LCRO 173/2017

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area]l Standards Committee [X]
BETWEEN	**ZD, YF AND WP**
	Applicant
AND	**FH**
	Respondent

DECISION

The names and identifying details of the parties in this decision have been changed.

Introduction

[1] Mr ZD, Ms YF and Ms WP (the complainants) have applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of their complaint concerning Mr FH's involvement as instructing solicitor to Mr BT in debt recovery proceedings against the complainants.

Background

[2] From March 2007 until December 2008 Mr FH was Mr BT's instructing solicitor. Mr BT acted for the complainants until they terminated his retainer, without paying all of his fees. Mr BT's arrangement with Mr FH was that Mr BT would not look to Mr FH for payment and would deal directly with the complainants over the financial aspects of his retainer himself. As a barrister, Mr BT could not sue for his own fees, so Mr FH, who considered himself honour-bound to provide full assistance to Mr BT to

recover his fees, commenced debt recovery proceedings against the complainants (the proceeding). Mr FH and Mr BT agreed that Mr BT would act in the proceeding.

[3] Although Mr FH's name was on the proceeding as plaintiff, Mr BT did most, if not all, of the work in having judgment entered against the complainants in default. However, when the complainants challenged the entry of default judgment, Mr BT found himself facing professional difficulties as a result of his role as both counsel and, potentially, a witness in the proceeding. With the default judgment being set aside by the High Court in mid-2011, the complainants were at liberty to file a statement of defence and counterclaim, and eventually did so.

[4] Although the High Court had expressed concern about Mr BT acting as counsel in the proceeding, he wanted to continue to act largely because it would have been uneconomic for him to do otherwise. Although Mr FH was at no financial risk, he firmly supported Mr BT's attempts to remain involved on the basis he was a litigant in person and should have the same rights as the complainants, who were generally self-represented. Mr FH found it difficult to understand why the complainants wanted to prevent Mr BT from managing the case and appearing in Court in relation to it.

[5] An application was made under Mr FH's name to the District Court seeking leave for Mr BT to appear as counsel in the proceeding. Mr FH swore an affidavit in support of the application dated 20 December 2011. He filed a further affidavit, sworn 15 March 2012, seeking leave for Mr BT to appear as his agent pursuant to s 57 of the District Court Act 1947.

[6] For various reasons, nearly a year passed before those applications were disposed of. In late 2013 Judge [B] declined leave. In essence, her view was that this was not one of those cases that would have been suited to Mr BT appearing as counsel, and giving evidence as a witness. Her Honour's view was that Mr BT's evidence at trial was likely to be highly contentious and vigorously contested, so it would not be proper for him to appear as counsel and a witness in the proceeding.

[7] Mr FH appealed that decision to the High Court, and in April 2014 [X] J dismissed the appeal. Mr BT did not appear on those applications, which were argued by senior counsel, although he did appear from time to time on procedural matters in the District Court proceeding. The complainants say Mr FH would have been aware of all those matters and should have called a halt to Mr BT's involvement as counsel.

[8] The proceeding came on for trial in late 2016 before Judge [D] and continued in early 2017. Judge [D] reduced Mr BT's fees and found no deficiencies in his conduct

or advice to the complainants, leaving the complainants obliged to pay most of Mr BT's outstanding fees.

[9] The complainants made a complaint to the New Zealand Law Society (NZLS).

Standards Committee

[10] The complaint is framed as allegations that Mr BT:

(a) substantially contributed to Mr BT's contravention of rr 13.5 and 13.5.3 of the RCCC, and

(b) breached the rules of provision of the principal aspects of client service, in particular after 1st August 2008.

[11] The Committee had determined an earlier complaint by the complainants on the basis that Mr BT had contravened rr 13.5 and 13.5.3. It considered there was no evidential foundation for a finding that Mr FH had "aided and abetted Mr BT" in those contraventions by instructing him as counsel in the proceeding and swearing affidavits in support of applications for leave. The Committee's view was that Mr FH was not responsible for the choices Mr BT made.

[12] The Committee considered making a determination that Mr FH had contravened r 3.4 in 2007 by failing to provide information to the complainants would be "completely out of proportion". The Committee noted a complaint from the complainants about Mr BT not having provided terms of engagement had already been determined by a Committee and on review by this Office. The Committee's view was that the complaint about Mr FH's conduct was trivial.

[13] The Committee decided further action was not necessary or appropriate in respect of either aspect of the complaint.

Application for review

[14] The complainants applied for a review. They contend Mr FH's failure to disclose his hourly rate is a proper basis for a determination of unsatisfactory conduct, based on a number of Tribunal decisions they supplied. They believe the Committee was not even-handed.

[15] The complainants also believe that Mr FH contravened r 2 by failing to uphold the rule of law and facilitate the administration of justice by instructing Mr BT. They say Mr FH unnecessarily wasted three and a half years in courts seeking to have Mr BT act

in the dual role of counsel and a witness in the proceeding. The complainants maintain that is an abuse of process.

Review Hearing

[16] The complainants attended a review hearing in Auckland on 14 December 2017. Mr FH was not required to attend and did not exercise his right to do so.

Nature and scope of review

[17] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[18] More recently, the High Court has described a review by this Office in the following way:[2]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

Analysis

Provision of Information — Rules 3.4, 3.5 and 3.6

[19] Mr FH acted for the complainants between March 2007 and December 2008. The rules came into effect on 1 August 2008. Between March 2007 and 1 August

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

2008, while it may have been good practice to provide written information to clients, there was no rule that obliged Mr FH to do so. That much is clear from the decision of Mr Vaughan in his decision *Larnark v Kirby* on which the complainants rely.[3] Mr Vaughan determined a review application filed by the complainants in 2010 arising from their complaint about Mr BT's conduct and fees. The complainants were aggrieved at Mr BT not having provided the information required by rr 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). Mr Vaughan said:[4]

> I would observe that both before and after 1 August 2008, any responsibility in this regard rested with the instructing solicitor. This is made quite clear in Rule 3.7 of the Client Care Rules, which provides that where a lawyer is instructed by another lawyer, the obligations created by Rule 3.4 do not apply.

[20] The complainants say Mr Vaughan said it was Mr FH's responsibility to provide the information required by rr 3.4 and 3.5. That is not an accurate report of Mr Vaughan's comments. What Mr Vaughan actually said was:[5]

> [31] In as much as there was any "obligation" to provide this information prior to 1 August 2008 (and I record that there was no formal obligation to do so in terms of disciplinary rules) this again, rested with the instructing solicitor.
>
> [33] I also observe that the Applicants had ample opportunity to request Mr FH to make this enquiry of the Practitioner, having received 5 accounts from the Practitioner, the first of which is dated 10 September 2007.

[21] From 1 August 2008, r 3.4 obliged a lawyer to provide his or her client with certain information in writing "in advance". The footnote to the rule recommends that lawyers provide the information set out in r 3.4 "prior to commencing work under a retainer". Rule 3.5 obliges a lawyer to provide certain information "prior to undertaking significant work" under the retainer. Rule 3.6 obliges a lawyer to update information provided under rr 3.4 and 3.5 if it becomes inaccurate in any material respect.

[22] Mr FH commenced work in 2007, and had undertaken significant work before he instructed Mr BT in 2007, and before 1 August 2008. In the circumstances, he could not comply with rr 3.4 and 3.5. The time had passed for Mr FH to provide information in advance, and prior to commencing work, and prior to undertaking significant work because his retainer was already well advanced by 1 August 2008 when the rules came into effect. While it may have been good practice to provide the written information referred to in rr 3.4 and 3.5 to clients after 1 August 2008, there was no rule that obliged Mr FH to do so and nothing to prevent the complainants from making inquiry if they had concerns.

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[3] *Larnark v Kirby* LCRO 44/2010 (1 October 2010).
[4] At [32].
[5] At [31], [33].

[23] The submissions the complainants filed for the review hearing on 14 December 2017 on this issue are generally focussed on the impact they believe the lack of information should have on their liability to pay any money to Mr FH or Mr BT. As I understand the position at the time of this review, the District Court has determined liability and quantum on the basis that the complainants still owe Mr BT some money, and the complainants have appealed that decision. This Office has no power to intrude on the District Court's jurisdiction and no role to play in any appeal from the District Court's decision.

[24] I agree with the Committee that there is no reason to take any further action in respect of this aspect of the complaint, but for the reason that rr 3.4 and 3.5 were not in effect at the beginning of Mr FH's retainer so he could not comply with them. The decision is modified accordingly.

Aiding and abetting a breach of the rules

[25] The first point is that the complaint relies on a decision by the Committee that has been modified by this Office on review. Although the determination that Mr BT contravened r 13.5 was confirmed, the determination of unsatisfactory conduct based on a contravention of r 13.5.3 has been reversed.

[26] My view is that the difficulty for Mr BT arose not so much from any actual lack of independence, but from the fact that he could not say he had acted in accordance with his duty to act for Mr FH in the proceeding without regard for his own personal interests. That obligation is imposed by r 13. The flow-on effect for Mr BT was that he could not say his independence was maintained when he had undermined others' perception of his independence from the start by not acting without regard to his own personal interests.

[27] Based on their reading of *Atkinson v Pengelly* and *Taylor v Black* the complainants say Mr FH should never have instructed Mr BT or allowed him to act as counsel in the proceeding.[6] That argument relies on those decisions imposing an absolute prohibition on any barrister acting as counsel and appearing as a witness in any proceeding involving his or her own personal interests. *Atkinson* is authority for the proposition that a barrister could not sue for his or her own fees before the Act came into effect. Whether the position remained thus after the Act came into effect has not been the subject of judicial comment, so there was room for argument.

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[6] *Atkinson v Pengelly* [1995] 3 NZLR 104 (HC), *Taylor v Black* HC Wellington CP157/92 4 October 1992

[28] The second point is that, unlike the Crimes Act 1961, the Act and Rules do not specifically mention whether it is possible to aid or abet a contravention of the Rules. It may therefore be that a complaint made on that basis cannot be sustained. If that is not the case, I observe that the general expectation is that each lawyer and firm is responsible for ensuring personal and firm compliance with the Act and Rules. However, for professional purposes, the complainants would cast Mr FH in the role of Mr BT's keeper, which brings me to the third point.

[29] Rules 2.8 and 2.9 provide for discretionary and mandatory reporting by lawyers about lawyers when there are reasonable grounds to suspect misconduct or unsatisfactory conduct. It is apparent from the evidence that Mr FH had no reason to believe there were grounds to report Mr BT to NZLS. On the contrary, affidavits Mr FH filed to support Mr BT acting as counsel say he expected to provide Mr BT with "full assistance" in recovering his fees from the complainants including lending his name as plaintiff in the proceeding. Mr FH's expectation accords with the relationship of honour between instructing solicitor and counsel.

[30] Initially, on Mr FH's instructions, Mr BT filed an application for summary judgment. There is no difficulty with that. It is a perfectly ordinary way of attempting to recover an alleged debt. Mr FH and Mr BT shared an objective and if the complainants had offered no resistance, the summary judgment proceeding would have been uncontentious. The complainants did offer resistance. They complained and applied for a review. When the complaint and review processes were completed, the complainants did not file any documents opposing the entry of summary judgment before summary judgment was entered in default. Again, that met Mr FH and Mr BT's shared objective and, as nothing had been filed by the complainants at that stage, was uncontentious.

[31] There was no threat to the lawyers' shared objective until the complainants began their campaign to have the default judgment set aside. Judge [E] was unmoved by the complainants' objection to Mr BT acting and to their application to have judgment set aside. There is no suggestion in Her Honour's decision that she lacked confidence in Mr BT's independence, although she was well aware that the default judgment was for his fees. There is no evidence that Mr FH (or Mr BT) had any difficulty at all with Mr BT's conduct, advice, participation in the proceeding as counsel and witness or his independence.

[32] There is evidence from Mr FH that he supported Mr BT remaining involved in both capacities, and found it difficult to understand why the complainants were so intent on Mr BT standing aside as counsel. Clearly Mr FH's view was that as Mr BT had

acted competently and diligently, there was no problem with his conduct, advice, fees or independence, so no reason for him not to act.

[33] The complainants then drew [G] J into a debate over Mr BT's role in the proceeding and whether the default judgment should be set aside. The rules were discussed, and [G] J expressed a view about rr 13.5 and 13.8.3. No mention was made of r 13 in his honour's judgment, so it is assumed the complainants did not contend that rule applied to Mr BT's conduct.

[34] Rule 13 is intended to promote independence in counsel appearing before the Court. While self-interest does not necessarily demonstrate a lack of independence, it does present a threat to it. However, it was not Mr FJ's independence that was at issue in terms of the rules, it was Mr BT's. It is implicit in Mr FJ's support for Mr BT that he did not perceive any lack of independence on Mr BT's part.

[35] As I understand the sequence of events that followed July 2011, Mr FJ engaged alternate counsel to argue the applications for leave for Mr BT to appear or act as Mr FJ's agent after [G] J set the default judgment aside. The fact that Mr FH (and Mr BT) made that application demonstrates Mr FJ (and Mr BT) submitted to the jurisdiction of the District Court.

[36] The complainants seem unable to accept that the High Court decision did not prohibit Mr BT from acting in the proceeding. Their view is based on their belief that the High Court ordered Mr BT not to act. That is not consistent with my reading of [G] J's July 2011 decision, or his honour's decision refusing Mr FJ leave to appeal his decision to set aside the default judgment. Mr BT's conduct in the High Court was a side issue, and not determinative of the complainants' appeal.

[37] While the District Court had made no decision about whether Mr BT could act in its proceeding, the effect of Mr FJ's application for leave was to formally submit that question to the District Court for it to determine. If the District Court did not grant leave, that would have been an end to the matter, except the decision was appealed. [T]J concluded that leave would not be granted to Mr BT. I am not aware of Mr FJ taking that issue any further. When the proceeding came on for trial Mr FJ was represented by another lawyer and Mr BT only gave evidence as a witness.

[38] So, it seems to me that the question is not whether Mr FJ aided or abetted Mr BT, but whether there is any evidence that leads to the conclusion that Mr FJ failed to comply with his professional obligations as an officer of the Court. The answer to that

question is no. That effectively also disposes of the complainants' contention that Mr FJ failed to uphold the rule of law and did not facilitate the administration of justice.[7]

[39] The rule of law was upheld by Mr FJ submitting the question of Mr BT's representation to the District Court, and then challenging that on appeal. The administration of justice was facilitated by the District Court, which had jurisdiction over the proceeding being presented with the competing arguments and determining those with regard to the interests of both parties. That is not a waste of the Court's time as the complainants would have it.

[40] Although my reasoning differs from that of the Committee, that is largely because the complainants have developed the arguments they put to the Committee in a different way on review. Nonetheless, after carefully considering the materials and arguments, the conclusion is the same. Further action in respect of the complainants' complaints about Mr FJ is not necessary or appropriate.

Decision

[41] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified to record that further action is not necessary or appropriate because rr 3.4 and 3.5 were not in effect at the beginning of Mr FH's retainer so he could not comply with them and is otherwise confirmed.

DATED this 20th day of December 2017

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr ZD, Ms YF and Ms WP as the Applicants
Mr FH as the Respondent
Area Standards Committee X
The New Zealand Law Society

[7] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 2.