

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the National Standards Committee

**BETWEEN**

**JK**

Applicant

**AND**

**ANTHONY MOLLOY QC**

Respondent

**DECISION**

**Introduction**

[1] Mr JK has applied for a review of a decision by the National Standards Committee dated 24 April 2013 in which the Committee determined pursuant to s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act) that there had been unsatisfactory conduct on the part of Mr Molloy QC pursuant to s 12(c) of the Act.

[2] The Committee determined Mr JK's complaint on the basis that:<sup>1</sup>

Dr Molloy's conduct had contravened s 4(a) of the Act and rule 2 of the RCCC, by failing to comply with his obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand.

[3] The complaint arises from an article published in the National Business Review (NBR) on 29 August 2012 (the article).<sup>2</sup> The article reports pithy quotes apparently sourced from interview with Mr Molloy against a background of him publishing commentary and academic articles elsewhere presenting arguments in favour of judicial specialisation in the High Court.

**PARAGRAPHS [4] to [125] REDACTED**

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<sup>1</sup> Standards Committee decision at [28].

<sup>2</sup> Rod Vaughan "New Zealanders shafted by fraudulent justice system says top QC". National Business Review, 29 August 2012.

## Analysis

[126] Mr JK confirmed at the review hearing that, while he had not filed written submissions as directed, if he were to do so, written submissions “would literally be a re-wording of the material on the file already”. He argues that this review can have one of only two possible outcomes: either Mr Molloy must be referred to the Tribunal “if the rule of law matters any more” in relation to lawyers’ professional standards in New Zealand, or the decision against Mr Molloy “should be reversed, and he shouldn’t have any black mark on his disciplinary record as a result of this”.<sup>42</sup>

[127] That argument is based on a false dichotomy. There is a third alternative. The Act leaves no gap between the realms of professional and personal conduct by lawyers.<sup>43</sup> Conduct by lawyers in either realm can be assessed within the disciplinary framework of the Act, which makes provision for conduct which falls below proper standards, but is not misconduct under s 7, to be considered in the framework of unsatisfactory conduct set out in s 12.

## Conduct

[128] Mr JK relies on there being relevant similarities between Mr Molloy’s conduct and the conduct under consideration in *Orlov*.

[129] Mr Molloy distinguishes *Orlov* on its facts, particularly because he says he laid a foundation for the comments before making them; he has shown that foundation, and he considers the foundation is proper. He does not defend the particular language of the comments published in the article. Mr Molloy considers the position he argues for is correct, any comments he has made to media are made in good faith, upon request, in the interests of the public and with no attendant element of personal gain. At the point in the review hearing where the focus was on how his comments came to be in the article that gave rise to the complaint, he said that, while he could not recall the details, he did not “just rip this off as a piece of abuse”.

[130] The Committee’s concerns about Mr Molloy’s comments were that they had not been made, as they should, “in a reasoned and temperate manner (to be adjudged on the individual circumstances in each case)”. I am not confident that is the correct

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<sup>42</sup> Review hearing, JK

<sup>43</sup> *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606 at [102].

approach, given no reliable explanation has been provided as to how the comments made their way into the article.

[131] The logical difficulty with the Committee's approach is that it focuses on the article that reports only fragments of Mr Molloy's lengthy arguments. It is difficult to see how Mr Molloy, a journalist, or anyone else for that matter, could do justice to Mr Molloy's arguments with brevity. Depriving those lengthy and detailed arguments of their proper context runs the risk that robust, structured argument may be reduced to little more than rhetoric.

[132] The approach adopted by the High Court in *Orlov*, which was not available to the Committee, was to attempt to identify whether Mr Orlov could point to any objective foundation, had made any attempt to provide a foundation or would be willing to explain his foundation to the Court. When weighing considerations around freedom of speech, context was important, "regard needs to be had to where it was said and what was said ..."<sup>44</sup>

[133] It is difficult to pinpoint when Mr Molloy's conduct occurred other than by reference to Mr Molloy's reply, which suggests he has been publishing commentary and articles on and off since the early 2000s.

[134] When asked at the review hearing, Mr Molloy said he has often spoken to the press, but he could not reliably recall a particular interview as the genesis of the article and he did not have access to his archives.

[135] Mr Molloy's recollection was too vague to be reliable.

[136] As his materials are widely published, the possibility that the article could have been written without a journalist having to speak to Mr Molloy at all cannot be overlooked. That proposition is supported to a limited extent by the fact that at least one of the articles Mr JK provided, the 22 May 2011 Sunday Star Times article, was a report of a report.

[137] In the evidence he provided to the Committee, and on review Mr Molloy has pointed to views expressed by others, a member of the public, colleagues, judges and academics as providing an objective foundation for the views he expresses in his

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<sup>44</sup> *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606 at [84].

lengthy arguments. While there comes a point at which majority belief is not a sound basis for a rational argument, there is no right or wrong answer for Mr Molloy's arguments.

[138] Based on *Orlov*, what appears to be important is that Mr Molloy has identified an objective foundation, and can rationally explain that. It is not for this Office to be persuaded one way or the other by Mr Molloy's arguments. One does not need to be persuaded by an argument to be able to assess whether, broadly speaking, it has a logical rational basis. The fact that Mr Molloy has demonstrated he had a justifiable (rather than justified) foundation for his arguments appears consistent with the High Court's approach in *Orlov*.

[139] Some of the language Mr Molloy deploys in delivering his arguments is provocative.

[140] The flouting of oaths and sitting under false pretences, which the Committee considered decisive in reaching its view that Mr Molloy's conduct was unsatisfactory, are consequences of deficiencies in the operating principle within the context of Mr Molloy's arguments. Mr Molloy does not suggest that judges willingly flout their oaths or sit under false pretences. His argument is that the operating principle puts judges in a position where they either refuse to be appointed to the bench, or they accept the limitations the system imposes.

[141] The quote that Mr Molloy was not mounting "an attack on the competence of judges, but on their delusions of omnicompetence" is more problematic. However, reading this aspect of Mr Molloy's arguments in context, there is no basis for the view that Mr Molloy was arguing that all judges at all times completely lack competence in all areas of law in which they make decisions, or that all judges (or in fact any) suffer delusions of omnicompetence.

[142] Mr Molloy's evidence at the review hearing was that a blanket criticism was not his intent. His arguments focus on his area of specialisation, equity and trust law and appear to be that considering oneself to be omnicompetent, whether a judge or not, would be delusional. His argument cannot be divorced from a criticism of judges who are prepared to accept the limitations imposed by the operating principle. Mr Molloy's argument, again, is that the operating principle puts judges in a position where they either boycott the system by refusing judicial appointment, or accept appointment "warts and all".

[143] The next quote of concern highlighted by the Committee came in the form of a rhetorical question apparently posed by Mr Molloy, and his rhetorical answer, in the course of which he develops a doctor/lawyer analogy which he maintains was “utterly apt”.<sup>45</sup> While the analogy is not without its flaws, Mr Molloy is candid about his desire for the public to engage with the discussion, and it is not difficult to understand the attraction of that analogy for a reporter.

[144] Other fragments of argument, described by Mr Molloy as “a very closely reasoned submission which was based on years of other work and discussions”,<sup>46</sup> are of necessity deployed as quotes out of context, which has the unfortunate effect of depriving them of their intended meanings. In the circumstances, that is not a fair or sound basis on which to make a finding of unsatisfactory conduct.

[145] Mr Molloy does not does not resile from his use of words like “fraudulent”, “flout”, “false pretences”, or “corruption”. They are attention-grabbing words. Mr Molloy says his purpose in using such words in his arguments is to stimulate public debate. That objective is a legitimate one, and given the subject matter, hard to achieve, and perhaps impossible with brevity.

[146] I am conscious that consideration of context can make the task of assessment more complex and difficult. However, I do not consider that a fair assessment of whether Mr Molloy’s deployment of particular words falls below a proper professional standard can be carried out without reference to the context within which he (rather than the reporter) has used them. Nor would such an approach be consistent with the direction taken by the High Court in *Orlov* given Mr Molloy relies on those articles to provide context and foundation for the quotes that gave rise to the original complaint.

[147] Mr JK identifies similar comments reported in other media. Similar reasoning applies to those. It is not the reporter’s article that is relevant to an inquiry under the Act: it is the lawyer’s conduct.

### **Misconduct or Unsatisfactory conduct**

[148] Decisions about whether lawyers’ conduct contravenes professional standards are guided by the purposes of the Act. Those are set out in s 3, which says:

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<sup>45</sup> Molloy, Review Hearing.

<sup>46</sup> Molloy, Review Hearing.

### 3 Purposes

- (1) The purposes of this Act are—
- (a) to maintain public confidence in the provision of legal services and conveyancing services:
  - (b) to protect the consumers of legal services and conveyancing services:
  - (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

[149] Mr Molloy's evidence is that his comments are all made with a view to maintaining public confidence in the provision of legal services, protecting consumers of legal services, and to ensuring that the status of the legal profession merits recognition. He refers to admonishments in his QC's warrant to act for the good of her Majesty's subjects.

[150] There is no reason to doubt Mr Molloy's evidence. I therefore proceed on the basis that Mr Molloy's conduct is probably not inconsistent with the purposes of the Act. However, given the definitions of misconduct and unsatisfactory conduct, that may not be a complete answer.

#### *Misconduct or unsatisfactory conduct – ss 7 and 12*

[151] The Act provides for determinations to be made in relation to lawyers' conduct. The analysis to be undertaken in determining whether conduct may be misconduct or unsatisfactory conduct as the complaint alleges involves a series of interrogations under ss 7 and 12, which relevantly say:

### 7 Misconduct defined in relation to lawyer and incorporated law firm

- (1) In this Act, **misconduct**, in relation to a lawyer or an incorporated law firm,—
- (a) means conduct of the lawyer ... that occurs at a time when ... he or she ... is providing regulated services...
  - ...
  - (b) includes—
    - (i) ...
    - (ii) conduct of the lawyer ... which is unconnected with the provision of regulated services by the lawyer ... but which would justify a finding that the lawyer ... is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer ...

**unsatisfactory conduct defined in relation to lawyers and incorporated law firms**

In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—

- (a) conduct of the lawyer ... that occurs at a time when ... he or she ... is providing regulated services ...
- (b) conduct of the lawyer ... that occurs at a time when ... he or she ... is providing regulated services ...
- (c) conduct consisting of a contravention of this Act, or of any ... practice rules made under this Act that apply to the lawyer ...

[152] In the present circumstances, the first question is whether Mr Molloy was providing regulated services as defined by the Act at the time of the conduct.

[153] If the answer to the first question were to be yes, ss 7(1)(a), (b)(i), 12(a) and (b) may apply. With the exception of s 7(b)(ii), the balance of s 7 is not relevant to the present exercise.

[154] If the answer to the first question is no, ss 7(1)(b)(ii) and 12(c) may apply.

*Was Mr Molloy providing “regulated services”*

[155] Ascertaining whether Mr Molloy was providing regulated services involves consideration of a series of definitions in the Act, relevantly, whether he was providing legal services, which in turn are defined as meaning “services that a person provides by carrying out legal work for any other person”.<sup>47</sup>

[156] Mr Molloy says he does not believe he was acting on instructions. On a common sense basis, he was not carrying out legal work for any other person: predominantly he was writing commentary and academic articles. However, as the Act also defines legal work, that interim conclusion can be checked against the definition of legal work:<sup>48</sup>

**legal work** includes—

- (a) the reserved areas of work:
- (b) advice in relation to any legal or equitable rights or obligations:

<sup>47</sup> Lawyers and Conveyancers Act 2006, s 6.

<sup>48</sup> Section 6.

- (c) the preparation or review of any document that—
  - (i) creates, or provides evidence of, legal or equitable rights or obligations; or
  - (ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property:
- (d) mediation, conciliation, or arbitration services:
- (e) any work that is incidental to any of the work described in paragraphs (a) to (d)

[157] Without more, none of the elements of the definition of legal work apply to writing academic articles. Although his arguments have been forged while he has been in legal practice, there is no evidence that supports a connection between the comments of concern to Mr JK or the Committee and Mr Molloy doing legal work.

[158] I therefore conclude the evidence does not prove Mr Molloy was providing regulated services as defined under the Act, so the answer to the first question is no.

[159] As the answer to the first question is no, the operation of ss 7(1)(a), (b)(i), 12(a) and (b) is excluded. The next step is to consider whether ss 7(1)(b)(ii) or 12(c) may apply.

#### *Section 7(1)(b)(ii)*

[160] Section 7(1)(b)(ii) contains two distinct criteria. One, the conduct in question is unconnected with the provision of regulated services by the lawyer. Two, the conduct would justify a finding that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer. The first criterion incorporates into the regulatory regime conduct by lawyers outside their professional lives, so that there is no gap between professional and personal conduct.<sup>49</sup> However, to fall within the regulatory regime of s 7(1)(b)(ii), both criteria must be capable of being met.

[161] The second criterion involves consideration of whether the conduct would justify a finding that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer. The use of the word “would”, rather than, for example, could or may, signals a high level of certainty is called for when carrying out the second part of the assessment in relation to conduct unconnected with the provision of regulated services by the lawyer.

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<sup>49</sup> *Orlov v New Zealand Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606, at [102].



[162] With respect to personal misconduct under s 7(1)(b)(ii), the High Court said in *Orlov* it:<sup>50</sup>

... involves moral obloquy. It is conduct unconnected to being a lawyer which nevertheless by its nature, despite being unrelated to the practitioner's job is so inconsistent with the standards required of membership of the profession that it requires a conclusion that the practitioner is no longer a fit and proper person to practice law.

[163] There is no evidence to support conclusion that Mr Molloy's use of language would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer. There is no basis on which Mr Molloy's conduct could engage the second criterion. Consequently, the operation of s 7(1)(b)(ii) can be excluded without reference to the first criterion, which leaves only s 12(c).

#### *Section 12(c)*

[164] Having excluded the operation of ss 7, 12(a) and (b), the only remaining question is whether Mr Molloy's conduct falls within the provisions of s 12(c) of the Act. That analysis is also carried out with the Act's purposes in mind.

[165] The complaint alleged misconduct. The Committee concluded the conduct contravened s 4 of the Act and r 2. Section 4 says:

Every lawyer who provides regulated services must, in the course of his ... practice, comply with the following fundamental obligations:

(a) the obligation to uphold the rule of law and to facilitate the administration of Justice in New Zealand;

...

[166] Section 4 is reflected in rule 2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which says: A lawyer is obliged to uphold the rule of law and to facilitate the administration of Justice.

[167] Those obligations arise from a lawyer owing an overarching duty as an officer of the court. Chapter 13 expands on the obligations of lawyers, as officers of the court. Rule 13.2, for example, says that generally, a lawyer must not act in a way that undermines the processes of the court or the dignity of the judiciary. The rules represent minimum standards. There is no maximum. Consideration of whether a

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<sup>50</sup> At [106].

lawyer may have breached any of those requirements is to be carried out within the context of the Act and its purposes.

[168] As noted above, there is good reason to accept, and no reason to reject, Mr Molloy's evidence that his arguments are aimed at benefiting the public. That objective is not inconsistent with upholding the rule of law or facilitating the administration of justice. There is no compelling evidence that his actions undermine the processes of the court or the dignity of the judiciary only because the arguments are primarily aimed at making what Mr Molloy and others argue are improvements.

[169] While the fragments of language that appeared in the article may be objectionable to some, to others they will not. Considered in the context of the commentary and academic articles in which they appear, the language of Mr Molloy's arguments does not warrant a disciplinary response.

[170] The decision is therefore reversed on review.

**PRAGRAPHS [171] to [174] REDACTED**

**Orders**

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

[176] Pursuant to ss 211(1)(b) and 138(2) further action on the complaint is unnecessary.

**DATED** this 14<sup>th</sup> day of April 2016

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**D A Thresher**  
**Legal Complaints Review Officer**

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

Mr JK as the Applicant

Mr Molloy as the Respondent

The National Standards Committee

The New Zealand Law Society