

Solicitor's lack of expertise and resources inflated the costs charged to his client

12 August 2015

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Introduction

1. The recent case of *LM -v- K LAWYERS*¹ serves as a timely reminder that a solicitor who lacks the expertise and proper resources to conduct proceedings on behalf of a client should obtain the assistance of a suitably experienced barrister.

The case

2. The background to the case was that, during a period of some 17 months, Mr M ("**Client**") had instructed Mr K ("**Solicitor**") to act in relation to family law proceedings between the Client and the Client's then wife. The Solicitor had rendered a series of bills in which his professional fees totalled over \$330,000. The costs were charged in accordance with a costs agreement but the Client claimed that he had been charged too much and sought an assessment of the costs.
3. The costs assessment was undertaken by Registrar C Boyle of the Supreme Court of Western Australia.
4. The Registrar noted that, in the course of the family law proceedings, the trial judge had criticised the Solicitor's conduct of the proceedings.² The Registrar went on to describe the Client's complaint against the Solicitor as "essentially a complaint of over-servicing by ineptitude".³
5. The Solicitor relied on time records to justify the costs charged but the Registrar found these to be unreliable for various reasons. In particular, the Registrar found that a sampling of the time records raised instances of time spent that appeared to be excessive, or time charged at professional rates for work of an administrative or clerical nature.⁴ An example given by the Registrar related to a "particularly disturbing" item for "Research: 200 units at \$270 per hour", a claim that the Solicitor had spent 20 continuous hours on research. The Registrar noted that:
 - the records gave no indication of what had been researched;
 - other work was shown as being done on the same day, such that the total charged on that one day was 24.8 hours; and
 - the Solicitor had offered no explanation for these figures.⁵

¹ [2015] WASC 244.

² Above, n 1, at [10].

³ Above, n 1, at [28].

⁴ Above, n 1, at [20].

⁵ Above, n 1, at [21]-[22].

6. The Registrar further noted that this day was not the only day on which extraordinary time was claimed to have been spent.⁶
7. As the Registrar could not rely on the time records, the Registrar's approach to the assessment was to consider the affidavit evidence, the submissions made by the parties, and the Solicitor's files, and to then make a broad judgment of the amount that a competent practitioner retained by the Client would have charged for the work.⁷
8. After considering the factors that might have inflated the costs, the Registrar concluded that three factors had caused a noticeable increase in the costs charged. These were:
 - the Solicitor's inability to adequately manage the Client's demands;⁸
 - the conduct of the Client's wife and her lawyers; and
 - the Solicitor's lack of expertise and resources to deal with the matter properly.⁹
9. As regards the third factor, the Registrar noted that the retainer related to a complex and serious family law dispute which required both expertise and proper resources but that the Solicitor was not an accredited family law specialist and was a sole practitioner with, apparently, little or no secretarial or administrative support.¹⁰ The Registrar then said:

*"In my view, he should not have accepted instructions to act for [the Client] at all. If he did, it should have been only on the basis that he would engage specialist counsel to provide him with the expertise he lacked. It was that lack of expertise that was the reason for repeated judicial criticism of [the Solicitor] in the course of the proceedings. That [the Solicitor] did not reflect on and consider his position as a result of those criticisms reflects poorly on him."*¹¹
10. After giving some specific examples of the problems which had occurred, the Registrar concluded that a very large part of the Solicitor's time that he had charged for was wasted because:
 - his documents were technically deficient;
 - he did not appear to understand the distinction between evidence and submission; and
 - he identified too closely with the Client's cause such that it interfered with his judgment of what battles to fight and what to concentrate on.¹²

⁶ Above, n 1, at [23].

⁷ Above, n 1, at [29]; [42].

⁸ The Client was described as demanding but not more so than was reasonable in the circumstances.

⁹ Above, n 1, at [34]-[39].

¹⁰ Above, n 1, at [39].

¹¹ Above, n 1, at [39].

¹² Above, n 1, at [41].

11. The Registrar then said that, even allowing for the fact that the matter was a contentious and difficult matter and that the conduct of the Client's wife and her lawyers had made it more expensive:

*"it is clear that [the Solicitor] was out of his depth. He floundered in the task of identifying and presenting relevant evidence. He spent time doing work that was of an administrative or clerical nature or that he simply should not have been involved in at all."*¹³

12. The Registrar then concluded that a competent and properly resourced practitioner could have done what was needed for no more than \$220,000.00 and, accordingly, assessed the professional costs (excluding disbursements) in that amount.¹⁴

Review of the assessment

13. The Solicitor objected and applied for a review of the assessment.

14. In *LM -v- K LAWYERS [No 2]*,¹⁵ one of the objections raised the questions of demands made of family law practitioners given the nature of the jurisdiction and the demands for service made by particular clients.¹⁶ However, Registrar Boyle noted that these questions had already been considered in his earlier reasons. The Registrar also noted that there was judicial authority to the effect that an advocate exercised an independent judgment in the conduct of a case and should not pursue every line of argument simply because the client might press for this, and that the Solicitor's approach to the conduct of the proceedings had led to severe criticism from the trial judge. In these circumstances, the Registrar found that this objection had no merit.¹⁷

15. The Registrar then concluded that there was nothing in any of the objections raised by the Solicitor sufficient to cause him to review the amount allowed on assessment, and, accordingly, did not vary the assessment.¹⁸

Final note

16. Charging for work which is unnecessary, or charging for "necessary work done in a wasteful fashion", may constitute a breach of fiduciary duty by a legal practitioner.¹⁹

¹³ Above, n 1, at [45].

¹⁴ Above, n 1, at [46].

¹⁵ [2015] WASC 245.

¹⁶ Above, n 15, at [24].

¹⁷ Above, n 15, at [26]- [27]. See *Vella and Bowden* [2011] WASAT 56 at [27] - [28]; *Giannarelli v Wraith* [1988] HCA 52; (1988) 165 CLR 543 at [12]; and *Ali v The Queen* [2005] HCA 8; (2005) 214 ALR 1; (2005) 79 ALJR 662 at [6].

¹⁸ Above, n 15, at [28].

¹⁹ See Allsop, J "Professionalism and commercialism – conflict or harmony in modern legal practice?" Australian Academy of Law 2009 Symposium Series, 5 May 2009, at [39]-[41].

17. Note too that two justices of the Supreme Court of New South Wales have said that where there is work that can be done either by a solicitor or by junior counsel, and junior counsel is more experienced than the solicitor and charges at a significantly lower rate, then (subject to the ability of the individual legal practitioners involved) the solicitor has a duty to his or her client to ensure that the work is done at the lower cost.²⁰ These statements were made in the context of commercial litigation but are clearly equally applicable to the conduct of civil litigation in general.

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²⁰ See *April Fine Paper Macao Commercial Offshore Ltd v Moore Business Systems Australia Ltd* [2009] NSWSC 867; (2009) 75 NSWLR 619 at [26]; *Ashington Capital Pty Ltd v Parissen Capital (Project X) Pty Ltd* [2012] NSWSC 410 at [15]. See also K Ottesen, "Costs of civil litigation: The solicitor's duty to ensure that work is done at the lower cost", 1 July 2014.