

LCRO 276/2013  
LCRO 293/2013  
LCRO 242/2016

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

two determinations of the [Area] Standards Committee

**BETWEEN**

**CS**

Applicant/Respondent

**AND**

**VN, PR AND ZW**

Respondents/Applicants

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

**DECISION**

**Introduction**

[1] Mr VN, Mr PR and Ms ZW (the complainants) and Mr CS, their former lawyer, have applied for reviews of two determinations by the Standards Committee (the Committee), dated 12 August 2013 and 13 September 2016. The applications for review concern the same parties and have their origins in events that followed the breakdown of the professional relationship between Mr CS and the complainants.

**Background**

[2] On instructions from Mr DH, Mr CS acted as counsel for the complainants. Mr CS commenced Court proceedings on the complainants' instructions (the complainants' proceeding), and engaged other parties in negotiations on the complainants' behalf. Mr CS' retainer ended in late December 2008 or early January 2009. At that stage settlement had not been reached and the complainants'

proceeding had not concluded. The complainants refused to pay the \$15,000 balance of Mr CS' fees (the fees) and he resisted the complainants' requests that he provide files to them or their new lawyer.

[3] Acting on instructions from Mr DH, Mr CS commenced summary judgment proceedings seeking to recover the unpaid balance of Mr CS' fees (the debt recovery proceeding).<sup>1</sup> Mr CS says it was uneconomic to instruct alternate counsel. The complainants challenged the quantum of Mr CS' fees through the complaint and review processes under the Lawyers and Conveyancers Act 2006 (the Act). After those processes concluded in 2010, Mr CS applied on Mr DH's behalf for summary judgment to be entered against the complainants, in default of them having filed a statement of defence, and on the basis that they were liable for the amount assessed as fair and reasonable by the Standards Committee and Legal Complaints Review Officer (LCRO).

[4] Summary judgment was entered, but was set aside in July 2011 by the High Court on the basis that the District Court did not have evidence the LCRO's decision had been served on the complainants.<sup>2</sup> At the same time, without deciding the point, the High Court expressed reservations over Mr CS having acted in any aspect of the debt recovery proceeding because of the prohibition imposed by r 13.5.3 of the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008 (the Rules).<sup>3</sup>

[5] Rule 13.5.3 generally precludes a lawyer from acting in a proceeding if that lawyer's conduct or advice is in issue in the matter before the court. [High Court Judge] considered Mr CS' conduct and advice were in issue before the District Court, and the High Court, although His Honour later declined Mr CS leave to appeal saying his conduct had not been determinative of the appeal.<sup>4</sup>

[6] Having been liberated by [High Court Judge] to do so, the complainants filed their first statement of defence on 8 August 2011. That was followed in November 2011 by an amended statement of defence, and a counter claim in which allegations about Mr CS' conduct and advice in acting for the complainants were formally pleaded. Deficiencies in Mr CS' conduct and advice were denied and Mr DH sought the District Court's leave for Mr CS to act as counsel and a witness in the debt recovery proceeding.

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<sup>1</sup> DH v VN DC [City] CIV-2009-004-678.

<sup>2</sup> VN v DH (2011) 20 PRNZ 806 (HC).

<sup>3</sup> At [16]–[23].

<sup>4</sup> VN v DH HC [City] CIV-2011-404-695, 6 October 2011.

### *The 2012 Complaint*

[7] On 22 May 2012, the complainants laid the first complaint that is under consideration on review. In summary, the complaint alleged that Mr CS:

- (a) refused to release the files he held to the complainants or their new lawyer after his retainer ended saying Mr CS breached r 4.4.1, and, as a barrister, he had no legal right to claim a lien;
- (b) misled them as to his right to claim a lien;
- (c) wilfully deceived the Court in order to secure judgment against the complainants;
- (d) misled the costs assessor, Standards Committee and LCRO in the earlier complaint and review process;
- (e) misled the Court as to its ability to enter default judgment;
- (f) lacked independence; and
- (g) abused the Courts processes.

### *Interlocutory phase of the debt recovery proceeding continues*

[8] While the complaint process followed its course, the interlocutory phase of the debt recovery proceeding continued. Mr CS was formally replaced as counsel on the court's record by other lawyers acting for Mr DH in the litigation. On occasion Mr CS appeared on timetabling and procedural matters. One of the directions the Court made related to the complainants' inspection of materials held on files under Mr DH's control.

### *The 2016 Complaint*

[9] There was a temporary hitch with inspection in January 2016, when there was some uncertainty about where the files to be inspected were. The suggestion by Mr DH's lawyer, Mr KL, was that the files were with Mr CS, who was out of the country at the time. Mr CS' inability to locate the files gave rise to further complaint in February 2016.

[10] The complainants said Mr CS had connived with Mr DH to act contrary to an earlier direction by the Committee that obliged Mr CS to return the files to Mr DH, because as a barrister he had no right to claim a lien.

### **Standards Committee Decisions**

#### *Decision on the 2012 Complaint*

[11] The Committee rejected most of the complainants' concerns, but accepted that Mr CS' conduct was at issue in matters before the Court and that he could not act for himself. It formed the view that Mr CS had not maintained his independence at all times and decided there had been unsatisfactory conduct on the part of Mr CS for contraventions of rr 13.5 and 13.5.3.<sup>5</sup>

[12] As to r 4.4.1 and the lien, after researching the point, Mr CS conceded that, as a barrister, he had no right to claim a solicitor's lien on his own behalf. However, he believes he was able to claim the lien on behalf of Mr DH. The Committee's view was that Mr CS' claim to a lien as the basis for retaining the complainants' files was a "fundamental misunderstanding" on his part. The Committee suggested other avenues he could have used such as returning the files to Mr DH, who did have the right to claim a lien. It also expressed the view that "simply refusing to hand over the files [to the complainants] should not have been an option". The Committee concluded Mr CS' conduct in that regard was unsatisfactory.<sup>6</sup>

[13] Mr CS was ordered to pay to NZLS a fine and costs totalling \$2,000.<sup>7</sup>

#### *Decision on the 2016 Complaint*

[14] The Committee considered the complaint that Mr CS did not know where the files were was a matter regulated by r 11, in that knowing where files were was an aspect of Mr CS' obligation to administer his practice in a manner that ensured his duties to the court and former clients were adhered to, and that the reputation of the legal profession was preserved. As he had been unable to pinpoint the location of files while he was away on holiday, and could not put his hand on them immediately on his

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<sup>5</sup> Standards Committee determination, 20 August 2013 at [73].

<sup>6</sup> At [80].

<sup>7</sup> At [86].

return, the Committee considered there was unsatisfactory conduct on Mr CS' part pursuant to s 12(c) of the Act, and made a determination accordingly.<sup>8</sup>

[15] Mr CS was again ordered to pay a total of \$2,000 to NZLS in fines and costs.<sup>9</sup>

## **Applications for Review**

### *Complainants' review application — the 2012 decision*

[16] The grounds of the complainants' application for review refers to the way in which the Committee addressed their concerns around abuse of process, misleading and deceptive conduct and misleading the Court in breach of his duty of fidelity. The complainants repeat that in the course of the debt recovery proceeding and associated processes under the Act, Mr CS:

- (a) misled, deceived, and gave false evidence to the costs assessor, Committee, LCRO, Court and the complainants in various ways;
- (b) used legal processes for the purpose of causing unnecessary embarrassment, distress or inconvenience to the complainants' reputation, interests or occupation; and
- (c) breached his duty of fidelity to the Court by not being absolutely honest.

[17] The complainants concur with the determinations of unsatisfactory conduct, and want the decision modified so the issues they raise on review can be reconsidered and determined by the Committee, or by this Office, in a way that is consistent with the concerns set out in their complaints.

### *Mr CS' review applications*

#### The 2012 decision

[18] Mr CS' application for review confirms he acted for Mr DH in the litigation. However, other than claiming a lien as a barrister, Mr CS does not accept that the complainants' criticisms of his conduct are valid.

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<sup>8</sup> Standards Committee determination, 13 September 2016 at [23].

<sup>9</sup> At [29].

### The 2016 decision

[19] The essence of Mr CS' application for review, is that the files were always in safe keeping, and that he had made a simple error in not correctly recalling where the files were when he was not in a position to check, and when, in fact, the files were being held by Mr DH's lawyer. He contends the facts do not warrant a finding of unsatisfactory conduct.

### **Review hearing**

[20] The parties attended a review hearing in [City] on 16 August 2017. Further information was requested, provided and considered before this decision was finalised, including the parties' submissions filed on 17 November 2017.

### **Nature and scope of review**

[21] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>10</sup>

... 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.

[22] More recently, the High Court has described a review by this Office in the following way:<sup>11</sup>

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.

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<sup>10</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

<sup>11</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[23] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) consider relevant materials afresh, including the Committee's decision and further information submitted by the parties; and
- (b) provide an independent opinion based on those materials.

### **Review issues**

[24] The main issue on review relates to counsel's independence in litigation. The key question is whether Mr CS could act in litigation in which he had a personal interest without jeopardising the presumption of independence that is fundamental to the effective functioning of the relationship between counsel and the court.

[25] Independence is a theme that permeates various rules that apply to lawyers as officers of the court, including r 13 which imposes a duty on a lawyer acting for a client in litigation to act in the best interests of his client "without regard for the personal interests of the lawyer". That obligation is subject to the overriding duty to the court owed by a lawyer in litigation.

[26] Relevant questions are whether Mr CS complied with:

- (a) rule 13.5 by maintaining his independence in the course of litigation between Mr DH and the complainants; and
- (b) rule 13.5.3 by not acting in a proceeding in which his advice and conduct were in issue in the course of litigation between Mr DH and the complainants.

[27] Acting as counsel in one's own cause is inconsistent with the presumption of independence that counsel generally enjoy. Having taken up his own cause through Mr DH, Mr CS has exposed himself to a miscellany of complaints by the complainants, many of which are invalid and baseless. Nonetheless, all of those have been considered in the course of this review. Of the complaints, review grounds and Committee's determinations about Mr CS, the relevant ones relate to:

- (a) refusing to allow the complainants and their new lawyer to uplift files on the basis he claimed a lien which, as a barrister, he had no right to claim pursuant to r 4.4.1;
- (b) allegedly using legal processes for the purpose of causing unnecessary inconvenience to the complainants' interests in breach of r 2.3;
- (c) allegedly misleading or deceiving others, including the court, in breach of rr 11.1 and 13.1
- (d) being unable to pinpoint the location of files subject to an order for inspection, in breach of r 11.

## **Discussion**

### *Rule 13 and 13.5*

[28] As mentioned above, r 13 is the starting point for consideration of Mr CS' conduct in litigation. Rule 13 says:

The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.

[29] Rule 13.5 says:

A lawyer engaged in litigation for a client must maintain his or her independence at all times.

[30] It is fundamental to the proper conduct of litigation that counsel acting is as independent and free from personal interests as possible. Although Mr CS was acting for Mr DH, the objective of the litigation was to recover Mr CS' fee from the complainants. Mr CS therefore cannot say he acted without regard to his personal interests. The fact that he had a personal interest in the litigation, undermined what should have been a more or less unassailable presumption of independence on the part of counsel.

[31] Mr CS' compromised impartiality allowed the complainants' complaints to gain some traction, and is problematic because of r 13.5 which says that "a lawyer engaged in litigation for a client must maintain his or her independence at all times". Mr CS' self-interest, about which he was completely candid from the commencement of the debt recovery proceeding, undermines any claim he might otherwise have been able to



make to independence. If independence is compromised at the start, there is no independence to maintain.

[32] Mr CS says there was no conflict between his interests and Mr DH's. That may be so, but whether Mr DH chooses to waive compliance with the duty is up to him. The fact is that Mr CS plainly has breached his duty to act for Mr DH without regard to his own self-interest. More importantly, however, by his self-interest, Mr CS has also put himself at risk of being unable to demonstrate independence in the provision of regulated services, which is a fundamental obligation s 4 of the Act imposes on every lawyer.<sup>12</sup>

[33] Mr CS has put himself in a situation where he is unable to satisfactorily demonstrate compliance with rr 13 and 13.5, both of which are practice rules made under the Act that applied to him. On that basis, Mr CS' conduct falls within the definition of unsatisfactory conduct in s 12(c) of the Act. The Committee's determination that Mr CS contravened r 13.5 is confirmed. Without Mr DH having raised any concern, that determination does not encompass any contravention of r 13.

#### *Rule 13.5.3*

[34] The complainants complain that Mr CS was prohibited from acting as counsel and a witness in the proceeding. Mr CS did not act as counsel at the trial when he gave evidence. That is not the issue. The issue has its genesis in comments made by [High Court Judge] in his decision of July 2011.<sup>13</sup> His Honour referred to r 13.5.3, which says:

A lawyer must not act in a proceeding if the conduct or advice of the lawyer ... is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself ...

[35] Mr CS was not acting for himself. He was acting for Mr DH, albeit in furtherance of his own personal interests. Mr CS therefore could not avail himself of the exception to r 13.5.3.

[36] Mr CS says, at least until [High Court Judge] determined the appeal, he continued to act in reliance on a Direction made by [District Court Judge] on 19 January 2011:

There is no reason why Mr CS may not, in these circumstances, appear as Counsel and witness:

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<sup>12</sup> Lawyers and Conveyancers Act 2006, s 4(b).

<sup>13</sup> VN v DH, above n 2.

1. In effect Mr CS is acting for himself (as client) thus he has no conflict;
2. Despite the submissions to the contrary, I do not see that Mr CS is truly giving evidence of a contentious nature, as there is a lack of convincing evidence to this effect.

[37] When it came to the complainants' appeal against [District Court Judge]'s decision not to set aside the summary judgment, however, [High Court Judge] expressed the view that r 13.5.3 precluded Mr CS from appearing in the District Court or the High Court:<sup>14</sup>

[19] The first proposition is that Mr CS' conduct is squarely in issue in this appeal – both as to the quality of the work he did when instructed, and as to the fact that he appeared in the District Court to procure the default judgement and in this court to defend it. Mr CS says his conduct is not at issue because his fee for work has been upheld “finally and conclusively” by the LCRO. He argued it is no longer open to the [complainants] to contest the substance of his work for the bill itself. I do not think that submission can be corrected technically because it will always be open to this court to correct errors of law committed by entities exercising statutory powers. In this case, the [complainants] argue that Mr CS' performance fell below the standard required by the Lawyers and Conveyancers Act. They say for example that he withheld documents from them and told them he had not. Whatever their rights and wrongs, they are clearly allegations relating to Mr CS' conduct.

[20] Even if the foregoing is wrong, it is clear in my view that by appearing in support of the application for default judgement, and for [Mr DH] in this appeal, in circumstances where his appearance is specifically objected to, as a ground of opposition and appeal, Mr CS engaged in conduct now at issue in this appeal in accordance with the first sentence in r 13.5.3. In short, I am clear that appearing in support of this proceeding amounts to “conduct... in the matter before the court” and it is obviously in issue.

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[22] Mr CS is therefore caught by the primary rule in 13.5.3 unless he can fit within its exception. That is only, as [District Court Judge] correctly noted, if he is acting for himself. [District Court Judge] said he effectively was. The problem with that conclusion is that it offends the rule in *Pengelly*. Mr CS is not allowed to act for himself so cannot, in my view, bring himself within the exception to this rule.

[23] I am not sure whether that problem is enough on its own to allow the appeal. I need not express an opinion on that given my conclusion on later matters. But it must be relevant in my overall assessment of the appeal.

[38] This Office sits well below the High Court in the hierarchy of Courts and Tribunals. However, it is “well-established that the Tribunal is not entitled to determine that facts in issue are proved by accepting without inquiry the findings of another court or tribunal as to the existence of those facts”.<sup>15</sup> It is a function of this Office to exercise

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<sup>14</sup> At [19]–[23].

<sup>15</sup> *Deliu v National Standards Committee of the New Zealand Law Society* [2015] NZCA 399, at [34].

powers of review conferred by the Act.<sup>16</sup> The Act “clearly contemplates the Review Officer reaching his or her own view” on the available evidence.<sup>17</sup> In the circumstances, it is necessary to consider whether the evidence supports the determination by the Committee, that Mr CS contravened r 13.5.3, which was clearly a concern to His Honour, and presumably an issue raised and argued by the complainants, who appear to have been self-represented on the appeal.

[39] It is accepted that the complainants:

- (a) wanted to put Mr CS’ conduct at issue in the debt recovery proceeding;
- (b) specifically objected to Mr CS’ appearance on the appeal; and
- (c) included his involvement as counsel as a ground of opposition and appeal.

[40] His Honour’s view was that appearing in support of the appeal was conduct on Mr CS’ part in the matter before the court, and it was obvious to His Honour that Mr CS’ advice and conduct were in issue in the appeal.

[41] It is assumed that when the complainants’ appeal against [District Court Judge]’s refusal to set the judgment aside was called before [High Court Judge], the complainants devoted quite some energy to detailing perceived wrongdoings by Mr CS. It is also clear that the decision of [High Court Judge] on appeal in July 2011 enabled the complainants to put Mr CS’ conduct and advice in issue.

[42] What is not clear is whether Mr CS’ conduct or advice actually were in issue before the appeal hearing. It is one thing to want to put them in issue, and another for them to be in issue.

[43] Mr DH’s opposition to the appeal appears to have been predicated on the interplay between the District Courts Rules and s 161 of the Act, and the contention that the LCRO’s decision was the final word on quantum.

[44] His Honour did not accept those arguments.

[45] It is relevant to note that Mr CS applied for leave to appeal the decision of [High Court Judge]. His Honour declined leave on the basis that Mr CS’ conduct and

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<sup>16</sup> Lawyers and Conveyancers Act, s 192(a).

<sup>17</sup> *Deliu v Hong*, above n 10, at [39]–[41].

advice had not been determinative of the appeal, because His Honour's decision focussed on the interplay between the District Courts Rules and s 161 of the Act.

[46] It is also relevant to note that Mr CS had not been prepared to argue in his own defence when he attended Court on the appeal, and was allowed an overnight adjournment so he could prepare his response to the concerns raised by [High Court Judge] about r 13.5.3.

[47] It can reasonably be assumed that Mr CS attended the appeal prepared to argue the relevant law that was determinative of the appeal, i.e. the interplay between the District Courts Rules and s 161. Those were the matters that were at issue in the complainants' application to set the default judgment aside.

[48] Without a valid defence or counter claim having been filed, Mr CS' conduct and advice were not at issue, except to the extent that [High Court Judge] was troubled by Mr CS having appeared as an advocate in his own cause. For the purposes of professional standards, that issue has been dealt with above.

[49] The High Court's discussion around r 13.5.3 is predicated on the complainants' appeal being successful so they could put Mr CS' conduct and advice at issue in the summary judgment proceeding. In addition to his misgivings about Mr CS acting in the appeal, in reliance on [District Court Judge] having given him leave to act in the District Court, [High Court Judge] refers to what will happen: the complainants will defend themselves against the claim for Mr CS' fees, and they will mount a counter claim based on a lack of competence on Mr CS' part, i.e. his conduct and advice. The complainants would only have been able to take those steps if their appeal succeeded. If it did not, summary judgment stood and could be enforced, without Mr CS' conduct or advice having been in issue.

[50] Conduct regulated by r 13.5.3 is not contingent on future events. Rule 13.5.3 is engaged when the conduct, or advice, of the lawyer acting in the proceeding is in issue in the matter before the court, as it plainly was once the judgment had been set aside. By that stage Mr CS was no longer acting for Mr DH. He had been replaced.

[51] It seems to me that r 13.5.3 calls for an assessment of present facts known to the lawyer, namely:

- (a) what is (not will be or may be) the matter before the Court; and
- (b) what is (not will be or may be) in issue in that matter.

[52] That is not to suggest the rule is applied rigidly. Circumstances will vary. Although the complainants did not have the benefit of legal representation, the evidence, pleadings and other documents lawyers routinely filed in proceedings should generally illuminate which matters are before the Court, what issues of fact and law the court is to determine, and whether the conduct or advice of the lawyer acting is relevant to determination of those issues.

[53] It is not entirely clear from the materials available on review that r 13.5.3 was engaged before the appeal, or that any conduct on Mr CS' part after the appeal was determined contravened r 13.5.3, when conduct of Mr DH's proceeding was handed to other counsel.

[54] While there certainly were problems with Mr CS acting, I am not persuaded that his conduct warrants a determination of unsatisfactory conduct based on a contravention of r 13.5.3. That determination is reversed.

#### *Rule 4.4.1*

[55] The complainants complained that Mr CS had breached r 4.4.1 and claimed a lien he had no right to claim. Mr CS accepts he has no legal right to claim a lien.

[56] The Committee considered Mr CS' failure to hand over the complainants' files was unsatisfactory conduct pursuant to s 12 of the Act. I disagree with the Committee's view for the reasons that follow.

[57] Rule 4.4.1 says:

...upon changing lawyers a client has the right either in person or through the new lawyer to uplift all documents, records, funds, or property held on the client's behalf. The former lawyer must act upon any written request to uplift documents without undue delay subject only to any lien that the former lawyer may claim.

[58] The word "lawyer" in r 4.4.1 is not defined in the Rules, but is defined in the Act as meaning "a person who holds a current practising certificate as a barrister or as a barrister and solicitor".<sup>18</sup> According to that definition, Mr DH and Mr CS were both lawyers. Without looking further than the Act and Rules, r 4.4.1 allows any lawyer, whether in practice as a barrister or as a barrister and solicitor, to claim a lien.

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<sup>18</sup> Lawyers and Conveyancers Act 2006, s 6.

[59] *Atkinson v Pengelly*, which discusses liens and notes that a barrister has no proprietary rights and therefore no right to claim a lien,<sup>19</sup> was decided before the Act came into effect, at a time the Law Practitioners Act 1982 (LPA) was in effect. The LPA had been repealed and replaced by the Act only a few months before Mr CS' retainer ended. Mr CS continued to claim a lien for several months, without any challenge being made to his right to do so, even when the complainants' new lawyer pressed for files.

[60] It was only after the complainants had asserted in their 2012 complaint that a barrister had no legal right to claim a lien, that Mr CS researched the point, and accepted the legal position was as it had been: as a barrister, he had no right to claim a lien.

[61] Although I accept that *Atkinson* remains good law on the point, with the Act coming into effect, there was room for the view that on the face of r 4.4.1 and the definition of lawyer in the Act, a barrister could claim a lien for the purposes of r 4.4.1. The rule permits a lawyer, defined in the Act as "a barrister or a barrister and solicitor", to claim a lien.<sup>20</sup>

[62] That being the case, there are two alternatives. Either Mr CS made an honest mistake or he adopted a position that was arguable based only on a plain reading of the Act and Rules. No one, including the complainants' new lawyer, challenged him at the time.

[63] Mr CS was not acting for the complainants. He did not owe them a continuing duty of loyalty, and he was not obliged to carry out research for them. There is no basis on which to assert that he misled or deceived the complainants, particularly as they had instructed another lawyer to act. It is not clear why Mr CS' position was not put to the test, given there was no reason to believe *Atkinson* was no longer good law.

[64] How Mr CS conducted himself, when the complainants sought to uplift the materials, is far the more significant issue from the perspective of professional standards.

[65] Rule 4.4.1 imposes an obligation to act upon any written request to uplift documents without undue delay. The rule does not prescribe in detail how a lawyer

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<sup>19</sup> *Atkinson v Pengelly* [1995] 3 NZLR 104 (HC).

<sup>20</sup> Lawyers and Conveyancers Act, s 6.

must act on receiving a request to uplift, but a request to uplift cannot simply be ignored.

[66] Mr CS did not ignore the request to uplift. He acted on it promptly by communicating with the complainants and their new lawyer. The new lawyer did not challenge Mr CS' right to claim to a lien. They discussed the documents that could be made available pursuant to the Privacy Act 1993, and although Mr CS' view was that it would have been pointless, he appeared willing enough to provide those.

[67] In the circumstances, I disagree with the Committee's view that Mr CS simply refused to hand over the files to the complainants. That is not a fair characterisation of how he acted upon the request to uplift.

[68] This is an appropriate point at which to exercise my discretion. In my view, the circumstances do not support a determination that there has been unsatisfactory conduct on Mr CS' part. Mr CS did not contravene r 4.4.1 by failing to act promptly in response to a request to uplift. He acted promptly either on an honest, but mistaken, belief that he had a right to claim a lien, or on the basis that he was able to claim a lien pursuant to the Act and Rules.

[69] The unsatisfactory conduct finding relating to Mr CS having claimed a lien for the purposes of r 4.4.1 is therefore reversed.

[70] Further action in relation to that aspect of Mr CS' conduct is not necessary or appropriate.

### *Rule 2.3*

[71] As I understand this aspect of the complaint, it is alleged that Mr CS contravened r 2.3 by abusing processes thereby causing unnecessary inconvenience to the complainants' interests.

[72] Mr CS denies the allegation.

[73] The Committee did not accept the complaint had grounds.

[74] The fact that any proceeds of the litigation were ultimately destined for Mr CS does not of itself connote an abuse of process, but it certainly fuelled the complainants' concerns.

[75] The evidence indicates that Mr CS used legal processes for the proper purpose of recovering an unpaid debt. There is no evidence he used, or knowingly assisted, in using the law legal processes for the purpose of causing unnecessary embarrassment, distress or inconvenience to any person's reputation interests or occupation, including the complainants'.

[76] Mr CS wanted to be paid. He initiated appropriate processes in Mr DH's name, and resources were deployed accordingly.

[77] The evidence does not support a finding that Mr CS contravened rule 2.3.

[78] This aspect of the Committee's decision is confirmed.

*Rule 11.1 and 13.1*

[79] Rule 11.1 prohibited Mr CS from engaging in conduct that misled or deceived anyone on any aspect of his practice, or was likely to mislead or deceive. Rule 13.1 obliged Mr CS to be absolutely honest to the court and not to mislead or deceive it.

[80] The complainants contend Mr CS contravened rr 11.1 and 13.1 by misleading various people in various ways; they refer to themselves, the costs assessor, the Committee and the District Court. Although there is no evidence of any deception on Mr CS' part, and no reason to suspect he was even slightly economical with the truth, his continued involvement in the litigation only served to aggravate the complainants' concerns.

[81] The complainants believe Mr CS wrongly took credit for progress on their behalf that he did not make. They say Mr CS told the costs assessor the complainants had settled their proceeding on particular terms, when he had no actual knowledge of any settlement terms, or whether any settlement had been reached. Mr CS' comment was repeated by the costs assessor in his report to the Committee. The complainants believe it had far reaching consequences, not least of which was the effect they believe it had on the Committee's assessment of a fair and reasonable fee.

[82] Although the complainants cite Mr CS' comment as an example of misleading and deceptive conduct and dishonesty on Mr CS' part, the complainants' representation of the information Mr CS gave the costs assessor is not accurate.

[83] Mr CS told the costs assessor he understood that the complainants had settled their grievance with one of the parties on terms that included them being paid



\$20,000. It would have been clear to the costs assessor at the time that Mr CS was relating his understanding. Mr CS did nothing to suggest he was relating known facts, beyond dispute, as the complainants would infer.

[84] Mr CS says his understanding was based on what he knew of the settlement offers made before his instructions came to an end, and his understanding that settlement had been achieved if only in part.

[85] There is no basis on which to contend that Mr CS misled or deceived the costs assessor. He can convey his knowledge and beliefs. He might be wrong or others might take a different view. That does not mean he misled or deceived. There is therefore no need to consider the allegations that others were also misled, or deceived, based on repetition of that understanding, even if it was incorrect or at odds with the complainant's views.

[86] A careful review of the evidence discloses no basis on which to say that Mr CS was less than completely honest, or that he misled or deceived anyone including the court, about anything. In particular, it was entirely clear to everyone involved, at all times, that it was Mr CS' fee that was central to Mr DH's proceeding.

[87] That aspect of the Committee's decision is confirmed.

#### *Rule 11*

[88] The complainants complain that in 2016 Mr CS deliberately withheld documents in the face of a Court order directing the complainants, as defendants in the debt recovery proceeding, to inspect the files that Mr CS had refused to hand over. They say Mr CS ignored the Committee's direction to hand the files over to his instructing solicitor.

[89] The first point is that the Committee made no such direction.

[90] Further, the complainants approached Mr DH's lawyer seeking to inspect documents pursuant to an order made by the Court in mid-January 2016. At that stage, the files that had begun life at Mr CS' office, had travelled elsewhere and perhaps returned before being sent away again. The files were only active in the sense that they were evidence in the debt recovery proceeding.

[91] Mr CS was away overseas in mid-January 2016 and was unable to check where the files were. He accepted what he was told by Mr DH's lawyer. Mr DH's

lawyer apparently did not recall that he had the files, and told the complainants the files were at Mr CS' office, when in fact they were not.

[92] Based on Mr DH's lawyer's comment, the complaint was filed.

[93] The Committee ascertained that Mr CS had not kept the files and did not know quite where they were. The Committee considered that Mr CS' inability to pinpoint the location of the files when the complainants wanted to inspect them constituted very minor unsatisfactory conduct.

[94] I agree that not keeping track of files is not entirely satisfactory, but Mr CS away on holiday and was not acting for Mr DH at that stage. The files were, quite properly, with the lawyer who was acting for Mr DH in the proceeding. When Mr CS returned to work, it seems he diligently searched his office, but as the files were not there he would never have been able to find them.

[95] To elevate the particular facts to a point where they form the basis of a determination of unsatisfactory conduct on Mr CS' part seems unduly harsh. In the circumstances a disciplinary response under the Act is not necessary or appropriate.

[96] The determination that Mr CS contravened r 11 and his conduct was unsatisfactory pursuant to s 12 of the Act, is reversed. As there is no statutory basis for the orders the Committee made pursuant to s 156 as a consequence of that determination, the orders made in 2016 requiring Mr CS to pay a fine and costs fall away.

## **Summary**

[97] After carefully considering all of the materials available on review, and having heard from the parties, there is a basis for a determination that there has been unsatisfactory conduct on the part of Mr CS for a contravention of r 13.5. Mr CS acted for Mr DH in litigation in which Mr CS had a personal interest, he is unable to demonstrate that he began from a neutral position, and therefore cannot show that he maintained his independence in that litigation.

[98] A disciplinary response to the balance of the complainants' complaints is not necessary or appropriate.

### Consequential orders — s 156

[99] Section 156 provides for a range of orders to be made in response to a determination of unsatisfactory conduct, only some of which are in the nature of penalty. The functions of penalty in the disciplinary context are referred to in *Wislang v Medical Council of New Zealand* as:<sup>21</sup>

- (a) punishing the practitioner;
- (b) a deterrent to other practitioners; and
- (c) to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[100] The starting points for penalty are the gravity of the misconduct and culpability of the practitioner, with the various mitigating and aggravating features being taken into account when fixing penalty. Acknowledgement of error and acceptance of responsibility are matters for mitigation.

[101] It is a serious matter for a lawyer to breach a duty owed to the court in litigation. However, Mr CS responsibly accepted at the review hearing that the criticisms levelled against him by the complainants were at least in part a consequence of his decision to act for Mr DH in the litigation to recover his fee.

[102] Mr CS' involvement in the litigation as counsel for Mr DH was completely avoidable, and driven solely by a desire to keep down costs. The litigation stretched over seven years. However, Mr CS was only instructed as counsel for the first two-years, and the s 161 stay was in effect for a large part of that time. Although the complainants' case is that his conduct was egregious, they have overstated the position by a considerable margin.

[103] The functions of penalty in a disciplinary context are met by the imposition of a censure and fine. Both are punitive, and have general and specific deterrent effect. Both reflect the public's and the profession's condemnation, or opprobrium, of the practitioner's conduct.

[104] A combination of fine and censure is appropriate because:

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<sup>21</sup> *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [21].

- (a) Neutrality and independence are fundamental to effective representation of a client before any court. Courts must be able to trust the lawyer not to be influenced by self-interest.
- (b) A purely financial consequence for breaching a duty intended to keep lawyer self-interest out of litigation could be seen as no more than a “licensing fee”.

[105] The maximum fine available under the Act is \$15,000. A fine of \$2,000 for a contravention of r 13.5, in conjunction with a censure, fulfil the three functions identified in *Wislang*; punishment, deterrence and the reflection of public and professional opprobrium. The fine is well short of the maximum. It is a justifiable and justified amount.

[106] Costs are not a penalty. The costs order of \$1,000 made by the Committee pursuant to s 156(1)(n) in relation to the contravention of r 13.5 is confirmed.

### **Costs on Review**

[107] Section 210 of the Act gives a LCRO discretion to order a practitioner to pay costs on review. The LCRO’s Costs Orders Guidelines assist in explaining the circumstances in which costs are likely to be ordered.

[108] Mr CS has been successful in part on review. However, it was Mr CS’ decision to act for Mr DH. His involvement in the proceeding allowed the complaints to gain far more traction than they should have.

[109] In the circumstances, it is just to order Mr CS to contribute to the costs of this review, which are otherwise borne by all New Zealand lawyers.

[110] Mr CS is ordered to pay the Guideline amount of \$1,600 for a review of average complexity where the parties attended a hearing in person.

### **Decision**

[111] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

- (a) the determination that Mr CS contravened r 13.5 is confirmed; and
- (b) the following determinations are reversed:
  - (i) that Mr CS contravened rr 11 and 13.5.3; and

- (ii) relating to r 4.4.1 and the lien.

[112] Pursuant to s 211(1)(b) and 156(i) of the Lawyers and Conveyancers Act 2006 Mr CS is:

- (a) Censured pursuant to s 156(1)(b);
- (b) Ordered to:
  - (i) pay a fine to NZLS of \$2,000 pursuant to s 156(1)(i) by 22 December 2017; and
  - (ii) pay costs to NZLS of \$1,000 pursuant to s 156(1)(n).

[113] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 Mr CS is ordered to pay costs on review of \$1,600 to NZLS by 22 December 2017.

[114] Pursuant to s 215(2) of the Lawyers and Conveyancers Act 2006 orders for costs may be enforced in the District Court.

**DATED** this 23<sup>rd</sup> day of November 2017.

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**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 CS as the Applicant/Respondent  
Mr VN as the Applicant/Respondent  
Mr PR as the Applicant/Respondent  
Mr ZW as the Applicant/Respondent  
[Area] Standards Committee  
The New Zealand Law Society