LCRO 47/2015

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**AT** Applicant
AND	**RN** Respondent

DECISION

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

Introduction

[1] [AT] has applied for a review of a 3 February 2015 decision of the [Area] Standards Committee to take no further action in respect to the complaint he had made against Mr [RN].

[2] The complaint arose from circumstances in which Mr [AT] had been assisting with funding High Court litigation in which Mr [EC] was the plaintiff.

Background

[3] On [Day Date Year], after a hearing which had occupied more than two weeks in [Month] and [Month] of that year, Mr [EC] secured a High Court judgment. At the conclusion of what was a lengthy judgment, the Judge remarked that "… [EC] has had a [redacted] in the proceeding…".[1]

[1] *[EC] v [Company X]* [20XX] NZHC [XXXX] at [XX].

[4] A reading of the judgment discloses that the proceedings arose from obviously very [redacted].

[5] The proceedings had been commenced in [year] and only went to trial some [redacted] years later.

[6] It is apparent from the judgment that but for significant agreement on a number of matters of fact, the trial would have taken considerably longer. It was a complicated case.

[7] It is evident that much was in dispute across a significant range of fronts. The length of the judgment alone is testimony to that.

[8] In [month year], Mr [RN] wrote to Mr [AT] advising that:

(a) Mr [RN]'s position as a funder of the litigation had been set out in a letter and affidavit from Mr [EC]'s lawyers, [Law Firm A].

(b) He considered his clients had a strong case.

(c) Mr [AT] was placed on notice that in the event Mr [RN]'s clients were successful in the litigation, and Mr [EC] was unable to pay any Court ordered costs, recovery of costs would be sought from Mr [AT].

The complaint

[9] Mr [AT]'s complaints arise from correspondence Mr [RN] had forwarded to him on [day month year].

[10] He maintains that:

(a) The correspondence should not have been sent to him personally.

(b) The correspondence should have been forwarded to [Law Firm A].

(c) The correspondence was bullying and intimidatory, and written with specific purpose of endeavouring to discourage Mr [AT] from continuing to financially support Mr [EC] with the litigation.

The Standards Committee decision

[11] The Standards Committee delivered its decision on 3 February 2015.

[12] It appears that the Committee had proceeded to deal with the matter without notice to Mr [RN] so that he first learned of the complaint upon receipt of the decision now subject to review.

[13] The Committee's decision, which was to take no action on the complaint, may be summarised as follows:

(a) An understanding of the relationship between a lawyer and his client was fundamental to an understanding of the outcome of the complaint.

(b) Subject to any overriding duty to the Court, a lawyer's duty is to his or her client not the person on the other side of the dispute.

(c) Mr [RN]'s duty was to his own client. He had no duty to protect and promote the interests of Mr [AT] or Mr [EC].

(d) Mr [RN] had been retained to consider his client's position, in the context of the available facts and the relevant law, to set out the legal position as he saw it and to advise his client accordingly. His client's role was to assess that advice and to instruct Mr [RN].

(e) It was in the context of instructions Mr [RN] had received from his client that he had written to Mr [AT] informing him that, if [EC] did not succeed in his litigation then Mr [AT] may be pursued for costs. Neither Mr [RN] nor, more appropriately, his client, can be compelled through the complaints process, to review that position.

(f) Rule 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 required:

> (i) A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect and courtesy.

(g) After reviewing Mr [RN]'s correspondence, the Committee was satisfied that there was nothing in the correspondence that supported the contention that Mr [RN] had breached any duties owed to Mr [AT].

(h) In the event that [EC]'s proceedings did not succeed, then Mr [RN]'s client would be entitled to seek costs against Mr [AT]. It would be a matter for the Court whether or not such an application succeeded. In advising Mr [AT] of that intention, Mr [RN] had done no more than put Mr [AT] on notice of the application his client intended to make.

(i) The Committee was therefore satisfied that whilst Mr [RN] had been direct in his language, it could find nothing in the words and language used which, judged objectively, could lead to a conclusion that its motivation was to inspire anxiety or that Mr [RN] had breached a duty owed to Mr [AT].

Application for review

[14] Mr [AT] filed an application for review on 19 March 2015. In summary, the grounds for review were that:

(a) Mr [RN] ought not to have written to Mr [AT] at his home address.

(b) [Law Firm A] had confirmed in correspondence that they were acting and that Mr [AT] was funding the litigation. Any correspondence should have been addressed through [Law Firm A].

(c) Mr [RN] had no right to contact Mr [AT] directly and the motivation was to inspire anxiety, fear or concern with Mr [AT]. This strategy was employed in an attempt to "scare" Mr [AT] off funding the litigation.

(d) The Committee had focused on the lawyer client relationship rather than rule 2.7, which provides that a lawyer must not communicate with another lawyer's client.

(e) Mr [AT] was effectively part of the litigation in respect of the party represented by [Law Firm A]. Mr [RN] was aware of this to the extent that he was attempting to threaten and scare off Mr [AT] from funding that litigation. It was not reasonable to suggest that he was merely acting for his client and did not know that [Law Firm A] was acting for the other party.

(f) The tone of the 30 March 2011 correspondence was inappropriate and unprofessional.

(g) Mr [RN] was attempting to mislead Mr [AT] into believing that his client's position was stronger than could reasonably be asserted at that point, the endeavour being to mislead Mr [AT] into the belief that Mr [EC]'s case was a lost cause that ought not to be funded. This constituted a breach of Rule 11.1 which provides that a lawyer must not engage in conduct that is misleading or deceptive or likely to be so as regards any aspect of the lawyer's practice.

(h) The Committee's decision paid insufficient attention to the actual content and language of the letter. Paragraphs four and five particularly went far further than to inform Mr [AT] that he may face a costs claim in the event that Mr [EC] was unsuccessful.

(i) The correspondence was not "respectful" and lacked "integrity" as it was designed to intimidate and discourage.

Mr [RN]'s response

[15] The essence of Mr [RN]'s response was that:

(a) [Law Firm A] were acting for Mr [EC] and surely not for Mr [AT] for that would have created a conflict of interest. In any event Mr [RN] was unaware that [Law Firm A] were acting for Mr [AT]. So far as he was concerned, Mr [AT] was simply a litigation funder.

(b) In short, there was no breach of Rule 10.2 as Mr [RN] was unaware that Mr [AT] had any legal representation.

(c) It was not inappropriate to address the letter to him personally. Nothing in the letter could lead to the conclusion that its motivation was to inspire anxiety or fear.

(d) Its purpose was simply to inform Mr [AT] that in the event that the defendants were successful and Mr [EC] was unable to meet costs ordered, they intended to apply for costs awarded against him.

(e) At the time the letter was written that was a potential consequence for Mr [AT] if the defendants had been successful.

(f) It had been appropriate for the Committee to consider relationships between the people involved to ensure that Mr [AT] knew the potential consequences of funding someone else's litigation.

(g) In sending the letter Mr [RN] was acting in the interests of his client. There had been no breach of Rule 10.2. (Rule 2.7 did not provide that a lawyer must not communicate with another lawyer's client, so it was assumed that Mr [AT] intended to refer to rule 10.2.)

(h) Rule 11.1 was irrelevant.

(i) There was nothing in the letter that was discourteous or disrespectful. A lawyer was duty-bound to advocate for their client's position and it was not to be expected that the recipients of such letters would always find them palatable.

(j) To say that it was designed to intimidate was to grossly overstate.

(k) Judged objectively nothing in the words or language of the letter led to a conclusion of breach of duty to Mr [AT] or of any rules of conduct.

Review on the papers

[16] The parties agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

Nature and Scope of Review

[17] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[2]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …

[2] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [41].

> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[18] More recently, the High Court has described a review by this Office in the following way:[3]

> 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.

[19] 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, including the Committee's decision and the information made available in the course of this review; and

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

Analysis

Costs against third parties

[20] A first question to consider is the issue as to whether there is anything untoward in a lawyer putting a litigation funder on notice as to the possibility of costs being sought against the funder.

[21] It is helpful to briefly examine what the case law says about applications for costs against non-parties who fund litigation and, in particular, the circumstances in which such applications may have prospects of success.

[22] I do that because it is necessary to examine the case law in detail to establish a proper footing upon which to consider the content and language of the letter, and thus get to the fundamental issue of whether that raises any conduct issues.

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

[23] In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*[4] (which was adopted by the Supreme Court in *Waterhouse v Contractors Bonding Limited*)[5] the opinion of the Privy Council was delivered by Lord Brown who said:[6]

> [16] Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.
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> [17] Generally speaking the discretion will not be exercised against "pure funders", described in paragraph 40 of Hamilton v Al Fayed as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.
>
> [18] Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence …

[24] So in March 2011, when the letter was written, the principles were:

(a) A funder who does not stand to benefit from the litigation but is simply funding it to ensure success to justice is unlikely to be at costs risk: whereas

(b) A funder who substantially controls and/or stands to benefit from the litigation (thus becoming the, or at least a, real litigant) is exposed to that risk.

[25] If it had been the case that Mr [RN]'s client was successful in the litigation, and was unable to recover costs from Mr [EC], it would clearly have been open to Mr [RN] to seek recovery from Mr [AT]. At that point, the Court would consider the circumstances, the applicable law, and make a decision. There was nothing untoward

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[4] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (No 2) [2004] UKPC 39, [2005] 1 NZLR 145 at [25].
[5] *Waterhouse v Contractors Bonding Limited* [2013] NZSC 89, [2014] 1 NZLR 91 at [64].
[6] Above n 4 at [64].

in Mr [RN] putting Mr [AT] on notice that should the proceeding fail he, as a non-party funder, would or could be at risk of costs.

[26] Notice, or its absence, can be a factor in the awarding or not of non-party costs. So, if not essential, it was a prudent step for Mr [RN] to take on behalf of his then clients and, it might be added, a fair one for Mr [AT] himself in case he was oblivious to the risk.

Contacting Mr [AT] directly

[27] Mr [RN] wrote directly to Mr [AT]. In doing so, Mr [AT] submits that Mr [RN] was in breach of rule 10.2 of the Conduct Rules, which provides that a lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter except as authorised by the rule.

[28] In advancing that argument, Mr [AT] is suggesting that he was being represented in the proceedings by [Law Firm A] and that Mr [RN] knew that, and by electing to correspond directly with him, his conduct breached rule 10.2.

[29] The full nature and extent of Mr [AT]'s role as a litigation funder for Mr [EC] is not clear on the papers. Nor is it clear on those whether, at the time, [Law Firm A] was acting for Mr [AT] personally, or whether he was merely working co-operatively with them in support of Mr [EC].

[30] There is no evidence advanced by Mr [AT] to suggest that he had instructed [Law Firm A] on a client-lawyer basis in respect to the proceedings being pursued by Mr [EC].

[31] The accounts provided by the parties would indicate that Mr [AT] was assisting Mr [EC], but there is no evidence to support argument that he had engaged [Law Firm A] to act for him in respect to matters relating to the proceedings.

[32] I note, that Mr [RN] records that he became aware of Mr [AT]'s involvement, on receipt of correspondence from [Law Firm A] which advised that Mr [AT] was funding the litigation. It is not suggested that this correspondence, recorded [Law Firm A]'s position as being that they had been instructed by Mr [AT], which it could be expected to have done if that was the case.

[33] No doubt Mr [AT] would have had engagement with Mr [EC]'s lawyers in the course of the proceedings, but there is nothing before me to suggest that he was in a client/lawyer relationship with [Law Firm A]. Mr [EC] was the client. Mr [AT] was the

litigation funder. The roles are quite distinct. A breach of rule 10.2 can only occur, if a lawyer communicates directly with a person whom the lawyer *knows* is represented.

[34] I have no reason to reject Mr [RN]'s claim that at the time he was unaware that (if it was the case) [Law Firm A] or any other law firm was acting for Mr [AT] in connection with the matter.

[35] I do not consider that Mr [RN] writing directly to Mr [AT] engages any conduct issues.

Engaging in deceptive and misleading conduct

[36] Mr [AT] complains that Mr [RN] misrepresented the strength of his client's case, when he advanced argument that he considered his case to be a strong one.

[37] He argues that Mr [RN] in overstating his client's position had breached Rule 11.1 which provides that a lawyer must not engage in conduct that is misleading or deceptive or likely to be so as regards any aspect of the lawyers practice.

[38] Rule 11.1 is concerned with misleading or deceptive conduct in relation to the lawyer's practice. It concerns matters such as the lawyer's practising certificate status, expertise in particular areas of the law, the existence of an association, affiliation or endorsement, or fee charging practices. The rule is not directed at misleading and deceptive conduct in the lawyer's advocacy work. That matter is more directly addressed by rule 13.1 concerning a lawyer's duty of fidelity to the court.

[39] Paragraph four of Mr [RN]'s letter to Mr [AT] does not purport to set out matters of incontestable fact. Rather it speaks of a belief on the part of Mr [RN] as to how matters stood in [Month Year]. And there is nothing to suggest that what was set out in that paragraph did not represent Mr [RN]'s instructions and perspective on the proceedings.

[40] It is a hallmark of litigation that opposing lawyers will (on account of the differing instructions they receive and the perceptions thus created or consequentially arising) see the case before them differently from each other, it eventually falling to the court (if, as here, the case does not settle) to determine who most probably is right.

[41] Significant issues concerning the assignability of, or right to pursue, certain causes of action as between [EC] and the Official Assignee in Mr [EC]'s former bankruptcy were later resolved in favour of Mr [EC].

[42] But plainly enough those issues were obviously moot in [Month Year]. The history of litigation is littered with cases the outcomes of which have been quite unexpected and as can be seen from the Court of Appeal's [Month Year] judgment matters were only finally resolved after first instance and appeal hearings, which no doubt involved extensive argument.[7]

[43] Mr [RN]'s letter to Mr [AT] spoke of the funding of 'unmeritorious proceedings which would otherwise not have been pursued', paragraph five describing the kinds of circumstances where a funder may well end up with, or at least be at risk of, some costs liability.

[44] It is clear that as matters then stood, it was Mr [RN]'s instructions-based perception that Mr [AT] should be alerted to the possibility of a costs application.

[45] Moreover, failure to put Mr [AT] on notice might have provided an argument against an award, if the case had turned out differently.

[46] Mr [RN], whose brief would have been to do all that was necessary or justifiable for his clients, cannot be criticised for taking the precaution of warning Mr [AT].

[47] There was nothing untoward or misleading in Mr [RN] expressing confidence in the merits of his client's case. It would be unusual to do otherwise. The fact that Mr [EC] was, at the end of significant and protracted litigation, ultimately successful, does not provide evidence to support serious allegation that Mr [RN] had been deceptive and misleading when advancing his views as to the strength of his client's case.

Discourteous-Intimidating conduct

[48] Mr [AT] contends that Mr [RN]'s correspondence was discourteous. He goes further. He says that the correspondence was intimidatory, and calculated to dissuade him from continuing to fund the litigation.

[49] It must be emphasised that the extent of the obligations owed by Mr [RN] to Mr [AT] were limited.

[50] The overriding duty of a lawyer is an officer of the Court. Next comes their obligations to their client. In acting for a client, a lawyer must, within the bounds of the

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[7] *Glynbrook 2001 Ltd v Official Assignee* [2012] NZCA 289.

law and the conduct rules, protect and promote the interests of the client to the exclusion of the interests of third parties.[8]

[51] That being said, a lawyer must, when acting in a professional capacity, conduct dealings with others, including self represented persons, with integrity, respect, and courtesy.[9]

[52] Read objectively, the letter can be seen to maintain a proper balance between those two principles. It does not read as one intended to intimidate or threaten, or even simply to create anxiety, but as a forthright way of giving Mr [AT] notice of a matter that Mr [RN] considered was necessary to bring to Mr [AT]'s attention.

[53] Whilst I understand Mr [AT]'s argument that he considered the objective of the correspondence was to discourage him from continuing to fund the litigation, there was nothing untoward in Mr [RN] advising him that costs may be sought. That is a common feature of litigation.

[54] Litigation is frequently confrontational and challenging for the parties involved in it. Protracted and complex litigation of this nature, would inevitably on occasions engage the competing parties, and their lawyers, in a robust and vigorous exchange of views.

[55] Looking closely at the language of the paragraphs that have caused offence to Mr [AT], I do not consider that the correspondence either in tone or subject can reasonably be described as threatening. It is correspondence which starkly presents the writer's intention to seek a legal remedy in the event of the Court awarding costs in his client's favour.

[56] The best defence to that was to retain a confidence in the merits of their case, and that clearly is what both Mr [AT] and Mr [EC] did. Mr [EC] was ultimately successful.

[57] I consider it significant that the last sentence of Mr [RN]'s letter to Mr [AT] reads:

> If there is any aspect of this advice that you are not clear about, then we strongly urge you to seek independent legal advice.

[58] Significant because that sentence, written in [Month Year], is consistent with Mr [RN]'s most recent assertion that he thought Mr [AT] to be unrepresented.

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[8] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 6.
[9] Rule 12.

[59] It may also be said of that sentence that it belies Mr [AT]'s supposition that Mr [RN]'s intention was to intimidate, or at least create anxiety. For a letter writer with such intentions would scarcely be urging the intended recipient to seek independent legal advice.

Conclusion

[60] The application for review is dismissed.

Decision

[61] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed.

DATED this 29th day of September 2016

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R Maidment
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 [AT] as the Applicant
Mr [RN] as the Respondent
Mr [JJ] as a Related Party
Mr [MM] as the Applicant's Representative
[Area] Standards Committee
The New Zealand Law Society