NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 22
LCDT 042/14

UNDER	the Lawyers and Conveyancers Act 2006
BETWEEN	**RICHARD ZHAO** Applicant
AND	**OTAGO STANDARDS COMMITTEE No. 1** Respondent

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr W Chapman
Ms S Fitzgerald
Mr M Gough
Ms C Rowe

HEARING at Auckland Specialist Courts and Tribunals Centre

DATE OF HEARING 18, 19, 20 July 2016

DATE OF DECISION 19 August 2016

COUNSEL
Mr J Shaw for the Standards Committee
Mr F Deliu for the Respondent

RESERVED DECISION OF THE TRIBUNAL

Introduction

[1] Mr Zhao faces a single charge of "misconduct", the charge is pleaded with two alternatives, namely "negligence or incompetence", or "unsatisfactory conduct".

[2] The charge is framed so as to set out four different categories of default:

1. Failure to pay client money into a trust account;

2. Failure to ensure client money earned interest;

3. Personally earning interest from client monies;

4. Failure to act upon a request to uplift client documents.

[3] The facts are largely undisputed, and the defaults acknowledged. The hearing was required because Mr Zhao disputed the level of seriousness claimed by the Standards Committee. In addition, Mr Zhao raised several defences, some of which were abandoned, or not strongly advanced, following the evidence. We shall only deal with those advanced by his counsel in closing submissions.

[4] Two preliminary issues arose for determination:

1. Mr Deliu sought, on Mr Zhao's behalf, to have the Chair and two of the members recused.

2. A document came to light, in respect of which a Standards Committee witness claimed confidentiality and privilege.

[5] Oral determinations for each of these were given with the reasons reserved.

Issues

[6] The issues for determination in this matter are as follows:

1. Is the test in *Saxmere*[1] met, so as to require the recusal of the Chair or the named members?

2. Is the document held by Mr B, subject to either litigation or solicitor/client privilege (or confidentiality) so as to exclude it from consideration?

3. Has Mr Zhao met the threshold of establishing an abuse of process such as to warrant a permanent stay of the proceedings?

4. Is Mr Zhao's undisputed conduct, in relation to his handling of Ms L's funds such a "wilful or reckless" breach of the Act,[2] or Rules[3] as to constitute misconduct?

5. If not, does the additional default of a one-year delay, (before sending the client's documents to Immigration New Zealand) compound behaviour to reach the level of misconduct?

6. If not, was Mr Zhao's conduct negligent or incompetent to the degree pleaded?

7. If not, is there unsatisfactory conduct, as a result of the acknowledged breaches of the Act and Rules?

Background

[7] The charge relates to the client relationship Mr Zhao had with a Ms L who was referred to Mr Zhao by a family friend, A, for assistance with family, immigration and other issues, from March 2013. Ms L came originally from China and had been living in Malaysia for a long period.

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[1] *Saxmere Company v Wool Board Disestablishment Company* [2010] 1 NZLR 35 (Supreme Court).
[2] Lawyers and Conveyancers Act 2006.
[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[8] Following some initial telephone contact during March 2013, Mr Zhao travelled to China where he met Ms L for the first time on 28 March. At that meeting they agreed about the legal work to be undertaken by Mr Zhao, which included some research and related work in China and thereafter Family Court and immigration applications in New Zealand.

[9] At this first meeting Mr Zhao handed Ms L a folder containing various information including a client engagement letter which summarised the work to be done, and their agreement that Ms L *"would make an initial deposit of $50,000 with us for fees, expenses and other payments to be used on your behalf."* The letter also contained Mr Zhao's estimate of total fees between $50,000 and $100,000 for the "intended action plans". Prior to that meeting in China, Mr Zhao had in telephone discussion with Ms L given her a rough idea of a fee range, but had not discussed a deposit or retainer.[4]

[10] Before returning from China to New Zealand, Mr Zhao, either directly or through his friend A, gave Ms L the details of his personal bank account into which the $50,000 deposit was to be paid. Mr Zhao says he did this because Ms L wanted to pay the money in cash before he left China. This was unacceptable to Mr Zhao and he did not have his trust account details with him, and was about to catch a flight. Mr Zhao accepted that there were other options for arranging the payment which would have satisfied the Trust Account rules.

[11] Mr Zhao had completed both the Stepping Up and Trust Account Supervisors course around a year before these events took place, and is aware of his responsibilities as Trust Account Supervisor. But his mindset at the time was that it did not matter for a few days or a couple of weeks where the funds were paid.[5] He admits it was a breach of trust account rules to direct fees for legal work to his personal bank account, even on a temporary basis.

[12] While Mr Zhao was and remains Trust Account Supervisor, he depended on his wife Catherine Zhao, a trained accountant, for management of the trust account. In a Statutory Declaration in evidence Catherine Zhao declared on 15 April 2014 that she was solely responsible for managing the 5 bank accounts she and her husband held with ANZ; and that she was the sole person holding logins and passwords for all bank

[4] Transcript p 141.
[5] Transcript p 149.

accounts including internet banking. The practitioner confirmed this under cross-examination. Mrs Zhao was not available for cross-examination on her declaration. Mr Deliu submitted that although his client had provided the declaration, she was not his witness, because the declaration had been filed with the Standards Committee bundle of documents, as part of the material provided to it by the practitioner.

[13] On or around 11 April 2013, after Mr Zhao had returned to New Zealand, Ms L deposited $49,975 (the $50,000 agreed retainer or deposit minus a bank fee) into Mr Zhao's "Freedom" account with ANZ. On the same day Mrs Zhao transferred these funds to a "Serious Saver" account in the name of Mr Zhao and his wife. Mr Zhao's reason for not immediately transferring the funds to his trust account was that he was not aware any payment had been made by Ms L; that he was particularly busy at the time; that he did not really pay that much attention to Ms L (he said he has a thousand on his client list)[6]; and that it was his wife who attended to these matters, and she may not have known about Ms L. From 1 May 2013 the funds from Ms L were transferred through various of Mr Zhao's personal accounts, including interest-earning accounts, in a number of transactions.

[14] Mr Zhao accepts that he knew from his Trust Account training that these funds could not properly be held in any of his or his wife's personal bank accounts. When he did become aware in late April/early May that Ms L had paid the deposit, he did not turn his mind to promptly ensuring the monies were directed to the trust account. The funds were eventually transferred to the trust account of Richard Zhao Lawyers Limited (Mr Zhao's firm) on 27 May, six and a half weeks after having been received from Ms L. This was apparently not an isolated incident. Mr Zhao's evidence in relation to trust account balances was that it was at the time when he and his wife did the billing that they made sure everything was done properly.[7]

Failure to ensure client money earned interest

[15] On 30 April 2013, the ANZ bank deposited $767.75 as interest earned into Mr Zhao's "Serious Saver" account. A portion of this interest was attributable to Ms L's funds, and has not been paid to date. Mr Zhao has pleaded that he has always been ready, willing and able to pay Ms L whatever interest she is entitled to, and indeed has

[6] Transcript p 154.
[7] Transcript p 154.

offered to do so. The Standards Committee position on this is that willingness to pay does not cure the breach.

[16] For the practitioner, Mr Deliu argued that payment of interest was within the discretion under s 114(a) or (b) of the Act which includes the smallness of the amount and the shortness of the period. (The relevant amount was estimated to be somewhere between $100 and $316). But Mr Zhao did not claim to have exercised that discretion at the time.

[17] It needs to be said that Mr Zhao's offer to pay Ms L interest owed was first made in response to the complaint from Ms L.

[18] There was no accounting for interest in the Trust Account Statement, even though Mr Zhao was aware that this was a requirement of the Trust Account regulations.

Retention of client documents

[19] During the course of the lawyer client relationship Mr Zhao had requested various immigration related documents from Ms L. She provided Mr Zhao with various documents, including passports, birth certificates and identification cards relating to herself and her family.

[20] Ms L agreed with Mr Zhao that she would need to appoint New Zealand barristers to attend to the immigration work. On his return to New Zealand from China, Mr Zhao instructed Justitia Chambers on the immigration matters while he continued working on the Family Court issues. During May 2013 the barristers attended to matters such as the extension of Ms L's visitor visa through to October, matters affecting the children's visas (the children still being in China), their schooling, and matters relating to a business entrepreneurial application which involved A.

[21] Ms L arrived in New Zealand in late April 2013. She met with Mr Zhao on 29 April where they discussed progress on all matters. They met again on 20 May 2013, and it was on this day that the relationship began to deteriorate. On or around this date Mr Zhao says Ms L produced new identity information for her children which showed that the children were born in China with a different father. Mr Zhao interpreted this as

forgery and that Ms L's alternative proposal was an attempt to defraud. Mr Zhao said it was at that point that he told Ms L what she was doing was wrong and that he would not help her for that purpose.[8] He also told her he needed to consider his position.

[22] Mr Zhao says Ms L left the meeting in anger, leaving the offending documents with Mr Zhao.

[23] Mr Zhao and Ms L met again on 23 May after which she faxed a letter dated 23 May 2013 terminating the relationship with Mr Zhao (and others) in writing. In doing so she formally requested "*return of ALL of my documents including ALL my children's legal documents and also copies of anything you hold in your file relating to me."* In the same document Ms L requested return of her deposit as follows:

> "a. The balance of my funds due to me after your reasonable expenses and costs including your reasonable cost for process of my visa.
> b. Please provide a detailed settlement statement in the normal manner thank you."

[24] Mr Zhao recalls quite a discussion at the 23 May meeting about a payment he might make to Ms L. He offered to pay back $15,000 of the $50,000 paid. There was also an apparently aborted discussion about a confidential deed of settlement through which the parties would agree not to release respective documents, and no further action would be taken.

[25] On 27 May 2013 Mr Zhao wrote to Ms L advising her that he suspected her of "criminal and/or immigration offences" and that he would not be releasing to her any documents which may be evidence of such. Mr Zhao also advised Ms L that he was considering whether to report her to the authorities and that he would advise her once he had decided whether or not to take that step.

[26] On the same day, 27 May 2013, several transfers were made within Mr Zhao's personal bank accounts resulting in $49,975 being deposited back into the Freedom account. From there, and also on 27 May 2013, $49,975 was transferred to the trust account of Richard Zhao Lawyers Limited (Mr Zhao's firm).

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[8] Transcript p 164.

[27] As we have noted, Mr Zhao told the Tribunal his practice was to sort out any money transfers at the time billing was done at the end of the month. He said under cross-examination[9] that he was not expecting there to be a complaint from Ms L because she was a family friend. However, once the relationship deteriorated, it got him thinking about a lot of issues including the trust account breach. He realised this could get him into trouble and so he decided to transfer the money back immediately. This tended to coincide with the normal billing time.

[28] On or about 29 May 2013 Ms L instructed Mr B to act for her in recovery of her files and her funds. Mr B does not practise in immigration work.

[29] Mr B wrote to Mr Zhao on 30 May 2013 enclosing an authority to uplift documents on Ms L's behalf. He requested that Mr Zhao forward immediately the documents belonging to Ms L, including original copies of her children's passports. Mr B also requested a statement detailing the then current balance of funds Ms L had paid; details of any deductions made; copies of relevant invoices; and for balance of funds held to be deposited to his firm's trust account.

[30] At the time Mr B wrote to Mr Zhao on 30 May, neither he nor Ms L had seen Mr Zhao's letter to Ms L dated 27 May in which the practitioner had alleged Ms L had requested his assistance in a criminal conspiracy and advising her that he would not return her documents. However, having read that document later the same day Mr B sent an email to Mr Zhao in which he said he did not consider the matters he had raised prevented the practitioner from returning the documents. A further email was sent on 31 May requesting a response.

[31] On 1 June 2013 Mr Zhao responded by email in which he refused to return the original documents and again alleged there had been a "criminal conspiracy to deceive immigration authorities." Mr Zhao said he needed "a couple or few weeks" to decide which documents would be returned. He added that he and the barrister he had briefed would render invoices and that "the balance of funds, if any, will be transferred" according to Ms L's instructions in two weeks' time.

[32] On 4 June 2013 Mr B sent an email to Mr Zhao indicating that the proposal for selective return of documents in a few weeks was unacceptable, and that this was in Mr

[9] Transcript p 160.

B's view a breach of the Conduct and Client Care Rules. He requested the documents be returned by 7 June, or that Mr Zhao identify the grounds on which he felt he was entitled to retain them. On 12 June 2013 Ms L lodged a complaint against Mr Richard Zhao with the New Zealand Law Society.

[33] On 17 June 2013 Mr Zhao released several of the documents Mr B had requested on Ms L's behalf. Mr Zhao retained documents including passports, birth certificates, household registers, wills and other Chinese legal documents.

[34] On 27 June 2013 the $49,975 held in trust for Ms L (plus $25 credited to her) was transferred to the practice account of Mr Zhao's firm in payment of the invoice.

[35] On 20 September 2013 the Otago Standards Committee approinted Mr Tim Maffey as an inspector to assist the Committee's enquiry.

[36] At a meeting with Mr Maffey on 27 November 2013, Mr Zhao produced a tax invoice dated 21 June 2013 for $50,000 which Mr Zhao told the investigator he had sent to Mr B. The narration summarises the work undertaken for Ms L but does not detail the basis on which the $50,000 fee was calculated.

[37] On 29 November 2013 Mr Zhao provided to the Law Society investigator a document headed "Time Sheet/WIP" which details the attendances to which the $50,000 fee related. This included $29,973 for barristers' fees which had not been previously invoiced.

[38] On 12 March 2014, the Standards Committee advised Mr Zhao that any submissions about the complaint filed by Ms L must be received by 14 April 2014.

[39] From the time of the initial request for return of Ms L's documents on 23 May 2013, Mr Zhao retained a number of those documents for a period of 11 months until 11 April 2014. On that date Mr Zhao sent the documents to Immigration New Zealand with an outline of what Mr Zhao argued was an intention by Ms L to engage in immigration fraud.

[40] To Mr B's knowledge, there has been no action by Immigration New Zealand on Mr Zhao's complaint to the authorities.

Issue 1 – Recusal, first ground

[41] Mr Deliu referred the Tribunal to the leading decision of *Saxmere*[10] which sets out the analysis to be undertaken. The test is well known that "*a Judge is disqualified if a fair minded lay observer might reasonably apprehend that there was a real and not remote possibility that the Judge might not bring an impartial mind to the resolution of the question the Judge was required to decide*." The steps set out are:

(a) To identify "from what is said might lead a Judge to decide a case other than on its legal and factual merits"

(b) And then there must be a logical articulation of "… the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".

[42] There were two grounds relied on by Mr Deliu, the first relating to the Chair and the two members sought to be recused, Mr Chapman and Ms Rowe, and the second to the Chair alone.

[43] In relation to the first ground Mr Deliu points to the Tribunal members and Chair having sat in the decision of *National Standards Committee v Orlov*[11]. It was Mr Deliu's submission that the three members of that Tribunal (along with the remaining two members) "… apparently wilfully disregarded the law". Specifically, that in its decision, the Tribunal had failed to refer to decisions which were referred to by Mr Orlov in his argument. In particular, the *Hong*[12] decision was referred to by Mr Deliu as having been, at the time of *Orlov,* "very recent" and "one involving identical issues". Mr Deliu went on to refer to other Standards Committee decisions that had then been referred to by Mr Orlov but which had not been supplied to the Tribunal, but which he also said were comparative and had been cited in support of "disproportionality and racism" on the part of the New Zealand Law Society.

[10] See note 1.
[11] *National Standards Committee v Orlov* [2013] NZLCDT 45.
[12] *Legal Complaints Review Officer v Hong* [2013] NZLCDT 9.

[44] Mr Deliu submitted that the fact that the *Hong*[13] decision in particular had not been referred to in the Tribunal's decision indicated that:

> "… There was a decision made by the members involved that Mr Orlov was going to be disbarred no matter what, and anything inconvenient to that result was going to be swept under the rug. …".[14]

[45] He extended that to the present case by saying that Mr Zhao would be adducing evidence that he has been subjected to:

> "… Arguably discriminatory or racist practices and his concern is that his evidence may be correct, in that regard but it will similarly (sic) swept under the rug, and if it's swept under the rug then he doesn't have a fair trial…".[15]

[46] It is to be noted on the second day of the hearing, while not abandoning the argument as to disproportionate treatment, Mr Deliu abandoned the submission that there had been any racist or discriminatory practice of that kind. (That followed a very lengthy cross-examination of the Standards Committee witness, Ms Kilkelly about, among other matters, the racial composition of the Otago Standards Committee.)

[47] In response Mr Shaw submitted:

> "It is not correct to state that the relevant Tribunal decision disregarded the disproportionality argument. Consistency and proportionality were explicitly considered by the Tribunal by reference to the decisions considered to be most relevant. The mere fact that the two decisions were not cited by the Tribunal does not mean they were ignored or treated as wholly irrelevant."

He submitted that this ground did not establish a qualifying bias. Nor had there been any identification of what is said might lead to bias. On that basis he submitted that "the logical connection required by the *Saxmere*[16] decision is entirely absent".

Discussion

[48] The mere fact that a Court or Tribunal has decided a matter in one manner, such as has occurred here, albeit found to be in error (as to penalty only), on appeal, cannot of itself be a ground for imputed bias. If that were the case, the Civil and Criminal litigation system of justice would grind to a halt.

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[13] See note 12.
[14] Transcript p 7.
[15] Transcript p 7.
[16] See note 1.

[49] Furthermore, if such an approach were adopted, it would encourage judge-shopping. This, and other concerns have been the subject of a recent article[17], which urges a robust approach, and the use of a careful objective standard (such as provided in *Saxmere*[18]).

[50] Finally, to assert that an approach taken in one case implies a pre-disposition to another is to disregard the judicial oath.

[51] In the decision of *Russell*[19] His Honour Cooper J referred to this notion by reference to *Liteky v United States*,[20] as discussed in the text book by Flamm:[21]

> "It is now generally agreed that, absent facts from which a reasonable person could infer that a challenged judge's rulings or decision was the product of actual bias, the rulings a judge renders in the same or a related case will almost never support an inference or a presumption of judicial bias – much less establish the bias required to warrant disqualification or reversal … The maxim that adverse rulings, standing alone, do not warrant disqualification applies regardless of whether the motion to disqualify is predicated on the judge's rulings in the same proceeding, a prior or different proceeding involving one or more of the same parties, or a proceeding that is only factually similar to a pending matter. …"

[52] His Honour Cooper J further cites *Phillips v Joint Legis. Comm.*[22]:

> "… That a Judge must be free to make rulings on the merits without the apprehension that, should she make a disproportionate number of rulings in favour of one party, she would have thereby have created the impression of bias towards that party or against its adversary."

[53] The cases under discussion in that matter related to patterns of judgment. In the present case there is only one judgment cited in support of the application, namely the *Orlov*[23] matter.

[54] As pointed out by Mr Shaw, in referring to the other cases put to it by Mr Orlov, the High Court noted: *"...at a broad level….none came close to the sustained misconduct involved here"*[24]*.* Thus, a failure to refer to the cases would not appear to approach the level of concern advanced by Mr Deliu that the Tribunal members

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[17] "Inappropriate recusals" L Q R 2016,132(Apr)318-337, A Olowofoyeku.
[18] See note 1.
[19] *J G Russell v Taxation Review Authority and Commissioner of Inland Revenue* (2009) 24 NZTC 23, 284, Cooper J.
[20] *Liteky v United States* 510 US 540.
[21] Referred to in "Judicial Disqualification: Recusal and Disqualification of Judges" 2nd ed. Flamm, 2007, Banks & Jordon Law Publishing Company, at 443-444.
[22] *Phillips v Joint Legis. Comm. on Performance and Expend. Review* 637 F.2d 1014 (5th circuit 1981).
[23] See note 11.
[24] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [203].

"apparently wilfully disregarded the law"[25]. Nor indeed would his assertion that the *Hong* decision was "one involving identical issues"[26].

[55] For the sake of completeness, *Saxmere*[27] is also the authority for the proposition that the party alleging bias is to carry the onus of satisfying the test, in the absence of which there is an **obligation** on the judicial officer to sit.[28]

Issue 1 – Recusal, second ground

[56] A further ground raised against the Chair is that she predetermined an "intimated stay application" (see para [10] of Mr Zhao's recusal affidavit dated 1 July 2016, and Ground 1 of the motion for recusal of the same date). The basis for the alleged predetermination is observations made by Judge Clarkson at para [18] of her decision,[29] declining to issue a summons requiring Justice X to attend to give evidence at the substantive hearing of this matter.

[57] At para [18] of the decision it is stated:

> "It would appear to be irrelevant, **at the stage of determining liability**, **what standards committees have done with other cases**. There is no appellate or supervisory role for the Tribunal with respects to standards committee decisions, that is for the Legal Complaints Review Officer ("**LCRO**") who has considered this matter and upheld **the decision to prosecute it to the Tribunal**." (emphasis added)

[58] Applying the test in *Saxmere*,[30] we do not consider there are grounds for the Chair's recusal on this basis, as follows:

1. The comments at para [18] of the summons decision are plainly directed to the question of liability. They are not directed to the question of Mr Zhao's "intimated stay application", which, importantly, had not been made at that time, and was only made on the last day of the substantive hearing (at which time a formal written application was also filed). Conceptually, there is a fundamental difficulty in predetermining an application which has not actually been made.

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[25] Transcript p 5.
[26] Transcript p 5.
[27] See note 1, at [42].
[28] See note 1, at [8].
[29] [2016] NZLCDT 17.
[30] See note 1.

2. The comments were directed at what other Standards Committees have done, in terms of deciding whether or not to prosecute a particular practitioner before the Disciplinary Tribunal. As stated, that issue does not have any direct relevance to the issue of liability in respect of a matter that is before the Tribunal. In those cases, the Tribunal is required to determine the question of liability on the facts and evidence before it.

3. As also noted at para [18] of the summons decision, the Disciplinary Tribunal does not have an appellate or supervisory role in relation to Standards Committees, which is the function of the LCRO. Indeed, and as noted, Mr Zhao did appeal the Standards Committee decision (to refer this matter to the Disciplinary Tribunal) to the LCRO, who upheld that decision. We were informed by Mr Deliu in argument on the stay application, once made, that a judicial review application has been filed in relation to the LCRO's decision and is due to be heard in October this year.

4. What other Standards Committees have done with other cases may, in certain circumstances, be relevant to an application for a stay of proceedings before the Disciplinary Tribunal on the grounds of abuse of process. As noted, such a stay application was eventually made on behalf of Mr Zhao, and we heard argument on it from Mr Deliu and Mr Shaw. As noted in paras [71] to [74], the threshold for a stay on the basis of abuse of process is very high. The Judge’s comments at para [18] in respect of liability do not touch on or relate to the stay application.

5. Further, the comments, *even if* they were relevant to the "intimated stay application" were not couched in determinative terms in any event. For the purposes of determining the summons, the judge was required to make a provisional assessment of whether the evidence in respect of which the summons was sought is or may be material to the matter to be heard by the Tribunal. For that purpose, it appears the view was formed that the evidence sought to be called did not appear to be relevant to the issue of liability.

[59] For all of the above reasons, and having carefully considered the arguments made by Mr Deliu on behalf of Mr Zhao, and observations of Mr Shaw for the Standards

Committee in his submissions on recusal, we are comfortable that the test for recusal as set out in *Saxmere*[31] is not met on this ground either.

Issue 2 - Privilege

[60] Shortly prior to the hearing of this matter, counsel for the Standards Committee, Mr Shaw, filed a memorandum recording that Mr B (solicitor for Ms L in respect of her complaint) had notified him that he had a document that was potentially relevant to the hearing but that he considered to be privileged. It was agreed that the document, and its privilege status, would be dealt with at the hearing itself.

[61] During the course of giving evidence, Mr B gave brief evidence of the nature of the document and the basis upon which he considered it was privileged (at a relatively high level, so as not to disclose the nature of the document and thereby risk breaching any potential privilege). Mr Deliu also cross-examined Mr B on this issue, and the Tribunal put a number of questions to him. Mr B initially stated that he considered the document privileged on the basis of both legal professional privilege and litigation privilege,[32] but later confirmed that his focus was litigation privilege.[33] The Tribunal noted that Mr B was being cautious in relation to the document, and that he was justified in doing so,[34] given if the document was privileged, it was not Mr B's privilege to waive.

[62] In the event, the Tribunal formed the view that it could not rule on the document's relevance or privilege without seeing a copy of it. A copy was accordingly provided to the Tribunal for the sole purpose of assessing relevance and privilege. By agreement, in the absence of counsel for Mr Zhao and the Standards Committee, the Tribunal also put some further questions to Mr B about the document.

[63] The document is a transcription of an audio recording of what appears to have been a discussion between Mr Zhao and Ms L during their meeting on 23 May 2013. It was common ground that this recording had been made surreptitiously by Ms L (ie. without Mr Zhao's knowledge).

[64] The test for litigation privilege was not in dispute at the hearing, namely that:

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[31] See note 1.
[32] Transcript p 33.
[33] Transcript p 44.
[34] Transcript p 48.

(a) the dominant purpose of the document's preparation is for use or assistance in legal proceedings; and

(b) those legal proceedings are reasonably apprehended at the time of the document's creation. For proceedings to be reasonably apprehended, their commencement needs to be probable rather than merely possible.[35]

[65] The Tribunal questioned Mr B in relation to each of these matters. The general thrust of Mr B's evidence was that the document was to help him understand the background to the complaint more generally, but also for use in potential proceedings against Mr Zhao for the return of the documents Ms L had left with him.[36]

[66] Although one of the document's purposes may have been for use in the proceedings, we were not satisfied that that was its dominant purpose. On the basis of Mr B's evidence, the dominant purpose was more likely to have been to assist Mr B assess the complaint and its background more generally, as a pre-cursor step to any such proceedings. The document was not, however, a solicitor/client communication between Ms L and Mr B, and while it was a record of such a communication between Ms L and Mr Zhao, there was no suggestion that it was privileged, for the purposes of this hearing at least, on the basis of that solicitor/client relationship. Further, and in relation to litigation privilege, we were not satisfied that the proceedings were reasonably apprehended at the time of the document's creation in any event. When questioned on these matters, Mr Bs evidence was that the proceedings were a possibility, not a probability.[37]

[67] In reaching its conclusion during the hearing that the document was not privileged, the Tribunal made it clear that it considered the document to be of marginal relevance to the issues before the Tribunal in any event. In this context, and as Mr Deliu noted, the transcript of the audio recording had not been verified, and there was no evidence as to who had actually carried out the translation, what steps were involved and so on. Mr Zhao, a native Mandarin speaker, also gave evidence that, in his view, the transcript contained many translation errors, and also potentially omitted

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[35] See, for example, the Court of Appeal's decision in *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 at 606.
[36] Transcript p 36.
[37] Transcript p 36, where Mr B stated the proceedings were "one of the options we were considering"; transcript, p 48, where Mr B confirmed the proceedings for the return of documents were a possibility, rather than probability.

some text.[38] For these reasons, and that the content of the transcript did not shed any particular light on the issues before the Tribunal in any event, we ascribe it little if any weight in reaching our decision.

Issue 3 - has Abuse of Process been established such as to warrant a Stay?

[68] In his submissions on the recusal application, Mr Deliu confirmed that he intended to pursue a stay application (which at that point had still not been made). Mr Deliu indicated that he first wished to see the evidence completed on matters that might be relevant to the stay application, before formally making it.[39] At that point however, Mr Deliu indicated that the basis of the stay application would be that "*Mr Zhao is being treated differently, without a proper basis*".[40]

[69] Subsequently, in his opening (oral) submissions, Mr Deliu confirmed, properly in the Tribunal's view, that he did not intend to base the stay application (or any related affirmative defence) on race or discrimination grounds,[41] given the evidence elicited on cross-examination (primarily from Ms Kilkelly) did not provide an appropriate basis for that submission. The thrust of Mr Deliu's argument was accordingly that other cases which concerned a delay in depositing client funds into the practitioner's trust account had been dealt with at the Standards Committee level, such that Mr Zhao was being treated disproportionately in being prosecuted before the Disciplinary Tribunal.[42] Mr Deliu also submitted that evidence of bad faith on the part of the prosecuting authority was not necessary, and it was sufficient if the practitioner was being treated disproportionately compared to others in materially similar circumstances.[43]

[70] The legal foundation for the stay application was abuse of process, and Mr Deliu relied in particular on *R v Fox*[44]*, Moevao v Department of Labour*[45] *and Polynesian Spa*[46] (though noting that the primary authority relied on was *Fox*[47]).

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[38] See generally, transcript, pp 179-190.
[39] Transcript p 27.
[40] Transcript p 27.
[41] Transcript p 121.
[42] Transcript p 124.
[43] Transcript p 124.
[44] *Fox v Attorney-General* [2002] 3 NZLR 62 (CA); transcript, p 329.
[45] *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA); transcript p 329.
[46] *Polynesian Spa Ltd v* Osborne [2005] NZAR 408 (HC); transcript p 329.
[47] See note 4 and transcript p 333.

[71] The threshold for a stay in such circumstances is extremely high. We note the following:

(a) In the Court of Appeal's judgment in *Moevao*[48], Richardson J summarised the test as follows:

> The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example for multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purpose of the administration of criminal justice and so constitutes an abuse of the process of the Court. (p 482).

(b) A similar approach appears to have been taken in England, in the decision in *R. v Horseferry Road Magistrates' Court, ex Parte Bennett.*[49] This was referred to in the *Fox*[50] decision, where McGrath J referred to the following observations of Lord Lowry (who had in turn approved the observations of Richmond P in *Moevao*[51]):

> ... I consider that a Court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the Court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a Court to try a person who is charged before it with an offence which the Court has power to try and therefore for the jurisdiction to stay it must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the Court's disapproval of official conduct.

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[48] See note 45.
[49] *R. v Horseferry Road Magistrates' Court, ex Parte Bennett* [1994] 1 AC, 42, 74.
[50] See note 44.
[51] See note 45.

(c) In *Fox*[52] itself, McGrath J, having referenced the above and other authorities, stated that:

> Conduct amounting to an abuse of process is not confined to that which will preclude a fair trial. Outside of that category it will, however, be of a kind that is so inconsistent with the purposes of criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety. The power of stay is not available for disciplinary purposes nor to reflect the Court's view that a prosecution should not have been brought. The hallmarks of official conduct that warrant a stay will often bad faith or some improper motive for initiating or continuing to bring prosecution but may also be simply a change of course by the prosecution having a prejudicial impact on an accused. Finally, to stay a prosecution, and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.

[72] In light of the above authorities, we accept Mr Deliu's submission that evidence of bad faith or an improper motive is not a precondition to a stay being granted. However, and as noted in *Fox*[53], such matters will often be a hallmark warranting a stay, reflecting as they do the very high threshold required.

[73] Mr Deliu did not advance the stay application on the basis of any evidence of bad faith or improper motive. Indeed, such a submission would not have been available on the evidence. Rather, and as noted, the proposition advanced was that a stay should be available where there is evidence of one person being treated disproportionately when compared to others in a similar (or worse) position.[54]

[74] We are satisfied that the evidence in this case falls well short of the high threshold required for a stay to be granted. We reach this conclusion for the following reasons:

(a) First, the essence of the stay application in this case is inconsistency (or as Mr Deliu framed it, "disproportionate" treatment when compared to others). We do not accept that inconsistency of treatment between practitioners in similar fact situations, without more, reaches the necessary threshold. While this might seem unfair to the practitioner concerned, the Court of Appeal in *Moevao*[55] made it clear that fairness to the accused is not the

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[52] See note 44.
[53] See note 44.
[54] Transcript p 330.
[55] See note 45.

yardstick.[56] This is particularly so where decisions are made on complaints by a number of different Standards Committees around the country, made up of a range of different members, which, in reality, will lead to inconsistent outcomes from time to time. While of course the Committees ought to strive for consistency, we are not satisfied that inconsistent or "disproportionate" treatment alone reaches the threshold set out in the authorities referred to at para [71] above.

(b) Second, Mr Deliu referred to a number of other decisions (of Standards Committees) which concerned conduct that he submitted was comparable to or worse than the conduct in this case. Mr Deliu relied primarily on a complaint concerning Practitioner X (which he referred to as "*the key of all [of the allegedly similar cases*]".[57] Mr Paul Collins was summonsed to give evidence before the Tribunal as to the facts in issue in that case and the outcome. In short, the case involved the practitioner, a barrister, issuing prospective fee invoices, being invoices for fees presently payable and due for services to be provided in the future. Upon receiving payment in response to those invoices, the fees were paid into the practitioner's practice account, ie not into a trust account. As the work was carried out, retrospective fee invoices/statements were issued, to confirm how much of the prospectively charged fee had been "consumed".[58] Mr Collins confirmed that the Standards Committee hearing the matter (on an own motion complaint) determined to take no further action (but to issue guidance to the profession), for the following reasons:[59]

(i) There was some uncertainty around the concept of prospective fee invoicing by barristers, such that an appropriate response would be to issue public guidance, and that no meaningful disciplinary or protective purpose would be served by making an adverse finding against the barrister.

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[56] See note 45, p 482.
[57] See transcript p 249; see also p 334. Mr Deliu also relied on complaints against Z and various decisions of Standards Committees.
[58] See generally, transcript pp 263-264.
[59] See generally, transcript pp 273-275.

(ii) The events had occurred a long time ago and gave rise to complications around the transitional provisions of the Act and whether at least some of the conduct in question fell under the Law Practitioners Act 1982 (where there was no equivalent rule to that relied on under the Act).

(iii) That there was no suggestion, or evidence, that the practitioner had acted anything other than honourably and responsibly in the manner in which he dealt with the client retainer and the funds.

(iv) While the Standards Committee found that the approach was ultimately wrongful, it came down to an interpretation of the interaction between the relevant provisions of the Act, the Rules and the Trust Account Regulations, such that it did not rise to a level of professional culpability. The practitioner had not considered the funds to be trust funds, on the basis of his interpretation of the Rules.

(c) We do not consider the case of Practitioner X to be sufficiently "on all fours" to give rise to a direct and clear inconsistency in any event. In that case, an invoice had been issued for fees, and a payment made in response to it. No invoice had been issued in this case, prior to the funds being paid by Ms L. Further, Practitioner X, and it seems, other barristers in the profession, had understood the approach taken in that case to be a legitimate practice, based on an interpretation of the relevant Rules. In this case, there is no dispute that the funds were trust funds and ought to have been deposited promptly into Mr Zhao's trust account.

(d) Third, the evidence before us does not demonstrate that this is the only case where a practitioner has been charged at the Disciplinary Tribunal level for a delay in depositing client funds into the trust account. Mr Deliu provided a selection of Standards Committee decisions in his bundle of authorities, at pp 318 to 341. There are indeed some examples where a failure or delay in depositing client funds into the trust account have been dealt with at Standards Committee level (though a number of the other cases concerned conduct that was somewhat different to that in this case). However, there are also some examples of misconduct charges being

brought in respect of similar conduct, either in isolation (for example, in the *Chen*[60] decision), or in conjunction with other conduct (as in, for example, *Jones*[61]).

(e) The Tribunal expressed its concern at the approach being taken, namely the presentation of a selection of cases on the issue, when to argue the matter fully, a more comprehensive approach would need to be taken, given there may well be other examples of similar conduct coming before the Tribunal.

(f) This issue was compounded by the stay application only being made on the last day of the hearing, such that counsel for the Standards Committee did not have a full opportunity to prepare and respond to it. Further, the Tribunal indicated that it was aware of other instances where similar conduct has come before the Tribunal, often in combination with other conduct, as in this case.[62] Matters such as this further compound the difficulty in even assessing, let alone concluding, whether there has been inconsistent treatment of Mr Zhao, when compared to all other practitioners who have had a complaint made against them for failing to promptly deposit funds into the trust account.

(g) Fourth, we note the observations of the Court of Appeal in *Fox*[63] and *Moevao*[64] that the purpose of a stay is not for disciplinary purposes, nor to reflect a court's view that a prosecution should not have been brought. Accordingly, irrespective of the Tribunal's view on whether the charges should have been laid against Mr Zhao, and we emphasise that we express no view on that, the point is that the charges are in fact before us. In the absence of the very high threshold for a stay being made out, we are obliged to deal with those charges. We observe, however, that how other similar conduct has been dealt with, and the penalties imposed, may be relevant at the stage of any penalty assessment.

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[60] *Auckland Standards Committee 5 v Chen* [2015] NZLCDT 2.
[61] *Wellington Standards Committee 2 of the New Zealand Law Society v Jones* [2014] NZLCDT 52.
[62] Transcript p 328.
[63] See note 44.
[64] See note 45.

[75] For all the above reasons, we do not consider the grounds for a stay to have been made out and the application is accordingly dismissed.

Issue 4 - Misconduct?

[76] For misconduct to be established, the admitted breaches of the Act and Rules, must have been "wilful or reckless" - s 7(1)(a)(ii). The charge is a single one, so the particulars may be considered either separately, or cumulatively to have reached this level of conduct.

[77] Having knowingly provided a client with a personal account number into which to deposit a fees retainer, Mr Zhao, a trained Trust Account Supervisor, ought to have been exquisitely aware of the need to monitor the funds coming in and to ensure that they were directed to the trust account. Instead, the funds were wrongly held in Mr Zhao's personal accounts for a period of more than six weeks. We regard this as a lengthy period in the context of this case. It is also unclear why Mr Zhao could not have provided his trust bank account details at an earlier stage, when he provided Ms L with his compendium of information about his legal services. Mr Zhao did not have a clear explanation for this.

[78] Mr Zhao's evidence establishes that he delegated the operation of his accounts to his wife, and that he did not advise her to be alert to the incoming deposit from Ms L. His excuse was that he was "busy", a description that applies to most lawyers, and would not provide the public with much reassurance as to the reason for mismanagement of their funds.

[79] Neither Mr or Mrs Zhao seems to have regarded the arrival of such a large sum of money into their account as a matter of particular interest or attention. In fact Mr Zhao's evidence seemed to suggest it was not a significant amount. It is doubtful that his client would agree.

[80] Perhaps more troubling is Mr Zhao's evidence that he was concerned to tidy up the movement of funds and ensure compliance at the time of billing, that is, that this was not an isolated or unusual occurrence. He did not seem to be troubled by the fact that while the funds were in his personal account, they lacked the protection afforded by the strict provisions of the trust account regime.

[81] The regulations and rules surrounding the handling of client funds are in place for important protective purposes. Compliance is a fundamental obligation of legal practice. We consider that the particulars in support of this limb of the charge show sufficient disregard by Mr Zhao of his professional and fiduciary obligations, to be classified as "reckless".

[82] If we are wrong in this assessment, we consider that cumulatively, the remaining particulars intensify the level of wrongdoing. The fact that Mr Zhao earned interest on his client's money, wrongly held, is certainly an aggravating feature, even if the amount itself is not high. An offer to recompense, coming only after the complaint was made, does not greatly assist the lawyer, and certainly does not provide a defence for this aspect, or indeed the "mirror" particular, of failure to ensure client money earned interest. Mr Zhao's evidence suggests he simply did not turn his mind to this latter obligation.

[83] The failure to promptly return the client's full file further exacerbates the overall conduct.

[84] We accept that Mr Zhao was genuinely concerned about the use to which his former client's documents would be put. However, he had a number of other alternatives than the one he chose, which was to retain important documents for a year, before sending them to the authorities. He declined to accede to clear requests to return the documents, and to retain certified copies. He delayed sending the documents to the authorities until the day before his response to the complaint was required by the Standards Committee.

[85] Had this conduct been the subject of a stand alone charge, we accept that it is likely to have been seen as unsatisfactory conduct only. However, it forms part of the overall behaviour charged and aggravates the central "offending".

[86] For completeness, we note that Mr Deliu raised two further points (very briefly) in his closing by way of affirmative defences, namely:

(a) That given a breach of s 110 of the Act amounts to an offence, it was outside the Tribunal's jurisdiction to rule on it[65]; and

(b) Certain of the facts stated in the particulars to the charge occurred outside of New Zealand and as a result the Tribunal had no jurisdiction to consider them.[66]

[87] Mr Deliu did not advance these points strongly, noting that they were not "at the forefront"[67] or "a big deal".[68] We can deal with them briefly.

[88] The statutory definition of misconduct, in s 7 of the Act, includes a wilful or reckless contravention of, inter alia, "any provision of this Act." There are no exclusions and s 110 is obviously a provision of the Act. A wilful or reckless breach of it can therefore amount to misconduct.

[89] On the extraterritoriality issue, it was not in dispute that the funds were received into a New Zealand bank account, and the omission/failure to transfer them promptly into Mr Zhao's trust account took place in New Zealand. We accordingly do not accept that, simply because the initial meeting with Ms L and the request for funds took place in China, we cannot consider and rule on these issues.

[90] The answer to the question posed by Issue 4 is "yes", misconduct is established.

Issue 5

[91] As stated above, the delay in returning client documents does compound the behaviour, but misconduct has been found in any event.

Issue 6

[92] Since misconduct has been found, the lesser level of negligence or incompetence is not addressed.

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[65] Transcript pp 319-320.
[66] Transcript p 321.
[67] Transcript p 320.
[68] Transcript p 321.

Issue 7

[93] Similarly, this issue does not now require comment beyond what has been stated.

DATED at AUCKLAND this 19th day of August 2016

Judge D F Clarkson
Chair