LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2023] NZLCRO 091

Ref: LCRO 14/2023

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**BW and COMPANY A LIMITED** Applicant
AND	**PK and OJ** Respondents

DECISION

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

Introduction

[1] In February 2022, Mr PK and Mr OJ made a complaint to the New Zealand Law Society Lawyers Complaints Service (NZLS) about the professional conduct of Mr BW. The complaint was completed and filed on their behalf by their lawyers, Law Firm A.[1]

[2] The complaint form referred to Mr BW's incorporated law firm, Company A Limited (Company A). The further particulars attached to the complaint form referred to Company A as an additional legal person against whom the complaint was made.

[1] Until this point, the complaint has been mistakenly intituled with the name of the lawyer who had file responsibility for Mr PK and Mr OJ; initially Mr MI and later Mr DT. The mistake has been corrected in this decision.

[3] The NZLS apparently did not process the complaint against Company A. The Standards Committee decision issued in due course therefore made no reference to the company and the orders it made were solely against Mr BW. Consequently, Mr BW is the sole applicant for review.[2]

[4] The parties have nevertheless intituled their submissions on the basis that the complaint was made against both Mr BW and Company A and that both of them are parties to this review. I proceed on the same basis. Although I make no further reference in this decision to the incorporated firm, any reference to Mr BW should be read as referring to both Mr BW and Company A unless the context requires otherwise.

[5] Mr PK and Mr OJ are the complainants in the original complaint and the respondents to the application for review. Mr BW is the respondent to the original complaint and the applicant in this review. This decision also refers to various entities as "respondents" in Court proceedings. To avoid confusion and for brevity, I will refer to Mr PK and Mr OJ as "the complainants" and to Mr BW (and his firm) as Mr BW.

[6] The complaint was referred to the [Area] Standards Committee [X] (the Committee). The Committee found that Mr BW had breached each of rr 6.1, 6.1.2 and 6.1.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) and determined that Mr BW had engaged in unsatisfactory conduct by reason of those breaches. It imposed a fine of $6,000 and $500 costs.

[7] Mr BW seeks review of that decision.

Background

[8] The complaint related to Mr BW's conduct in acting for Company B Limited (Company B). Company B operated a [business] in Region A.

[9] The complainants were two of four directors of Company B. The other two directors were Mr TE and Mr HT.

[10] The complainants controlled a corporate shareholder holding [a majority] of the shares in Company B. The shareholder was initially Company C Ltd (Company C).

[11] There was a dispute between the shareholders, which may not have been resolved, as to whether Company C's shares have been validly transferred to another company controlled by the complainants, Company E Limited (Company E). That

[2] Standards Committee Decision (20 December 2022).

dispute is not relevant to this decision. The complainants held a [majority] shareholding interest in Company B through either Company C or Company E.[3]

[12] Mr TE and Mr HT controlled the other shareholder, Company D Limited (Company D), which held the [minority] of the shares.

[13] Company C and Company D were parties to a shareholders' agreement [redacted] relating to Company B.[4] Mr TE was also a party to the shareholders' agreement.

[14] The complainants were appointed by Company C as directors of Company B pursuant to the shareholders' agreement. Mr TE and Mr HT were appointed by Company D. I will refer to them as "the Company D directors".

[15] Company B engaged Mr BW to act for it regarding various matters in October 2019. The engagement letter is a "general" retainer and is addressed for the attention of Mr HT.[5]

[16] There was no issue at Company B board level at the time regarding Mr BW's representation of Company B under the general retainer between October 2019 and at least July 2021 if not December 2021.

[17] I decline to consider submissions regarding any advisory role for Company B Mr BW may have had before that date. The information was not before the Committee and cannot be relevant to his role in relation to the events that are the subject of this review.[6]

[18] In [redacted], [a Government agency (the Agency)] conducted an audit of Company B's Region A [business].

[19] Mr TE had been the manager of the Region A [business] [redacted]. In [redacted], he ceased managing the [business].

[20] Also in [redacted], representatives of the complainants' shareholding entity sought to exercise rights of inspection and audit provided for in the shareholders' agreement[7] and were allegedly prevented from doing so.

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[3] [redacted].
[4] Applicant's Exhibit "A".
[5] Exhibit BW.01.
[6] See my further comments at [115]–[121].
[7] Clauses 7.3 and 7.4 of the shareholders' agreement.

[21] According to the Company D directors, the complainants or their shareholding entity sought to exert management control of the [business] allegedly in breach of the shareholders' agreement.

[22] In [redacted], the Agency began investigating allegations that Company B had [engaged in an allegedly unlawful business practice (the business practice)].

[23] Between [redacted], the Agency exercised a range of search warrants and production orders (warrants) under the Search and Surveillance Act 2012[8] (SSA12) on the premises and records of Company B, Mr TE, Mr HT and three companies associated with or controlled by Mr TE and Mr HT.

[24] Those companies are referred to in the materials as the "Group X" companies.[9] For the purposes of the complaint and this review, Mr TE, Mr HT and the three Group X companies are "the Group X".[10]

[25] The exercise of the warrants, which were also executed against another company associated with Mr HT and an accounting firm, resulted in the Agency seizing a large volume of information. This is referred to as "data" in the correspondence.[11]

[26] In [redacted], Company C and Company E issued High Court proceedings under the Companies Act 1993 against Company D and the Company D directors (the Prejudice Proceedings).[12] In [redacted], Company D counterclaimed.[13]

[27] Each shareholding company alleged oppressive, unfairly discriminatory or unfairly prejudicial conduct by the other, including breach by the other of the shareholders' agreement. Each shareholding company sought relief under s 174 of the Companies Act as well as procedural relief and damages for breach of the shareholders' agreement.

[28] Among the allegations made by Company C and Company E in the Prejudice Proceedings was an allegation against Mr TE of permitting Company B to [engage in the business practice].[14]

[29] The fact, legitimacy and legal implications of [the business practice] have been and continue to be the subject of various legal processes.

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[8] Search warrants, remote access search warrants and production orders.
[9] Company F Limited, Company G Limited and Company H Limited.
[10] There are other companies in the corporate Group X that are not relevant to this decision.
[11] There were 12 terabytes of data, according to Mr BW's lawyers' submissions.
[12] Exhibit PK-1.
[13] Exhibit PK-2.
[14] [redacted]

[30] Other allegations were made against Mr TE and Mr HT, personally, of failures to meet duties owed either to Company B or to the complainants as directors of Company B [redacted].[15]

[31] The background [redacted] ultimately but indirectly to the complaint against Mr BW was that although Mr HT and Mr TE held a [minority] shareholding in Company B through Company D and although Mr TE managed Company B's business, Company B itself was a commercial competitor of the three companies in the Group X.

[32] Among the allegations made by Company D in its counterclaim was an allegation that the complainants either directly or indirectly complained to the Agency that Company B was carrying out [the business practice].[16]

[33] Company B itself was not a party to the Prejudice Proceedings.

[34] From November 2020 onwards, Mr BW engaged with the Agency on behalf of the three Group X companies about the maintenance of their legal rights of privilege in relevant data seized by the Agency under the warrants. He engaged barristers, Mr NX and Ms KC, for that purpose.

[35] On [redacted], [redacted] Company B ceased trading.

[36] On 4 June 2021, Mr BW contacted the Agency for the first time about the assertion of privilege by Company B and Mr TE but apparently advised he was awaiting instructions to act for both of them.[17]

[37] On 9 July 2021, a meeting was attended in person or by teleconference by the complainants, the Company D directors and Mr BW. The principal outcome of the meeting was agreement on terms for resolving the Prejudice Proceedings. Those terms are confidential to the parties.

[38] One of the outcomes of the 9 July 2021 meeting was that it was agreed that Company B would maintain its legal rights of privilege over relevant Company B data seized by the Agency. Instructions to that effect were given to Mr BW by Mr HT, Mr TE and Mr OJ.

[39] On 13 July 2021, the parties to the Prejudice Proceedings signed a settlement agreement reflecting the terms agreed on 9 July 2021. [redacted][18] There is ongoing

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[15] [redacted].
[16] Exhibit PK-2 at [86].
[17] Exhibit PK-6 at [9(a)].
[18] Exhibit PK-3.

debate about whether the settlement agreement resolved all matters in dispute in the Prejudice Proceedings.

[40] One of the terms of the settlement agreement was apparently that Mr BW would act for Company B in relation to the process of asserting privilege in the relevant seized data. This is asserted on behalf of Mr BW in his lawyers' submissions and is not disputed in the submissions for the complainants.

[41] Mr BW as solicitor for Company B instructed the barristers already advising the three Group X companies, Mr NX and Ms KC, for that purpose.

[42] Mr BW continued to correspond with the Agency's lawyers about the process of identifying and distinguishing between privileged data and non-privileged data and segregating one from the other. In evidence in relation to Company B are:

(a) a letter dated 12 July 2021 from Mr BW to the Agency;[19]

(b) a letter dated 16 July 2021 from the Agency's lawyers to Mr BW and the two barristers he had instructed;[20]

(c) an email dated 27 August 2021 from Mr BW to the Agency's lawyers;[21]

(d) an email dated 31 August 2021 from the Agency's lawyers responding to the 27 August 2021 email from Mr BW;[22]

(e) an email dated 1 October 2021 from Mr BW to the Agency's lawyers;[23]

(f) an email dated 6 October 2021 from Mr BW to the Agency's lawyers;[24]

(g) an email dated 10 December 2021 from Mr BW to the Agency's lawyers.[25]

[43] Mr BW's correspondence with the Agency between November 2020 and 12 July 2021 is not in evidence. There is also reference to correspondence between the Agency and the barristers that is also not in evidence.

[44] In general terms, there was no dispute between the Agency and the entities being investigated about the propriety of segregating privileged data from non-privileged data and the need to do so. The SSA12 expressly recognises and preserves various

[19] Exhibit PK-14.
[20] Exhibit PK-4.
[21] Exhibit PK-5.
[22] Exhibit PK-5.
[23] Exhibit BW.03.
[24] Exhibit BW.04.
[25] Exhibit BW.05.

categories of legal privilege[26] and requires the warrant-holder to advise persons searched of their rights in that regard when warrants are exercised.

[45] The categories are legal professional privilege,[27] privilege for preparatory materials for proceedings,[28] privilege for settlement negotiations and mediation[29] and privilege against self-incrimination.[30]

[46] The warrant holder is precluded from searching the seized data until claims of privilege have been resolved.[31]

[47] The discussion and then debate between Mr BW, the barristers and the Agency was about the mechanics of achieving the desired outcome, partly because of the sheer volume of data and the technological difficulties and cost involved in searching it.

[48] A technical expert gave an estimate of up to 50 calendar days of machine searching time to search computer hard drives using three searching machines in parallel at an estimated minimum cost of about $40,000.[32] There is subsequent reference in submissions to a total cost of $70,000. There was other material shared via Sharelink and by USB stick.

[49] The parties disagreed about various aspects of the required process and how the seized data related to potential offences under the [redacted] Act. In particular, the Agency wanted the respondent parties to specify search terms so that the machines would know what to search for.

[50] Mr BW advanced the view that the Agency needed to apply to the Court to get orders under the SSA12 regulating the process. The Agency advanced the view that it was the responsibility of the respondent parties to apply to the Court for directions or relief under s 147(b) of the Act.

[51] In December 2021, the Agency filed an originating application in the [Area A] District Court pursuant to the SSA12 [redacted] regarding the matter of segregating privileged from non-privileged material.[33] The respondents were Company B and all the Group X entities.

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[26] Section 136 SSA12.
[27] Section 53(5) of the Evidence Act 2006.
[28] Section 56 of the Evidence Act 2006.
[29] Section 57 of the Evidence Act 2006.
[30] Section 60 of the Evidence Act 2006, subject to s 138 of the SSA12.
[31] Section 146(c) SSA12.
[32] Exhibit BW-02.
[33] Exhibit PK-6.

[52] The essence of the application was to impose on the respondent parties the responsibility and cost of identifying and isolating the material in which they claimed privilege and to have the Court resolve any dispute should the Agency not accept any claim of privilege.

[53] The application named Mr NX and Ms KC as counsel for the respondent parties but did not name Mr BW as the solicitor acting. It appears that the Agency purported to serve the respondent parties by sending the application by email to the barristers.

[54] Mr BW considered the application to be procedurally defective for numerous reasons and advised the Agency accordingly by letter on 10 December 2021.[34] The Agency withdrew the application.

[55] I have no information as to when the application was withdrawn but it appears to be undisputed that it was withdrawn before any of the respondent parties had to respond to it and probably before service was effected.

[56] The July-December 2021 lawyers' correspondence that is in evidence has the look of a "cat-and-mouse game" over the procedural burden, cost and focus of the Agency investigatory process. There is nothing unusual in that.

[57] Also in December 2021 or no later than that, the entities named as respondents in the Agency's Court application, including Company B, notified their respective insurers. In such circumstances, an insurer will normally first decide whether or not it is provisionally on risk and then appoint its own lawyers to handle the matter from a legal perspective.

[58] On 16 December 2021, the complainants' lawyers, Law Firm A, wrote to Mr BW twice by email.[35] In the first email, Ms SF stated:

> Dear BW,
>
> I am writing to you further to my instructions from PK and OJ.
>
> PK and OJ have instructed me that they wish to withdraw their consent for you to act on behalf of Company B Limited (**Company B**) in relation to the Agency matter under the Search and Surveillance Act currently before the [Area A] District Court.
>
> The reason for this is because of the conflict of interest in light of the fact that you are also acting for all the other defendants [referring to each of them by name] who are owned and controlled by HT and TE.

[34] Exhibit BW.05.
[35] Exhibit PK-8.

> PK and OJ are of the view that Company B needs to secure independent legal representation to protects (sic) Company B's interests and will be moving rapidly to agree an independent lawyer with HT and TE to represent Company B in this matter. We are in the process of sending them a list of lawyers that they (sic) can be put to HT and TE.
>
> We have also separately informed the Agency of this forthcoming change in representation.
>
> In the interim PK and OJ have instructed that no correspondence is to be sent to the Agency on behalf of Company B unless it has been reviewed and approved by me.
>
> Regards
>
> SF

[59] Although the email did not refer to Mr NX and Ms KC, it was copied to them and it was implicit that the claimed lack of independence related to their roles as counsel as well as Mr BW's role, or presumed role, as solicitor for Company B.

[60] In the second email,[36] also copied to Mr NX and Ms KC, Ms SF referred to two other barristers as "lawyers for Company B for your clients' consideration, who have relevant expertise". They were JB and GA KC. The email concluded:

> Please let us know which of these lawyers is acceptable to your client as soon as possible so that we can make progress towards confirming the alternative representation for Company B and proceed to update the Agency's lawyers and the Court.

[61] Also on 16 December 2021, there was an email exchange between Mr BW and Ms SF, with both emails being copied to the two barristers.[37] Mr BW wrote:

> Hello SF, who have the Company B's Insurers appointed to represent Company B in this matter, please?

[62] Ms SF replied:

> I am instructed as follows:
>
> No appointment by Insurer. OJ spoke last week with NQ, the insurance broker from TJ, who advised that JMN would respond to the policy if it was triggered by a prosecution. At this stage not a prosecution so we were to discuss again mid-January.

[63] On the same date, Ms SF advised the Agency's lawyers that Mr BW and the barristers were no longer acting for Company B on the basis that her clients had

[36] Exhibit PK-8.
[37] Exhibit BW.07.

withdrawn their consent for him to do so and that her clients were "…working urgently to confirm separate independent representation for Company B with the other directors".[38]

[64] The Agency filed a fresh originating application under the SSA12, this time in the [Area B] District Court.[39] [redacted]. The application was served on Company B at its registered office on 10 or 11 February 2022. Mr HT hand-delivered a copy of the application to Mr BW's office.

[65] On Monday 14 February 2022 at 3.09pm, Mr BW provided copies of the Court documents by email contemporaneously to the complainants, the Company D directors, the two barristers and Law Firm A.[40] In doing so, he stated:

> We respectfully request Company B's insurer's urgent advice as to what steps they will take in respect of these proceedings, and in particular, whether they will engage counsel to represent Company B.

[66] I infer that this was sent as a broadcast email on the assumption that the Company B directors would re-engage with Company B's insurers. It seems implicit that Mr BW himself had received no instructions to do so before sending the email.

[67] Mr BW then sent a second email to the same recipients the same day, this one at 8:58 pm, attaching a letter. The covering email stated:

> Hello DT, HKS[41] advised today that the [Area] Court has allocated this number to the present proceedings: [redacted]
>
> They also advised that a first call date has yet to be allocated.
>
> Have Company B's Insurers determined that they ought to involve themselves in the above, please? And if so, whether they are appointing representation for Company B in respect of the above proceedings?
>
> (We have today copied Group X's insurer's solicitors the present, [Area B] Court, proceedings, and they have since been in dialogue with NX, barrister, who advises that those solicitors are looking to come back to him within the next 48 hours).
>
> If Company B's insurers are not involving themselves at this stage, then please see the attached letter, regarding Company B's representation.

[68] I observe that it is evident from Mr BW's second paragraph that he was not acting for the Group X entities in relation to the Agency Court application and that the barristers were being instructed by the solicitors for Group X's insurers. This rather important fact seems to have been overlooked throughout this matter.

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[38] Exhibit BW.08.
[39] Exhibit PK-9.
[40] Exhibit BW.09, being the first of several emails attaching documents.
[41] The Agency's external lawyers.

[69] The letter he attached[42] was addressed to Law Firm A for the attention of Mr DT and read as follows:

> With reference to your firm's email of 16 December last, and as noted in that email, you act for PK interests ("PKs"). You do not act for Company B in any capacity.
>
> It is not open to you – or PKs – to unilaterally terminate my firm's appointment as representing Company B, as you effectively seek to do by claiming a right of veto over any correspondence. I was nominated to represent Company B by Company D and that was endorsed/approved/sanctioned by OJ on behalf of the PK side of Company B.
>
> Unless the directors/shareholders of Company B get together to change things, the status quo – my firm being appointee – stands, as far as I can see. If the Company D and PK sides both agree to new representation for Company B vis-à-vis the Agency, we will of course comply.
>
> As to the Company D-appointed directors of Company B, it will be a pre-condition to agreeing to Company B engaging another firm of solicitors (which will not be Law Firm A), to engage another barrister, that – to protect their interests in Company B – neither solicitor nor barrister does anything at all vis-à-vis the Agency/HKS/the Court on behalf of Company B without my prior approval.
>
> As regards Company B's insurance, and your firm's third email of 16 December and your email of 25 January 2022[43], saying that Company B's policy does not respond unless there is an actual prosecution, we note that the Group X's insurers have already engaged counsel to review matters to date, even though they so far just relate to the claims of privilege in relation to the seized material.
>
> There is no conflict of interest in our acting as solicitors for the Group X-controlled entities as well as for Company B, in relation to the Agency. There would only be a potential conflict of interest if the Group X side had caused prejudice to Company B vis-à-vis the Agency, unsanctioned by PKs, and not covered by Company B's insurance.
>
> We view the claims of privilege to be entirely non-contentious – it is in the interests of both sides of Company B to push back against the Agency/HKS in relation to this preliminary aspect of matters, which has now been successfully achieved for over 15 months.

[70] In the fifth paragraph, he recorded that Group X's insurers had engaged counsel "to review matters to date, even though they so far just relate to the claims of privilege in relation to the seized material".

[71] This seems to indicate that Mr BW considered he continued to have a watching brief for the Group X entities generally "in relation to the Agency" although not in respect of the Agency's Court application relating to the claim of privilege.

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[42] Exhibit PK-10.
[43] This email is not in evidence.

[72] In his sixth paragraph, Mr BW stated his opinion as to the circumstances in which "a potential conflict of interest" could arise as between the Group X entities and Company B. I will return to the matter later in this decision.

[73] Law Firm A replied to Mr BW by letter the following day, 15 February 2022,[44] relevantly as follows:

> 1. I am instructed to write to you on behalf of Company C Limited and Company E limited, the Party A who are or were the majority shareholders of Company B Limited).
>
> …
>
> 3. Our clients cannot agree with the assertions in your letter, given our previous email correspondence to you on 16 December 2021 at 11:52am where we already indicated PK and OJ's withdrawal of their consent for you to act for Company B due to conflict of interest. We note we also … provided you the names and contact details of barristers whom we suggested were qualified to act for Company B as counsel, independent of yourself and of Law Firm A.
>
> …
>
> 5. Our instructions are that the Party A would accept an appointment of legal counsel on behalf of Company B from the Company B insurers, if that was offered. We are currently waiting to hear from the insurers. However, in the interim, Company A is conflicted and cannot act for Company B as the Party A have withdrawn your authorisation, as the majority shareholders of Company B. The barristers you have instructed are also conflicted, for the reasons set out below.
>
> 6. Company B will need to procure alternative independent legal counsel. The fact that the Party A and the Group X entities were opposing parties in a formal High Court proceedings (sic) in [redacted] for shareholder prejudice concerning Company B was already sufficient to disqualify Company A from acting for both Company B and the Group X entities. This also applies in relation to barristers NX and KC as they acted for the Group X entities in that same dispute and would have a similar conflict of interest.
>
> 7. This matter is urgent for resolution given that the first call for the Agency District Court proceedings at the [Area B] District Court will likely be scheduled within the week with the first appearance the week after.
>
> 8. We are instructed to demand that the four Company B directors **meet no later than by 3pm Friday 18 February 2022** to pass a resolution appointing independent legal counsel for Company B in relation to this proceeding. …
>
> 9. In the event Company B fails to appoint alternative independent counsel, the Party A will have no other option but to apply as interested third parties for injunction orders constraining Company A (and the barristers you have instructed) from acting for Company B …. The primary ground in support is that a failure to prevent Company A (and the barristers you have instructed) from acting and Company B making a timely appointment of alternative counsel will prejudice the conduct of the proceeding going forward on account of your conflict of interest.

[44] Exhibit PK-11, BW-12.

…

[74] Mr BW responded by email on 17 February 2022 at 3.07pm[45], as follows:

> Following discussions between NX and Group X's insurer's lawyers (Law Firm C), I understand that so far the latter have indicated they have seen nothing which prejudices Group X's cover in respect of the Agency matter. Also, that the insurer (SYZ) would want their appointee to represent the Group X (assuming cover is available).
>
> It seems likely that JMN will shortly be reaching a definitive conclusion as regards Company B's cover extending or not extending to the Agency matter. If the outcome is positive, I further understand that, given the congruity of interests of the Respondents vis-à-vis the Agency, the insurance companies will talk amongst themselves and likely appoint the one representation for all the Respondents, including Company B.
>
> Also it seems likely that [it] will be some time before the [Area B] District Court (sic) appoints a first hearing date for the Agency matter, meaning there is no urgency over the Company B representation issue.
>
> So it seems reasonable, just at this stage, for matters to be left to lie until the respective insurers have concluded their deliberations on the availability or otherwise of cover; and then (assuming cover is available from both SYZ and JMN) on who the insurers wish to represent the Respondents – as above, it seems likely that they will want to have the one firm represent all the Respondents. Meaning, there is no need to have a teleconference this Friday regarding the issue of representation for Company B, there is just a need to encourage the insurers to make their final assessments of coverage and representation as promptly as possible.
>
> You are welcome to discuss this with NX, who has had the most recent discussions with SYZ's lawyers, and who has been copied in to the JMN interim view per the TJ' email of yesterday.[46]

[75] The riposte from Law Firm A was at 6:56 pm that evening,[47] in the following terms:

> I am in receipt of your email response below. I have written instructions from OJ and I have just spoken to PK.
>
> You are conflicted in acting for Company B, as set out in my letter of 15 February 2022, and you are conflicted in advising on your own conflict.
>
> It is clear from our dealings with JMN that it will take some time to come to a decision on cover. In the interim, my instructions have not changed. If you do not remove yourself from acting for Company B, along with the barristers you have instructed, we will [be] making an application for an injunction constraining (sic) you as the solicitor on the record for Company B, and the barristers you have instructed.
>
> This matter is urgent given that the first call for the Agency proceedings in [Area B] will be next week.

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[45] Exhibit BW.13.
[46] The "TJ email of yesterday" is not in evidence. I infer the reference is to insurance brokers, TJ.
[47] Exhibit BW.14.

> PK and OJ have already invited your clients Messers (sic) HT and TE to video conference at 12.30pm, Friday. If they are not on that call (given that there has been no acceptance of the invitation) and we get no confirmation of your withdrawal as the solicitor on the file nor of the barristers you have instructed to act for Company B, then we will file court papers ASAP and we will seek costs.
>
> I decline your invitation to discuss this matter with NX as he is also conflicted in acting for Company B, given the clear withdrawal of authorisation from the Party A parties, who are or were the majority shareholders of Company B.

[76] I note in passing that Mr BW was not "the solicitor on the record for Company B" at the time and neither were the barristers. No decision on representation of Company B in the Court application had been made and that decision was up to Company B's insurer, unless it declined cover. I infer that Ms SF was referring to the fact that Mr BW and the barristers had been representing Company B in the correspondence with the Agency since July 2021.

[77] I note also that Ms SF did not respond to Mr BW's comment about "the congruity of interests of the Respondents vis-à-vis the Agency".

[78] Mr BW replied at 12:21 pm the following day, 18 February 2022[48], relevantly:

> Would you please advise by return what you understand to be the first call date and time at [Area B] next week.
>
> Our views differ as regards my firm and NX being conflicted (not least because the PK side agreed to our acting knowing we acted for the Company D side in relation to the now settled proceedings), but if we are conflicted, it follows Law Firm A must also be conflicted. The historic matters you refer to have been fully and finally resolved.
>
> As far as Company B's representation is concerned the way to resolve the current dispute, as we have said, is for the insurers between them in due course to determine who Company B's instructing solicitors should be and who its counsel. We do not share your concern that it will be some time before the insurers have made a decision on cover. The indication from SYZ's solicitor is that it will make a decision by early next week.
>
> Nevertheless to avoid an unnecessary short-term escalation of the dispute we suggest the following as a set of reasonable steps for Company B to take in the interim:
>
> – Company B appoints JB as counsel to appear at the first call of the Agency's application, provided that JMN has not accepted cover and appointed its own solicitor and counsel in the meantime
>
> – Company B appoints another solicitor to instruct JB but only for that first call
>
> – Company B's instructions for that first call are that the Agency's applications will be opposed
>
> – Company B pursues JMN for cover urgently

[48] Exhibit BW.15.

> – If JMN accepts cover Company B will be represented by JMN's nominated lawyers and counsel
>
> – If JMN does not accept cover the above arrangements will be reviewed between us.
>
> We trust that the above is likewise seen by you and your clients as a reasonable way to proceed (not least because it resolves any apparent conflict on the part of Company B representation), and so a meeting is not needed between the directors this afternoon, but it is prudent for us to reserve our clients' rights if the foregoing is rejected.
>
> With respect, your assertion that your client has grounds for seeking an interim injunction in relation to these matters is rejected. My clients reserve their rights entirely as regards anything past, present or future in relation to all Agency matters vis-à-vis Company B which is unfairly prejudicial to them.

[79] At 3:29 pm that day, Mr BW emailed Ms SF again,[49] expanding on the first paragraph of his previous email. He questioned the factual basis for her assertion that the first call of the Agency proceedings was imminent and consequently the veracity of that assertion.

[80] He referred to contradicting advice he had received that day from the Agency's lawyers (in addition to the advice he had received and communicated four days earlier) and requested an apology "to all those misled by your making that statement". He stated that:

> It also calls into question the rationale for the rest of your email last night, and everything your client have proposed since then - if the first call date is weeks away, there is no urgency whatsoever, and it is even more likely that the insurers will have made their determinations on cover and representation well before the first call date.

[81] It is indeed objectively puzzling as to how Ms SF could have had an understanding that the first call date could have been as early as she stated it to be. The originating application was on notice. The District Court Rules require any party wishing to oppose such an application to file a notice of opposition, supported by affidavit, within 10 working days of service.[50]

[82] The timeframe for filing notices of opposition had yet to expire at the time of the 14-18 February 2022 correspondence. It therefore seems unlikely that any call date could yet have been allocated and any such date could not have been the following week.

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[49] Exhibit BW.16.
[50] Rules 20.17, 7.17 and 7.18 of the District Court Rules 2014.

[83] Ms SF responded at 4.14pm[51] to Mr BW's email of 12:21 pm (18 February 2022). She stated:

> I confirm receipt of your email but regret to note that the list of steps you suggested cannot be agreed by the majority shareholders of Company B.
>
> It has become clear from recent correspondence that none of your suggestions could be agreed upon. You continue to act without instructions and attempt to preserve a status quo where your office cannot discharge the obligations owed to more than one client. If the conflict was not clear to you from the onset, then the commencement of the District Court proceedings no doubt crystallised the opposing interests between the Party A parties vis-à-vis the Group X parties.
>
> I have never suggested that Law Firm A could or would ever step in as Company B's solicitor as I am clearly aware of the more than negligible risk of taking any role with conflicting duties. Indeed I expressly stated this in my letter of 15 February 2022 where I indicated that any counsel for Company B would need to be "independent of yourself and of Law Firm A" and my previous emails of 16 December 2021 where I referred to the need for an independent lawyer and provided a list, from my client, of independent lawyers not part of Law Firm A.
>
> I am informed that the 12:30pm board meeting today was called with absences from Messrs HT and TE. It follows that Company B remains incapable of giving coherent instructions to any solicitor (conflicted or not), and that appearances as independent parties will be necessary going forward.
>
> I also respond to your indication that your clients reserve their rights in relation to all Agency matters for Company B that are prejudicial to them. My clients did not direct Company B to engage in any illegal conduct or activity and so concealing any such conduct or activities on the part of Company B (if they exist) is not in the interests of my clients or Company B. In their view it is likely not in the interests of Company B to oppose the orders sought by the Agency.
>
> All of the above still lead to the same consequence indicated in my previous correspondence: if I do not get written confirmation of you abdicating your position as the solicitor on the file for Company B, as you do not have instructions from the majority shareholder, then my clients have instructed me to file an application for injunction orders. …

[84] A few minutes later, in response to Mr BW's email of 3:29 pm regarding the factual basis on which she had asserted that the first call in the Agency application was imminent, Ms SF emailed Mr BW again,[52] as follows:

> As I indicated in my email of 16 December 2021 (attached), when my clients withdrew their consent for you to act for Company B, "we have separately informed the Agency of this forthcoming change of representation". I was simply relaying what the Agency's lawyers informed me and my junior MI on Tuesday this week.

[85] On the same day, the complaint form that has ultimately led to this review process was completed within Law Firm A's office and signed by the complainants. The

[51] Exhibit BW.17.
[52] Exhibit BW.18.

expedition with which this was done is remarkable and I will remark on it later in this decision.

[86] On 21 February 2022, Mr BW sent to Ms SF another response firstly about his alleged conflict of interest and secondly about the veracity of Ms SF's assertions about the urgency of the issue of Company B's representation in the Agency's application to the [Area B] District Court, including as to the suggested inadequacy of Ms SF's explanation of 4:31 pm on 18 February 2022. He relevantly wrote:

> Hello SF, with reference to your email of 4.14 of last Friday evening, nothing has been filed in Court by me or NX naming me as solicitor or NX as counsel for Company B, and nothing substantive has been said to the Agency's lawyers by either myself or NX, and no steps taken on behalf of Company B vis-à-vis the Agency, since 16 December. I have nothing to abdicate, as far as I can see.
>
> With reference to your email of 4.31 last Friday evening, responding in relation to the incorrect statement made as regards the first call being this week, and that accordingly urgency was required in relation to representation of Company B, we do not understand the first line of or attachment to that email. Your communication of 16 December relative to Company B representation seems not to be relevant to the making of the incorrect statement in your email of last Thursday evening.
>
> We cannot reconcile such a statement with the clear advice to us from the Agency's lawyers last Friday that there are no more civil days for the month of February – if there are no more civil days for February as at Friday last, then there weren't any available for this week as at last Tuesday, either, and we think it highly unlikely that anyone at the Agency's lawyers would make such a statement to you and your junior without checking, nor without having advised us on behalf of the other respondents.
>
> It is also unclear to us in what capacity you and your junior contacted the Agency's lawyers on Tuesday last week.
>
> With reference to the penultimate paragraph of your 4.14pm Friday last email, with respect, it is not open for your clients to cause Company B to act in a way prejudicial to our clients, and accordingly the matter of the Originating Applications relative to the question of privilege must be dealt with currently with that in mind, and only after consulting with our clients and Company B's insurer's lawyers (since acting without so doing would prejudice Company B's insurance claim, which would also be prejudicial to our clients).

[87] The contemporaneous correspondence between the lawyers traversed above necessarily informs the substance of the complaint dated 18 February 2022. In considering its implications, I acknowledge that the lawyers were corresponding with each other in considerable haste and apparent tension against a background of historical conflict between Company B's directors. Clarity and precision, as well as professional judgement, can suffer in such circumstances.

The Complaint

[88] In their complaint, Mr PK and Mr OJ alleged a breach or breaches by Mr BW of r 6.1 of the Rules, which provides as follows:

> A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

[89] The specific breach of r 6.1 alleged by the complainants was that Mr BW acted:[53]

> … for more than one client in a [District Court] proceeding under circumstances where there is a more than negligible risk that Mr BW may be unable to discharge the obligations owed to one or more of the clients, being all six respondents in the proceeding particularly considering the likely divergence between the interests of Company B and the other five respondents.

[90] The primary outcomes sought by the complainants were expressed as follows:

> (a) Mr BW to cease to act for Company B immediately to minimise prejudice to Company B's position under the current proceeding before the District Court and any other subsequent proceeding and/or further investigation.
>
> (b) A declaration that Mr BW breached rule 6.1 … for having a conflict of duty between acting in the best interests of Company B and that of the interests of 2 of Company B's directors and their affiliates including one of the shareholders in Company B.

[91] The "2 of Company B's directors and their affiliates" referred to in paragraph (b) of that quote are not the complainants or their Company B shareholding entity. Mr BW had never acted for them. The reference is to the Company D directors and the three Group X companies.

[92] Further outcomes sought by the complainants were for the NZLS:

> … to publicise the irresponsibility on Mr BW's part in failing to abdicate his role as legal counsel under circumstances where he could not possibly discharge his obligations to Company B due to his conflicting duties … [and] … any other declarations or punitive sanctions (including fines) that the Standards Committee considers appropriate.

The Standards Committee's decision

[93] In its 20 December 2022 decision, the Committee briefly traversed the background facts it considered relevant. Of potential relevance, it noted two facts not included in the background section of this decision. These were that:

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[53] Complaint (18 February 2022), Part 6.

(a) the July 2021 settlement agreement of the Prejudice Proceedings provided that Mr BW was to continue to act in the winding up[54] of Company B, including facilitating the sale of assets of Company B.

(b) Company B's insurers, JMN, appointed Law Firm D to act for Company B in relation to the Court application by the Agency that was the trigger for the flurry of correspondence between Ms SF and Mr BW in February 2022.

[94] The Committee took a broad-brush approach to its analysis of the complaint. The sole question it identified and sought to answer in its decision was:

> Did Mr BW breach his professional obligations when he acted for Company B and the other entities affiliated with Mr HT and Mr TE?

[95] In essence, it answered "yes" to that question and concluded that Mr BW's actions constituted a breach of rr 6.1, 6.1.2 and 6.1.3 (but not 6.1.1) of the Rules and that those breaches amounted to unsatisfactory conduct.

[96] The Committee's decision is admirable for its brevity. Unfortunately, that brevity has been achieved by stating its reasoning in just five paragraphs that leave the reader insufficiently informed about its factual findings and its conclusions as to the application of the applicable rules to those findings.

[97] The Committee did not base its finding on any identified conflict between the interests of Company B and the interests of the two Company D directors and their affiliates referred to in the complaint. It made it mainly on the basis of disagreement between the four directors of Company B as to who should represent Company B in relation to the District Court proceedings referred to in the complaint and partly on the basis that there were other, unspecified disagreements between the Company B directors.

[98] In relation to the application of r 6.1, the Committee considered that Mr BW knew there were differences of view between the two pairs of Company B directors and/or the two Company B shareholders, mainly about the [business practice], that had not been resolved by the settlement agreement in the Prejudice Proceedings.

[99] The Committee considered that Mr BW must therefore have been aware there was a risk that the interests of Company B and the interests of the Group X entities

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[54] The term "winding up" was used in the commercial sense of the managed realisation of the company's assets. Company B had ceased trading. It was not in liquidation.

"would not be aligned in the Agency investigation" and, implicitly, that this risk was more than negligible.

[100] The Committee then considered what it perceived to be an issue of informed consent for the purposes of r 6.1.1, although not expressed by reference to that rule. It stated that "Mr BW has relied on Mr OJ's agreement that he could act as given in a teleconference on 9 July 2021" and that Mr BW "… cannot rely on Mr OJ who did not have full knowledge of the raids, the nature of the information being sought by the Agency, or the underlying issues".

[101] This is implicitly a conclusion that Mr OJ's consent as director to Mr BW acting for Company B could not have been "informed" for the purposes of that rule.

[102] Next, the Committee addressed the issue of the complainants' "withdrawal of consent" for Mr BW to act for Company B. It concluded that "Mr BW's response to the withdrawal of consent was inappropriate and inadequate". It also considered that "the fact Mr PK and Mr OJ did not want Mr BW to act and the reasons for that should have triggered a consideration by Mr BW of his position".

[103] On that basis, the Committee found that Mr BW had breached r 6.1.2 of the Rules.

[104] Lastly, the Committee determined that "Mr BW stated that he could not cease acting for Company B until all of the directors agreed new representation". It considered that "this was not consistent with the requirements of r 6.1 (sic)[55] which requires a lawyer to either terminate the retainers or advise the parties to seek independent advice and obtain the informed consent of all parties to continue to act". On that basis, the Committee found that Mr BW had breached r 6.1.3. of the Rules.

[105] The Committee concluded that Mr BW's conduct was "towards the serious end of the range" after taking into account that:

> (a) The conduct continued for some months without Mr BW appearing to turn his mind to the apparent conflict;
>
> (b) Mr BW continued to act for Company B after being advised by [the complainants] of their view that he had a conflict of duty;
>
> (c) While there does not appear to be any personal benefit to Mr BW from continuing to act, there may have been potential commercial benefit to Mr BW's other clients in Mr BW acting for Company B in the investigation;
>
> (d) Mr BW has no previous disciplinary findings;

[55] The Committee presumably intended to refer to r 6.1.2.

(e) Mr BW's conduct appeared to be reckless and potentially negligent.

Application for review

[106] In his application for review, Mr BW seeks an order overturning the determination of the Committee and quashing the orders made against him.

[107] The application mistakenly refers to the Committee as the respondent. The complainants are the respondents in this review process. Nothing turns on this.

[108] The review application was initially supported by 18 pages of submissions made by Mr BW's lawyers, Law Firm B, on his behalf. In the context of this matter, they were succinct.

[109] The complainants responded with 54 pages of submissions through counsel[56] making new factual allegations, on the basis of which they alleged:

(a) an objectionable "pattern of behaviour" by Mr BW over many years in acting for Company B;

(b) prejudice caused to the complainants by reason of "the divergent interests between [the complainants] and the other entities that Mr BW was acting for"; and

(c) breach by Mr BW of rr 5, 5.1–5.3, 7, 7.2 and 8 of the Rules.

[110] They sought to adduce fresh evidence including a copy of affidavit evidence given by the complainants in the Prejudice Proceedings and for this Office to exercise its investigatory powers under ss 204(c) and (d) of the Lawyers and Conveyancers Act 2006 (the Act) in relation to these allegations.

[111] Those submissions triggered a further 46 pages of submissions from Law Firm B, principally objecting but nevertheless responding, perhaps in an excess of caution, to the fresh complaints advanced by the complainants.

[112] The above submissions were in addition to the cumulative 63 pages of equally detailed submissions filed at various points in the Committee inquiry process.

[113] This Office has also received a further letter from Ms SF in April 2023 in which she provides an update on the status of the Agency investigation.

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[56] [redacted].

[114] I have read all the submissions; in the case of the submissions traversing the fresh complaints only to ascertain any content relevant to the original complaint. They are certainly comprehensive, to the point of being exhaustive. I intend no disrespect to counsel in making reference to the content of them in this decision only by exception.

Jurisdiction

[115] It is inappropriate for the complainants to have advanced fresh allegations in the context of responding to the submissions made for Mr BW in support of his application for review of the Committee's decision. This Office has a review jurisdiction, not a first instance complaint or investigatory jurisdiction. As stated previously by this Office:[57]

> The review process is not intended to provide opportunity to parties to adduce fresh or new evidence at the review stage. A Review Officer must be cautious to ensure that he or she does not get cast into the role of a "first instance" determiner of the evidence. Such an approach, if permitted, would undermine the very process of review

[116] Consequently, I have no jurisdiction to consider either the additional factual allegations or alleged breaches of the above-mentioned rules in this review and decline to do so.

[117] If the complainants wish to advance an argument of breach by Mr BW of any of those additional rules based on fresh factual allegations not put to the Committee, being those described as "below the water line until now" in their counsel's submissions on review,[58] they are entitled to do so by making a complaint to the NZLS in the usual way.

[118] The submissions made in paragraphs [204] – [212] of counsel's initial submissions to this Office dated 3 March 2023 and paragraph [8] of her letter of 6 April 2023 are matters to be raised with the NZLS should the respondents proceed to lodge a fresh complaint.

[119] This decision is confined to the alleged breach of r 6.1 that was the subject of the original complaint and the Committee's findings of breach of that rule and of rr 6.1.2 and 6.1.3. Using counsel for the complainants' metaphor, it deals only with the "tip of the iceberg".[59]

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[57] *GS & Ors v ABC LTD and HY & Ors* [2022] NZLCRO 126 at [70]
[58] Ms SF's submissions of 3 March 2023 at [26]. Mr DT is counter-signatory on all submissions for the complainants. For brevity, references are to Ms SF only, as having primary carriage of the matter for the complainants. No discourtesy is intended to Mr DT.
[59] At [7] and [26].

[120] In that context, counsel for Mr BW pertinently draws attention to clause 17 of this Office's *Guidelines for Parties to Review,* which reflects the following principle:[60]

> Firstly, a Review Officer will seek to be satisfied that the evidence could not, with the application of reasonable diligence, have been obtained and put before the Standards Committee. Secondly, the evidence must be seen to have relevance to the issues under review. Thirdly, the evidence must be present as credible although it need not present as incontrovertible.

[121] The complainants have sought to adduce in evidence for the first time in response to the review application a copy of affidavit evidence of Mr OJ in the Prejudice Proceedings. No good reason has been given as to why that documentation was not made available to the Committee. I see no good reason to consider it now. I can readily infer, however, that it supports the allegations made in the statement of claim in those proceedings, which is in evidence.

Review on the papers

[122] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties. The respondents have agreed to this course of action. The applicant has not objected within the timeframe requested for a response on the proposal to do so.

[123] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review so far as they relate to the subject matter of the complaint, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available, I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[124] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[61]

> … 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

[60] *RK v ZW* [2023] NZLCRO 028 at [65]
[61] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> 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.

[125] More recently, the High Court has described a review by this Office in the following way:[62]

> 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.

[126] 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 all of the available material afresh, excluding the material relating to the additional allegations made by the complainants that I have no jurisdiction to consider, as previously explained; and

(b) provide an independent opinion based on those materials.

The issues

[127] I identify the elements of the generalised question the Committee asked itself as set out in paragraph [94] and the issues for consideration in this review as follows:

(a) What was the complaint about?

(b) What is the effect of rr 6.1 to 6.1.3?

(c) Has the Committee properly applied those rules?

(d) Who was Mr BW acting for?

(e) What was the matter in respect of which Mr BW was acting for more than one client?

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[62] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(f) At the time Mr BW accepted instructions to act on the matter, was there a more than negligible risk that he might not be able to discharge his obligations to two or more of the clients?

(g) Did such a more than negligible risk arise at any subsequent time?

(h) Is Mr OJ's initial consent to Mr BW acting for Company B relevant?

(i) Is the complainants' subsequent "withdrawal" of their consent relevant?

(j) Did it become apparent that Mr BW was no longer able to discharge the obligations owed to all of the clients for whom he acted?

(k) If so, did he immediately inform each of the clients of this fact and either:

(i) obtain their informed consent to him continuing to act on the basis of the clients having received independent advice; or

(ii) absent such informed consent, terminate the retainers with all of the clients?

(l) Consequently, did Mr BW breach any of rr 6.1, 6.1.1, 6.1.2 or 6.1.3?

(m) If a breach of any such rule has been established, does Mr BW's conduct warrant a disciplinary response?

(n) If so, what orders are appropriate in the circumstances?

Discussion

(a) What was the complaint about?

[128] From the outset, the complaint has suffered from an unfortunate conceptual confusion between:

(a) Mr BW acting for Company B and the Group X allegedly against the interests of the complainants and their shareholding entity in Company B (described by Law Firm A as "the Party A interests"); and

(b) Mr BW acting for Company B after having previously acted for the Group X entities in a separate matter; and

(c) Mr BW acting for Company B and acting at the same time for the Group X.

[129] The complaint was about a conflict of interest arising in the third of the above scenarios. This is not the way either Mr BW's lawyers or the Committee in due course interpreted the complaint. This is because of the way Law Firm A sought to define Company B's interests between 16 December 2021, when they first raised an issue of alleged conflict of interest, and 18 February 2022, when the complaint was made.

[130] The complainants' focus in pursuing their complaint through Law Firm A and consequently the focus of Mr BW's lawyers in responding to it and the attention of the Committee in dealing with it was in fact on the first of the three scenarios of potential conflict of interest outlined above.

[131] There were two District Court proceedings; the first in the [Area A] District Court and the second in the [Area B] District Court. Law Firm A referred to the "transfer" of the Agency originating application from one Court registry to the other. This is technically incorrect. There were two separate applications and they were materially different in form but this was principally because the first one effectively contained a memorandum of counsel and submissions in the body of the application.

[132] The orders sought in the two applications were identical, apart from the second one seeking an order for costs, and Law Firm A's reference to "transfer" is in substance accurate.

[133] The assertion of conflict of interest was first made by Law Firm A on behalf of the complainants in relation to the first Agency Court application. It seems that the application was never served. In any event, Mr BW took no step for Company B in relation to the application after sending his letter of 10 December 2021 alerting the Agency to its deficiencies.

[134] Nor did he expect to. His immediate response to the first email from Ms SF on 16 December 2021 was to ask who Company B's insurers had appointed to represent Company B in the matter.

[135] The assertion of conflict of interest was made for a second time by Law Firm A on receipt of Mr BW's 14 February 2022 broadcast email alerting all relevant parties to the fact of his receipt from Mr TE of a copy of the second Agency Court application and attaching the application.

[136] As with the first application, Mr BW immediately sought to establish whether Company B's insurers had engaged lawyers to act. No issue of either his or the two barristers' representation of Company B could arise if they had done so or proceeded to do so in response to the filing of the application.

[137] The implication of the second 16 December 2021 email exchange with Ms SF was that Mr OJ was the Company B director engaging with the insurers on the matter and Ms SF had advised that she and Mr OJ were to be discussing the matter again in mid-January.

[138] Nothing turns on the fact that there were two Agency applications to the District Court. Each of them was a procedural step taken by the Agency in the investigation it had commenced about 18 months earlier. Mr BW and the two barristers had been acting for the Group X companies since November 2020 and for Company B and Mr TE personally since July 2021 in relation to the legal privilege aspect of that investigation.

[139] I observe at this point that the complaint was made solely against Mr BW and not against Mr NX and Ms KC. If Mr BW was conflicted by reason of a divergence of interest between Company B and the Group X entities and a resulting conflict of duty, then so were they.

[140] As I have also already noted, the outcomes sought by the complainants included a "declaration" in the terms set out in paragraph [90(b)] above. Although the allegation of conflict of interest was initially made specifically in relation to the District Court proceedings, the complainants later expanded it to relate to the Agency investigation as a whole.

[141] The commencement of the District Court proceedings was nevertheless identified as raising a new element that was not inherent in the investigation that preceded them.

[142] In recording what the complaint was about, it is worth recording what it was not about. It was not about the issues in dispute between the Company B shareholders and/or between Company C/Company E and Mr TE in the Prejudice Proceedings. Nor was it about any disagreements there might have been between the two pairs of Company B directors, except only from December 2021 onwards in relation to Company B's legal representation in relation to the Agency application(s).

[143] In that regard, counsel have invested considerable energy in submitting about whether or not the differences of view between the Company B directors about the [business practice] were resolved by the 13 July 2021 settlement agreement. There is

no finding I can make about that without the benefit of evidence on the issue (and there is none from either party) but I do not need to do so.

[144] The issue for determination is conflict of duty in relation to the assertion of privilege in the Agency's investigation, not conflict of duty in relation to Company B's historical [business practice], which had obviously ceased at the point Mr BW was instructed by Company B regarding the privilege issue.

[145] I do agree with counsel for Mr BW, however, that there is no evidential basis for the Committee's finding that there were "other matters of difference" between the Company B directors during the relevant period.[63] Counsel makes a generalised assertion to that effect and refers to a District Court proceeding between Company C and Company D.[64] The connection between that shareholder dispute and the claim of privilege by Company B is not articulated.

[146] Again, the debate is not directly relevant to this review. What matters is whether there were "matters of difference" between Company B and the Group X entities that gave rise to a conflict of duty for Mr BW.

(b) What is the effect of rr 6.1 to 6.1.3, inclusive?

[147] The full text of rr 6.1 to 6.1.3 is set out below for ease of reference:

> 6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.
>
> 6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.
>
> 6.1.2 Despite rule 6.1.1, if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.
>
> 6.1.3 Despite rule 6.1.2, a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act for the client and no duties to the consenting clients have been or will be breached.

[63] Law Firm B submissions (8 February 2023) at [27]–[29].
[64] Ms SF's submission, above n 59, at [14(d)].

[148] These rules and the related fiduciary concepts at common law have caused lawyers, and the Courts, endless difficulties. The following comments should be regarded as no more than a potted summary of the regulatory concepts relevant to the circumstances of this complaint.

[149] Rule 6.1 is expressed as a prohibition. Its effect is that a lawyer may act for two or more clients in relation to the same matter only if there is not "a more than negligible risk" that the lawyer may be unable to discharge the obligations owed to one or more of the clients.

[150] Rule 6.1.1 permits a lawyer to act for more than one party in respect of the same transaction or matter "where the prior informed consent of all parties concerned is obtained". Despite its permissive wording, r 6.1.1 is necessarily read as imposing an obligation on the lawyer to obtain such consent.

[151] Rule 6.1.1 applies subject to r 6.1, however. It does not override or qualify r 6.1. This is a significant distinction from the parallel fiduciary duty principles from which it is derived.

[152] The effect of rr 6.1 and 6.1.1 together is that r 6.1.1 permits a lawyer to act for two or more clients where a risk is identified but is considered to be no more than negligible at the time. To do so, the lawyer must obtain the prior informed consent of all parties concerned.

[153] The primary focus of the cases and commentary on r 6.1.1 is on whether or not the consents obtained from the two or more clients were properly "informed". I will not discuss that aspect of the law here, as I do not consider it to be relevant to this complaint for the reasons discussed later in this decision.

[154] The need to consider the issue of informed consent can arise only if the risk of conflict is "no more than negligible" for the purposes of r 6.1. Expressing the matter another way, if the risk of the lawyer being unable to discharge the lawyer's obligations to two or more clients is more than negligible, the prohibition under r 6.1 is absolute. The assessment under r 6.1 can be viewed as a gate through which the lawyer must pass.

[155] I have no argument with the Committee's premise that any consent Mr BW might have needed, from either Company B or the Group X entities, for him to act for all of them needed to be properly informed. The questions that are begged are whether or not there was a risk of conflict between the interests of Company B and the Group X entities in the first place and, if so, whether or not that risk was more than negligible.

[156] The only basis on which the Committee could have embarked on its inquiry under r 6.1.1 is that the risk it identified of the interests of Company B and those of the Group X entities not being "aligned in the Agency investigation" was no more than negligible for the purposes of r 6.1. This was not the conclusion it reached in paragraphs [21]–[23] of its decision.

[157] It follows that the Committee appears to have considered both that there was a risk of conflict that was more than negligible, thus triggering r 6.1, and that there was risk of conflict that was not more than negligible, thus triggering r 6.1.1 and the requirement for informed consent. Both conclusions cannot be drawn at the same time.

[158] Rule 6.1 is frequently honoured in the breach rather than the observance. This is for two main reasons and sometimes a third. The first reason is that the clients themselves are frequently unconcerned about the risk of conflict of interest that has been identified and consider it unobjectionable from their viewpoint for the same lawyer to act for both or all parties.

[159] Clients may adopt this position for any number of reasons. Often, they are concerned at losing the benefit of the "institutional knowledge" held by the lawyer who has acted for them. Similarly, they do not wish to incur the cost of bringing a new lawyer "up to speed" or, in general terms, the process cost of involving two lawyers when one would do. There may be perceived time constraints, cost constraints and a commercial imperative to "drive on".

[160] Some clients do not understand the distinction between a conflict of interest and a conflict, in the sense of a dispute. For any of these and other reasons, the clients are often less sensitive to conflict-of-interest issues than a prudent lawyer would be. This is perfectly understandable; ultimately, conflict of duty is the lawyer's problem, not the clients'.

[161] The second reason is simply that it can be commercially advantageous for the lawyer to act for both or all parties, not necessarily or solely in terms of fee revenue but in terms of avoiding immediate perceived damage to the solicitor-client relationship. The lawyer makes a cost/benefit or risk/benefit decision.

[162] In either case, the commercially and professionally sanguine approach in day-to-day legal practice is frequently to "manage the conflict", not to avoid it altogether. The lawyer focuses on achieving adequate protection from only legal liability risk.

[163] In both cases, however, the lawyer takes the commercial and regulatory risk that things will not go wrong. If things do go wrong, normally manifested by a dispute

arising between two or more of the parties for whom the lawyer has acted, the relevant clients' viewpoints are more than likely to change.

[164] In such circumstances, the lawyer is visited with the regulatory consequences of the initial conflict assessment and decision regardless of whatever view the respective clients might initially have taken of the matter and regardless of the legal risk protection measures taken.

[165] The third reason that is sometimes applicable is that some lawyers either misapprehend or seek to argue that the clients' prior informed consent "cures" any conflict of interest inherent in the lawyer accepting instructions from two or more clients in the first place.

[166] This is because they observe the issue through a purely legal lens. Under the common law, a client can waive the exercise of rights arising from a lawyer's fiduciary duties. A lawyer being sued for breach of fiduciary duty may legitimately raise a defence based on the client's informed consent.[65] Consequently, client "waivers" of conflict of duty are commonplace.

[167] From a regulatory perspective, however, this is not so, except only where the risk of conflict was not "more than negligible" when the instructions were accepted. The regulatory position is significantly more stringent than the common law.

[168] There is also possibly a hangover of misunderstanding from the pre-2008 regulatory regime, which focused on the probability of disadvantage to one or other of the affected clients.[66] The threshold of concern was higher[67] and the focus was on the effect on the client, not on the lawyer's duties.

[169] Pre-2008 Court decisions should therefore be interpreted and applied with care to the regulatory environment. It remains to be seen whether the current regulatory construct will in due course inform judicial development of the tort in New Zealand.

[170] Rules 6.1.2 and 6.1.3, which need to be read together, address the situation when circumstances change during the course of the retainer such that an initial situation of "no more than negligible risk" becomes a situation of "more than negligible risk".

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[65] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 211–212.
[66] Rule 1.07 of the New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors that applied until 31 July 2008.
[67] "would or would likely" in r 1.07 cf. "not more than negligible" in r 6.1.

[171] In that situation:

(a) The onus is on the lawyer to recognise that the lawyer will no longer be able to discharge the obligations owed to both or all clients;

(b) The lawyer must immediately inform each of the clients of that fact;

(c) If the lawyer wishes to continue acting, he or she must ensure that each affected client receives independent advice about the situation;

(d) This necessarily implies full disclosure by the lawyer of all relevant facts and implications of the identified conflict of interest. This is because any consequent client consent cannot otherwise be "informed";[68]

(e) If both or all affected clients give their informed consent and no duties to the consenting clients have been or will be breached, the lawyer can continue to act. The words "will be breached" import an analysis that is prospective as well as retrospective;

(f) Unless all of those conditions are satisfied, the lawyer must terminate the retainers with all of the clients.

[172] In bald terms, unless both the lawyer and all relevant clients are satisfied (in the clients' case, on the basis of independent advice) that "there isn't a problem and there won't be a problem", the lawyer is disqualified from acting.

[173] As with assessment of conflict in the first place under r 6.1, the lawyer may well choose to continue acting for one or more of the clients either:

(a) because the client or clients want the lawyer to do so, regardless of the identified conflict of interest; or

(b) because the lawyer considers it to be in the lawyer's commercial interests to do so; or

(c) because the lawyer believes, rightly or wrongly, that he or she can meet the duties owed to all clients.

[174] In any such case, the lawyer again takes both the commercial and regulatory risk of a subsequent complaint. When that complaint comes to be determined, the lens

[68] As noted earlier, this aspect is not discussed here.

of hindsight imposed on the lawyer provides a clarity that could not necessarily have been expected of the lawyer at the time.

[175] Again, for clarity, a "conflict of interest" does not mean a "conflict" in the sense of a dispute. Lawyers frequently seek to conflate the two concepts, often in the classic situation of the same firm acting on both sides of a conveyancing transaction.

[176] In such circumstances, it is impossible, as a minimum, for a lawyer to meet the fundamental fiduciary and regulatory obligation to each client to protect and promote the interests of that client to the exclusion of the interests of "third parties",[69] which of course include the lawyer's or firm's other client.

[177] In that regard, it should be noted that the term "conflict of interest" is not used in the Rules. Nor is there any distinction between a "potential" conflict of interest and an "actual" conflict of interest. The focus is on the threshold of "more than negligible risk" and on the obligations, both fiduciary and regulatory, owed by the lawyer to each involved or affected client.

[178] Analysis of those obligations involves identification of any divergence of interest as between those clients and an assessment of whether the lawyer is meeting and will be able to meet the duties owed to both or all the affected clients.

[179] Both r 6.1 and r 6.1.2 require the exercise of considerable foresight by the lawyer. An assessment of risk for the purposes of either rule is necessarily prospective. The lawyer must think about what potential issues loom on the horizon.

[180] Nevertheless, that assessment can only be undertaken on the basis of the circumstances known to the lawyer at the time. Just because interests of two clients do diverge at some point resulting in a conflict of duties for the lawyer (if still acting) does not necessarily mean that the lawyer should necessarily have foreseen that divergence and conflict. If it were otherwise, there would be no need for r 6.1.2.

[181] The wording of the rules assumes a divergence of interest between the clients. The focus is on the lawyer's duties. There are many situations, many of them commonplace, where a lawyer can meet duties owed to both or all clients despite a divergence of client interests.[70]

[182] It is perhaps unfortunate that the term "conflict of interest" is used universally as the shorthand term for the issues under discussion, as it perpetuates confusions between

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[69] Rule 6 of the Rules.

[70] Examples commonly cited are acting for the bank and the client on a lending transaction, acting for trustees and beneficiaries on uncontentious trust matters and acting for insurer and insured.

the clients' interests and the lawyer's interests, between a divergence of client interests and a conflict in the sense of a dispute, and between a divergence of client interests and a resulting breach of duty.

[183] The better shorthand term, which I will use below as it reflects the focus of the rules, is conflict of duty.

(c) Has the Committee properly applied those rules?

[184] Applying the above principles to the present circumstances, the argument for the complainants is that Mr BW either:

(a) acted for Company B and the Group X entities in relation to the maintenance of privilege in the Agency investigation where there was a "more than negligible risk" of such conflict of duty in the first place, in which case r 6.1 was breached; or

(b) properly considered on accepting the instruction that there was not a "more than negligible risk" of such conflict of duty but failed to get the informed consent of all affected clients to act for them, in which case r 6.1.1 was breached; or

(c) in that circumstance, did obtain informed consent initially but continued to act once such consent was "withdrawn", in which case r 6.1.1 was breached; or

(d) failed to identify a conflict of duty once it arose, with specific reference to either the commencement of the District Court proceedings or other circumstances drawn to his attention, and then failed to go through all the steps set out in paragraph [171] above so as to enable him to continue to act.

[185] It follows that Mr BW can be found to have breached r 6.1 or r 6.1.1 but not both. Here, the Committee found a breach of r 6.1 and then either a failure to obtain informed consent or the withdrawal of such consent but did not find a breach of r 6.1.1. For the reasons explained above, the Committee's dual findings of breach of r 6.1 and failure to obtain informed consent for purposes of r 6.1.1 cannot stand.

[186] In relation to the "more than negligible risk" test under r 6.1, the Committee considered at paragraphs [21] – [23] of its decision that:

(a) Mr BW was not able to discharge his obligations to Company B in relation to the matter of the Agency investigation having already agreed to act for the Group X entities;

(b) Mr BW knew that Mr PK, Mr OJ and their appointing shareholder had raised the matter of the [business practice] that was the subject of the Agency investigation;

(c) Although the Prejudice Proceedings had been settled, the settlement involved the winding up of Company B;

(d) It could not be concluded from the fact of settlement of the Prejudice Proceeding that the difference of view regarding the [business practice] had been resolved;

(e) The Agency investigation was continuing and "other matters of difference existed between the two sets of directors";

(f) Therefore, Mr BW must have been aware there was a risk that the interests of Company B and the interests of the Group X entities "would not be aligned in the Agency investigation".

[187] The Committee's comments about the fresh circumstance that arose are in paragraphs [24] – [25] of its decision, as follows:

> [24] The Committee then considered Mr BW's actions when he was advised in December 2021 that Mr PK and Mr OJ withdrew their consent for Mr BW to act for Company B because they were informed of the originating application by the Agency, and Mr BW's ongoing discussions with the Agency before and since July 2021. The Committee concluded that Mr BW's response to the withdrawal of consent, was inappropriate and inadequate (sic). The fact that Mr PK and Mr OJ did not want Mr BW to act and the reasons for that, should have triggered a consideration by Mr BW of his position and whether he could continue to act for Company B and his other clients in respect of the Agency investigation.
>
> [25] The Committee noted that Mr BW stated that he could not cease acting for Company B until all of the directors agreed new representation. The Committee considered that this was not consistent with the requirements of Rule 6.1 (sic) which require a lawyer to either terminate the retainers or advise the parties to seek independent advice and obtain the informed consent of all parties to continue to act. The Committee noted that Mr BW did not do either of these things and instead waited for his client to sort out the matter of representation.

[188] The reference to r 6.1 in paragraph [25] quoted above appears to be a typographical error. The Committee proceeded to find that Mr BW had failed to comply with his obligations under r 6.1.2 when he did not immediately advise the parties and terminate the retainers.

[189] Again, the Committee's finding that he breached both r 6.1 and r 6.1.2 cannot stand, unless the breaches of the two rules arose from different factual circumstances.

[190] Rule 6.1.3 is permissive. It contains no obligation that can be breached. If a lawyer fails to satisfy any one of the three elements of the proviso to r 6.1.3, the consequence is a breach of r 6.1.2. (The interplay of rr 6.1.2 and 6.1.3 is different from the interplay of rr 6.1 and 6.1.1 in that respect). Consequently, the Committee's finding of breach by Mr BW of r 6.1.3 cannot stand.

[191] The regulatory questions to be answered nevertheless remain whether Mr BW breached either r 6.1 or r 6.1.1 or r 6.1.2 in the circumstances, which are discussed below.

(d) Who was Mr BW acting for?

[192] Mr BW was acting at all relevant times – from July 2021 until the complaint was lodged in February 2022 – for Company B and the Group X entities. He did not act, and had never acted, for the complainants personally or for their Company B shareholding entity.

[193] At the risk of stating what ought to be obvious, no allegation of breach of r 6.1 by Mr BW can be made on the basis of any divergence of interest between the complainants and/or their shareholding entity (the Party A interests) and either Company B or the Group X entities.

[194] Mr BW owed no material duties to the complainants personally or to their shareholding entity.[71] In that regard, I again note that the complaint as made was not about Mr BW having represented the Group X entities in the Prejudice Proceedings.

(e) What was the matter in respect of which Mr BW was acting for more than one client?

[195] The matter in respect of which Mr BW was acting for more than one client was the Agency investigation. On the evidence available, the scope of that instruction between 9 July 2021 and 18 February 2022 was to maintain legal rights of privilege in respect of privileged information.

[71] The 'third party' duties in rr 10, 10.1 and 12 are not material in this context.

(f) At the time Mr BW accepted instructions to act on the matter, was there a more than negligible risk that he might not be able to discharge his obligations to two or more of the clients?

[196] The complainants have advanced several arguments in support of the proposition that Mr BW had a conflict of interest in acting for both Company B and the Group X entities in relation to the same matter. I will discuss them in the order they were first raised in the contemporaneous correspondence and then deal with the retrospective, additional arguments.

[197] The first argument was something of a bootstraps one. In her 16 December 2021 email to Mr BW, Ms SF simply asserted that there was a conflict of interest by reason of the fact that Mr BW was also acting for the Group X entities. No basis for there being a conflict of duties for Mr BW in those circumstances was stated.

[198] It is clear from the email exchanges on that day that Mr BW did not expect to be acting for Company B in relation to the Court proceeding anyway. His immediate response was to ask who Company B's insurers had appointed to represent Company B in the matter.

[199] The question was left unanswered on the basis of Ms SF's advice in reply that JMN would respond to the policy if it was triggered by a prosecution. I will discuss the significance of the commencement of Court action later in the discussion of the application of r 6.1.2.

[200] The matter of possible conflict was next raised on 14 February 2022, this time pre-emptively by Mr BW, who referred to Ms SF's email of 16 December 2021. It seems he was mainly concerned to establish that Law Firm A were not seeking to act for Company B in relation to the Agency Court application, given Ms SF's advice on that date that she had communicated with the Agency about Company B's legal representation.

[201] He then stated that:

> There is no conflict of interest in our acting as solicitors for the Group X-controlled entities as well as for Company B, in relation to the Agency. There would only be a potential conflict of interest if the Group X side had caused prejudice to Company B vis-à-vis the Agency, unsanctioned by PKs, and not covered by Company B's insurance.

[202] Mr BW's statement is both challenging on its face and difficult to understand. If "the Group X side had caused prejudice to Company B vis-à-vis the Agency", there would be a very real conflict of interest, not a "potential" one. In the context of the sole relevant

matter, the claim of privilege, the only obvious hypothetical scenario prejudicial to Company B would be a decision by the Group X members not to continue to maintain their legal rights of privilege.

[203] Mr BW may have been referring to the wider matter of the Agency investigation, not to the Agency Court application that prompted the email. He was again assuming or expecting that the Court process would be covered by Company B's insurance and therefore handled by the insurer's lawyers.

[204] He nevertheless sought to make clear that, regardless of who might be instructed to act for Company B in relation to the Court application, the claim of privilege was non-contentious.

[205] In reply, Ms SF referred to her own email of 16 December 2021 "where we already indicated PK and OJ's withdrawal of their consent for you to act for Company B due to conflict of interest". This was either the bootstraps argument again (there is a conflict because we say there is a conflict) or a suggestion that the complainants' "withdrawal of consent" gave rise to a conflict of interest.

[206] This suggestion was repeated in the fifth paragraph, where Ms SF stated "…Company A is conflicted and cannot act for Company B as the Party A have withdrawn your authorisation, as the majority shareholders of Company B".

[207] A disagreement between the directors of a corporate client as to which lawyer should represent the company in a legal proceeding undoubtedly makes it difficult for the lawyer to take instructions from and advise the client with professional confidence but it does not of itself give rise to a conflict of duty.

[208] This is so regardless of any legal debate there might be about the effect of the shareholders' agreement and the ambitious suggestion that any shareholder might have the right to give or withdraw "authorisation" regarding any aspect of management of the company's affairs (beyond the scope of matters reserved for shareholder approval by statute or contract).[72]

[209] Ms SF's next argument was that "the fact that the Party A and the Group X entities were opposing parties in [the Prejudice Proceedings] was already sufficient to disqualify BW Legal from acting for both Company B and the Group X entities".

[72] The shareholders' agreement included a clause setting out a commercially customary list of key decisions requiring unanimous director approval (rather than shareholder approval).

[210] The first immediate flaw in that argument is that a lawyer is constrained from acting only where there is a divergence of client interests in relation to the same "matter". The Prejudice Proceedings and the assertion of privilege in the Agency investigation (or the Agency Court application) were different "matters" for the purposes of r 6.1.

[211] The second flaw is that Company B was not a party to the Prejudice Proceedings, albeit that those proceedings were about the conduct of its business. The proceedings were between the Company B shareholders and between the Party A shareholding entity and the Company D directors.

[212] Counsel for Mr BW also argued in submissions that the settlement agreement resolved all issues at large in the Prejudice Proceedings, so those proceedings could not give rise to a conflict of interest in relation to the Agency investigation. I do not accept that argument, regardless of what the undisclosed settlement agreement did or did not provide for.

[213] The fact that the parties to the Prejudice Proceedings allegedly resolved their differences at the time[73] does not mean that a divergence of interest could not later arise between one of those parties and the ultimate subject of the Prejudice Proceedings, Company B.

[214] Ms SF argued that the two barristers, Mr NX and Ms KC, were similarly conflicted for the same reason; that they had been counsel to Mr HT, Mr TE and Company D in the Prejudice Proceedings. Her argument is flawed for the same reasons.

[215] I appreciate and accept Ms SF's submissions as to the applicable legal principles within paragraphs [104] to [114] of her 3 March 2023 submissions to this Office, with two material exceptions relating firstly to the "community of interest" concept and secondly to the submission that the decision of this Office in *FE v AD of [Firm1]*[74] is analogous.

[216] Regarding the first matter, counsel relevantly stated that:[75]

> It was clear to the Complainants, once they had received independent advice, that since they had done nothing wrong, they had nothing to hide from the Agency. The Complainants had nothing to gain from asserting privilege in the manner that Mr BW had done [on] behalf of Company B which delayed and hindered the Agency investigation….
>
> The Complainants instead wanted to be fully transparent with the Agency and, if requested by the Agency, to assist with the investigation. They knew they had

[73] The settlement agreement is not in evidence and I am not prepared to accept evidence by way of submissions as to what it does and does not contain.
[74] *FE v AD of [Firm 1]* [2022] NZLCRO 111.
[75] Ms SF's submission, above n 59, at [104]–[107].

> done nothing wrong and they were concerned that Company B had been involved in wrongdoing that they had not authorised or even been aware of at the time.
>
> Mr BW seeks to rely on *Swift v Gray (Swift)*[76], arguing that it should be applied in these circumstances for the proposition that "*there will not be a conflict of interest where the parties have the same interest in the subject matter of a proceeding, where the core factual issues are the same and the parties positions regarding those issues are identical*".
>
> However, this case is clearly distinguishable from Swift, as there was no "community of interest" between the directors of Company B as a whole and Mr HT and Mr TE, especially following the Prejudiced Shareholder Proceedings which reflected a clear and open conflict as to how Company B should be run.

[217] Here, the relevant "community of interest" to be examined was between Company B and the Group X, not between the complainants personally and the Company D directors personally or between the complainants personally and the Group X corporate entities. So, the proposition in *Swift v Gray* is not distinguishable on the grounds submitted.

[218] So far as r 6.1 is concerned, *FE v AD of [Firm 1]* was about a shareholder executing a personal guarantee of a company borrowing transaction. The issue was whether or not, as a matter of fact, the lawyer had acted for both the borrower company and the guaranteeing shareholders. The lawyer sought to rely on a "waiver" document to establish that he had not acted for the guarantors, precisely because to do so would constitute a breach of r 6.1. The LCRO concluded that the document itself established that he had. Rule 6.1 was therefore breached.

[219] A hypothetical analogy with the present case would involve Mr BW acting for each of Company B, Company D and Company C/Company E and failing to insist that Company C/Company E obtain independent legal advice. There is no suggestion here that Mr BW ever acted for Company C/Company E. Further, no warrants had been exercised against Company C/Company E or the complainants, so no issue of any of them requiring advice about asserting their rights of privilege could have arisen.

[220] An entirely separate issue raised in *FE v AD of [Firm1]* was whether the lawyer had continued to act for the company after giving the shareholder an assurance that he would not do so. The LCRO's finding was that he had not. The issue had nothing to with r 6.1.

[221] With due respect to counsel, the circumstances in *FE v AD of [Firm1]* are not similar at all to the present case, let alone "strikingly similar", and the submission[77] is misconceived.

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[76] *Swift v Gray* [2022] NZHC 1794.
[77] Ms SF's submission, above n 59, at [114].

[222] Regardless of how Ms SF sought to express the complainants' position regarding legal representation of Company B in connection with the Agency investigation, that position was essentially that it was not in the complainants' personal interests for Company B to be maintaining its legal rights of privilege in privileged information.

[223] I find that this is not a sufficient basis for establishing a more than negligible risk of Mr BW being unable to discharge his obligations to Company B and to the Group X entities in relation to that matter. The interests of Company B need to be considered objectively in isolation from any other entity's interests, and particularly in isolation from the interests of either of its shareholders or their appointed directors.

[224] A claim of privilege in privileged material is uncontroversial in any legal proceeding and particularly so in an investigation or preliminary proceeding that might result in a criminal proceeding. There is no evidence before me to suggest that the interests of Company B and the Group X entities were not identical in that respect.

[225] Company B's insurance position was also fundamental, as Mr BW kept pointing out. I have no information as to the terms of Company B's insurance cover. It can be readily assumed, however, that a voluntary waiver of privilege in privileged material without insurer consent would be highly likely to prejudice Company B's insurance position.

[226] It cannot be argued that an intentional undermining of a company's insurance position by a shareholder or director could be in its best interests.

[227] Clear distinction needs to be drawn between the commercial and reputational interests of the complainants and of their Company B shareholding entity and the legal and commercial interests of Company B. [redacted].

[228] It is very clear that the complainants wished to distance themselves from the allegedly unlawful trading activity of Company B in respect of the [business practice]. They had had no role in the management of Company B's business at any time between [redacted].

[229] They had titular responsibility, jointly with the Company D directors, for Company B governance decisions but no effective ability to influence them other than by exercising what was effectively their right of veto of any board decision.

[230] It can be assumed that the [business practice] had never been the subject of a board decision. The complainants' position was that they were unaware of it and would not have condoned it.

[231] Critically, it appears that one or other of the complainants, if not both, fulfilled a "whistle-blower" role in relation to the [business practice] issue that was the subject of the Agency investigation. They were the Agency's informants.

[232] Having, in layperson's terms, "dobbed in" their own company, it is understandable that they would seek to ensure that they were not adversely affected by the outcome of the resulting investigation.

[233] Company B having effectively ceased trading [redacted], there was no ongoing [business practice] and presumably no ongoing revenue-generating potential in Company B for the complainants to seek to protect (other than by ensuring that Company B's insurance position was preserved) but a significant reputational interest in seeking to distance themselves from any wrongdoing by Company B that might be established.

[234] In all the circumstances, it seems objectively clear that the complainants' personal interests and those of Company B were divergent if not starkly in conflict.

[235] Whether or not that is so, there is no reasonable basis on which they can argue that Company B's best interests were defined by reference to their personal interests, or the interests of their shareholding entity simply by reason of the fact that the shareholding was [a majority] or that they constituted one half of the Company B board.

[236] This is so even if the shareholders' agreement had not made explicit, as it did, that directors were obliged to put the best interests of the company before their own.[78] Company B was not, as submitted by counsel for the complainants, a "joint venture company" in a company governance sense rather than a commercial sense.[79] Nor was it a partly-owned subsidiary whose directors were constitutionally entitled to act in its holding company's interests.[80]

[237] Be that as it may, the extent to which the complainants' interests (or those of their shareholding entity) were or were not aligned with the interests of Company B does not dictate the assessment of Mr BW's duties as solicitor to Company B.

[238] It appears to be undisputed that the sole relevant matter on which Mr BW was instructed by Company B between July 2021 and February 2022 was Company B's

[78] See [256]–[265] below.
[79] Section 131(4) of the Companies Act 1993.
[80] Section 131(3) of the Companies Act 1993.

maintenance of privilege in privileged material and the consequent negotiation with the Agency of an agreed process by which privileged material could be identified and segregated from non-privileged material.

[239] The same issue applied to the Group X entities that were also the subject of investigation by the Agency. The broad context was the Agency investigation of allegedly unlawful activity and the resulting risk of criminal prosecution.

[240] In that context, or for that matter in any other legal context involving risk to the interests of a client, the proposition that privilege should be maintained in privileged material is so uncontroversial it is in the "goes without saying" category.

[241] The Agency was not in a position to disagree in principle with the proposition. The respondent parties' legal rights of privilege were expressly preserved by statute. The initial debate by correspondence and ultimately the originating application to the Court were only about the proper process for segregating the two categories of material and the burden of undertaking it.

[242] Incidentally, this would seem to have been as much in the Agency's interests as it was in the respondents' interests. The Agency was legally precluded from progressing with its investigation until the privilege issues had been resolved. It was in its interests to impose the responsibility and cost burden of the necessary process onto the respondent parties.

[243] Mr BW's argument that there could not be, and was not, any divergence of interest between Company B and the Group X entities in that respect is objectively difficult to fault. He put the matter plainly enough, stating in the last paragraph of his letter of 14 February 2022 that "...the claims of privilege [are] entirely non-contentious – it is in the interests of both sides of Company B to push back against the Agency/HKS in relation to this preliminary aspect of matters…".

[244] Ms SF's eventual response to this proposition, after being pressed several times by Mr BW, is informative. In her email of 4.14 pm on 18 February 2022, which was expressly sent on behalf of "the majority shareholders", she relevantly stated:

> … If the conflict was not clear to you from the onset, then the commencement of the District Court proceedings no doubt crystallised the opposing interests between the Party A parties vis-à-vis the Group X parties …
>
> … My clients did not direct Company B to engage in any illegal conduct or activity and so concealing any such conduct or activities on the part of Company B (if they exist) is not in the interests of my clients or Company B. In their view it is likely not in the interests of Company B to oppose the orders sought by the Agency.

[245] It is unclear why Ms SF assumed that Company B might "oppose the orders sought by the Agency", other than the application for costs. It was surely in Company B's interests to define the search parameters required for identifying its privileged material. That was a decision for Company B's insurer to make, however.

[246] Be that as it may, it seems clear that Ms SF was not asserting a conflict between the interests of Company B and those of the Group X. She was asserting a conflict between the interests of her clients, the complainants and their shareholding entity, and the interests of the Group X. In doing so, she sought to equate Company B's interests with those of her clients. This has remained the position in all submissions filed for the complainants.

[247] Ms SF's second statement quoted above appears to confirm that the complainants' interests were very much at odds with those of Company B. Regardless of that, the position expressed by the complainants through Ms SF did not establish that Company B had any lesser or otherwise differing interest from the Group X entities in preserving the confidentiality of privileged communications and otherwise asserting the legal rights of privilege protected by the SSA12.

[248] Specifically in relation to that narrow issue of preserving their various legal rights of privilege, I find that there was nothing inherent in the circumstances that gave Mr BW any reason to consider that there was a more than negligible risk of being unable to meet his obligations owed to both Company B and to the Group X entities.

[249] My paraphrasing of the Committee's reasoning on the application of r 6.1 is set out at paragraph [186] above. In essence, its concern was that there had been and continued to be "differences of view" between the two pairs of Company B directors about various matters including the [business practice] issue that was the subject of the Agency investigation.

[250] For the reasons explained above, I consider that a difference of opinion or a differing of personal interest about a company business matter (whether [the business practice] or anything else) does not equate to a divergence of interest between that company and any other company or person affected by the same business matter, namely the preservation of privilege.

(g) Did such a more than negligible risk arise at any subsequent time?

[251] The complainants initially argued that the commencement of the Agency Court proceeding was the event that gave rise to a conflict of interest for Mr BW. The obvious

problem with that argument is that Mr BW was not acting for the Group X in relation to the Court application. The Group X's insurers immediately appointed their own lawyers.

[252] Further, Mr BW was not acting for Company B either, at least so far as he was aware. In the context of his general retainer from Company B and consequently his professional duty to act in its interests, his primary concern from the outset on 16 December 2021 was to ensure there was no delay in Company B's insurer making a decision on cover and appointing lawyers to act.

[253] As at the date the complaint against him was made, Mr BW did not act for any of the respondent parties to the Agency Court application in relation to that application. Consequently, he could not possibly have been in breach of either r 6.1 or r 6.1.2 on that ground.

(h) Is Mr OJ's initial consent to Mr BW acting for Company B relevant?

[254] The necessary first step in discussion here, and it is a fraught one given the commercial arrangements between the Party A interests and the Group X interests, is who can give or withdraw consent on behalf of a corporate client entity.

[255] This question does not arise for consideration at all if either:

(a) the risk of conflict of duty was "more than negligible" in the first place; or

(b) the risk of conflict of duty was not "more than negligible" in the first place but the consent to act obtained from Company B was not fully informed; or

(c) the risk of conflict of duty having become "more than negligible" after the initial instructions, further consent to act was then [not] obtained or was not fully informed.

[256] For argument's sake, however, the question that can be asked is whether Mr BW obtained the informed consent of Company B to act for it.

[257] This brings to the fore the fundamental structural issue that underlies all of the commercial difficulties between the Party A interests and the Group X interests in relation to Company B, namely their equal representation on the Company B board.

[258] Company B's governance was and is determined by its constitution and the [redacted] shareholders' agreement, the latter prevailing over the former in the event of

inconsistency.[81] The constitution is a printed, standard ADLS form for a closely held company [redacted] and never amended to reflect the shareholders' agreement.

[259] The parties to the shareholders' agreement were the two original shareholding entities, Company C and Company D, Company B itself and Mr TE personally.

[260] The reason Mr TE was a party to the agreement personally appears to have been that the agreement as a whole was conditional on Mr TE agreeing to and executing his employment agreement as designated manager of Company B's business.

[261] [redacted].

[262] The shareholders' agreement provided for four directors, two to be appointed and removed by Company C and two to be appointed and removed by Company D.[82]

[263] The attendance of at least one director appointed by each shareholder was required to form a quorum for a meeting of directors.[83]

[264] Board decisions were to be made by majority vote, subject to the quorum requirement.[84]

[265] Directors were required to act in the best interests of the company and to ensure that the interests of the company prevailed in the event of any conflict between those interests and that of the appointing shareholder.[85]

[266] The constitution was consistent with that provision. It did not permit any director to act in the interests of the director's appointing shareholder or of the company's holding company.

[267] Mr BW had had a general retainer to act for Company B since October 2019. The directors and shareholders had fallen out with each other, the consequence being the Prejudice Proceedings. The 9 July 2021 discussion determined the basis for resolution of those proceedings, resulting in the settlement agreement [redacted].

[268] The agreement to assert privilege in privileged material is probably best described as a fresh instruction within the existing engagement rather than a fresh engagement. In either case, it was certainly prudent if not also necessary for Mr BW to

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[81] Clause 12.1.
[82] Clause 6.1.
[83] Clause 6.2.
[84] Clause 6.6.
[85] Clause 6.9.

ensure that the instruction constituted an instruction from the board in the context of the Company B governance arrangements with which he was perfectly familiar.

[269] Those arrangements required a quorum comprising three directors of which one had to be an appointee of each shareholder. The instruction appears to have been consistent with those requirements.[86]

[270] I find that there is nothing expressed in or to be inferred from the complaint materials or the surrounding circumstances to suggest that the assertion of privilege by Company B was in any way contentious. I have already expressed the view that, in those circumstances, the better analysis is that there is no evidence of a divergence of interest between Company B and the Group X in that regard.

[271] Consequently, there is no evidence of a "more than negligible risk" of conflict of duty on Mr BW's part and informed consent was therefore not required.

[272] If I am wrong about that, Mr OJ's agreement to the instruction to Mr BW establishes that there was a valid Company B board consent to Mr BW acting for all parties.

[273] The remaining issue in that scenario is therefore whether or not the board's consent was "informed" for the purposes of r 6.1.1. A legitimate way of addressing that question is to ask what Mr BW knew about the facts and circumstances relevant to his acting for Company B on the assertion of privilege that the board members did not know and that he should have told them about.

[274] I am unable to find that there was any such fact or circumstance unless there is evidence to support that finding. Speculation about the matter is inappropriate. This is nevertheless what the Committee appears to have done in making its finding that "Mr OJ … did not have full knowledge of the raids, the nature of the information being sought by the Agency, or the underlying issues".

[275] One of the several remarkable things about this complaint is that, despite the enormous volume of submission material, there is no evidence whatever given by the complainants themselves in support of their complaint. It is for them to establish the grounds for their complaint.

[276] There is no evidence about any knowledge Mr OJ may or may not have had and no evidence that any advice was sought from or given by Mr BW about the possibility

[86] It is unclear from the materials whether or not Mr PK was a party to that part of the 9 July 2021 board discussion.

of Company B waiving its legal rights of privilege. Only the complainants can give such evidence.

[277] At the very least, I would have expected an assertion from the complainants about information known to Mr BW by reason of having acted for the Group X entities that had not been brought to the attention of the board of Company B, that was not already known to the complainants and that was relevant to the maintenance of privilege by Company B in the Agency investigation.

(i) Is the complainants' subsequent "withdrawal" of their consent relevant?

[278] There is no question that a client's consent to a lawyer acting for two or more parties on the same matter can be withdrawn. In this instance, the client was Company B, not the complainants personally.

[279] At [24] of its decision, the Committee stated:

> The fact that Mr PK and Mr OJ did not want Mr BW to act and the reasons for that, should have triggered a consideration by Mr BW of his position and whether he could continue to act for Company B and his other clients in respect of the Agency investigation.

[280] The contemporaneous correspondence shows that Mr BW did indeed consider his position and decided that it had not changed. The import of the Committee's comment is that Mr BW should have decided that he had a conflict of duty in continuing to act for Company B because the complainants did not want him to.

[281] As I have already found, the issue is hypothetical to the extent the "withdrawal" of consent related specifically to the Agency Court application. Mr BW was not acting for any of the respondent parties in respect of the application and did not expect to be acting for any of them. He was primarily concerned that any board difference of opinion over legal representation did not imperil Company B's insurance position. On any analysis, it must have been critical to Company B's interests not to prejudice its insurance position unless and until its insurer adopted a view on cover.

[282] The following observations are therefore unnecessary for this decision except for the purpose stated in the next three paragraphs:

(a) Mr BW had a general retainer to act for Company B and owed Company B fiduciary duties and regulatory obligations in that regard;

(b) Mr BW had been instructed by the board in accordance with the governance protocols in the shareholders' agreement;

(c) The board of a company is bound by a decision it has made until it makes a new one;

(d) The withdrawal of support for, or an expression of lack of confidence in, the company's lawyer by half the members of a board obviously puts the lawyer in a difficult position in terms of confidence in being able to receive and act on any further instructions;

(e) His or her retainer nevertheless continues unless and until it is terminated;

(f) The better view is that the "withdrawal" of consent by the complainants as directors did not terminate Mr BW's retainer;

(g) To the extent that there is uncertainty about that, there is certainly no evidence of any instruction from Company B not to maintain the assertion of privilege in relation to the Agency investigation or about the issue ever being raised until Ms SF did so on 18 February 2022, the day the complaint was lodged;

(h) That issue was absolutely the province of Company B's insurer anyway, not that of the board, unless the insurer declined cover;

(i) At the date of the events in question, the insurer had yet to state a position in relation to either cover or representation;

(j) Company B had 10 working days from service of the originating application to file a notice of opposition and supporting affidavit evidence, if indeed there was anything about the application other than the costs application that it might wish to oppose (as to which I have no information).

[283] In those circumstances, it seems to me that Mr BW's most basic fiduciary obligation was to ensure that the "status quo" was preserved and that Company B was not left unrepresented in its efforts to preserve privilege in privileged communications pending the expected, urgent decision by its insurer as to cover and representation and, having made those decisions, how it wished to respond to the investigation.

[284] If I am wrong on both the factual and legal points i.e.:

(a) Mr BW was in fact acting for the Group X entities in relation to the Agency Court application; and

(b) the withdrawal of consent to act by two of four directors constitutes the withdrawal of consent to act by the company,

[285] The finding I make is that the ongoing performance of Mr BW's fiduciary duty to Company B was far more important than his immediate compliance with either r 6.1.1 or r 6.1.2. Consequently, any breach of either of those rules in the circumstances does not warrant a disciplinary response.

[286] It seems that Mr BW may also have had concern that the complainants were seeking to disqualify him from acting for Company B on commercial matters not connected with the privilege claim. His counsel submits that there were such matters[87] and that Mr BW's initial response of 14 February 2021[88] related partly to those matters.

[287] I do not accept counsel's interpretation of that letter. Mr BW was referring specifically to the Agency proceedings. There is no reference in any of the correspondence to other commercial matters. He was nevertheless doing so against a background of expectation that Company B's insurer would engage its own lawyers for the Agency proceedings. The better view is that Mr BW was seeking to pre-empt an argument about representation should the insurer decline cover.

(j) Did it become apparent that Mr BW was no longer able to discharge the obligations owed to all of the clients for whom he acted?

[288] I answer this question in the negative on the basis of the information available to me. The Committee's comments about it are unhelpful in that they appear to conflate the issue of informed consent to act with the issue of an assumed or developing divergence of interest between Company B and the Group X and a consequent conflict of duty for Mr BW.

[289] I acknowledge some uncertainty about the Committee's thinking on the matter. At paragraph [24] of its decision, the Committee refers to "the fact that Mr PK and Mr OJ did not want Mr BW to act **and** the reasons for that" (my emphasis). Unfortunately, the Committee did not articulate "the reasons for that" which it was referring to. As I have already mentioned, there is no evidence from the complainants on the matter.

[290] If the Committee's reference was intended to be only to the reasons articulated in Law Firm A's correspondence of 16 December 2021 and between 14 and 18 February 2022, then I refer to the discussion at paragraphs [196] – [250] above.

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[87] Law Firm B submissions, above n 63, at [17], [28].
[88] Exhibit PK-10, discussed at [83] above.

[291] In summary, the reasons were either not stated or stated in a way that displays confusion between the personal interests of the complainants and those of Company B, or in a way that seeks to define Company B's interests by reference to board-level or shareholder-level disagreements.

[292] If the Committee's reference to Mr OJ's "reasons" was intended to be a reference to its own comment that "Mr OJ … did not have full knowledge of the raids, the nature of the information being sought by the Agency or the underlying issues", there does not appear to be any evidential basis for the Committee's finding.

[293] The factual statement by the Committee appears to be inherently unlikely. Mr OJ was the Agency's informant, or an informant, in [redacted]. The raids were from [redacted] onwards. The instruction for Company B to maintain its legal rights of privilege was nevertheless given in July 2021.

[294] Counsel says that Mr BW had no knowledge of Mr OJ's involvement until after the complaint was lodged in February 2022. Putting aside the difficulty of counsel seeking to give evidence by way of submission on the matter[89] (and noting that Mr BW has given no evidence either), Mr BW was at least on notice that his clients suspected the complainants of being behind the Agency investigation. The allegation had been pleaded in Company D's counterclaim in the Prejudice Proceedings [redacted] months beforehand.

[295] I note that, at least between December 2021 and February 2022, Law Firm A were in direct communication with the Agency's lawyers and appear to have been well informed about the Agency's intentions and actions. I have no information as to lines of communication before that period.

[296] Be that as it may, it is Mr BW's state of knowledge, not Mr OJ's or Mr PK's, that is relevant to any required assessment of conflict of duty for him at any relevant time. Knowledge of the Company D directors' suspicions about Mr OJ's and/or Mr PK's allegedly undisclosed role as the Agency's informant does not equate to knowledge of a divergence of interest between Company B and the Group X.

[297] In this context, Mr BW's comment to Ms SF on 14 February 2022 quoted at paragraph [69] above[90] ignores the need to assess whether any actions taken by the Group X might reasonably be considered to prejudice Company B's interests in future in relation to the matter on which Mr BW had been instructed by more than one client.

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[89] Law Firm B submissions (14 April 2023) at [104]–[105].
[90] Exhibit PK-10, paragraph [6].

[298] In that regard, I find there was nothing inherent in the assertion of privilege by the Group X and Mr BW's engagement with the Agency to determine a process for the segregation of privileged material that could reasonably have been expected to prejudice the same assertion and the same engagement on behalf of Company B.

[299] In the circumstances pertaining up to 18 February 2022, I am not satisfied that any case for conflict of interest between Company B and the Group X on the issue of preservation of privilege is made out.

(k) If so, did he immediately inform each of the clients of this fact and either:

(i) obtain their informed consent to him continuing to act on the basis of the clients having received independent advice; or

(ii) absent such informed consent, terminate the retainers with all of the clients?

[300] By reason of my previous findings, this question falls away.

(l) Consequently, did Mr BW breach either r 6.1 or r 6.1.1 or r 6.1.2?

[301] On the evidence before me and for the reasons set out above, there was no breach by Mr BW of any of these rules in the circumstances pertaining up to 18 February 2022.

[302] For the reason stated in paragraph [190], there can have been no breach of r 6.1.3.

(m) If a breach of either r 6.1 or r 6.1.1 or r 6.1.2 has been established, does Mr BW's conduct warrant a disciplinary response?

[303] This question falls away and, in relation to rr 6.1.1 and 6.1.2, I reiterate the findings made in paragraphs [283] – [285].

[304] For completeness, I find that:

(a) The Committee's speculative comment about potential commercial benefit to Mr BW's other clients[91] was not appropriate for the purposes of its decision; and

[91] Decision, above n 2, at [29c].

(b) there was no basis for the Committee's finding that Mr BW's conduct "appeared to be reckless and potentially negligent".[92]

(n) If so, what orders are appropriate in the circumstances?

[305] A decision quashing the Committee's unsatisfactory conduct finding and penalties is appropriate.

Other matters

Submissions

[306] In recording the above conclusions, I have seen no need to refer expressly to the various other authorities to which counsel helpfully referred me. I record my appreciation of their diligence in doing so. This matter turns on its facts and on the applicable rules themselves, not on the relevant case law. This is not to say that similar issues have not arisen in other cases, such as *RV v ZL.*[93]

Presenting evidence supporting a complaint

[307] It is incumbent on a complainant to ensure that, in lodging the complaint, all material documentary evidence relevant to the issues raised in the complaint is provided to the NZLS.

[308] Where a party is legally represented and particularly where the lawyer has prepared the complaint, any standards committee will be hampered in its task if counsel does not make a reasonable effort to compile and present all the relevant material, subject to the client's instructions.

[309] Gaps in information can be filled following the lawyer's response and as the standards committee inquiry progresses. However, the selective presentation of only material that supports one side of the argument about an issue that is inherent in the complaint at the time it is made is not conducive to a prompt and robust decision-making process.

[310] In this instance, all the immediately relevant correspondence was the correspondence between Law Firm A and Mr BW between 16 December 2021 and 18 February 2022. I would have expected it to be disclosed at the outset with the complaint.

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[92] At [29e].
[93] LCRO 85/2012 (23 May 2016).

[311] I make the same comment about the additional documentary evidence the complainants have sought to adduce at the review stage, being a copy of affidavit evidence given in the Prejudice Proceedings. If the complainants wished to rely on it, they could and should have provided it to the Committee to consider.

[312] The review process is informal, inquisitorial and robust[94] but it is not an opportunity [redacted] for the retrospective construction of the basis for a complaint after making it.

[313] I reiterate the observations made at paragraph [87] above.

Undue haste

[314] I commented at paragraph [85] on the remarkable expedition with which this complaint was lodged. One consequence of this is that the complainants have hampered themselves in the scope of their complaint and in the material they were able to advance for consideration before the Committee and are able to advance in this review process.

[315] The complaint has then been pursued with unusual determination, given all the circumstances. Despite the retrospective assertion of conflict of interest on Mr BW's part in relation to the Agency investigation as a whole, it was triggered specifically by the filing of the Agency's originating applications in the District Court.

[316] The fact and subject matter of the Agency applications were objectively non-contentious. Any procedural urgency related to the applicable time constraints under the District Court Rules for Company B to respond to the application and consequently the insurer's decisions on cover and representation.

[317] The Agency had yet to search any of the seized data, 18 months or so after seizing it. There can be no suggestion that specific prosecution decisions were yet in contemplation, let alone being imminent.

[318] At no time did Mr BW seek to act for any of the respondent parties in relation to either originating application. On the contrary, he anticipated that all respondent parties' insurance would be engaged and that the respective insurers would engage their own counsel.

[319] His primary concern appears to have been to ensure that Company B engaged with its insurers without delay. In that regard, he expressed no objection to Ms SF facilitating that engagement for Company B, with Mr OJ, as she had signalled in the

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[94] *Deliu v Connell*, above n 62, at [2].

December email exchange, despite her not acting for Company B. This remained the position as at 17 February 2022.[95]

[320] He also wished to verify that Law Firm A were not seeking to act for Company B otherwise, given their manifest conflict of interest (which, to her credit, Ms SF acknowledged),[96] and to ensure that Company B was not left unrepresented pending the decisions to be made by the insurer.

[321] In addition, Mr BW expressed no objection to the immediate, temporary appointment of counsel independent of the two shareholders, pending the insurer's decisions, and expressly confirmed approval of counsel nominated by Ms SF, within two days of the issue arising that needed to be addressed.

[322] It had also already been expressly confirmed that Group X's insurers had engaged their own legal representation.

[323] Regardless of the nuances of application of rr 6.1 to 6.1.3, none of this was ethically objectionable.

[324] If Company B's insurers had in due course declined cover, then no doubt further assessment of Company B's interests and the issue of appropriate representation would have needed to occur. That circumstance did not arise. In any event, it had not arisen at the time the complaint was made.

[325] The perceived urgency of the complainants' action in making their complaint seems to stand in considerable contrast to the factual circumstances. This is puzzling.

[326] [redacted].

[327] [redacted].

[328] [redacted.

[329] [redacted].

[330] It seems likely that if the complete file of lawyer-to-lawyer correspondence between mid-December 2021 and mid-February 2022 had been given proper and unhurried consideration by independent counsel, the resources of the Lawyers Complaints Service might not have been engaged in this matter.

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[95] See [75] of this decision.
[96] See [83], third paragraph of this decision.

[331] The complainants are nevertheless entitled to have their complaint considered on its merits and I have done so.

Fresh issues

[332] [redacted].[97]

[333] [redacted].

[334] [redacted].

[335] [redacted].

[336] It may be also that there were other aspects relating to or arising from the commercial relationship between the Party A interests and the Group X that the complainants consider gave rise to a conflict of duties owed by Mr BW to Company B and to the Group X respectively or to a breach of other duties owed to Company B, as alleged by the complainants in counsel's submissions to this Office on the matters I have no jurisdiction at this point to consider.

[337] It is open to the complainants to pursue any such matter should they wish to do so. To be clear, any such fresh matter could relate to the alleged breaches of rr 5, 5.1–5.3, 7, 7.2 and 8 in connection with the circumstances giving rise to the Agency investigation and/or any of the other matters that counsel has not persuaded me to consider in this review.

Decision

[338] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is reversed and its unsatisfactory conduct finding and penalties quashed.

Publication

[339] Mr BW and Company A are permitted to disclose the full text of this decision to their insurer.

[340] As the allegation of conflict of interest but not the complaint was also made against Mr NX and Ms KC, Mr BW is permitted to disclose the full text of this decision to them.

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[97] [redacted].

[341] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

DATED this 31ST day of August 2023

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FR Goldsmith
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 BW and Company A Limited as the Applicants
Mr PK and Mr OJ as the Respondents
Ms FG and Ms VU as the Applicants' representatives
Ms SF and Mr DT as the Respondents' representatives
[Area] Standards Committee [X]
New Zealand Law Society