

**IN THE DISTRICT COURT
AT HUTT VALLEY**

**I TE KŌTI-Ā-ROHE
KI TE AWAKAIRANGI**

**CIV-2012-485-000574
[2020] NZDC 26571**

BETWEEN	WOODROFFE LAW PARTNERSHIP Plaintiff
AND	LUAIVA FAGALILO First Defendant
AND	IORITANA TONISE Second Defendant

Hearing: On the papers

Appearances: O Woodroffe for the plaintiff
J Gwilliam for the Second Defendant

Judgment: 18 December 2020

**JUDGMENT OF JUDGE C N TUOHY:
[On Application for Debarment of Counsel]**

Background

[1] Mr Tonise, the second defendant, has applied for an order that Olinda Woodroffe be disqualified from acting as counsel for the plaintiff, Woodroffe Law Partnership (Woodroffe's), in this proceeding in which they claim that he is liable for legal fees.

[2] The background facts of the proceeding were aptly summarised by Cull J in Mr Tonise's unsuccessful appeal against the dismissal of his application for summary judgment¹. (Mr Tonise had applied for summary judgment on the basis that there was

¹ *Tonise v Woodroffe Law Partnership* [2020] NZHC 1926.

no contract between himself and Woodroffe's, the claim was statute barred and that the claim was an abuse of process):

[3] The legal fees which are the subject of Woodroffe's claim against Mr Tonise were incurred in respect of a proceeding which commenced in the High Court in 2008 against Mr Luaiva Fagalilo, the pastor of the Green Valley Samoan Assembly of God Church, an unincorporated society.² Woodroffe's acted for Pastor Fagalilo in defending the proceeding, which involved a disagreement between two factions of the Green Valley Church about the appointment of a new trustee of the Green Valley Church's Trust Board. Pastor Fagalilo was largely unsuccessful in the litigation, and costs were awarded against him.³

[4] Woodroffe's issued summary judgment proceedings against Pastor Fagalilo on 16 March 2012 for payment of fees of \$91,540.94. Mr Tonise, a member of the Green Valley Church, swore an affidavit in support of Pastor Fagalilo's opposition. On 30 April 2012, the same day Mr Tonise swore his affidavit, he made a formal complaint on behalf of the Green Valley Church to the Lawyers Complaints Service about Mrs Woodroffe's incompetence, unprofessionalism and that her fees were overcharged. This complaint triggered the operation of s 161(1) of the Lawyers and Conveyancers Act 2006 which stayed the summary judgment proceeding until the complaint was finally disposed of.

[5] In June 2013, the New Zealand Law Society Standards Committee essentially upheld the complaint. Woodroffe's applied for a review of that decision to the Legal Complaints Review Officer who, in March 2015, overturned the Committee's decision and sent the matter back to the Committee for further consideration. On 7 July 2016, the Standards Committee delivered its second decision and upheld the complaint in part. Woodroffe's fees were reduced by \$9,000 and they were fined \$500 plus costs. A finding was made of unsatisfactory conduct, and a certificate of final determination of the matter was issued under s 161(2) of the Lawyers and Conveyancers Act. Woodroffe's filed a review of this second decision which was upheld on 17 May 2017. Pastor Fagalilo passed away during this process in May 2015.

[6] On 1 May 2018, a payment of \$13,100 from the National Body of the Samoan Assemblies of God was made towards Woodroffe's fees. On 7 August 2018, a further payment of \$2,500 was made. It is not clear why the National Body made these payments. Mr Tonise says he is unaware of them and Woodroffe's say they did not ask for payment from the National Body.

[7] On 4 September 2018, Woodroffe's applied to join Mr Tonise as a second defendant in its proceedings against Pastor Fagalilo. Joinder was granted on 12 October 2018 and backdated to the date of the application on 4 September.⁴

² *Time v Fagalilo* HC Wellington CIV-2008-485-540, 9 March 2010.

³ *Time v Fagalilo* HC Wellington CIV-2008-485-540, 30 June 2010; *Time v Fagalilo* [2011] NZCA 605.

⁴ *Woodroffe Law Partnership v Fagalilo* [2018] NZHC 2727.

[8] On 25 February 2019, Woodroffe's filed an amended statement of claim particularising its claim against Mr Tonise and claiming outstanding fees of \$65,590.94. The claim is made on the basis of both "services supplied" and "quantum meruit". As to the services supplied, it alleges that Pastor Fagalilo instructed Woodroffe's to supply legal services in respect of the Green Valley Church "on behalf of himself and members of the congregation", an unincorporated body comprising of individual people; that Woodroffe's supplied legal services to Pastor Fagalilo and the congregation; that Mr Tonise was a member of the congregation; and that Pastor Fagalilo engaged Woodroffe's both in his own right as pastor, as a member of the congregation and as an agent for other members of the congregation. Woodroffe's also plead that Mr Tonise held himself and the congregation out as liable for the fees in the complaint to the Legal Complaints Service. As to the quantum meruit claim, it is pleaded Mr Tonise accepted the benefit of the legal fees and is liable to pay a reasonable fee as compensation in the sum claimed.

[9] On 12 March 2019, Mr Tonise applied for summary judgment against Woodroffe's. On 25 March, Woodroffe's dispensed with the services of counsel and is now self-represented.

Submissions of the Second Defendant

[3] The second defendant submits that an order disqualifying Ms Woodroffe from acting as counsel for the plaintiff is necessary in order for justice to be done. Further, that Ms Woodroffe's continuing to act for the plaintiff is in breach of her professional obligations as a lawyer, pursuant to r 13.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules") and r 1.24 of the District Court Rules 2014 ("the DCR").

[4] The second defendant submits that Ms Woodroffe is the only member of Woodroffe's who was present when instructions were received and that it was her who provided advice to members of the congregation in relation to the original litigation. The second defendant further submits that there has been no evidence provided by the plaintiff as to who was actually instructing Ms Woodroffe in that original litigation. Mr Tonise's defence to the present litigation is that he never directly instructed Ms Woodroffe or engaged in any direct communication with her in the original litigation in respect of which the plaintiff is seeking recovery of her fees. Ms Woodroffe will therefore need to give evidence in these proceedings.

[5] The second defendant notes that both this Court and the High Court have invited Ms Woodroffe to remove herself as counsel from the proceedings on a number of occasions.

Submissions of the Plaintiff

[6] The plaintiff submits that Ms Woodroffe should be allowed to continue to act for the plaintiff as she is a natural person of sufficient age, capacity and experience in law and therefore should not be denied the right to present her case in person. The plaintiff relies on *Re: GJ Mannix* as authority for the assertion that a natural person cannot be denied the right to act in person.⁵

[7] The plaintiff submits that the second defendant's reliance on r 13.5 of the Rules is misconceived, and that r 13.5.3 of the Rules applies instead because it states that the rules barring lawyers from acting in a proceeding where the lawyer's conduct is at issue do not apply if the lawyer is acting for themselves or for the member of the practice whose actions are at issue. The plaintiff states that Ms Woodroffe is acting for herself, not a client, and therefore should not be barred from acting in these proceedings.

The Law

[8] The power to disqualify counsel was discussed by the Court of Appeal in *Li v Liu*.⁶ It arises from the Court's inherent jurisdiction to protect the integrity of the judicial process. As a creature of statute, the District Court does not have inherent jurisdiction. However, the power to disqualify counsel may equally be described as an inherent power of the Court within the meaning explained by the Supreme Court in *Siemer v Solicitor-General*:⁷

[113] All courts in New Zealand have inherent powers. While these powers have in the past sometimes been described as part of the "inherent jurisdiction" of the courts, we think that the term "inherent powers" more aptly describes them. "Jurisdiction" and "power" are two distinct concepts. The jurisdiction of a court is its

⁵ *Re: GJ Mannix Ltd* [1984] 1 NZLR 309.

⁶ [2018] NZCA 528

⁷ *Siemer v Solicitor-General* [2013] NZSC 68

substantive authority to hear and determine a matter Jurisdiction may be inherent in a particular court or it may be conferred by statute. But every court has inherent powers which are incidental to or ancillary to its jurisdiction, whether that jurisdiction is inherent or statutory.

[114] ... The courts' inherent powers include all, but only, such powers as are necessary to enable a court to act effectively and uphold the administration of justice within its jurisdiction. Their scope extends to preventing abuse of the courts' processes and protecting the fair trial rights of an accused.

[9] I am satisfied that the District Court has the power to make an order disqualifying counsel as part of its inherent power to uphold the administration of justice.

[10] The Court of Appeal in *Li v Liu* set out the principles applicable to a decision to disqualify counsel:

[23] ... The court has inherent jurisdiction to disqualify counsel or solicitors from acting where to allow them to do so would impair the integrity of the judicial process. That said, the court should not lightly interfere in a party's fundamental right to counsel of their choice, particularly where considerations of delay in the application, inconvenience, or sunk cost favour the affected party. Further, the court should be vigilant in preventing objections whose purpose is only to disrupt or inconvenience the other side. To allow the judicial process to be played in this tactical fashion would itself be an unacceptable impairment.

[24] One area where it may be necessary to protect the integrity of the judicial process was addressed by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*. In that case the meaning of a clause in a gas supply contract was in issue. Counsel appearing for the parties to the dispute had each played a role in the negotiation of the clause. Wilson J (with whom, on this point, the other members of the Bench expressly agreed), recorded his concern at the position in which counsel had put themselves:

[147] Whatever the court or tribunal in which they are appearing, it is undesirable for practitioners to appear as counsel in litigation where they have been personally involved in the matters which are being litigated. In that situation, counsel are at risk of acting as witnesses and of losing objectivity.

[11] The Court's discretion to disqualify counsel may be guided by the Rules. Relevantly, r 13.5 of the Rules provides as follows:

Independence in Litigation

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

- 13.5.1 A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.
- 13.5.2 If, after a lawyer has commenced acting in a proceeding, it becomes apparent that the lawyer or a member of the lawyer's practice is to give evidence of a contentious nature, the lawyer must immediately inform the court and, unless the court directs otherwise, cease acting.
- 13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.
- 13.5.4 A lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue.

[12] In *Anderson v De Marco* the High Court noted that the Court should adopt a pragmatic approach to decisions on whether to disqualify counsel.⁸

[13] The overarching test for the Court is whether Ms Woodroffe appearing in this matter creates an appearance of injustice such that she should not be permitted to act.

Discussion

[14] Ms Woodroffe will be the primary witness for the plaintiff, her evidence will be critical and will undoubtedly be highly contested. She will not be in a position to bring to bear the independence expected of the Court from counsel. That was apparent when she appeared on the summary judgment application before me.

[15] It is true that, as well as being the key witness, she is also one of the partners in Woodroffe's so she would be acting for an entity of which she is a principal. In that sense she would be acting for herself. But there is another partner in that entity who does not appear to have been directly involved in the crucial events although he has made a rather partisan affidavit in the proceeding. She would be acting as counsel for him as well.

⁸ *Anderson v De Marco* [2020] NZHC 837 at [33]-[34], [38].

[16] I do consider that this case involves a little more than simply a lawyer acting for herself. Ms Woodroffe is an experienced counsel but does not in this proceeding have the independence and objectivity which that position requires. I think that that puts the Court itself in a potentially difficult position especially when both her and her partner have obligations to the Court arising from their positions as officers of the Court which may conflict with their personal interests.

Conclusion

[17] I make an order disqualifying Ms Olinda Woodroffe from acting as counsel in these proceedings.

C N Tuohy
District Court Judge