Cancellation fees

by Mark Brabazon SC

You have been working on a big case for months. It is listed for hearing with an estimate of six weeks. You have set that time aside and refused other work. The case is due to start on Monday 16th. It settles on Friday 13th. Your family is pleased to have you to themselves for the weekend. You return to chambers on Monday. There is a large gap in the diary. What can you fairly and properly claim in your bill?

Uniform Law and costs assessment

The answer to that question is not determined solely by the terms of your fee agreement. Section 172 of the *Legal Profession Uniform Law* of New South Wales and Victoria says that '[a] law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances' having regard to the matters set out in the section. Existence of a compliant costs agreement is no more than *prima facie* evidence that the costs for which it provides are fair and reasonable (s 172(4)); the principal obligation is not abrogated. Section 207 has the effect that a contravention of that requirement is capable of constituting unsatisfactory professional conduct or professional misconduct by a barrister.

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Unlike previous New South Wales legislation which focussed on the fairness of a costs agreement, the Uniform Law focusses on fairness of fees actually claimed. It is clear that a fee will not be fair if it exceeds what a barrister is contractually entitled to claim but, if a barrister claims less than a contract permits, it is the claimed amount with which s 172 is concerned.

Costs assessors in New South Wales are used to dealing with claims for cancellation fees in the context of both party/party and practitioner/client (including barrister/solicitor) assessments under the Uniform Law and under the *Legal Profession Act 2004*. The number of practitioner/client assessments under the Uniform Law is still quite small because transitional provisions preserve the old law where first instructions were given before 1 July 2015.

The assessors approach such claims on the usual basis, i.e. by determining whether the claim is fair and reasonable having regard to the relevant facts and circumstances of the particular case.[1] They treat the question as one that they can determine in the ordinary way by the application of their professional judgment and expertise to those facts and circumstances. Some claims are allowed, some are disallowed, and some are allowed in part. The cases in which the assessors see claims for more than the first hearing day (i.e. other than claims that resemble the old fee-on-brief concept) tend to involve large cases listed for long hearings.

The approach of the costs assessors accords with judicial opinion in *Wilkie v Gordian Runoff Ltd* [2005] NSWSC 873 and *Levy v Bergseng* (2008) 72 NSWLR 178, 198–204, which are considered below.

Judicial statements, history, context

So what have the judges said about cancellation fees? Different things in different circumstances, as it turns out. Because of the importance of history and context, it is best to approach the case law chronologically.

It is also important to appreciate that the term 'cancellation fee' has no current technical meaning. It is not used in legislation or professional rules relating to legal costs or the practice of barristers in New South Wales. It does not have a fixed factual meaning. Some people appear to use the term to refer to any charge referable to a day when an expected hearing does not proceed, without further qualification. Others use the term in a more restricted sense. It used to be distinguished from a fee-on-brief, which was generally payable even if the relevant action settled before trial. That was the position before 1 July 1994, when fee deregulation began.[2]

Razzi (1991)

It is obvious that Wilcox J had the more limited meaning in mind in *Commissioner (AFP) v Razzi (No 2)* (1991) 30 FCR 64, 67. A criminal case that had been expected to run for some weeks lasted only four days because, not long before the trial date, two of Mrs Razzi's co-accused decided to plead guilty and an agreement made between her representatives and the prosecutor limited the evidence that would be needed. On her application for a costs order against the prosecutor on a solicitor-client basis, it appeared that 'some sort of agreement' had been made that she would pay her counsel '"cancellation fees" in respect of some or all of the time which was originally expected to be needed for the case but was not in fact required.' Wilcox J said that, in his 21 years at the bar (1963 to 1984), he 'never heard of such fees being asked' and that, as he understood the usual situation, any disadvantage to the barrister from a case ending early 'had to be balanced against the advantage conferred by the rule which permits barristers to charge a full fee on a matter settled after delivery of the brief but before any hearing.' That practice, which his Honour expressly contrasted with a cancellation fee, clearly involved a charge referable to an expected hearing that does not occur.

His Honour's observations about 'cancellation fees' were, strictly speaking, obiter, and were to the following effect:

> At a time when legal fees are so onerous as to exclude from significant litigation all but the wealthy and the legally-aided, any new practice which further increases costs requires meticulous justification. I am not aware of any attempted justification of 'cancellation fees'. It seems to me that it would be desirable for Bar Councils and Law Societies to examine such fees, and perhaps issue a ruling or some guidelines, before the practice becomes firmly entrenched.

The old practice described by Wilcox J is no longer used to any appreciable extent, if at all. It contemplated a 'fee-on-brief' that covered the first day of a trial and general preparation. If a trial lasted longer than a day, a 'refresher' was conventionally charged for each extra day at 2/3 of the fee-on-brief. A trial would ordinarily take more than half a day to prepare, and a long trial considerably more, so the fee-on-brief and refresher both reflected a combination of in-court advocacy and corresponding preparation. The old practice has generally been replaced by explicit charges for hours and days of a barrister's professional time, effort and commitment.

Bar Rules in the 1990s

The Barristers Rules included a provision

dealing with cancellation fees as rule 85A from 1992 to 30 June 1994. The text of the rule has proven difficult to verify. Secondary sources indicate that it was in these terms:

> (a) When a case is settled, adjourned or not reached, or the hearing date is vacated, a barrister shall not be entitled to a cancellation fee in addition to the normal Brief on Hearing fee except by agreement with the instructing solicitor.
>
> (b) If a cancellation fee is sought at the time of retainer or within a reasonable time of the notification to the barrister of the date fixed for hearing, but is not agreed to by the instructing solicitor, the barrister shall be at liberty to decline the retainer or return the brief.

There was also a jointly agreed statement by Bar Council and the Law Society:

> When a case is settled, adjourned or the hearing date is vacated counsel will not be entitled to a cancellation fee in addition to the normal Brief on Hearing Fee unless agreed.
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> Where counsel has set aside days for the hearing of a case and if counsel desires to charge a cancellation fee counsel must in writing notify the solicitor within a reasonable time after delivery of the Brief and a reasonable time before the date fixed for hearing that a cancellation fee will be charged.
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> It will be the responsibility of the solicitor to notify his or her client of the proposed cancellation fee and, after receiving his client's instructions, to communicate to counsel as to whether the cancellation fee is accepted.
>
> If the cancellation fee is not accepted counsel shall be at liberty to return the brief.
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> If counsel receives a fee for the hearing of a case or cases on days for which the cancellation fee was applicable and no prior agreement has been reached to cover that situation it is expected that counsel will act fairly to the solicitor and the solicitor's client by adjusting the cancellation fee accordingly, particularly when the cancellation fee has been agreed upon an indemnity basis.[3]

It is also understood that Bar Council issued a guideline to barristers concerning rule 85A during the life of that rule and subsequently endorsed the view that the spirit of the guideline survived repeal of the rule.[4]

Wilkie (2005)

The question of cancellation fees was considered in a more modern context by McDougall J in *Wilkie v Gordian Runoff Ltd* [2005] NSWSC 873. The facts arose during the time of the *Legal Profession Act 1987* and after deregulation. Mr Wilkie had been charged with offences, and the High Court had held that his insurers were liable to pay his defence costs. The trial would be long – six to twelve weeks – and his counsel, senior and junior, would have to work full time on preparing the trial for two to four months beforehand. He had entered into costs agreements with his defence counsel. Each required

> payment in advance of an amount equal to 20 days' fees, on the basis that the amount would be payable regardless of the duration of the hearing (or, indeed, regardless of whether the hearing proceeded at all).[5]

A cancellation fee could also be described as a commitment fee.

The insurer objected to this term, which was referred to in the judgment (presumably reflecting its treatment by the parties – the description does not appear to have been contentious) as a cancellation fee.

The legal question in this insurance context was whether it had been reasonable for Mr Wilkie to agree to such a term. His Honour decided that it had been reasonable to agree to a cancellation fee, and referred the question whether its quantum (in effect, the 20 days) was reasonable for the report of a referee with expertise in the assessment of legal costs. His Honour's conclusion on the question of principle appears at [17]; it is useful to read that passage together with the two preceding paragraphs:

> [15] In circumstances where counsel do not have the ability to require the solicitor to pay their fees, it is to be expected, I think, that they would require some assurance for the payment of their fees. Since they do not look to the solicitor, that assurance cannot come from having money on account of their fees in the solicitor's trust account. It is therefore not surprising that, as they may now do, counsel require payment in advance of some part of their fees.
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> [16] Particularly where counsel are retained to defend criminal charges, it is hardly surprising that they require some security for the payment of their fees. They cannot hold fees in trust, because they cannot operate trust accounts. But they can be paid in advance. That is what has happened here. It is hardly unreasonable; quite the contrary.
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> [17] Equally, it is a fact of life that *where counsel are retained to work exclusively on one matter*, they must reject all other offers for work during the currency of that retainer. Even with capable counsel, it is not always possible to go out and find other work in replacement if such a retainer comes to an end abruptly, unexpectedly and early. Thus, *it is common for counsel retained in such matters to require an agreement to pay some sort of cancellation fee. Whether or not that practice is reasonable depends, I think, more on the amount of the fee demanded, and the events by reference to which it is payable, rather than the concept.…* (emphasis added)

Martiniello (2005)

In *R v Martiniello* [2005] ACTSC 109 [9], a short *ex tempore* judgment in a criminal case, Connolly J was 'not aware of any practice in the civil side of [the ACT Supreme Court] where cancellation fees are generally regarded as appropriately caught within a general

form of costs order' but noted a different approach in the Northern Territory. His Honour also referred to *Razzi,* declined to 'make an order pursuant to a cancellation fee basis', and stood the matter over for negotiation between the parties. No reference was made to *Wilkie*, which had been decided a few months before.

KK v JV (2006)

In *KK v JV* (12 April 2006, unreported, Family Court of Australia), a judgment concerning a claim for costs between adverse litigants, Faulks J expressed the view at [113] that 'the charging of cancellation fees in family law matters at least is not to be encouraged' and at [118] that, if an indemnity costs order had been appropriate in the case, he would not have been 'prepared to endorse or approve the application of any agreement about cancellation fees'. The judgment does not make clear which of the potential meanings his Honour attached to the expression 'cancellation fees', other than a pejorative characterisation at [108] as 'fees payable to the barrister for not attending Court'. His Honour cited *Razzi* with approval, but did not mention *Wilkie*.

A barrister should never charge a cancellation fee without consciously considering whether it is fair to the client to do so and whether the amount charged is fair.

Levy v Bergseng (2008)

Razzi, Wilkie and *Martiniello* were considered by Rothman J in *Levy v Bergseng* (2008) 72 NSWLR 178, an appeal from a review panel under the *Legal Profession Act 1987* arising from an assessment of costs between Levy SC and his instructing solicitors in a complex medical negligence case. The ultimate costs agreement provided that counsel would act on a speculative basis including a 25 per cent uplift and cancellation fees. Pre-trial preparation was extensive; the plaintiff and her family now resided in Greece, and counsel travelled to that country and to England in the course of preparing the case. The cancellation fee structure was set out in a letter of 10/9/2004, sent at a time when the case was listed to start on 7/2/2005 with an estimate of six weeks. It provided for two weeks' fees if the case should settle by 30/11/2004, three weeks if it should settle between 1/12/2004 and 4/2/2005, and otherwise the remaining time set aside for the trial, subject to offset if counsel obtained other court work in the relevant period. The starting date was put back and, after a single day's hearing, a date was appointed to take evidence in Athens with an estimate of eight weeks. Twelve days before that was to happen, the case settled at mediation. Counsel claimed a cancellation fee equal to 20 days, i.e. half the estimated eight weeks.[6] A costs assessor allowed the claimed cancellation fee to the extent of 15 days, without uplift. The solicitors applied for review, and a review panel reversed. Rothman J restored the determination of the costs assessor. His Honour's judgment should be understood against this somewhat complex factual background.

One other aspect of the case should be mentioned. The review panel had decided that the costs agreement was unjust under s 208D of the 1987 Act. Rothman J held that this was *ultra vires*, as that section only applied to a costs agreement with a client. His Honour also concluded, however, that '[n]o other reason provided would satisfy me that the fees charged were unreasonable or unjust …. If it be necessary, I independently come to the view reflected in the Costs Assessor's Determination.'[7]

Rothman J declined to follow the approach of Wilcox J in *Razzi* on the basis of subsequent factual changes in the nature of a barrister's practice, increased specialisation, and the fact that, while a significant number of barristers had not embraced 'cancellation fees', the phenomenon of barristers demanding such fees 'is a not uncommon practice'.[8] His Honour embraced the 'more modern view of cancellation fees' in *Wilkie*.

His Honour rejected an argument that the agreement, including the cancellation fee, was not a costs agreement within the meaning of the legislation on the basis (as it had been put) that the cancellation fee was for work *not* done. The agreement was 'still a cost for the provision of the work in question'.[9] This, with respect, was correct. A client derives a real benefit from a barrister's commitment to expected trial dates. A cancellation fee could also be described as a commitment fee. The language and structure of the present legislation are different and some argument might be made about that, however his Honour's reasoning would point to the characterisation of Mr Levy's fees as 'legal costs' as defined in the *Legal Profession Uniform Law* (NSW) s 6.

The reasons that led Rothman J to conclude that the cancellation fee was reasonable appear at 72 NSWLR 201 – 202. In substance, they relate to the speculative nature of the case (including the fact that counsel had an offer of other work when he committed to the subject case), specialisation of counsel, opportunity cost, the fact of agreement, the lead time that would have been involved in getting other court work, the graduated basis on which the cancellation fee was to be calculated in the event of pre-trial settlement, and the offset provision. His Honour's conclusions appear at 203 [110] – [111]:

> [110] To the extent available in these proceedings, and to the extent that the Court is entitled to deal with this issue, the charging of cancellation fees was reasonable, was part of the agreed costs arrangements and is not rendered unjust by any factor adumbrated by the Appeal Panel.
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> [111] Nothing in this judgment should be taken as a general proposition that all counsel in all cases can reasonably and justly charge cancellation fees. In most cases, and for most counsel, cancellation fees would be unjustifiable. This judgment deals only with this appeal, relating as it does to senior counsel engaged 'on spec' in particularly specialised work for which the lead time is lengthy and during which he has, in fact, foregone other paid court work.

Hoffman (2014)

Razzi, Wilkie and *Martiniello* and *Levy v Bergseng* were considered by Neilson DCJ in *Commissioner of Police v Hoffman* (2014) 18 DCLR (NSW) 320; [2014] NSWDC 113, an unsuccessful application for leave to appeal from a review panel which, being divided in opinion, had affirmed the decision of a costs assessor. The costs assessor had allowed as party/party costs a barrister's fee for 'brief on hearing' at his daily rate where a one day case in the Special Statutory Compensation List of the District Court had settled 11 days before the listed hearing date. His Honour declined to regard this as a 'cancellation fee', treating that expression as referring to a fee where a case is adjourned or does not last as long as expected.[10] His Honour rejected the submission that the barrister had not done 'any relevant "work" which entitled him to charge a fee-on-brief' by holding himself available for the hearing and concluded that the barrister was 'entitled to charge a fee for a brief on hearing when the matter settled when it did.'

Cancellation fees are not for everybody, and they are not for every case.

Levy v Bergseng and *Hoffman* both rejected the view that the possibility of a barrister doing chamber work on a cancelled hearing day (in contrast to replacement court work) should preclude or reduce a cancellation fee.

Other statutory rules

Other statutory rules may have a bearing on the propriety of cancellation fees. Two will be mentioned here, without elaboration.

The Legal Profession Uniform Conduct (Barristers) Rules 2015 says: 'A barrister must not in any dealings with a client exercise any undue influence intended to dispose the client to

benefit the barrister in excess of the barrister's fair remuneration for the legal services provided to the client.'

The Australian Consumer Law Part 2-2 (ss 20 to 22A) contains prohibitions on unconscionable conduct in trade or commerce. Other provisions might also conceivably be relevant, such as the avoidance of unfair terms in consumer and small business contracts under Part 2-3 (ss 23 to 28).

What is to be done?

Cancellation fees are not for everybody, and they are not for every case. Many barristers never charge a cancellation fee, at least in the narrower sense of that term. Whether it is called a cancellation fee or a fee-on-brief, the least contentious is probably a claim for a single day's fee when a case settles shortly before hearing. The other situation where a cancellation fee might be justified is the long, all-consuming case. The current state of New South Wales law is reflected in *Wilkie* and in *Levy v Bergseng*. The most important parts of those judgments are the monitory words, which remind practitioners of their fundamental professional obligations now expressed in the Uniform Law s 172.

In the present regulatory environment, a barrister should not claim a cancellation fee in any sense of that term unless it is covered by fee disclosure and is within the terms of any applicable costs agreement. Members can find advice about this on the costs and billing page of the Bar Association website.

Cancellation fees can be particularly contentious. A barrister should never charge a cancellation fee without consciously considering whether it is fair to the client to do so and whether the amount charged is fair. If one is minded to do so, it is good practice to discuss the matter with the instructing solicitor first. If there is any doubt about fairness or amount or if the claim is for more than the first day, it is also good practice to talk to an experienced and objective colleague who understands the relevant area of practice.

ENDNOTES

1 The statutory criteria in a practitioner/client context are now set out in the *Legal Profession Uniform Law* s 200.
2 1 July 1994 was the commencement date of most of the provisions of the *Legal Profession Reform Act 1993*, including substitution of Part 11 of the *Legal Profession Act 1987*.
3 See (1997) 35 (6) *Law Society Journal* 28.
4 The writer has not yet succeeded in locating primary records of these. They are referred to in correspondence held by the Bar Association.
5 [2005] NSWSC 873 [13].
6 The terms of the costs agreement would have entitled him to charge the full eight weeks.
7 72 NSWLR 178, 209 [138], [139].
8 72 NSWLR 178, 199 [95].
9 At 200 [99], [100].
10 The barrister's costs agreement provided a daily rate for hearings and an hourly rate for chamber work, but did not separately refer to pre-trial preparation as a separately billable item; this may have played a role in the particular case by reference to the old fee-on-brief concept.

Equitable briefing

By Brenda Tronson

Since the Bar Association adopted the Law Council of Australia's National Model Gender Equitable Briefing Policy (the policy), the Diversity and Equality Committee of the Bar Association and the Women Barristers Forum have been working together to promote awareness of the policy and to take steps for its implementation by the Bar Association.

The aims of the policy include driving cultural change within the legal profession, supporting the progression and retention of women barristers and addressing the significant pay gap and underrepresentation of women in the superior courts. Read more broadly, the policy is a vessel by which unconscious bias may be consciously addressed by those responsible for selecting counsel. The policy is available for adoption by any briefing entity, including organisations and counsel, in addition to clients.

Based on the New South Wales Bar Association website as at August 2017, women constituted just over 20 per cent of all barristers, and approximately 10 per cent of silks. Further, approximately 33 per cent of barristers of 10 years standing or under are women, and approximately 15 per cent of barristers with over 10 years' seniority are women.

The policy itself, together with more information and the Law Council of Australia's online register of adoptees, are online.[1] The Bar Association adopted the policy in 2016. At the time of writing, 75 NSW barristers had adopted the policy, together with five NSW chambers and a large number of important briefing entities, including law firms of all sizes, government agencies and corporations.

What steps has the Bar Association taken?

During 2017, the Diversity and Equality Committee of the Bar Association and the Women Barristers Forum, through a joint working group, have taken steps towards the implementation of the policy by the Bar Association.

1. We have presented a number of seminars to build awareness of the policy among barristers and to assist barristers in understanding their (not onerous) obligations once they adopt the policy.

   On 9 March 2017, we held a CPD seminar entitled 'Gender Equitable Briefing – Making it Happen: The Solicitor's View'. A panel of solicitors from a range of firms and agencies provided their perspective on gender equitable briefing and what barristers can do to help firms fulfil their own obligations. This CPD was well-attended and received positive feedback.

   During the February-March 2017 CPD season, members of the Diversity and Equality Committee attended regional CPD conferences and presented seminars informing members about the policy.

   On 16 August 2017, we made history by running the first NSW Bar Association live-streamed CPD seminar: 'Reporting under the National Model Gender Equitable Briefing Policy: A practical guidance seminar'. The in-person audience was highly engaged; another 200 viewed via the live stream.

   We presented a session on 19 September 2017 to provide information and support for those wishing to present a seminar on equitable briefing to their own floors.

   Many of the seminars we run are available to barristers to view on the Bar Association CPD Online website.[2]
2. We have developed resources to support barristers who have adopted the policy, or who wish to learn more, including FAQs, a Guide to Reporting and a worksheet and report template.[3] We welcome any feedback.
3. We have produced a three year Strategic Implementation Plan for the Bar Association,[4] which was adopted by Bar Council on 11 May 2017.

The Bar Association's strategic goals are divided into two phases, Phase 1 ('Awareness, Adoption and Facilitation') and Phase 2 ('Reporting, Monitoring and Evaluation'). The two phases are not completely temporally distinct. Once we have analysed the information presented to us through barristers' reports, you will see more Phase 2 activities, and we will continue to work on the Phase 1 objectives throughout the life of the Strategic Plan.

Bar Association's report

In September 2017, the Bar Association released its report as a briefing entity. From 1 September 2016 to 30 June 2017, the Bar Association briefed 10 barristers (seven men and three women) in 11 matters. The Bar Association is pleased to report that the figures show women were selected for 25 per cent of the briefs and account for 55 per cent of the value of all brief fees paid. Of the senior barristers, women account for 30 per cent of all briefs to senior barristers, which meets the 1 July 2018 target of 20 per cent. Neither of the two junior barristers briefed were women.

More information?

If you require more information about the policy and its implementation at the NSW Bar, please contact Ms Ting Lim, policy lawyer, at the Bar Association.

ENDNOTES

1 https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy
2 https://www.nswbar.asn.au/for-members/cpd
3 https://www.nswbar.asn.au/coming-to-the-bar/equitable-briefing
4 https://www.nswbar.asn.au/coming-to-the-bar/equitable-briefing