a disciplinary decision concerning a solicitor who engaged a barrister to appear in the Family Court but failed to pay that barrister’s fee when it was invoiced.<sup>12</sup> The Court held:

[18] A solicitor who engages a barrister or solicitor agent undertakes a personal liability, either in honour or in contract as the case may be, to pay the barrister’s or agent’s fees, unless otherwise agreed. Where a legal practitioner undertakes such a personal liability, it is unethical to ignore his or her obligation, and hence a wilful or persistent refusal or failure to pay fees can amount to unprofessional conduct.

[59] The Australian position, which differs slightly from the New Zealand position, is described in *Halsbury’s Laws of Australia*:<sup>13</sup>

A lawyer who deals with a third party on behalf of a client for the purpose of obtaining a service in respect of the client’s business must inform the third party, when the service is requested, that the lawyer will accept personal liability for payment of the fees to be charged for the service. Alternatively, if this is not the case, the lawyer must inform the third party of the arrangements intended to be made for the payment of the fees. A failure to pay third party’s fees for which personal liability has not been disclaimed can generate liability in contract as well as attract disciplinary sanction.

As historically no contract existed between counsel and his or her instructing solicitor, counsel was precluded from recovering those fees from the instructing solicitor in contract, although a failure to pay counsel’s fees could sound in disciplinary proceedings. The statutory removal of counsel’s historical incapacity to contract, either with the instructing solicitor or the client, in several jurisdictions means that the person who is liable to meet counsel’s fees is determined according to who, under the terms of the retainer, has undertaken responsibility for this purpose.

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<sup>11</sup> See, for instance, *Law Society of New South Wales v McCarthy* [2002] NSWADT 58.

<sup>12</sup> *Legal Practitioners Conduct Board v Wharff* [2012] SASFC 116.

<sup>13</sup> *Halsbury’s Laws of Australia* (2018, online ed) vol 250 Legal Practitioners at [250-6040].

[60] The position in England and Wales concerning the obligation of solicitors to pay counsels' fees is a step further removed from the Australian position. The position is described in *Cordery on Legal Services*:<sup>14</sup>

At one time, counsel's fees were honoraria, which prevented counsel for suing for unpaid fees. Nowadays, the norm is for barristers to enter into contractual relationships with the solicitors instructing them; and since the specific professional duty on solicitors to pay counsel's fees has gone it is prudent for barristers to enter into contracts with their instructing solicitors to pay them. In the absence of agreed terms or an agreed fee, it appears that counsel must resort to claiming on a *quantum meruit*.

It has also been suggested that even if a solicitor takes the precaution of obtaining money on account of disbursements from the client and on the strength of this incurs counsel's fees, the client can subsequently instruct the solicitor not to use the money to pay counsel. This would of course undermine the purpose of obtaining payment on account of disbursements and be a matter of serious consequence to the conduct of litigation. It is submitted that the payment of money on account of disbursements gives the solicitor irrevocable authority to use it to discharge any liability for disbursements, including counsel's fees, he incurs in reliance on the money in his client account.

[61] Rule 10.7 represents what has always been the commonly understood position in this country. Instructing solicitors cannot simply wash their hands of their obligation to a barrister because the client refuses to pay. Mr McGuire was not, as he said in his email to the Standards Committee on 19 June 2018, "effectively a spectator".

#### *The evidence*

[62] Against the backdrop of the legal position, I turn to consider the evidence of the arrangement between Mr McGuire and Mr Twist. The following key points emerge from the early correspondence between Mr McGuire and Mr Twist:

- (a) Mr Twist was very deliberate about his fee and the timing of payment. Along with his estimate he advised Mr McGuire he would begin work once Mr McGuire confirmed the agreed sum had been deposited into Mr McGuire's trust account.

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<sup>14</sup> *Cordery on Legal Services* (9th ed, 2019) F General Principles at [1383].

- (b) Mr McGuire insists his client's authority constitutes an agreement between his client and Mr McGuire absolving Mr McGuire from his obligation under r 10.7 to pay Mr Twist's account. But Mr McGuire's insistence is misplaced. Rule 10.7 requires a lawyer (Mr McGuire) who, acting in a professional capacity, instructs another lawyer (Mr Twist) to pay that other lawyer's account promptly and in full "unless agreement to the contrary is reached". An "agreement to the contrary" must be between the lawyers. Rule 10.7 regulates the conduct of lawyers. The rule is concerned with the fee arrangement between the lawyer who instructs and the barrister who is instructed. Unless they reach a contrary agreement, the lawyer who instructs must, quite simply, pay the barrister's account promptly.
- (c) In this case, Mr McGuire's obligation to pay Mr Twist was not varied by an agreement to the contrary. Nor did Mr McGuire promptly dispute the fee through proper professional channels.

[63] I discussed with Mr McGuire the obvious inference to be drawn from the payment of \$3,600 by W into Mr McGuire's trust account. The fact W paid \$3,600 into Mr McGuire's account strongly suggests W did not understand he was responsible for paying Mr Twist directly. It also suggests there was no agreement between W and Mr McGuire to that effect.

[64] Mr McGuire said he did not understand what was meant by "proper professional channels" and that he "reached out" to the Standards Committee. He emailed the Standards Committee on 19 June 2018 advising he was happy to pay the amount to Mr Twist, or the Standards Committee, while the matter was being decided. He asked the Standards Committee to advise what "proper professional channels" means under r 10.7. Mr McGuire concluded his email:

As I have already stated, I have no direct interest in how this is determined as I am effectively a spectator.

The money can be paid out of my trust account as directed. After that, I prefer not to be involved in it thank you.

[65] Mr Collins, aptly in my view, described the communication as disingenuous. The email was written two months after the complaint was made. The email was in response to the Standards Committee notifying Mr McGuire of the date of the hearing and inviting Mr McGuire's submissions. Mr McGuire sent nothing further to the Standards Committee after his email of 19 June 2018.

[66] In those circumstances, it is not surprising the Standards Committee proceeded to complete its statutory function and determine the complaint. Where Mr McGuire seemed to be inviting the Standards Committee to enter into a bargaining process, while declining to participate further in it (having not made submissions), the Standards Committee had a role to complete.

[67] Mr McGuire is an experienced lawyer and, on his own evidence, can be taken to know his way around the complaints system. Besides, as I said to Mr McGuire, as a practitioner he is obliged to understand the nature of the professional obligations and responsibilities on him. If he was really concerned to understand what is meant in r 10.7 by "disputed through proper professional channels" he might have inquired at any time in his lengthy career other than in the middle of an inquiry into a complaint against him. I cannot regard the inquiry in Mr McGuire's email of 19 June 2018 as genuine.

[68] In any event, Mr McGuire's response was dismissive. He cannot both say (as he did) that his email amounted to his dispute through proper professional channels and at the same time say he preferred not to be involved and had no direct interest in how it was determined. As I have said, that Mr McGuire considered himself to be "effectively a spectator" demonstrated a misunderstanding of his obligations under r 10.7. It is fair to say this misunderstanding generally underpinned the dismissive tone of the email.

[69] Mr Twist could not have done more to ensure the appropriate arrangement was in place, in writing, between himself and Mr McGuire. Mr McGuire's response to Mr Twist's requirement for confirmation that he be paid on provision of his opinion, was: "No problems Peter." That strikes me as an unequivocal confirmation by Mr McGuire that he would perform according to the obligations on him under r 10.7.

That is, as a lawyer acting in his professional capacity instructing Mr Twist, he would pay Mr Twist's account promptly and in full or dispute the fee promptly through proper professional channels.

[70] I am satisfied no explicit arrangement was reached between Mr McGuire and Mr Twist that the client would be solely responsible for the payment of the fee. The Standards Committee did not err in determining Mr McGuire's failure to pay Mr Twist's account was in breach of r 10.7.

[71] I make one final observation. In this case the controlling rule is r 10.7. I do not regard r 12.2 as relevant. Rule 12.2 concerns the obligation to pay "a third party". I think it is clear that third parties are in contradistinction to lawyers whose arrangements are governed by r 10.7.

**Was Mr Twist entitled to payment of his fees despite Mr McGuire's dissatisfaction?**

[72] Mr McGuire argued that because Mr Twist had failed to provide an opinion on the very question he was instructed to address, his work was not "done".

[73] Rule 10.7 is clear. If a solicitor disputes a barrister's fee the solicitor must promptly advance that dispute through "proper professional channels". It is unnecessary, and indeed inappropriate, to address Mr McGuire's criticisms of Mr Twist's work in this judgment. A judicial review of a standards committee decision determining a complaint arising from a refusal to pay fee is not the proper professional channel. Mr McGuire was required to raise his concerns through an appropriate disputes resolution process or through the LCS. Mr McGuire's refusal to pay Mr Twist's fee was, in the circumstances, in breach of r 10.7.

**Result**

[74] The application for judicial review is dismissed.

[75] The respondent is accordingly entitled to 2B scale costs.<sup>15</sup>

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Karen Clark J

Solicitors:  
New Zealand Law Society, Wellington for Respondent

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<sup>15</sup> The proceeding having been previously classified.