NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 26

LCDT 008/12

BETWEEN	**NATIONAL STANDARDS COMMITTEE No. 1** Applicant
AND	**FRANCISC CATALIN DELIU** of Auckland, Lawyer

CHAIR

Ms M Scholtens QC

MEMBERS OF TRIBUNAL

Ms S Hughes QC

Ms J Gray

Mr W Smith

Mr P Shaw

HEARING at Auckland

DATE 30 September – 9 October, 10 December 2015 (with LCDT 010/10)

DATE OF DECISION 15 September 2016

APPEARANCES

Mr P Morgan QC for the Standards Committee

Mr F Deliu in Person

DECISION OF THE TRIBUNAL ON THE NATIONAL STANDARDS COMMITTEE CHARGES - LCDT 008/12 ("THE JUDGES CHARGES")

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Introduction

[1] Mr Deliu (the practitioner) is the sole director and principal of Justitia Chambers Limited, a law firm that operates from premises in central Auckland. In July 2008 he was a staff solicitor in the Auckland law firm known as Equity Law.

[2] In these proceedings the National Standards Committee brings charges arising from the practitioner's allegations of judicial misbehaviour against the Hon Justice Rhys Harrison and the Hon Justice AP Randerson (then Chief Judge of the High Court). The essence of the charged misconduct is that the practitioner's allegations were either false or were made without sufficient foundation and would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable.

[3] These charges were consolidated with charges LCDT 010/10 by consent on 18 March 2014. The charges were heard together over 10 days, from 30 September to 9 October, and 10 December 2015. Further charges ('the incompetence charges' – LCDT 014/15) were heard by the same Tribunal on 22 February 2016. The decisions on the three sets of charges are given together.

[4] Charges 1 and 2 relate to actions in July 2008 and so are laid under the Law Practitioners Act 1982. Charge 1 is of misconduct in the practitioner's professional capacity and charge 2, in the alternative, of conduct unbecoming a barrister and solicitor. The other charges are brought under the Lawyers and Conveyancers Act 2006. Five allege misconduct when providing regulated services and five, in the alternative, allege misconduct unconnected with the provision of regulated services.

The misconduct provisions

[5] The first two alternative charges relate to conduct in July 2008 and are laid under s 112(1)(a) and (b) of the Law Practitioner's Act 1982, which specify:

> (1) Subject to this Part of this Act, if after enquiring into any charge against a practitioner the New Zealand Disciplinary Tribunal—
>
> (a) Is of the opinion that the practitioner has been guilty of misconduct in his professional capacity; or

(b) Is of the opinion that the practitioner has been guilty of conduct unbecoming a barrister or solicitor; or

…

it may if it thinks fit make an order under this section.

[6] The remaining charges relate to conduct after 1 August 2008 and are laid alternatively under s 7(1)(a)(i) and s 7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006:

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 or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct—

(i) that will reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or

…

and

(b) includes—

…

(ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm *(emphasis added).*

[7] The charges also refer to various rules of professional conduct in place at the relevant time.

The charges

[8] The charges and their particulars are attached to this decision as **APPENDIX A**.

[9] Charges 1, 3, 5 and 7 against the practitioner charge either professional misconduct (under the 1982 Act) or conduct in connection with the provision of regulated services (under the 2006 Act). Charges 9 and 11 relate to conduct

unconnected with regulated services (under the 2006 Act). Alternative charges are laid for all charges. Counsel for the Committee, in a memorandum dated 9 October 2014, indicated that the Tribunal would be invited to make its findings about the charged conduct based on the primary charges. Consistent with the judgment of the Full Court in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* relating to similar conduct, charges 10 and 12 (also relating to conduct occurring at a time the practitioner was providing regulated services) were advanced as the primary charges rather than the alternatives 9 and 11 (relating to conduct unconnected with regulated services).[1] Accordingly the prosecution argued all the charged conduct occurred in connection with the provision of regulated services.

[10] The charges arise from statements or allegations made by the practitioner in letters, emails and documents that he accepts were authored and published to the intended recipients by him, being:

[a] A faxed letter dated 23 July 2008 and an email dated 24 July 2008 sent to the Judicial Conduct Commissioner making allegations about Justice Harrison, including that he discriminated against the practitioner and was carrying out a personal vendetta against the practitioner; (subject of charges 1 and 2)

[b] A letter dated 5 August 2008 sent to the Chief High Court Judge, the Honourable Justice Randerson, making allegations against Justice Harrison and seeking that Justice Randerson direct that Justice Harrison not be allocated any cases in which the practitioner appeared (subject of charges 3 and 4);

[c] An Originating Application dated 5 September 2008 filed in the High Court at Auckland (in CIV 2008-404-5878) applying for an order that Justice Harrison be permanently recused from all cases filed by the practitioner and his colleague Evgeny Orlov (subject of charges 5 and 6);

[d] A Notice of Application for Special Leave to Appeal to the Supreme Court in SC 77/2008 dated 14 October 2008 against a costs judgment of Justice

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1 *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606 (FC,HC) at [96]-[115].

Harrison alleging, among other things, discrimination, bad faith and malice on the part of the Judge (subject of charges 7 and 8);

[e] An email and attached letter dated 18 April 2009, sent to the Judicial Conduct Commissioner alleging racism on the part of Justice Harrison (subject of charges 9 and 10);

[f] A letter dated 27 May 2010, sent to the Judicial Conduct Commissioner alleging Justice Randerson had engaged in judicial corruption (subject of charges 11 and 12).

[11] In addition, the particulars of the charges allege breaches of the practitioner's duty as an officer of the court, that he undermined the dignity of the judiciary and the processes of the court, and that he made allegations in documents filed in court without reasonable grounds or good cause.[2]

The practitioner's defences

[12] The practitioner filed an extensive response to the charges. In his amended response of 26 May 2014, he responded to what he grouped together as the "Judge's charges". He included the following denials:

> E. I deny that there is any evidence whatsoever that my allegations were false.
>
> F. I deny that the "without foundation" component of the charges is properly particularized for me to properly address.
>
> G. I deny ….that I was or was not providing regulated services …

He went on to say:

> 2. I deny that:
>
> ….
>
> b. The allegations I made were false (there is no evidence of this from the Judge);
>
> c. The allegations I made were without sufficient foundation, being an unlawful reverse onus….

[2] See Conduct and Client Care Rules 2.1, 13.2 and 13.8.

[13] The practitioner accepted responsibility for the documents he had produced, but denied that they evidenced any form of misconduct.

[14] He also pleaded some 35 matters "by way of opposition and/or affirmative defences".

[15] Before dealing with the charges themselves, we deal with a number of introductory themes arising from the practitioner's arguments and 'positive defences'.

Evidence from the Judges

[16] The practitioner was not able to require Justice Harrison and Justice Randerson to appear before the Tribunal to answer his questions.[3] Therefore, he submitted, it could not know whether his allegations were false. There was no evidence that they were. In effect, the Committee could not prove that what he said is without foundation without calling the Judges to say what he has said about them was untrue. He asserted he was being subjected to an 'unlawful reverse onus', whereby the Committee could assert that anything was without sufficient foundation and the practitioner has to rebut that. He submitted it defeated his right to a presumption of innocence.

[17] It is not for the Committee to call a Judge to say that he or she has complied with their judicial oath. An informed observer will not lightly accept that a Judge has put aside his or her professional oath and training.[4] If a practitioner asserts that a Judge has not done so (as here) that practitioner needs to be able to show the basis for the allegation – he or she must have a sufficient foundation or a good cause, such that he or she can honestly say that what is being said is true.

[18] In this case, there is no dispute that the practitioner's belief was, in the case of Justice Harrison, essentially based on three judgments. In the case of Justice Randerson, it was based on the fact that Justice Randerson had referred his conduct to the New Zealand Law Society. There is no difficulty exploring and answering the question of "sufficient foundation" in this context.

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3 *Re Deliu* CIV 2015-004-1120, District Court Auckland, 1 October 2016, Judge LG Powell.

4 See, for example, *Muir v Commissioner of Inland Revenue* [2007] NZLR 495 (CA) at [33], [96].

Definition of "without sufficient foundation"

[19] The practitioner denied making knowingly false allegations or allegations "without sufficient foundation". He was concerned that, he believed, there was no definition of this standard.

[20] The test of "sufficient foundation" is settled law.[5] An allegation of impropriety or moral turpitude should not be made without evidence to support it.[6] See also, in the context of litigation, *Gazley v Wellington District Law Society,*[7] *and Q v The Legal Complaints Review Officer*[8].

[21] That the practitioner's allegations were either false or were made without sufficient foundation is a formulation that the Full Court in *Orlov* held, based on similar facts, to be correct and appropriate.[9] The question of whether there is sufficient foundation for the allegations made against the two Judges by this practitioner in relation to these charges will depend on the particular facts.

Definition of "regulated services"

[22] The practitioner denied he was providing regulated services at the time of the conduct, and submitted there was no evidence to support the conclusion that he was.

[23] This issue has been dealt with by the Full Court in *Orlov.* In relation to s 7(1), conduct must be either "connected" with the carrying out of legal services under para (a), or "unconnected" under s 7(1)(b)(ii). All conduct must be covered by one or the other provision.[10] In that case, the High Court determined that very similar conduct was connected with the provision of legal services and came within the s 7(1)(a)(i) limb of misconduct.[11]

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5 *Orlov v NZ Lawyers and Conveyancers Disciplinary Tribunal* [2016] NZCA 224 at [17].
6 *X v Y* [2000] 2 NZLR 748 (HC) at [58].
7 *Gazley v Wellington District Law Society* [1976] 1 NZLR 452 (HC, Full Court).
8 *Q v The Legal Complaints Review Officer* [2014] NZAR 134 at [9] –-[10].
9 *Orlov*, n1 at [30].
10 *Orlov*, n1 at [96] – [112].
11 *Orlov*, n1 at [109].

Duty to the judiciary/Complaint directed to the appropriate body

[24] The practitioner did not consider that he owed, or ought to owe, any greater duty of respect and any greater duty of appropriate conduct to the judiciary than anybody else. He argued on several occasions that if he can call a member of the public racist under the Lawyers and Conveyancers Act 2006, he must be able and entitled to call a Judge racist. If not, then that would put a Judge on a pedestal that a Judge does not deserve.

[25] In response, Counsel for the Committee submitted this was completely untenable and flew in the fact of the purpose of the Act and the fundamental obligations of lawyers in sections 3 and 4. He submitted that all practitioners owe duties to the judiciary beyond those of members of the public, and what might be acceptable between members of the public is not acceptable coming from a lawyer and aimed at a Judge.

[26] In reply the practitioner was derisive of such a notion. He maintained the law should apply the same to everyone. He drew an analogy with the caste system in India (not the first of his inappropriate parallels). He described the idea as part of the "bizarre English foolishness" that New Zealand had adopted.

[27] As the practitioner ought to know, the need for counsel to play their role in upholding the dignity of the judiciary is central to the administration of justice and the maintenance of the rule of law. That is, in part, why the duty to the court overrides the duty to one's client.

[28] The practitioner argues that he made his various complaints and applications to the appropriate body – the Judicial Conduct Commissioner and the Chief High Court Judge, the High Court and the Supreme Court. Thus the documents went to the appropriate bodies and no member of the public was aware of them (so as to undermine the dignity of the judiciary).

[29] This overlooks the fact that they contained (as we have found below) false allegations and allegations without any foundation at all. It is not possible to make such allegations and, at the same time, comply with ones obligations to uphold the

rule of law and facilitate the administration of justice. The court proceedings were potentially public proceedings.

[30] Moreover, as discussed below, the practitioner was advancing his own interests with these complaints, securing an advantage for himself and possibly his clients. It did not matter to him that the complaints were not published. The fact that no member of the public may have become aware of what he did does not diminish its seriousness.

[31] Finally the practitioner argued that there was no evidence that judicial process was undermined or the dignity of the judiciary offended. Evidence should be called.

[32] Counsel for the Committee submitted, and we agree, that "One only has to articulate what occurred here to demonstrate that there could be an undermining of the process of the Court and offending against the dignity of the judiciary where a practitioner, for purposes of his own, falsely or without foundation accuses a Judge of racism."

Freedom of expression

[33] The practitioner submitted that his right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 permitted him to make the claims he did.

[34] The ambit of this right in similar circumstances has helpfully been considered by an earlier judgment of the Court of Appeal in relation to Mr Orlov. The Court noted the protection afforded by freedom of expression is not absolute:[12]

> [121] …it is not the making of the complaint which is the concern but the allegedly intemperate and persistent manner in which the complaints have been made
>
> [122] As noted by Heath J, while complaints may be made against judicial officers it is clear that disrespectful or scandalous allegations against a judge exercising judicial authority is an affront to the court and poses a risk to public confidence in the judicial system. Such excessive conduct does not qualify for protection under the right to freedom of expression. To hold otherwise would be to inhibit both the court's own disciplinary jurisdiction over lawyers appearing before it and its contempt jurisdiction. We agree.

[12] *Orlov v NZLS* [2013] 3 NZLR 562 (CA).

[35] There is thus no absolute protection based on freedom of expression, and lawyers must meet their obligations as officers of the court and under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (and its predecessor). Excessively aggressive conduct in breach of these obligations is not protected by the right to freedom of expression.[13]

[36] The practitioner emphasised the importance of the right to free speech, and why it was important for people like him to speak up about issues with the judiciary, even if he is wrong. We reiterate that members of the legal profession are entitled and indeed encouraged to speak up about judicial misconduct. However as the Court of Appeal emphasised in *Orlov*, it was the manner in which the complaints were made in that case that led to disciplinary action. The practitioner quoted at length from the Ninth Circuit case of *Yagman*[14] concerning an outspoken civil rights lawyer who was suspended from practise for, among other things, impugning the integrity of the court. His suspension was lifted on appeal. The legal test in that case was different from the test we must apply. However at the heart of the reasoning in *Yagman* was the principle –

> Lawyers may freely voice criticisms **supported by a reasonable factual basis** even if they turn out to be mistaken (*emphasis added*)

As in California, the practitioner must show that there is a reasonable factual basis supporting his criticisms – a "sufficient foundation". The practitioner appeared to assume that the facts spoke for themselves – that it was reasonable for him to think on the basis of the three cases and the information from Mr Orlov that the Judge was out to get him and was racist, corrupt etc.

[37] The Full Court in *Orlov* also referred to the recent case of the Supreme Court of Canada in *Dore v Barreau du Quebec*[15]:

> [86] … Mr Dore, a barrister unhappy with his treatment in court by a Judge, wrote subsequently to the Judge in terms that were in equal measure colourful and abusive. Disciplinary proceedings were instituted.
>
> [87] The relevant conduct rule which was said to be breached required that:

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13 At [77].
14 *Standing Committee on Discipline v Yagman*, 55 F.3d 140 (9th Cir. 1995).
15 *Dore v Barreau du Quebec* 2012 SCC 12, [2012] 1 SCR 395.

> … the conduct of an advocate must bear the stamp of objectivity, moderation, and dignity.

[88] The Supreme Court of Canada considered that the importance of professional discipline to prevent incivility in the legal profession was beyond question. It described the misconduct in this case as consisting of:

> … potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy.

[89] We cite two passages from the Supreme Court's decision in *Doré* as representing, we consider, sufficient articulation of the task. After that it is simply a matter of assessing the particular case.

[90] First:

> … [65] Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. As the Ontario Court of Appeal observed in a different context in *R v Kopyto*, the fact that a lawyer is criticising a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer's expressive rights under the *Charter*. This does not by any means argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility.
>
> … [66] We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

[91] And then:

> [68] Lawyers potentially face criticism and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.
>
> [69] A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. As discussed, such criticism, even when it is expressed robustly, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.

> [92] Before leaving this aspect of the discussion, we observe that before us Mr Orlov's submissions on freedom of expression came by way of an appendix which consisted of submissions Mr Deliu had apparently prepared for his own defence in relation to similar charges. The submissions cite copiously from primarily North American authorities, but also decisions of the European Court of Human Rights. We consider it can be taken from these cases that there is no absolute right of freedom of expression, that it is legitimate for states to draw a balance between freedom of expression and the need to protect the authority of the judiciary and the processes of the Court, that a significant degree of robustness is required, and that any punishment should be proportionate bearing in mind the competing interests and the importance of freedom of expression. If this is the intended import of the submissions we agree. If more is claimed, we consider it is not consistent with domestic authority by which we are bound.

Privileges and immunities

[38] The practitioner submitted he was entitled to absolute immunity as his court filings, judicial complaints and law society complaint answer are all absolutely privileged as he was complainant, counsel and/or witness at all material times. Similar arguments were dismissed in *Orlov*[16]. We agree with the reasoning of the Full Court in determining that the challenge based on privilege fails.

Process issues

[39] The practitioner also raised a significant number of defences which did not relate to the merits of the charges, but challenged the process or the actions of those that sought to bring disciplinary action against him. There was extensive overlap between them. Most related to the other sets of charges before the Tribunal as well. These 'affirmative defences' included discrimination based on birthplace or nationality, arbitrary, capricious and frivolous prosecution, abuse of process including blackmail; corruption by the state, vexatious actions, misuse of evidence, misuse of the disciplinary processes, violation of fundamental freedoms in particular free speech and privacy, immunities and qualified privilege.

[40] We consider the primary role of this Tribunal is to hear and consider the charges laid. Matters of administrative law are properly for the supervisory jurisdiction

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[16] *Orlov* n1 at [86] – [92].

of the High Court and, if they remain of concern, will usually be considered by that Court together with any appeal from the Tribunal.[17]

[41] However we understood from earlier decisions of the High Court that these matters should be considered by this Tribunal. However despite hearing and considering extensive submissions from the practitioner and considerably more evidence than the charges otherwise warranted, we address them only briefly in both this and the decisions on the other charges. This is because having considered all the material it was plain that none of the submissions held merit.

[42] We deal with the key matters below with related topics.

Selective/discriminatory/racist/arbitrary/frivolous prosecution

[43] A key plank of the practitioner's defence to each group of charges against him was that the respective Standards Committee was discriminatory in its approach. He submits that in other complaints of scandalising the judiciary the disciplinary bodies failed to take action because of favouritism towards "white middleclass protestant kiwi males". It did not treat certain New Zealanders as it did immigrants. Reference was made to disciplinary investigations or proceedings in relation to *M QC, B, M, H, M* and *C QC.*

[44] Some cross-examination of witnesses occurred on this point but it was limited because the Tribunal does not consider these cases to be relevant to the charges we must consider. There are plainly differences between the various cases, some apparent on the information in the public arena, and very likely other differences. We are concerned only with the practitioner's conduct and whether that conduct alone breaches the relevant provisions. The witnesses could properly only say that these were different cases from the facts in this case. That information may be relevant to penalty, but it is not to the merits of the charges.

[45] The practitioner submits that the fact that *Orlov, Dorbu* and *Comeskey* were struck off by the Tribunal but *M QC, B, M, H* and *M* were not demonstrates racism on the part of the disciplinary process. Again, we do not find the practitioner's analysis

[17] *Orlov v New Zealand Law Society* [2013] NZSC 94, *Deliu v New Zealand Law Society* [2015] NZCA 12; [2016] NZAR 1062.

to be accurate, relevant or helpful. The cases turned on their own facts and each is different from the next. It is not a submission that reflects well on the practitioner, who ought to be capable of reading the various decisions and appreciating the distinctions. The fact that the practitioner is not a native New Zealander is no indication that the practitioner will meet the same fate as those he nominated. The fact that the practitioner is not a native New Zealander is of no relevance to this Tribunal. To repeat, we are concerned only with the conduct of this practitioner.

[46] Along similar lines was the practitioner's submission that judges and senior silks could get away with the same or similar misconduct, because they were held to different standards. He asserted that the fact that no judge has ever been removed in New Zealand (compared with America, Australia, Canada and the United Kingdom) proved we are backwards. He characterised these proceedings, and those against Mr Orlov, as necessary to deal with those few lawyers who were not persuaded by the climate of fear to keep quiet about judicial misconduct.

[47] Further, the practitioner considers he has been targeted because he is a highly successful and outspoken lawyer, and a "clear and present danger" to the system. There is no evidence that this is a motivation for any act. That hypothetical explanation would not be consistent with the actions of Justice Harrison in the three cases at the centre of the practitioner's complaints, which were in response to concerns explained in his decisions and minute. This Tribunal has considered the propriety of the practitioner's actions in those and other cases in LCDT 014/15 (the competence charges).

[48] The practitioner also considers there have been "backroom arrangements", passing of documents and discussions between Judges and the Law Society which are evidence of state persecution "by proxy". We do not consider the evidence supports such allegations or demonstrates any impropriety.

Abuse of process

[49] The practitioner makes the same arguments as for the charges considered in LCDT 010/10, in that there was an abuse of process arising from the "without prejudice" discussions between he and Mr Pyke, who was at that stage briefed as the

prosecuting counsel for the Standards Committee. The matter is dealt with in that decision. The argument is rejected.

The evidence

[50] The relevant documents were authored by the practitioner in support of his complaints and applications against the Judges. It is necessary to read the whole of his communications to see what underlies and motivates his complaints.

[51] The practitioner's allegations of unjudicial or corrupt behaviour by the Judges are based on inferences which he says can be drawn from the records he relies on. The Committee submits that the inferences the practitioner seeks to draw are not available on the evidence.

[52] The practitioner also sought to rely on further background material to provide the foundation for his allegations, including evidence from Mr Orlov and Mr Siemer. The import of this was that, before having anything to do with Justice Harrison he became aware from these persons that the Judge was, he says, racist. He knew he would have to be extremely careful. At the same time he was determined not to be deterred from standing up for his clients.

[53] Both the Committee and the practitioner have put before the Tribunal a large number of judgments which are available to the Tribunal where they assist us. The Committee's evidence was filed with permission of the Tribunal given on 14 May 2014. The High Court upheld its admission, and the Court of Appeal upheld the High Court, and said: [18]

> First, … the question whether judgments can be used as evidence in disciplinary hearings depends on the use the judgments are being put to in the particular case. It is of course well-established that the Tribunal is not entitled to determine that facts in issue are proved by accepting without inquiry the findings of another court or tribunal as to the existence of those facts. But, as Mr Morgan confirmed, that is not the purpose for which the Committee seeks to adduce the judgments in evidence in this case. Here the Committee simply seeks to produce them under s 239(1) of the Act as evidence that may assist the Tribunal to deal effectively with the matters before it. As the practitioner points out, s 239(1) is subject to s 236 which requires the Tribunal to observe

[18] *Deliu v The National Standards Committee of the New Zealand Law Society* [2015] NZCA 399 at [34]. Confirmed in relation to the use of judgments in the *Orlov* disciplinary proceedings in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2016] NZCA 224, at [80].

> the rules of natural justice, but there is no basis here for concluding in advance of the Tribunal hearing that it will breach those rules when considering this evidence.

[54] The judgments are admissible because they are evidence of the background to the allegations, and of what the practitioner relied on to establish his allegations, and they prove his conduct to that extent – they are not relied on as proof of any fact in those proceedings.

[55] The affidavits admitted were as follows:

[a] An affidavit made by the practitioner on 9 September 2008 in support of a recusal application made by his then clients*, L.* It was not made in support of the originating application that is the subject of charges 5 and 6 but it relates to the same subject matter, as can be seen from reading the practitioner's various letters sent to the Judicial Conduct Commissioner and to Justice Randerson (to whom he sent a complaint about Justice Harrison). This document provides the practitioner's explanation for his allegations against Justice Harrison.

[b] The affidavit made by the practitioner on 19 August 2013 in support of Mr Orlov's defence before this Tribunal in LCDT 002/11 on similar charges, largely about the same subject matter. The practitioner repeats and seeks to justify his allegations against Justice Harrison in this affidavit.

[56] The Committee called one witness, Mary Ollivier, who produced the records of the practitioner's allegations and set out the process before the Committee and the practitioner's responses to the Complaints Service.

[57] The practitioner provided a key "substantive" affidavit of 75 pages, annexing 353 exhibits in 11 spiral bound volumes. He also gave further evidence orally and in response to questions from Counsel for the Committee and the Tribunal members. After evidence had closed but before final submissions he produced a further substantive affidavit and 8 exhibits.

[58] A further witness for the practitioner was Mr Pyke, who was the prosecutor with the carriage of these charges until October 2014. The practitioner indicated he wished to subpoena Mr Pyke, and Mr Pyke appeared voluntarily before the Tribunal. His evidence traversed these and the other charges. The practitioner was primarily wishing to interrogate Mr Pyke on matters which were the subject of "without prejudice" discussions, for which privilege was maintained.

[59] Mr Skelton QC (member of the National Standards Committee) appeared in response to the practitioner's application for subpoenas for members of the Committee to attend. He was questioned on complaints about other practitioners. He indicated under cross-examination that he did not know the practitioner was originally from Europe, or held US citizenship.

[60] Mr Orlov responded to the practitioner's summons. Most of his evidence related to the meeting interruption charge, LCDT 010/10.

The law

[61] In relation to allegations by lawyers about judges, the Tribunal is mindful of the Full Court's findings about similar conduct, regarding overlapping subject matter, in the appeal from Mr Orlov's disciplinary proceeding.[19] Counsel for the Committee referred to the following summary which is relevant to these charges:

> [145] The penultimate sentence is an accusation that the Judge found against Mr Orlov's Russian client because of the Judge's dislike and discrimination against Mr Orlov. One struggles to think of a more serious allegation than that dislike of counsel (and inferentially discrimination because of nationality) led a Judge to decide a case differently from how he otherwise would have…
>
> [146] …The statements clearly fall outside the protection of freedom of expression, are disgraceful allegations for a practitioner to make without foundation, and the charges were rightly considered to be proved.
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> …
>
> [157] Looking at the statements overall we consider that allegations of ethnic discrimination, of discrimination based on foreign nationality, of acting out of spite and a desire to harm counsel personally, all made without any suggested foundation, would rightly be regarded by lawyers of good

[19] *Orlov* n1.

> standing as dishonourable and disgraceful, and as falling outside the protection of freedom of expression.

[62] Relevant too is the Court of Appeal's decision of *Q v The Legal Complaints Officer*[20]:

> [9] It was common ground that rr 2.3 and 13.8 reflect the ethical duties of legal practitioners described by the High Court of Australia in the following terms:
>
> > [I]t is not merely the right but the duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person, and to use such strong terms as seem to him in his discretion to be appropriate to the occasion. From the point of view of the common law, it is right that the person attacked should have no remedy in the courts. But, from the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of doing harm which it confers, should not be abused. Otherwise grave and irreparable damage might be unjustly occasioned. The privilege may be abused if damaging irrelevant matter is introduced into a proceeding. It is grossly abused if counsel, in opening a case, makes statements which have ruinous consequences to the person attacked, and which he cannot substantiate or justify by evidence. It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that he has, and definitely intends to adduce, evidence to support them. It cannot, of course, be enough that he thinks that he may be able to establish his statements out of the mouth of a witness for the other side.
>
> [10] As noted in *Lawyers' Professional Responsibility*, [FN: GE Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters, Sydney, 2013) at 575–576]. rules such as rr 2.3 and 13.8 require a lawyer, in exercising the forensic judgments called for throughout a case, to take care to ensure decisions to invoke the coercive powers of a court or to make allegations or suggestions under privilege are reasonably justified by the material then available and are appropriate for the robust advancement of the client's case on its merits. The rules proscribe decisions or allegations made principally to harass or embarrass or to gain a collateral advantage for the client or the legal practitioner out of court.

[63] To support his allegations the practitioner called for inferences to be drawn from what the Judges said in court judgments, records and official correspondence. He sought to cross-examine the Judges to establish their prejudice, and in some cases to show what had happened at the underlying hearings. The Full Court's observations in *Orlov* are apropos:

> [34] Mr Orlov's main claim to prejudice is that the change meant he now had to prove his primary facts. He wanted an adjournment so he could gather

[20] *Q v The Legal Complaints Officer* [2013] NZCA 570; [2014] NZAR 134.

> together such evidence as might be available to show what happened on the hearing days in issue. This submission squarely puts in issue Mr Orlov's analysis of the case. We consider his focus on the primary facts was incorrect and failed to recognise that the real issue was the legitimacy of the claims he was making based on those primary facts. Put simply, even assuming that things happened as Mr Orlov claims, what is the basis for saying that they stem from prejudice, racism and a malicious desire to harm Mr Orlov rather than from the fact that the Judge considered Mr Orlov was not displaying the basic knowledge and skills a client is entitled to expect from their lawyer?

[64] The practitioner invites an inference that the Judges put aside their oaths of office. A conclusion that a Judge has not followed the oath of office will not lightly be drawn. In the recusal context, the Court of Appeal in *Muir v Commissioner of Inland Revenue*[21] observed:

> [33] On appointment to office in New Zealand, a Judge takes an oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will" (s 18 of the Oaths and Declarations Act 1957). Lord Bingham has said:
>
> If one were to attempt a modern paraphrase [of that oath], it might perhaps be that a judge must free himself of prejudice and partiality and so conduct himself, in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent, and impartial judgment."
>
> (Bingham, "Judicial Ethics", in The Business of Judging: Selected Essays and Speeches (2000), p 74.)

[65] The Court added[22]

> The informed observer will not, for instance, lightly accept that a Judge has put aside his or her professional oath, or indeed his or her professional training (for as everybody knows, a vast amount of time in litigation is taken up with sifting and weighing "facts" in evidence)."

And:[23]

> Every judicial ruling on an arguable point necessarily disfavours someone – Judges upset at least half of the people all of the time – and every ruling issued during a proceeding may thus give rise to an appearance of partiality in a broad sense to whoever is disfavoured by the ruling. But it is elementary that the Judge's fundamental task is to judge. Indeed, the very essence of the

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21 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA).
22 At [96].
23 At [99].

> judicial process is that the evidence will instil a judicial "bias" in favour of one party and against the other – that is how a Court commonly expresses itself as having been persuaded.

[66] This is not a demonstration that the system is overly deferential towards judges, as the practitioner appears to believe. It is recognition of the realities of judging within the constitutional framework that resolutely upholds the independence of the judiciary in pursuance of the rule of law. Confidence in the administration of justice is central to the rule of law. Without confidence in the judiciary, the resolution of disputes through the courts would be undermined. However within that framework is a hierarchy of appeals and processes for dealing with complaints. Judges are not immune from scrutiny.

Background to charges – the three judgments

[67] The background to these charges is found in two judgments and a minute of Justice Harrison in matters that involved the practitioner:

[a] Minute of 16 July 2008 in *G*[24]

[b] Judgment of 16 July 2008 in *C v C*[25]

[c] Judgment of 24 July 2008 in *L*[26]

(a) *G v Chief Executive of the Ministry of Social Development*

[68] *G* was a proceeding which appeared to suffer from numerous defects. The brief minute of 16 July (Justice Harrison) recorded Mr Chambers as appearing on instructions from the practitioner, acting for the plaintiffs. The Court noted that the causes of action were numerous and that counsel for the five defendants had all raised questions about the arguability of the proceedings. There were issues of *res judicata* and statutory defences for some defendants. The Court observed at para [2] the pleading suffered from prolixity and pleaded evidence:

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[24] *G v Chief Executive of the Ministry of Social Development* CIV 2008-404-3461, 16 July 2008.
[25] *C v C* CIV 2008-404-002469, 16 July 2008.
[26] *RL v Chief Executive of Ministry of Social Development* CIV 2007-404-7031, 24 July 2008.

> It is discursive and uninformative and reflects a fundamental misunderstanding about Ms G's legal rights. If the proceeding is to go further a total revised statement of claim must be filed.

[69] The Court had before it a memorandum from the practitioner on behalf of the plaintiff. It was described as unhelpful, doing nothing to dispel the problems to which the Judge had referred about the tenability of any or all of Ms G's causes of action. The Judge noted at para [5]:

> Mr Deliu refers to an application 'for a case stated to be determined prior to any further steps in these proceedings'. The concept of a case stated is unknown in this area of the law, and the contents of the memorandum only serve to reinforce the concerns I have earlier expressed.

[70] The Court allocated a fixture for a strike out argument on a standby basis, and directed the filing of an amended statement of claim in the proper form and advice as to whether legal aid had been granted to Ms G. The Judge recorded, at the request of counsel for at least one defendant, that costs would be sought against solicitors and counsel for Ms G personally if the proceeding was dismissed. He also noted that the second plaintiff was a nine year old child, and as there was no application for an order appointing a litigation guardian, her name was struck out as a party. The Judge put solicitors and counsel for Ms G expressly on notice that the proceeding in its present form was fundamentally defective.

(b) *C v C*

[71] *C v C* was another very brief judgment of Justice Harrison, some 15 paragraphs. Again, Mr Chambers is recorded as appearing for the appellant on instructions from the practitioner. Ms C was appealing a decision of the Family Court dismissing her application for interim spousal maintenance pending hearing of the substantive application.

[72] The Judge said he was unable to understand why leave had been given. Mr C had been put to unnecessary expense and inconvenience opposing the appeal. The practitioner had filed an extensive written synopsis in advance of the hearing. The Judge said it was difficult to identify from that the real basis for Ms C's challenge. He endorsed the Family Court Judge's view, noting the evidence for both sides was unsatisfactory. He noted that, while a timetable had been set to get to the substantive

fixture, the practitioner had requested the Family Court defer allocating a fixture. His Honour considered the matter could have been on the way to a proper resolution.

[73] The Judge held the appeal was hopeless and dismissed it. He directed the registry to send a copy of the judgment to the Legal Services Agency:

> It should not be meeting the costs of an appeal that never had any merit in circumstances where Ms C was provided with an opportunity to have her substantive application for final maintenance orders determined by now.

[74] He granted counsel for Mr C leave to apply for an award of costs even though Ms C was legally aided, on the basis of the exceptional circumstances provision in s 43 of the Legal Services Act.

[75] For completeness we note that the practitioner filed a memorandum of counsel two days later, on 18 July. He submitted that there were clearly merits to the appeal. But if he was wrong, he questioned the Court's jurisdiction to refer the matter to the Legal Services Agency. If there was jurisdiction, he submitted that should not occur, for a number of reasons including the conduct of the respondent.

(c) *RL v Chief Executive of the Ministry of Social Development*

[76] *L* (or *RL*) was an application to strike out judicial review proceedings commenced by the L's. The proceedings sought to review decisions of the Chief Executive and the Family Court which had granted an interim custody order and a declaration that the L's three sons were in need of care and protection. Following this the boys went to live with caregivers under the Chief Executive's supervision.

[77] The Judge, Justice Harrison, recorded counsel for the L's as Messrs Orlov and Deliu, neither of whom was available to appear and so Mr Hirschfeld was instructed, "bringing some light to a jungle of conceptual confusion".[27] The Judge referred to documents that Messrs Deliu and Orlov attempted to file in the Family Court. He noted that two Judges of that Court refused to accept them as they did not comply

[27] At [4].

with the relevant statutes and rules.[28] With specific reference to the practitioner he said:

> …Judge Hikaka ordered that the memorandum filed by Mr Deliu, purporting to be an application for substantive orders, be returned, and directed that:
>
> > Applications to be made in accordance with the Rules and Act and within the timeframe directed or there should be an explanation why counsel has not complied with Court's directions

The Judge noted that the L's failed to comply with the Court's timetabling order despite the need for urgency. He referred to the statutory timeframes and the concern expressed by counsel for the Chief Executive about delays and their impact on the children, in a memorandum of 16 July (5 days after the timetable required the filing of the substantive application together with supporting affidavits).

[78] The judgment records that later on the same day, 16 July, the practitioner filed what is described as "inter partes interlocutory applications" proposing a range of orders. The Judge described the document as confusing (adopting counsel for the children's description):

> [19] … For example, it sought to set aside the interim custody order made on 6 June even though the L's had confirmed their concurrence a week later. A five page affidavit was also filed by RL. It was unstructured and argumentative, and did not attempt to address seriatim the contents of the Chief Executive's comprehensive affidavit. While acknowledging ongoing problems with her husband relating to alcohol abuse and subsequent violence, RL expressed her love for the boys and sought their return. Her love for the children is not in issue. The issue, not addressed, was the Chief Executive's evidence that the boys were in need of care and protection; that is, they were or were likely to be harmed, physically or emotionally, or their development was likely to be seriously or avoidably impaired or neglected.

[79] The Judge described the complex procedural history before Judge Rogers in the Family Court in some detail at paras [15] to [33]. He was critical of both Mr Orlov and the practitioner. For example:

> [44] A Court is entitled to expect elementary standards of competence, compliance and courtesy from counsel in a specialist area where the focus of the proceedings is on the best interests of the children. Messrs Deliu and Orlov left the Family Court with no choice but to maintain its refusal to accept non-complying documents. The history of proceedings in the Family Court

[28] At [11].

> represents an abject failure by the L's lawyers to discharge their obligations to the Court and their clients.
>
> [45] The Court still allowed the Ls to be heard. Both Messrs Orlov and Deliu appeared and made submissions in opposition to the Chief Executive's application when it was called on 22 August. The Judge obviously contemplated that RL would also appear. Her lawyers failed to advise her to attend. It cannot be argued that the Court deprived the Ls of their right to be heard and to a fair hearing. To the contrary the Court gave them every opportunity, despite the failings of counsel.

[80] The Judge found the "only possible cause of action" to be hopeless, and struck it out.[29]

[81] He agreed with counsel for two of the defendants who argued that the proceeding was an abuse of process, being no more than a collateral attack on the decision of the Family Court.[30] The proceeding seemed designed to frustrate the processes envisaged by the Act and the victims were the Ls and their children.[31]

[82] The Judge then made comments which appear to have been of particular concern to the practitioner. The Judge stated:[32]

> [52] This proceeding appears part of a wider agenda, not necessarily attributable to the Ls. In his written synopsis filed in this Court, Mr Deliu described the children as:
>
> > … belong[ing] to an indigenous socio-economically disadvantaged subclass of persons who have been historically abused by the New Zealand nation and about whose removal the New Zealand authorities need to be particularly sensitive (the analogy with the aboriginal lost generation of children removed by governments is, it is submitted, direct). Indeed, they are protected both by international conventions and the Treaty of Waitangi.
>
> [53] He then submitted:
>
> > … that the merits of the decision are not directly challenged and therefore in a sense the facts as to the parents are irrelevant. Nevertheless, it never has been nor can it be the law that historical domestic violence and drinking problems between indigenous parents can allow the state to remove their children.

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29 At [46].
30 At [48].
31 At [51].
32 At [52]-[55].

> That used to be the view amongst 18th Century Anglo-Saxon social workers that the state should remove aboriginal children to better homes but that view has squarely been shown to be bigoted, racist, supremacists and elitist and imply (sic) wrong by over 50 years of research and reports. Further that view is simply not permitted by the international law. The Māori people have been placed in a situation of social inequality by the English 'settlers' that is no longer an argument but simply a fact (sic). Their social problems need to be addressed in a humane and culturally sensitive manner and one which recognises and provides for procedural rights as great as (if not greater) than those of the middle and upper class WASPs because their problems need to be approached with sensitivity and understanding.

[54] This submission speaks for itself in its fundamental misunderstanding of New Zealand society, its norms, its values and its legal system. Even a passing familiarity with the Act and the steps taken by the social workers involved in this case would confirm the statutory concern with promoting Māori needs, values and beliefs where they arise: see, for example, ss 4, 5, 9, 13 (particularly s 13(f), 21 and 22. All citizens are equal before our law and the indigenous ethnicity of parents has never justified giving the interests of Māori children less protection than other racial groups. The rights of children, and the state's responsibility towards them, are universal.

[55] A similar theme underlined a submission made by Mr Deliu in the Family Court on 27 May that a Māori should be appointed as lawyer for the children (he does not suggest the same for his clients). Judge Hikaka's informed reply is apposite:

> [18] Children in these circumstances, whether they be Māori or non-Māori, in my view, are entitled to receive and deserve to receive, top quality legal representation. Again mindful of Mr M's background and experience I am satisfied that if he forms the view that he is not able to adequately represent these children on account of their Māori heritage then he can be relied on to alert the court to that fact. I would not like to think that the evidence that has been provided to the court with respect to the children's upbringing and aspects of the parenting they have received is somehow linked to being a part of their Māori heritage.
>
> [19] To suggest that link would, in my view, not only indicate somehow Māori parents are not up to the task of providing parenting, it would besmirch the integrity and standing of Māori families who have successfully parented, and even those who have had difficulty parenting but nonetheless to the best of their ability overcome those difficulties, and parented for the welfare and best interests of their children.

[83] He then reserved leave for the defendants to file submissions on costs (the Ls not being legally aided) "both as to the basis upon which costs should be fixed and liability for an award". He timetabled the making of written submissions for that.[33]

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[33] At [56].

Finally, he directed the registry to forward a copy of the judgment to the Professional Standards Director of the Auckland District Law Society.[34]

[84] A "minute to counsel" was issued on the same day, referring to the submissions filed by the practitioner on 8 July, which themselves referred, in para 47, to the Family Court Judge and her actions in the following terms:

> The fact that the decision was made by an Anglo-Saxon former counsel for CYF in a manner showing complete disregard for procedural rights accompanied by a statement that she was doing so because of the attitude of trial counsel simply heightens the danger of accepting the Crown's view that this judicial review should be struck out.

[85] The Judge observed the submission suggested that the Family Court Judge had acted in deliberate disregard of the obligations assumed according to her judicial oath. He indicated that was a disgraceful submission, and was giving the practitioner until 1pm the next day, 25 July, to file a memorandum of withdrawal of the submission and apology both to this Court and the Family Court. Failing strict compliance with this direction, he would make a formal complaint about the practitioner's conduct to the Auckland District Law Society.

Charge 1 and in the alternative charge 2 – complaint to Judicial Conduct Commissioner re Justice Harrison

[86] Charge 1 alleges misconduct in the practitioner's professional capacity in terms of s 112(1)(a) of the 1982 Act, by virtue of making allegations about Justice Harrison that either were false or were made without sufficient foundation, in the two items of correspondence to the Judicial Complaints Commissioner of 23 and 24 July 2008.

[87] Charge 2 is the alternative charge of conduct unbecoming a barrister and solicitor in terms of s 112(1)(b) of the 1982 Act, for the same allegations.

[88] The relevant rules at the time read as follows:

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[34] At [58].

8.01

In the interests of the administration of justice, the overriding duty of a practitioner acting in litigation is to the court or the tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of his client.

Commentary

(1) A practitioner must never deceive or mislead the court or the tribunal.
(2) The practitioner must at all times be courteous to the court or the tribunal.
(3) The practitioner, whilst acting in accordance with these duties, must fearlessly uphold the client's interests, without regard for the personal interests or concerns.

8.04

A practitioner must not attack a person's reputation without good cause.

Commentary

(1) This rule applies equally both in court during the course of proceedings and out of court by inclusion of statements in documents which are to be filed in the court.
(2) A practitioner should not be a party to the filing of a pleading or other court document containing an allegation of fraud, dishonesty, undue influence, duress or other reprehensible conduct, unless the practitioner has first satisfied himself or herself that such allegation can be properly justified on the facts of the case. For a practitioner to allow such an allegation to be made, without the fullest investigation, could be an abuse of the protection which the law affords to the practitioner in the drawing and filing of pleadings and other court documents. Practitioners should also bear in mind that costs can be awarded against a practitioner for unfounded allegations of fraud.

The correspondence

[89] By a seven page fax letter dated 23 July 2008 (the first relevant communication under charge 1) the practitioner wrote to the Judicial Conduct Commissioner to make a complaint against Justice Harrison. The practitioner's grounds for complaint were said to be:

> ….to date, I have never appeared personally before Harrison J yet he has on three occasions in the past week:
>
> i. Intimated a costs award against me (and a colleague) personally at a very early stage in a proceeding;
>
> ii. Referred one of his decisions to the Legal Services Agency which I submit was an effort to discredit me (and a colleague) and, I also note ultra vires, and

> iii. Attempted to have me (and a colleague) removed as a legal representative for my clients in a lower court, without even a modicum of jurisdiction to do so.

[90] The faxed letter included the following statements which are also the subject of charges 1 and 2:

> 14. It therefore appears that whether or not costs are threatened or ordered against a legal representative or whether a disparaging judgment is referred to the Legal Services Agency is not really based on the frivolity of the case or appeal, but rather Justice Harrison's whims on the day in question (or worse yet, the lawyer in question). With the greatest of respect, that is the very definition of *in*justice. *(emphasis the practitioners)*

And:

> 20. Two of the cases (*G* and *L*) involve my clients' direct allegations of breaches of their human rights by the State. I ask this Honourable Body to consider that I have cited replete cases where Harrison J seems not to mind (and in fact praise) frivolity in commercial cases but seems to attack lawyers representing their clients in human rights cases. If I am correct, that is a clear breach of human rights law and per se a ground of complaint by my clients to the relevant human rights authorities.

[91] The second document which records relevant statements is an email of the next day, 24 July, sent by the practitioner to the Judicial Conduct Commissioner. It is not in evidence but a letter dated 13 August 2008 from the practitioner to Mr Haynes (of the Office of the Judicial Conduct Commissioner) sets out some of the content of that earlier email, including the following quotes which evidence further particulars of charges 1 and 2:

[92] Referring to Justice Harrison:

> "Judge is completely out of control and a danger to the public, lawyers appearing before him and is bringing the administration of justice into grave disrepute"

> "Justice Harrison is prepared to violate directly the international conventions ratified by New Zealand in terms of access to justice, i.e., independent and unafraid counsel, for the purpose of following his own agenda"

> "Justice Harrison appears to be breaching the human rights legislation in that he appears to be discriminating against me, a lawyer representing Maori interests, by making costs awards"

> "Justice Harrison is a judge that routinely acts outside the law and any complaints he makes against lawyers (which are more frequent than any other judge) ought to be considered only in light of what I submit to be his blatant and repeated abuse of power"
>
> "he has breached both my domestic and international rights, has attacked me personally without cause, has placed my basic societal freedoms, as well as the right to earn a living and care for my family, in peril and has otherwise acted not like a judge sitting on the bench should"
>
> "Justice Harrison has already taken every conceivable measure to attack me personally"
>
> "he simply acts outside his authority whenever he feels like it"
>
> "he is therefore either acting in bad faith (which I think) or, if I am wrong, he is incompetent and does not realise it is not within his provenance to:"…..
>
> "he should be the first judge in New Zealand removed from the bench because it appears he is now attacking me more than once a day and his actions bring the administration of justice into great disrepute, if not outright mockery"
>
> "Justice Harrison is now on a personal vendetta against me"
>
> "he either abuses his power or does not understand how limited it is in nature and is therefore not competent"

Discussion

[93] Counsel for the Standards Committee submitted that the statements to the Judicial Conduct Commissioner were false or without sufficient or any foundation. He referred to Rule 8.04 (Rules of Professional Conduct) which provided that a practitioner must not attack a person's reputation without good cause.

[94] He referred too to Rule 8.01 which, at the time, provided that the overriding duty of a practitioner acting in litigation is to the Court or the Tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of his client.

[95] Counsel submitted there was no basis for the practitioner's claims in the 23 July letter that the Judge was threatening or ordering costs and referring judgments to the Legal Services Agency, not on the merits of the matter but on the basis of the Judge's whims on the day. There was no basis for asserting that Justice Harrison had singled out him and Mr Orlov, dismissing cases, referring judgments to the Legal Services Agency and threatening to award indemnity costs against them, but not doing so for

other practitioners. Nor could he be said to have any foundation for alleging the Judge was prejudiced against lawyers representing clients in human rights cases. We note that as at 23 July, the judgment in *RL* had not been delivered.

[96] Nor was there any foundation for the various statements in the 24 July email. By this stage it appears the practitioner had received the judgment in *RL* and the Minute to Counsel referred to above. The practitioner said the Judge was out of control and a danger to the public – he was bringing the administration of justice into grave disrepute – violating international conventions – breaching human rights legislation – acting outside the law – breaching the practitioner's rights – attacking him personally – acting outside his authority – acting in bad faith or is incompetent – should be removed from the Bench – has a personal vendetta – abuses power or does not understand how limited it is.

[97] The practitioner held to his position – the statements were either true, or he had good grounds for believing them to be true by virtue of the Judge's conduct towards him or the judgments produced in support. He emphasised there was no evidence to support the assertion that they were false, nor that the practitioner lacked sufficient foundation or good cause for his statements. He did not, under cross-examination, "accept their falsity". No-one could prove they were false, he submitted. Justice Randerson did not give evidence denying his allegations. There were no facts in the charges and accordingly no case to answer

Professional capacity

[98] The practitioner did not consider the Rules of Professional Conduct to be relevant as he was not acting in court, but was writing to the Judicial Conduct Commissioner in his personal capacity. This was, he submitted, taking his complaints to the proper, confidential channel.

[99] However as the Court of Appeal has confirmed, lawyers' professional obligations are not suspended when exercising rights to complain in connection with the provision of regulated services. There is no absolute privilege attaching to

statements made to the Judicial Conduct Commissioner.[35]

[100] We consider the practitioner was acting in his professional capacity. He was complaining about a Judge's conduct in cases in which the practitioner had acted, and about the Judge's conduct generally. His actions are linked to his professional role as counsel. It did not matter that the conduct itself was not in court.

Foundation – background with Mr Orlov

[101] He submitted there was more than ample basis for his complaints. It is clear from the 23 and 24 July correspondence that the complaint was focussed on his treatment in the *G, C* and *L* decisions. It is relevant to note that he did not appear in those matters – he had never appeared before Justice Harrison.

[102] He submitted that he also relied on his "*a priori* knowledge," such as abuse he believed Mr Orlov had suffered at the hands of Justice Harrison, and also (raising this at a late stage) Mr Siemer's experience with His Honour. The practitioner explained how he had been told by Mr Orlov to be careful of Justice Harrison as Mr Orlov had experienced discrimination and prejudice in his Court, even been "unlawfully threatened with imprisonment". He submitted that he did feel threatened by the Judge and that there should not be anything wrong in seeking protection from the proper sources.

[103] He also suggested that, because the Judge had made a complaint to the Law Society against Mr Orlov that was ultimately not upheld, and he was from the same firm, the Judge may have "co-mingled" him with Mr Orlov and as a result, treated him unjustly. In other words the Judge had some antipathy (at least) towards Mr Orlov (a vendetta, he submitted,) and this was rubbing off onto the practitioner.

[104] In arguing his "sufficient foundation", the practitioner focussed on the history between the Judge and Mr Orlov "over a long period of time and this is what led up to these complaints"[36] His evidence was:

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[35] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2016] NZCA 224 at [14].
[36] Transcript p 449/10.

> …these conclusions that I felt Justice Harrison was persecuting me [didn't just come] out of thin air – so in fact it went back before me and Orlov. I've always said that I'm the innocent party in this, in the sense that Justice Harrison and Mr Orlov were the real enemies of one another and I happen to be a moon that got caught up in this whole fracas.[37]

And further

> I genuinely felt that Justice Harrison was out to get Mr Orlov especially and yes, if I happen to fall in the rubble, so be it, and I wasn't going to let that happen, I was going to make sure that Justice Harrison got held accountable for any attacks that he made on Mr Orlov and me.[38]

[105] Counsel for the Committee submitted, and we accept, that the foundation for the practitioner's statements in relation to Justice Harrison is limited to the three judgments which the practitioner asserts as the grounds for his complaints in the correspondence.

[106] We agree with Counsel for the Committee's description of the complaints as intensely personal. The practitioner claimed that Justice Harrison was racist towards him, imperilling him, imperilling his clients, referring his cases to the Law Society and the Legal Services Agency, threatening costs against him. If the position was that Mr Orlov had made claims like those about Justice Harrison's behaviour towards him, it still could not have given the practitioner a substantial foundation for what he actually said against Justice Harrison as it related to the practitioner himself.

[107] Counsel for the Committee hypothesised that Mr Orlov and the practitioner had come to the view that Justice Harrison was a threat to them. A threat to them in the sense that he might affect their reputation as lawyers and might affect their ability to earn an income, particularly from the legal aid system. Accordingly the two of them engaged in a campaign to discredit the Judge in an effort to protect them from him by making these disgraceful allegations. That was in the hope that it would mean that they no longer had to appear before him and potentially suffer the reputational or financial damage they evidently feared.

[108] Under cross-examination the practitioner agreed that he was, at the time of this letter, anticipating a "rough ride" from Justice Harrison. He agreed he hadn't yet had

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[37] Transcript p 451/3.
[38] Transcript p 452/2.

one. He was creating a paper trail because he knew that the Judge was "out to get [him]" and would, in the future, complain about him (the practitioner) and order costs against him (something that had not yet occurred on 23 July).[39] The practitioner's conduct is consistent with Counsel's hypothesis.

Foundation - Eleven judgments

[109] The practitioner also relied on his "research", a collection of eight judgments which, he submitted, demonstrated the foundation for his complaint. These showed, he maintained, that the Judge treated him differently from other counsel who brought "hopeless" or "untenable" cases. He submitted the judgments demonstrated that the Judge discriminated against "foreign" counsel and favoured white "kiwi" lawyers, and against human rights cases in favour of commercial cases, when threatening or ordering costs against a legal representative, or referring a "disparaging judgment" to the Legal Services Agency. A further three decisions were relied on as showing a clear pattern of the Judge referring decisions to the Law Society.

[110] Counsel for the Committee went through each of the 11 cases cited by the practitioner in support, submitting that they did not support the practitioner's thesis. We have read them and we agree. The cases are the first 11 cases summarised largely by Counsel for the Committee and attached as **APPENDIX B.** As would be expected, they all turn on their particular facts.

[111] One only has to read the various judgments and documents which the practitioner relies on to see that they provide no foundation at all for his statements.

[a] There was no basis upon which the practitioner could say he believed Justice Harrison determined costs and referred matters to the Legal Services Agency on whims or upon his prejudice about the lawyer in question. Each case where costs were determined or referrals were made was because the Judge had concerns about the skill of counsel, and/or the public interest in funding clearly hopeless cases.

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[39] Transcript p 525/14.

[b] There was no foundation for asserting that Justice Harrison attacked lawyers representing clients in human rights cases, in breach of human rights law.

[c] Nothing indicated that Justice Harrison was out of control or a danger to the public, and/or to lawyers appearing before him, and bringing the administration of justice into disrepute.

[d] Justice Harrison did not violate international conventions, breach human rights legislation, act outside the law, blatantly and repeatedly abuse his power and act outside his authority.

[e] Justice Harrison did not discriminate against the practitioner and attack him personally without cause, or display a personal vendetta against him.

[f] Justice Harrison was not partial, was not acting in bad faith, was not abusing his power, was not incompetent and there was no basis for the practitioner to maintain to the Judicial Conduct Commissioner that Justice Harrison should be removed from the Bench.

[112] Finally the practitioner submitted that all he did was use "colourful language" which he submitted was a cultural issue that deflected from the real purpose of the prosecution, which was to punish him for having the audacity to claim that New Zealand judges had "wronged" him. If the practitioner truly believes this is an accurate description of the nature of his allegations, then this is a particularly unfortunate perception. The Judge was concerned that the practitioner's clients were not receiving the service they were entitled to. The Judge was well placed to observe that.

Conclusion on charge 1

[113] The essence of the practitioner's defence was that his statements were either true or he believed them to be true, that what he said had sufficient foundation, that there was no evidence to the contrary and that the very prosecution for disciplinary offences was evidence of systemic prejudice against him.

[114] However it was plain from reading the three judgments that the Judge had concerns about the way the practitioner was providing services to his clients, and whether he was meeting his obligations to the court.

[115] We find that the practitioner's statements were not true and there was no basis for making them. The practitioner had never personally appeared before the Judge. There was nothing to indicate that the Judge's conduct towards the practitioner in the three matters referred to stemmed from prejudice, racism or a malicious desire to harm the practitioner as opposed to a consideration that the practitioner was not displaying the basic knowledge and skills a client was entitled to expect from their lawyer. The eleven judgments referred to all turn on their own facts. They do not provide any foundation for the allegations made by the practitioner.

[116] Professional misconduct under the Law Practitioners Act 1982 ranges from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner. Intentional wrongdoing is not a necessary ingredient to the charge.[40] We consider the practitioner was at the very least indifferent to, and can properly be said to have abused, the privileges that accompany registration as a legal practitioner. His actions clearly breached Rules 8.01 and 8.04 and qualify as misconduct under the Act.

[117] Charge 1 is proved.

Charge 3 and in the alternative charge 4 - complaint to Justice Randerson as Chief High Court Judge about Justice Harrison

[118] Charge 3 alleges misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, by virtue of making allegations about Justice Harrison that either were false, or were made without sufficient foundation, in his letter of 5 August 2008 sent to the Chief High Court Judge, Justice Randerson, that sought to have Justice Randerson direct that Justice Harrison not be allocated any case in which he appeared as counsel.

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[40] *Complaints Committee No 1 of ADLS v C* [2008] 3 NZLR 105 at [33].

[119] As well as relying on section 7 of the Lawyers and Conveyancers Act 2006, the charges refer to Rules 2.1 and 13.2 of the Conduct and Client Care Rules:

> 2 A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.
>
> 2.1 The overriding duty of a lawyer is as an officer of the court.
>
> 13.2 A lawyer must not act in any way that undermines the processes of the court or the dignity of the judiciary.
>
> 13.2.1 A lawyer must treat others involved in the court processes with respect.

[120] The particulars are set out in **APPENDIX A**.

[121] The alternative, charge 4, becomes relevant if it is considered that the practitioner's conduct was unconnected with the provision of regulated services.

[122] The letter of 5 August from the practitioner to Justice Randerson was 28 pages in length. It was expressed as an informal letter requesting "that no existing or future cases in which I am a lawyer acting be heard by Justice Harrison". It recorded his complaints, giving instances that the practitioner said gave rise to his concern. Statements from the letter that evidence the particulars are:

> 19. I submit this *prima facie* shows that Harrison J is acting biased against me, or alternatively at Least with the appearance of bias.
>
> …
>
> 24. If true, that is a showing that Justice Harrison is discriminating against me, possibly on the basis of my foreign nationality (he refers in the L case to my misunderstanding of New Zealand, though I have never actually been face-to-face with him, so I can only assume he saw my foreign-sounding name or otherwise inquired as to where I am from).
>
> 25. Here is but a sample of what I submit to be clearly disproportionate treatment ..... [reference is here made to 35 cases where the practitioner says practitioners were not meted the same treatment as he (and Mr Orlov) received in *G, C* and *L* despite the cases being 'hopeless'.]
>
> …
>
> 51. … I no longer feel I can safely appear before him, as if I do so I submit that:
>
> - I fear for my liberty and freedom as he may [be] very well arbitrarily and capriciously hold me in contempt and incarcerate me if he does not like me or my arguments.

…

66. … I cannot fathom why he went back to the file after it had been closed and he had already made a de facto law society complaint, other than to submit he must have been acting mala fides towards me (and in my further submission outside the scope of his judicial immunity). In my submission, absent a reasonable explanation as to why he issued the further Minute mere hours after issuing his judgement, then he has proven himself to be a judge lawyers and the public should be very scared of dealing with.

…

76. This is conduct very similar, if not identical, to that which the South African apartheid, Stalinist and other abhorrent regimes of the past did. …

…

78. More fundamentally, and perhaps of more concern, is that Justice Harrison is prepared to violate directly the international conventions ratified by New Zealand in terms of access to justice, …. This means that in terms of human rights in general, and Maori rights specifically, Justice Harrison appears to be breaching the human rights legislation in that he appears to be discriminating against me, a lawyer representing Maori interests, by using Law Society complaints, costs awards and other tools to prevent me advancing my aboriginal minority client's causes.

Connected with legal services

[123] The practitioner submits that he was acting in his personal capacity, and not in connection with the affairs of any particular client. He should not therefore be subject to misconduct charges under s 7 of the Act.

[124] He says at the beginning of his letter:

> I note I have not written this on my firm letterhead because it is coming from me directly, ie not just as a lawyer, but also as an individual whose human rights have been repeatedly and grossly breached and who seeks your assistance both as fellow officers of the Court, but also in your capacity as an official of this state of whom I am afforded protections from.

[125] However the letter is clearly that of a lawyer writing in his professional capacity wanting to secure for the future what he considers to be an advantageous position of not having his cases heard by Justice Harrison. It raises matters which the practitioner considers the Chief Judge should be concerned about in the administration of the court. We consider, following the Full Court in *Orlov,* that such

correspondence to be sufficiently connected with legal services, and so subject to section 7(1)(a).

False or without sufficient foundation

[126] Counsel for the Committee accurately summed up the claims made to Justice Randerson against Justice Harrison as follows:

> Based on the three cases of *G, C v C* and *L* the practitioner … claims that the Judge was biased against him, treating him disproportionally and discriminating against him because he was not New Zealand born, behaving arbitrarily and capriciously and holding him in contempt and possibly incarcerating him, acting with mala fides, a Judge that lawyers and the public should be scared of and saying that Justice Harrison's conduct was similar to that in South Africa under apartheid and Stalinist [Russia]. He claimed that Justice Harrison had violated international conventions and breached human rights legislation by discriminating against him, being a lawyer representing Maori interests.

[127] Again, one only has to read the three cases and the practitioner's letter to see clearly that those cases do not support these claims.

[128] No other evidence lends support to the claims. In particular, the 35 decisions cited provide no evidential basis for the claims. These are the same 11 cases as were referred to the Judicial Conduct Commissioner in July (charge 1), plus a further 24 cases. The practitioner submitted to Justice Randerson that these cases demonstrated that Justice Harrison had an increasing propensity to dismiss cases as hopeless. He also submitted the Judge punished parties or, in his cases far more than others, counsel. He highlighted passages where the Judge had "basically called a case frivolous or abusive, yet praised counsel for their efforts". This he saw as evidence of Justice Harrison discriminating against him.

[129] Merely because the Judge had decided some cases were hopeless (and they plainly were), awarded greater than scale costs or referred matters to the Law Society or the legal aid authorities, could not possibly have justified the claims made. Each case was determined on its merits. The judgments did not provide support for the practitioner's allegations. These cases are also summarised by Counsel for the Committee in the attached **APPENDIX B**.

[130] There was no foundation for the claims made. They were not true. The practitioner is in breach of his overriding duty to the court, and his duty not to act in a way that undermines the processes of the court or the dignity of the judiciary (Conduct and Client Care Rules 2.1 and 13.2). We find the practitioner's conduct would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable.

[131] Charge 3 is proved.

Charge 5 and in the alternative charge 6 – Application for permanent recusal of Justice Harrison

[132] Charge 5 also alleges misconduct when providing regulated services under s 7(1)(a)(i) of the Act, by virtue of making allegations about Justice Harrison that were either false or without sufficient foundation, or made without good cause, in an Originating Application dated 5 September 2008 seeking an order that Justice Harrison be permanently recused from all cases filed by the practitioner and Evgeny Orlov.

[133] Alternatively charge 6 is relevant if the practitioner's conduct is found to be unconnected with the provision of legal services.

[134] The charge also relies on the following rules:

> Rule 2.1 and 13.2 of the Conduct and Client Care Rules (cited earlier), and
>
> Rule 13.8 and 13.8.1 of the Conduct and Client Care Rules:
>
> Reputation of other parties
>
> 13.8 A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.
>
> 13.8.1 A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.

[135] There are six particulars **–** see **APPENDIX A**.

[136] The Originating Application dated 5 September to the High Court at Auckland (in CIV 2008-404-5878) sought 'permanent judicial recusal' and recited allegations and statements that evidence the particulars as follow:

> Justice Harrison has filed de facto and de jure law society complaints against one or both Applicants based on untenable and/or non-particularized grounds and also which were frivolous, malicious, vexatious, vindictive, oppressive, and/or punitive in nature and the original and only complaint(s) finally and fully determined was not upheld;
>
> 16. The Applicants' human rights are being violated arbitrarily and/or capriciously;
> 17. The breaches are ongoing;
> 18. The severity of the breaches is likely to increase;
> 19. Justice Harrison is discriminating against one or both Applicants;

[137] The Application lists some 25 grounds. It was brought in the names of the practitioner and Mr Orlov jointly, but it was only signed by the practitioner and is described at the conclusion as having been filed by the practitioner. We consider the filing of the application to be conduct connected with the provision of legal services, following the decision of the Full Court in *Orlov.*[41] The practitioner is again seeking a perceived benefit for the future when appearing in court for clients, and using his legal training and knowledge to do so through an originating application to the High Court.

[138] An application for permanent recusal seems a very dramatic and public step to take. A firm foundation must be necessary. However this application, and the claims made in support were once again based on the practitioner's view of what Justice Harrison had said in the *L, G* and *C v C* cases. There is no evidence to support the practitioner's assertion in particular that the complaints to the Law Society by Justice Harrison were "frivolous, malicious, vexatious, vindictive, oppressive, and/or punitive".

[139] The statements made in the Originating Application were false and without foundation. There was no good cause for the application and what was said in it. We consider while the claim of discrimination by itself would not support this level of charge, in the context of the other claims and the practitioner's intent to secure a perceived benefit, we consider it to be properly part of the charge. The practitioner breached his overriding duty as an officer of the court (rule 2.1) and acted so as to

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[41] *Orlov* n1 [109] – [110].

undermine the processes of the court and the dignity of the judiciary (rules 13.2 and 13.2.1). We consider that lawyers of good standing would reasonably regard such conduct as disgraceful or dishonourable.

[140] Charge 5 is proved.

Charge 7 and the alternative charge 8 – Application for leave to appeal to the Supreme Court against costs order by Justice Harrison

[141] Charge 7 alleges misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, by Notice of Application for Special Leave to the Supreme Court in SC 77/2008 against a costs judgment of the High Court of 13 October 2008, he drafted, settled and filed, or authorised and approved the drafting and filing of, an application for leave to appeal to the Supreme Court that made allegations about Justice Harrison that either were false, or were made without sufficient foundation, or made without good cause.

[142] Charge 8 is an alternative charge in the event that the alleged misconduct is unconnected with the provision of regulated services.

[143] Also relied on are Rules 2.1, 13.2, 13.2.1, 3.8 and 13.8.1 of the Conduct and Client Care Rules, cited earlier.

[144] The particulars are found in **APPENDIX A**.

[145] The practitioner and Mr Orlov filed a Notice of Application for Special Leave to Appeal direct to the Supreme Court against a judgment of Justice Harrison in the *L* litigation where the Judge refused to recuse himself and made an order for costs against the practitioners as counsel. The grounds of appeal included the following statements which evidence the particulars of the charges:

> Justice Harrison discriminated against the Appellants/Applicants lawyers on the basis of their foreign nationality, imputed political beliefs and/or status as human rights advocates;
>
> Justice Harrison acted without jurisdiction, ultra vires, mala fides, maliciously, vindictively, spitefully, oppressively, unduly punitive and/or with an ulterior motive to harm Messrs Orlov and Deliu personally and thus the Court abused its own processes;

[146] The judgment appealed from is the subject of consideration in LCDT 014/15.

Connected with regulated services

[147] Although the appeal was part of the *L* litigation, the award of costs against the practitioner in the judgment of Justice Harrison affected the practitioner's (and Mr Orlov's) personal interests. However we consider the conduct was sufficiently connected with the provision of regulated services on the *Orlov* test. The award of costs was made as a result of the practitioner's representation of Mr and Mrs L, and his conduct in the course of representing them. His application to the Supreme Court was entitluled as for the *L* case, the parties were the Ls as applicants and the Chief Executive of the Ministry of Social Development, the Family Court and the Attorney General were first, second and third respondents respectively. The practitioner was the solicitor on the cover sheet. The document was signed by Mr and Mrs L and noted as filed by both Mr Orlov and the practitioner "on behalf of the appellants/applicants". Under cross-examination the practitioner said this was just a "template" – he needed to make sure it was filed. After that, he said, it would be exclusively in his and Mr Orlov's name. We do not believe that this, if true, would have made any difference.

[148] We consider the test for regulated services set out in *Orlov* is met.[42]

False or without sufficient foundation or without good cause

[149] The Full Court in *Orlov* considered the same statements in relation to Mr Orlov's conduct:[43]

> Looking at the statements overall, we consider that allegations of ethnic discrimination based on foreign nationality, of acting out of spite and a desire to harm Counsel personally, all made without any suggested foundation, would rightly be regarded by lawyers of good standing as dishonourable and disgraceful, and as falling outside the protection of freedom of expression.

[150] The only suggested foundation was the cases referred to earlier. As discussed, they provide no basis for such claims. Nor does the judgment appealed from add any support. We take the same view as the Full Court.

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[42] *Orlov* n1 at [106] – [107].
[43] At [157].

[151] Charge 7 is proved.

Charge 10 and the alternative charge 9 – allegations of racism against Justice Harrison

[152] The practitioner sent an email and attached letter dated 18 April 2009 to the Judicial Conduct Commissioner lodging a further complaint against Justice Harrison. In the email the practitioner says "I have attached a letter outlining my complaint, but in substance it deals with my submission that he is a racist". It goes on to say…"I argue that Justice Harrison has a pattern of singling out foreigners who appear before him for sentencing" …

[153] In the attached letter the practitioner says at various places;

> I write to make a complaint against Justice Rhys Harrison of the High Court on the grounds that he is a racist, or de minimis discriminates against foreigners.
>
> … Justice Harrison might improperly be using one's race or foreign nationality as a basis in sentencing …
>
> … Justice Harrison is a racist
>
> This is a fundamental subversion of the rule of law and if allowed to continue could bring the administration of justice into grave disrepute.

[154] By charge 10 the Committee charges the practitioner with misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, in terms of s 7(1)(a)(i) of the Act, by virtue of deliberately or recklessly making false, intemperate and scandalous allegations against Justice Harrison in the email and letter to the Judicial Conduct Commissioner referred to above. The charge refers to the particular statements in the paragraphs above. (See **APPENDIX A** – particulars set out in relation to charge 9)

[155] The Committee further alleges that by making such allegations the practitioner breached his overriding duty as an officer of the Court, in breach of Rule 2.1 of the Conduct and Client Care Rules, and acted in a way that undermined the processes of the Court and the dignity of the judiciary, in breach of Rule 13.2.

False or without sufficient foundation

[156] The practitioner has repeatedly asserted in various written communications the subject of these proceedings, and repeated in his opening submission, that Justice Harrison was maliciously motivated by racist views, in that he treated those not New Zealand born more harshly. This was the practitioner's explanation for the Judge's actions involving him in the *L, C* and *G* judgments.

[157] His 2009 complaint to the Judicial Conduct Commissioner focussed on this theme. This time it was not about himself or Mr Orlov. It was more general and a direct claim of racism based on a series of sentencing decisions given by Justice Harrison. The response of the Standards Committee was that the documents speak for themselves.

[158] We find that they do indeed but for the sake of completeness we review the cases relied on, and find that in every case where His Honour referred to the ethnicity of an offender he did so as part of a plea of mitigation. Furthermore in each case he accepted the offender's plea and reduced the sentence imposed accordingly.

[159] The first case relied on was that of *R v Briaturi and ors* (CRI 2005-019-7571). In summary the offenders appeared before His Honour after a four week trial following which they had been convicted on charges of conspiring to import cocaine and exporting same to Australia. The offenders were Uruguayan nationals living in New Zealand.

[160] His Honour recorded inter alia that:

> [49] ….it is relevant though, that each of you understands that you conspired to commit crimes against people in New Zealand while you were a guest among us.
>
> …
>
> [53] ….Any sentence I impose must send a message to those who want to deal in drugs and use others for that purpose.

[161] In dealing with the race of the offenders when imposing sentence, His Honour then recorded at para [56]:

> … Some discount must be made for your previous good character, the onerous effect of the bail conditions, and the severance from your family that you have suffered and will suffer. But, as all counsel know, in this area it is modest. ...

[162] With respect to His Honour there is nothing remarkable about the words used – he simply records the pernicious effect of the importation of drugs and then gives a modest discount in response to a plea in mitigation made that prison will be a harsher penalty than for native New Zealanders because their families had returned to Uruguay.

[163] We note that appeals against conviction and sentence were dismissed.[44]

[164] The next case relied on by the practitioner is *R v Yang* (CRI 2006-004-15149). In that case Mr Yang had pleaded guilty to a charge of manufacturing and supplying methamphetamine.

[165] Mr Yang was a methamphetamine addict and had been induced to manufacture drugs and hence the charges. He was a Chinese national.

[166] In sentencing His Honour recorded that:

> [17] Your fate is a sad one. It befalls many young Chinese students who come to New Zealand. They find themselves without resources and without any support mechanisms in this country when their financial circumstances or social life turns adverse
>
> …
>
> [20] You have committed very serious crimes against New Zealand society, Mr Yang. You understand that. I understand from Mr Winter that you have a sense of remorse. If that is so, I wish you well when you are released from prison in New Zealand …

[167] His Honour gave the offender a discount of $33^{1}/_{3}$% on the starting point of six years. Obviously a prompt plea of guilty attracts a reduction of 25%. Mr Yang's personal circumstances accounted for the additional discount.

[168] In *R v Teh* (CRI 2008-004-010768), Ms Teh pleaded guilty to charges of importing and possessing methamphetamine. She was a 27 year old Singaporean.

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[44] *R v Briaturi and ors* [2008] NZCA 412.

[169] In sentencing Ms Teh, His Honour recorded that:

> [11]…. Service of a term of imprisonment in New Zealand will be particularly harsh for you. Mr Winter says you have no friends or family here. You have no support network
>
> [12] Accordingly I propose to adopt a discount of six years against the starting point of 14 years imprisonment…

[170] In this case Ms Teh received a discount of 42%. Her ethnicity, or more that she was alone in a foreign country, was seen by His Honour as a significant mitigating factor which contributed to the discount.

[171] The next case is that of *R v Zhou* (CRI 2007-004-22697), Mr Zhou pleaded guilty to multiple counts of serious drug dealing.

[172] His Honour recorded at para [25]:

> You are not of good character. You are 41 years of age. You came to New Zealand in 1989. … It is of concern that you have three previous convictions…While you have worked very hard, Mr Zhou, you are not a man who respects the norms and values of New Zealand society. While also you have a gambling addiction which has led you into offending, that is no excuse. The probation officer assesses you at being of a medium risk of re-offending.

[173] Having found that there were no mitigating factors the Judge then sentenced Mr Zhou allowing for a 25% discount as required by law for a prompt plea of guilty.

[174] In *R v Wong* (CRI 2004-004-16271), His Honour was required to sentence Ms Wong who had pleaded guilty to charges of importing and supplying methamphetamine. His Honour recorded in paras [6]-[8] that:

> Ms Wong you are, I understand, a New Zealand resident of Chinese nationality ….you have lived in New Zealand for at Least 10 years…you have lived in New Zealand long enough to know that trafficking in methamphetamine is one of the most serious crimes you could commit against our society. Judges sitting in this Court frequently see the human wreckage caused by its consumption…

[175] After sentencing Ms Wong, His Honour then requested that the prison authorities give favourable consideration to shifting the prisoner from Christchurch Women's Prison to a prison which would enable Ms Wong's young daughter to visit her.

[176] It is impossible to see this as other than an example of His Honour endeavouring to ensure compassionate treatment of the prisoner, contrary to the practitioner's claims of racism.

[177] In the case of *R v Al Amery* (CRI 2009-004-003788), the prisoner had pleaded guilty to two counts of murder. His Honour recorded that Mr Al Amery was an Iraqi refugee. He had received a report for sentencing from a forensic psychiatrist, Dr Sampson, and recorded the Doctors opinion:

> [35] …that you are suffering genuine mental impairment, that you are from a different culture without a family here and serving time will be particularly isolating for you in prison …

[178] Mr Al Amery's lawyer sought to mitigate the sentence to be imposed by referring to hardships experienced by Mr Al Amery in the country of his birth. In response to that submission, His Honour recorded at para [37]:

> You may have suffered great trauma in Iraq during your teenage years and early 20s. It may well explain why you showed such little regard for the lives of these innocent men. But it can never mitigate or excuse what you did: if anything members of this society would have expected that a person who has been given asylum and the opportunity of a new life in a country of social and political stability that values the sanctity of human life would respect that privilege, Mr Al Amery, not abuse it in the way that you have chosen.

[179] In his Opening Statement the practitioner referred to this case on the issue of his accusations of racism; at (368):

> Now again, let's just continue with the racist one, because that's the one that's been discussed so far. I provided to the Commissioner a number of judgments in which Justice Harrison was referring to peoples nationalities when sentencing them. Now, in a civilised country that's outrageous as a starting point. It is obviously outrageous: it's not even something that's debateable.
>
> Because if Justice Harrison, and this is one of the cases, an Iraqi appears before him on a murder charge, from memory, and that Iraqi had been given refugee status in New Zealand. Fair enough. Some time ago. And to say to that Iraqi when sentencing him on the murder- remember this is what the Iraqi had done wrong- to say "We let you into our country, we gave you refugee status and this is how you repaid us" The message that's sending is "Somehow your murder is worse because we were so kind to you in the past. We gave you this special status.

That is an example of the distorted and quite outrageous misrepresentation of His Honour's remarks.

[180] The next sentencing decision relied upon by the practitioner is that of *R v Narayan* (CRI 2009-057-2305), in which Mr Narayan was to be sentenced for multiple sex crimes. The only reference to ethnicity is the judge's recording that the prisoner was a Fijian Indian national.

[181] The final sentencing decision was *R v Choy* (CRI 2006-004-15149). Mr Chen and Mr Choy were both sentenced on one charge of manufacturing methamphetamine. Again, the Judge applied significant discounts having taken into account all relevant matters raised in mitigation.

[182] We note that there were other cases which the practitioner contended were on point but they were not sentencing decisions and demonstrate nothing of note in the manner in which His Honour dealt with applications for severance, discharge, admissibility of evidence and other similar matters.

[183] There is nothing in the judgments relied upon by the practitioner to support his contention that those who appear for sentence before His Honour, if not of New Zealand birth, can expect to be treated more harshly. They are unremarkable and indeed demonstrate the Judge's compassion when in some instances he has given substantial discounts by acknowledging, for example, the additional hardship that the foreign born prisoner suffers in the New Zealand prison system.

[184] In essence the practitioner has maintained that the allegations made were true and this assertion was maintained in spite of the Judicial Conduct Commissioner's decision that the charges had been found to be without foundation.

[185] Count 10 is in our opinion a more egregious allegation because it asserts that His Honour is, in the execution of his duty, acting corruptly by sentencing foreign offenders more harshly. We reiterate, there is not one shred of evidence to support such an assertion. It was a false complaint. It was made without cause. This conduct would, we consider, without doubt reasonably be regarded by lawyers of good standing as disgraceful or dishonourable.

[186] Charge 10 is proved.

Charge 12 and the alternative charge 11 – complaint to Judicial Conduct Commissioner re Justice Randerson

[187] By charge 12 the practitioner is charged with misconduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable in terms of s 7(1)(a)(i) of the Act, by virtue of deliberately or recklessly making false, intemperate and scandalous allegations against Justice Randerson, in his letter of 27 May 2010 and email of 26 July 2010, sent to the Judicial Conduct Commissioner.

[188] This charge also engages Rules 2.1, 13.2 and 13.2.1.

[189] The particulars are found in **APPENDIX A** under charge 11.

[190] The statements are found in the letter from the practitioner dated 27 May 2010 to the Judicial Conduct Commissioner lodging a complaint against Justice Randerson. The letter is 10 pages long, with a further 72 pages of annexures. One attachment is a letter of complaint from the Judge (as Chief High Court Judge) to the Law Society (dated 18 December 2009) in light of the "ongoing pattern of persistent, wide-ranging and disgraceful allegations and complaints against Justice Harrison". Justice Randerson noted none had, to date, been found to have a proper foundation, and some, such as allegations of racism, had been made without any foundation.

[191] The letter has to be read in its entirety to get the full meaning, but the particulars are found expressed in the following extracts. In his opening paragraphs the practitioner alleges that Justice Randerson had (*inter alia*):

> Conducted a secretive and unlawful investigation;
>
> Been using his judicial office in a gross abuse of taxpayer money;
>
> Been doing so for an improper motive, i.e. to protect a fellow judge from legitimate complaints; and
>
> Attempted to obstruct the course of justice by interfering with sub judice matters.

[192] Later in the letter the practitioner says:

> It would appear to me that Justice Randerson based this fabrication [ie effectively accusing the practitioner of the most serious breaches of his duties

> to the court] on some rumour, hearsay or other innuendo he heard and could not bother checking such a basic fact.
>
> …
>
> The second part of my complaint deals with far graver matters in that it goes not only to the issue of Justice Randerson's competence and his understanding of his duties to fellow officers of the court, but rather what I would term – for lack of a better term – judicial corruption.
>
> Justice Randerson appears to have engaged in a: (i) secretive; (ii) investigation outside of his judicial capacity; (iii) involving at Least the Executive branch of government ...
>
> …it also tends to indicate that Justice Randerson may have – again, to be polite - conspired with the Executive and/or Justice Harrison in conducting his investigation. This would mean that Justice Randerson has completely put aside his judicial oath and embarked on a personal crusade to destroy my and Mr Orlov's career,…

[193] In his conclusion to the letter the practitioner says:

> Also, he has conducted a secret investigation, well outside his jurisdictional authority and in doing so has breached basic separation of powers tenets, not to mention privacy rights of officers of the court. Additionally, it appears that he has done so for the purpose of stifling lawful complaints and other actions taken regarding Justice Harrison and it appears that protecting his fellow Judge is more important to Justice Randerson than upholding the democratic rule of law in New Zealand.

[194] The practitioner accepts that he authored the documents and does not resile from the statements and allegations.

False or without sufficient foundation

[195] It is difficult not to draw the conclusion that when the practitioner perceives someone is attacking him, he simply attacks back, focusing on the personal rather than the factual. In this instance, the Chief High Court Judge collated some correspondence and sent it off to the Law Society. The practitioner characterised it as an attempt to silence him from criticising the judiciary. While it is not relevant to the charges, we consider the Chief High Court Judge was fully entitled to raise such concerns with the Law Society in the way that he did. Before us the practitioner disputed this. He considered that, because the complaint was about him, he ought to have been advised/given an opportunity to comment before it was "closed" (i.e. sent to the Law Society). Further, he submitted, it was unlawful as there was no legal authority pointed to.

[196] The Chief Judge was referring matters to the relevant body for consideration as to whether disciplinary action would be taken. As the practitioner well knows, there are a number of processes that follow which provide a practitioner the opportunity to put their side of the story if disciplinary action is proposed, and again when it is brought.

[197] We note the Chief Judge's letter was the subject of a second complaint on 26 July 2010. The practitioner asked for another official in the Judicial Conduct Commissioner's office to handle the matter because "in my respectful submission you do not fulfil your statutory duty to fully, fairly and impartially consider complaints".

[198] We do not accept the practitioner has demonstrated that there is any foundation for saying the Chief Judge conducted a secretive and unlawful investigation or that he used his office in a gross abuse of taxpayer's money.

[199] Nor did he act for an improper motive, being (it is alleged) to protect a fellow judge, or himself, from legitimate complaints. It is clear that there were proper concerns with the actions of the practitioner and Mr Orlov that were raised, properly, with the Law Society. It is unfortunate the practitioner has not to date recognised that the primary concern of all those involved in these matters has been to ensure the fair administration of justice, and that those that come into contact with the courts have their disputes dealt with fairly and efficiently. We have seen nothing to suggest this is not the overriding public interest which has motivated the various players.

[200] The practitioner argued that Justice Randerson was attempting to obstruct the course of justice (being the complaints before the Judicial Conduct Commissioner relating to Justice Harrison). There is no evidence of that. Complaints to the Judicial Conduct Commissioner and complaints against practitioners under the Lawyers and Conveyancers Act are entirely separate.

[201] The practitioner argued that the complaint to the Law Society was based on "some rumour, hearsay or other innuendo". That is not so. The complaint annexes documents to support the matters it suggests could be the subject of disciplinary action. Most of those matters are in fact now the subject of disciplinary action in these and the related hearings. There is one paragraph where Justice Randerson refers to

two recent decisions of Justice Cooper, allegedly ordering costs against the practitioners. The practitioner highlights this as wrong ("defamation", in his terms). The practitioner argued the Judge had lied, or at least was not careful – just acted on a rumour or innuendo.

[202] There is nothing to support the use of such provocative language. The Chief Judge did make an error, understandable in the context, and wrote to rectify that and to apologise to the practitioner. Yet the allegations have not been withdrawn.

[203] The judgments of Cooper J referred to are involved in charges in LCDT 014/15.

[204] There is no foundation for the allegation that the Chief Judge conspired with the executive and/or Justice Harrison in conducting an investigation, such that Justice Randerson had "completely put aside his judicial oath and embarked upon a personal crusade to destroy my and Mr Orlov's career". The practitioner argued that this was evidenced by the fact that the Chief Judge knew that Mr Orlov had issued proceedings in the Human Rights Review Tribunal alleging the Judge had discriminated against him on various grounds. The proceedings had been struck out. In the practitioner's mind, this information must have been obtained from Justice Harrison.

[205] The allegations made based on this point indicate to us that the practitioner appears incapable of controlling the manner of his complaints, or recognising the almost absurd reasoning that underlies the links he makes. We do not know how the Chief Judge obtained the information. It could have been from a number of different places, including from Justice Harrison, and all quite legitimate. It was his role to manage the judges of the High Court. It would be most unusual if he were not aware of proceedings against one of the judges in that (or any) jurisdiction. We note the practitioner gave evidence of the complaint in his affidavit of 9 September 2008 in support of an application for recusal in the *L* case (at para 50).

[206] The practitioner also pointed to the fact that the Chief Judge had a copy of the practitioner's letter of apology to Justice Harrison, which was written as part of the settlement of his application to permanently recuse Justice Harrison. Again, that would have been a matter of significant interest to the Chief High Court Judge in his

administrative role. Justice Randerson included the letter in the material for the Law Society. The practitioner would likely have complained had he not.

[207] In his evidence in chief the practitioner wished to make it clear that, by corruption, he wasn't accusing Justice Randerson of taking a bribe. He was using the word corruption in the same way that you would for a computer file that stops working properly – the file is corrupted.

> And that's the analogy that I'm saying that when a Judge or any Government official isn't performing their function the way they should be performing their function, they have become corrupted, broken, whatever label you want to use. But I certainly didn't mean the bribe sense of the word.[45]

[208] We did not understand the practitioner to be suggesting anyone was taking a bribe. However he chose the word carefully, and used it in a context which would indicate determinedly corrupt practise; one which involved clear intent to defeat or avoid the legal boundaries that would otherwise apply. His letter submitted:

> The second part of my complaint deals with far graver matters in that it goes not only to the issue of Justice Randerson's competence and his understanding of his duties to fellow officers of the Court, but rather what I would term – for lack of a better term - judicial corruption. Justice Randerson appears to have engaged in a: (i) secretive, (ii) investigation outside of his judicial capacity; (iii) involving at least the Executive branch of government, and likely Justice Harrison, and breaches of privacy; (iv) at the taxpayer's expense; (v) for the purposes of attacking me for making complaints against his brother judge, for the purpose of frustrating my extant lawful complaints.

There is no evidence to support such a serious allegation.

[209] An unsupported allegation of judicial corruption is very serious misconduct. Justice Randerson answered the practitioner's allegations in his letter to the Judicial Conduct Commissioner, and the Commissioner dismissed the complaint.

[210] Counsel for the Committee suggested that the practitioner's complaints against, first, Justice Harrison were not proper complaints at all. They were merely an effort by the practitioner to protect himself, as he saw it, from Justice Harrison (Justice Harrison was simply demanding competent counsel). When that conduct was exposed by Justice Randerson the response of the practitioner was to attack Justice Randerson and to do so in a disgraceful way, that is, to accuse the Judge of serious misconduct

[45] Transcript p 461/1.

such as breaching his judicial oath, judicial corruption, obstructing the course of justice etc.

[211] We agree that it appears the complaints were made to protect the practitioner from the consequences of his own misconduct. But even if that is wrong, there was nevertheless no foundation for them.

[212] We find the practitioner did not have sufficient foundation for his allegations and some, such as his judicial corruption allegation, were plainly false. What he said about the Judge would reasonably be regarded by lawyers of good standing as disgraceful and dishonourable conduct.

[213] Charge 12 is proved.

Conclusion

[214] In this case the practitioner has not shown a foundation for any of his allegations. His statements about Justice Harrison were based solely on his experience in the *L, G* and *C v C* cases. He had not even appeared before Justice Harrison. He says he was also prepared to take as truth the reported experience of his colleague Mr Orlov, which he said made him approach the Judge with suspicion, anticipating unfair treatment. None of this could provide a foundation for the very serious allegations made against the Judge.

[215] His statements in relation to Justice Randerson were baseless. They appeared to be a most disgraceful response to Justice Randerson's complaint to the Law Society.

[216] We reiterate that any practitioner is entitled to make a complaint against a member of judiciary. However in accordance with the practitioner's obligations it is expected the language will be moderate and the allegations founded in fact. The real concern for this Tribunal is that, after all that has happened since 2008, the practitioner still appeared to be unable to accept that his performance as an officer of the court in the initial three cases was not appropriate, and that the same fate would likely befall any lawyer who behaved in the same way.

[217] We find charges 1, 3, 5, 7, 10 and 12 proved. The alternative charges are dismissed.

DATED at WELLINGTON this 15th day of September 2016

M T Scholtens QC
Chair

Appendix A

CHARGES – LCDT 008/12

CHARGE 1

1.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland with misconduct in his professional capacity, in terms of s. 112(1)(a) of the Law Practitioners Act 1982, by virtue of making allegations about the Honourable Justice Rhys Harrison that either were false or were made without sufficient foundation, in his faxed letter dated 23 July 2008 and in his email dated 24 July 2008, sent to the Judicial Conduct Commissioner.

Particulars of the allegations made in the lawyer's faxed letter dated 23 July 2008:

[1.01 and 1.02 deleted]

1.03 Justice Harrison determined costs matters and referred judgments to the Legal Services Agency based on "…whims on the day in question (or worse yet, the lawyer in question)… .", which is "…the very definition of *in*justice." (italic emphasis in Mr Deliu's original);

1.04 Justice Harrison "…seems to attack lawyers representing their clients in human rights cases", in "…clear breach of human rights law";

Particulars of the allegations made in the lawyer's email dated 24 July 2008:

1.05 Justice Harrison "…is completely out of control and a danger to the public, lawyers appearing before him and is bringing the administration of justice into disrepute";

[1.06 -1.08 deleted]

1.09 Justice Harrison is prepared to violate international conventions, breaches human rights legislation and "…routinely acts outside the law…", in a "…blatant and repeated abuse of power…", and acts "…outside his authority whenever he feels like it";

1.10 Justice Harrison discriminates against him and attacks him, using "…every conceivable measure…", "…personally without cause", and has "…a personal vendetta against me";

1.11 Justice Harrison is not impartial, but acts in bad faith, abuses his power, or is incompetent because he does not appreciate the limits of his powers;

1.12 Justice Harrison ought to be "…the first judge in New Zealand removed from the bench… ."

Further Particulars of the Charge:

1.13 by making the allegations as aforesaid Francisc Catalin Deliu breached his over-riding duty as an officer of the Court, in breach of Rules 8.01 and 8.04 of the Rules of Professional Conduct for Barristers and Solicitors, 7th ed. 2008;

1.14 by making the allegations Francisc Catalin Deliu undermined the processes of the Court and the dignity of the judiciary.

CHARGE 2 (ALTERNATIVE TO CHARGE 1)

2.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland with conduct unbecoming a barrister and solicitor, in terms of s. 112(1)(b) of the Law Practitioners Act 1982, by virtue of making allegations as particularised at 1.01 to 1.12, about the Honourable Justice Rhys Harrison, that either were false or were made without sufficient foundation, in his faxed letter dated 23 July 2008 and in his email dated 24 July 2008, sent to the Judicial Conduct Commissioner. Particulars 1.13 and 1.14 are repeated and relied on as further particulars of this charge.

CHARGE 3

3.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, with misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, in terms of s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations about the Honourable Justice Rhys Harrison that either were false, or were made without sufficient foundation, in his letter dated 5 August 2008 sent to the Chief High Court Judge,

the Honourable Justice A P Randerson, that sought to have Justice Randerson direct that Justice Harrison not be allocated any case in which he appeared as counsel.

Particulars of the allegations made in the lawyer's letter dated 5 August 2008:

[3.01 and 3.02 deleted]

3.03 Justice Harrison was biased against him, or acted so that there was an appearance of bias, treated him disproportionately (when compared to his treatment of other counsel), and discriminated against him on the grounds of his "foreign nationality";

3.04 Justice Harrison may "…arbitrarily and capriciously hold me in contempt and incarcerate me if he does not like me or my arguments… .";

3.05 Justice Harrison acted "mala fides" towards him and had "…proven himself to be a judge lawyers and the public should be very scared of dealing with… .";

3.06 Justice Harrison's conduct was "…very similar, if not identical, to that which the South African apartheid, Stalinist and other abhorrent regimes of the past did… .";

3.07 Justice Harrison violated international conventions ratified by New Zealand relating to access to justice, and had breached human rights legislation, by "…discriminating against me, a lawyer representing Maori interests, by using law society complaints, costs awards and other tools to prevent me advancing my aboriginal minority client's causes."

Further Particulars of the Charge:

3.08 when making the allegations as aforesaid Francisc Catalin Deliu breached his over-riding duty as an officer of the Court, in breach of Rule 2.1 of the Lawyers Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Conduct and Client Care Rules");

3.09 by making the allegations Francisc Catalin Deliu undermined processes of the Court and the dignity of the judiciary, in breach of Rules 13.2 and 13.2.1 of the Conduct and Client Care Rules.

CHARGE 4 (ALTERNATIVE TO CHARGE 3)

4.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, with misconduct unconnected with the provision of regulated services that would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer in terms of s.7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations as particularised at 3.01 to 3.07, about the Honourable Justice Rhys Harrison, that either were false or were made without sufficient foundation, in his letter dated 5 August 2008 sent to the Chief High Court Judge, the Honourable Justice A P Randerson, that sought to have Justice Randerson direct that Justice Harrison not be allocated any case in which he appeared as counsel. Particulars 3.08 and 3.09 are repeated and relied on as further particulars of this charge.

CHARGE 5

5.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, with misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, in terms of s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations about the Honourable Justice Rhys Harrison that either were false; or were made without sufficient foundation; or were made without good cause, in an Originating Application dated 5 September 2008 to the High Court at Auckland (in CIV2008-404-5878), whereby he applied for an order that Justice Harrison be permanently recused from all cases filed by him and his colleague Evgeny Orlov.

Particulars of the allegations made in the Originating Application:

[5.01 deleted]

5.02 Justice Harrison had filed untenable and insufficiently particularised complaints with a law society, which were "…frivolous, malicious, vexatious, vindictive, oppressive, and/or punitive in nature";

[5.03 and 5.04 deleted]

5.05 his human rights were violated arbitrarily and/or capriciously by Justice Harrison, and these breaches were ongoing and likely to increase "in severity";

[5.06 deleted]

Further Particulars of the Charge:

5.07 by making the allegations as aforesaid Francisc Catalin Deliu breached his over-riding duty as an officer of the Court, in breach of Rule 2.1 of the Conduct and Client Care Rules;

5.08 by making the allegations Francisc Catalin Deliu acted in a way that undermined processes of the Court and the dignity of the judiciary, in breach of Rules 13.2 and 13.2.1 of the Conduct and Client Care Rules;

5.09 when making the allegations Francisc Cataslin Deliu breached Rules 13.8 of the Conduct and Client Care Rules;

5.10 by making the allegations Francisc Catalin Deliu was a party to the filing of a document in Court alleging reprehensible conduct by Justice Harrison, without having first taken appropriate steps to ensure that there were reasonable grounds for the making of the allegations, in breach of Rule 13.8.1 of the Conduct and Client Care Rules.

CHARGE 6 (ALTERNATIVE TO CHARGE 5)

6.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, with misconduct unconnected with the provision of regulated services that would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer in terms of s.7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006, by virtue of making the allegations as particularised at 5.01 to 5.06, about the Honourable Justice Rhys Harrison, that either were false; or were made without sufficient foundation; or were made without good cause, in an Originating Application dated 5 September 2008 to the High Court at Auckland (in CIV2008-404-5878), whereby he applied for an order that Justice Harrison be permanently recused from all cases filed by him and his colleague Evgeny Orlov. Particulars 5.07 to 5.10 are repeated and relied on as further particulars of this charge.

CHARGE 7

7.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, with misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, in terms of s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006, that by Notice of Application for Special Leave to Appeal to the Supreme Court in SC77/2008 dated 14 October 2008, against a costs judgment of the High Court dated 13 October 2008, he drafted, settled and filed, or he authorised and approved the drafting and filing of, an application for leave to appeal to the Supreme Court that made allegations about the Honourable Justice Rhys Harrison that either were false; or were made without sufficient foundation; or were made without good cause.

Particulars of the allegations made in the Notice of Application:

[7.01 deleted]

7.02 Justice Harrison discriminated against him and Evgeny Orlov on the basis of their foreign nationality, political beliefs and/or status as human rights advocates;

7.03 Justice Harrison "…acted without jurisdiction, ultra vires, mala fides, maliciously, vexatiously, vindictively, spitefully, oppressively, unduly punitive and/or with an ulterior motive…" to harm him and Evgeny Orlov personally, and thus His Honour abused the Court's process.

[7.04 and 7.05 deleted]

Further Particulars of the Charge:

7.06 by making the allegations as aforesaid Francisc Catalin Deliu breached his over-riding duty as an officer of the Court, in breach of Rule 2.1 of the Conduct and Client Care Rules;

7.07 by making the allegations Francisc Catalin Deliu acted in a way that undermined processes of the Court and the dignity of the judiciary, in breach of Rules 13.2 and 13.2.1 of the Conduct and Client Care Rules;

7.08 when making the allegations Francisc Cataslin Deliu breached Rules 13.8 of the Conduct and Client Care Rules;

7.09 by making the allegations Francisc Catalin Deliu was a party to the filing of a document in Court alleging reprehensible conduct by Justice Harrison, without having first taken appropriate steps to ensure that there were reasonable grounds for the making of the allegations, in breach of Rule 13.8.1 of the Conduct and Client Care Rules.

CHARGE 8 (ALTERNATIVE TO CHARGE 7)

8.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, with misconduct unconnected with the provision of regulated services that would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer in terms of s.7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006, by virtue of drafting, settling and filing, or authorising and approving the drafting and filing of a Notice of Application for Special Leave to Appeal to the Supreme Court in SC77/2008 dated 14 October 2008, against a costs judgment of the High Court dated 13 October 2008, that made allegations as particularised at 7.01 to 7.05, about the Honourable Justice Rhys Harrison, that either were false; or were made without sufficient foundation; or were made without good cause. Particulars 7.06 to 7.09 are repeated and relied on as further particulars of this charge.

CHARGE 9

9.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, with misconduct unconnected with the provision of regulated services that would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer in terms of s.7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations about the Honourable Justice Rhys Harrison that either were false; or were made without sufficient foundation, in his email and attached letter dated 18 April 2009, sent to the Judicial Conduct Commissioner.

Particulars of the allegations made in the lawyer's email dated 18 April 2009:

9.01 Justice Harrison "…has a pattern of singling out foreigners who appear before him for sentencing… ." and "…is a racist";

Particulars of allegations made in the lawyer's letter dated 18 April 2009:

9.02 Justice Harrison "…is a racist, or de minimis discriminates against foreigners";

9.03 Justice Harrison "…might improperly be using one's race or foreign nationality as a basis in sentencing… .";

9.04 Justice Harrison engaged in "…a fundamental subversion of the rule of law and if allowed to continue could bring the administration of justice into grave disrepute";

Further Particulars of the Charge:

9.05 when making the allegations as aforesaid Francisc Catalin Deliu breached his over-riding duty as an officer of the Court, in breach of Rule 2.1 of the Conduct and Client Care Rules;

9.06 by making the allegations Francisc Catalin Deliu undermined the processes of the Court and the dignity of the judiciary, in breach of Rules 13.2 and 13.2.1 of the Conduct and Client Care Rules.

CHARGE 10 (ALTERNATIVE TO CHARGE 9)

10.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, with misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, in terms of s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006, by virtue of making the allegations as particularised at 9.01 to 9.04, against the Honourable Justice Rhys Harrison, that either were false; or were made without sufficient foundation, in his email and attached letter dated 18 April 2009, sent to the Judicial Conduct Commissioner. Particulars 9.05 and 9.06 are repeated and relied on as further particulars of this charge.

CHARGE 11

11.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, with misconduct unconnected with the provision of regulated services that would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer in terms of s.7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations against the Honourable Justice AP Randerson that either were false; or were made without sufficient foundation, in his letter dated 27 May 2010, sent to the Judicial Conduct Commissioner.

Particulars of the allegations made in the lawyer's letter dated 27 May 2010:

11.01 Justice Randerson "Attempted to obstruct the course of justice by interfering with sub judice matters.";

11.02 Justice Randerson fabricated a costs award based on "… some rumour, hearsay or other innuendo… .";

11.03 Justice Randerson conducted "…a secretive and unlawful investigation.";

11.04 Justice Randerson was "a law unto himself";

11.05 Justice Randerson used his judicial office "…in a gross abuse of taxpayer money…" and was "…doing so for an improper motive, i.e., to protect a fellow judge from legitimate complaints.";

11.06 Justice Randerson had "…conspired with the Executive and/or Justice Harrison in conducting this investigation. This would mean that Justice Randerson has put aside his judicial oath and embarked on a personal crusade to destroy my and Mr Orlov's career,… .";

11.07 Justice Randerson breached "…basic separation of powers tenets, not to mention privacy rights of officers of the court. Additionally, it appears that he has done so for the purposes of stifling lawful complaints and other actions taken regarding Justice Harrison and it appears that protecting his fellow Judge is more important to Justice Randerson than upholding the democratic rule of law in New Zealand.";

11.08 By virtue of the above, Justice Randerson had committed acts of "judicial corruption".

Further Particulars of the Charge:

11.09 by making the allegations as aforesaid Francisc Catalin Deliu breached his over-riding duty as an officer of the Court, in breach of Rule 2.1 of the Conduct and Client Care Rules;

11.10 by making the allegations Francisc Catalin Deliu undermined the processes of the Court and the dignity of the judiciary, in breach of Rules 13.2 and 13.2.1 of the Conduct and Client Care Rules.

11.11 by writing directly to Justice Randerson, by a letter dated 29 April 2010 and email dated 20 May 2010, criticising the Judge for sending letters sent to the Complaints Service, he further demonstrated that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer.

CHARGE 12 (ALTERNATIVE TO CHARGE 11)

12.0 The National Lawyers Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, with misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, in terms of s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006, by virtue of making the allegations as particularised at 11.01 to 11.08, against the Honourable Justice AP Randerson, that either were false; or were made without sufficient foundation, in his letter dated 27 May 2010, sent to the Judicial Conduct Commissioner. Particulars 11.09 to 11.11 are repeated and relied on as further particulars of this charge.

Appendix B

JUDGMENTS REFERRED TO BY PRACTITIONER IN SUPPORT OF STATEMENTS MADE

[1] *Bradbury v Westpac Banking Corporation*, HC Auckland CIV 2006-404-1328, 23 May 2008 and *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400

Costs in excess of $1m awarded against the Plaintiffs, who were partners in a law firm. Upheld by the Court of Appeal.

[2] *Jireh Customs Limited v Grafton Road Builders Limited* HC Auckland CIV 2007-404-7856, 18 December 2007.

Claim to remove some caveats by an innocent landowner. The caveators attempted to resist that. The Judge took the view that they, the caveators had no equitable beneficial interest and so he made the orders sought. He awarded indemnity costs despite able argument advanced by Counsel for the caveators.

[3] *Global Prestige Brands Limited v DHL Global Forwarding (NZ) Limited* HC Auckland CIV 2008-404-1579, 19 June 2009.

An appeal against a civil judgment in the District Court. The Plaintiff had been successful. The Defendant appealed to the High Court. Counsel made the same arguments on appeal as had been made and dismissed in the District Court. The Judge said that he accepted the skill and ingenuity of counsel but the appeal was hopeless and he awarded indemnity costs.

[4] *Asian Foods West City Limited v West City Shopping Centre Limited* HC Auckland CIV 2007-404-1215, 11 September 2007.

An attempt to set aside an Arbitrator's award. The grounds argued to set aside the award were not strong, but the Judge decided that he would determine the case on the basis that the award was set aside and examine whether the Applicant had any basis to complain about the award. In the end the Judge said that the arguments put forward had no substance. He decided the arbitral award was substantively correct

and the result would have been no different if it was set aside and the dispute re-litigated. He determined that the application was hopelessly misconceived from the outset and awarded indemnity costs.

[5] *Danaher v Police HC Auckland* CRI 2007-404-97, 3 September 2007.

An excess blood alcohol appeal. Counsel attempted to challenge the factual conclusions of the lower Court. The Judge held that on the record of the lower Court there were no grounds for appeal. What was argued did not have an evidential basis. He dismissed the appeal saying it was without merit and ordered costs against the Appellant.

[6] *Edwards v Police* HC Rotorua CRI 2004-463-90, 17 November 2005.

This was a bail appeal. Bail was sought pending sentence in the District Court. There was no prospect of bail in those circumstances and the appeal was dismissed. The issue of costs never arose.

[7] *Hunter v Police* CRI 2007-463-64/65/66, 11 June 2007.

An application for bail pending trial. The appeal was hopeless as the Defendant had previous convictions for failing to answer bail. The Judge in the lower Court and Justice Harrison took the view that the Appellant presented a substantial risk of re-offending and flight. The appeal was dismissed. Again the question of costs never arose.

[8] *R v Lee* CA 217/06 28 November 2006.

This was a Court of Appeal judgment. Justice Harrison was a member of the three member Court, the others being Justice Glazebrook and Justice John Hansen. The reasons of the Court were given by Justice John Hansen. It was a sentence appeal against a sentence of two years and six months on charges of assault with a weapon, threatening to kill, burglary and arson. The three member Court concluded that the appeal was without merit and dismissed it. The issue of costs is not mentioned.

[9] *Hikaiti v Police* HC Auckland CRI 2007-404-20, 31 January 2007.

This was again a bail appeal. The grounds for refusing bail were overwhelming according to the lower Court and Justice Harrison. The Judge found Counsel for the Appellant's written synopsis emotive, intemperate, verging on contempt of Court and containing personalised criticisms of Judge Tompkins. He referred copies of his decision and the submissions to the Auckland District Law Society. The question of costs is not mentioned.

[10] *Wenzel v The Official Assignee* HC Auckland CIV 2005-404-6852, 13 March 2006.

This was an application by the Official Assignee to strike out an application for judicial review. The Judge took the view that the Statement of Claim was incomprehensible, after the matter had been adjourned so that it could be re-pleaded. The Official Assignee was awarded costs. The Judge directed the Registry to send to the Auckland District Law Society a copy of the Statement of Claim, Counsel's memorandum and the judgment. He further directed that the judgment go to the firm of Solicitors who had instructed Counsel for them to confirm Counsel had indeed been instructed. Counsel instructed did not actually appear having been directed to file a memorandum explaining his discourtesy in failing to appear previously. The Judge determined that the memorandum verged on the unintelligible and was unprofessional.

[11] *R v Twidle* CA 339/067, December 2006.

This was another judgment of the Court of Appeal with Justice Harrison sitting with Glazebrook J and John Hansen J. The appeal was dismissed with the reasons given by Justice Harrison. The Court recorded that the appeal was misconceived with Counsel Mr Deobkakta accepting that it must fail, he having come to that conclusion with the benefit of observations from members of the Court. The judgment records that the explanation does not justify Counsel's pursuit of hopeless grounds or an abject failure to provide reasoned argument in support and the judgment was directed to the Legal Services Agency and the Waikato District Law Society.

[12] *Solicitor General v Graham* HC Auckland M 1628-IM01, 13 December 2001

Claim by the Solicitor General for a restraining order in which the Respondent had been entirely reasonable by offering a mortgage as opposed to a restraining order. The Judge was very critical of Counsel for the Solicitor General including offering Counsel

for the Solicitor General the opportunity of an adjournment to take instructions from him. Counsel for the Respondent submitted it was a hopeless application that it should at the very least have been supported by admissible evidence. The application was dismissed with the Solicitor General ordered to pay all of the Respondent's reasonable costs.

[13] *Williams v Police* HC Whangarei A 81/02, 14 August 2002

Blood alcohol appeal on a very narrow point. The Judge concluded that it did not raise a legal question. It was no more than a challenge to factual findings where there was an overwhelming evidential basis for them. The Judge recorded that the Police sought costs on the basis that it was a hopeless appeal which should never have been pursued. The Judge agreed and awarded costs.

[14] *Featherstone v Greenslade* HC Auckland CP 335-SD01, 4 November 2002

Application for review of Master's decision refusing to issue third party notice. The cause of action was marginal but the real reason was the very extensive delay. Counsel for the Plaintiff submitted it was a hopeless application which should never have been brought and the Judge agreed awarding indemnity costs.

[15] *Mohebbi v Minister of Immigration* HC Auckland M 436-PL03, 9 April 2003

Application for judicial review of an Immigration Service decision to remove applicant who was in New Zealand illegally — interim order is sought to prevent deportation. Describes the case as being hopeless, the substantive application for judicial review doomed to failure and so not prepared to grant interim relief — no costs — both Counsel commended.

[16] *Taylor v Chain Construction (1990) Limited* HC Auckland CIV 2003-404-3412, 28 August 2003

Civil appeal from the District Court involving a construction contract. Series of judgments in the District Court. Case was the subject of factual findings in the District Court in reserved judgments. Counsel attempted to challenge the core facts. The Judge said the appeal had as little merit as the defence did in the District Court. Doomed to failure for obvious and well settled reasons - $10,000 costs including GST

together with disbursements awarded which was largely actual costs of the successful Respondent.

[17] *Blanshard v The National Mutual Life Association of Australasia Limited* HC Auckland CIV 2001-404-1961, 22 September 2003.

Complex civil action leading to a 212 paragraph judgment between the insured wanting a declaration that he was incapacitated and his insurance company which wanted to recover medical benefits it had paid which it believed had been obtained fraudulently. The insurance company won and so was entitled to costs under the terms of the insurance policy on a Solicitor/client or indemnity basis — no order made — the Judge hoped Counsel would reach agreement — agreement was not reached and the Judge fixed them on that basis in a subsequent judgment.

[18] *Trustees in the Estate of Frederick Stewart v Trustees of the Stewart Family Trust* HC Auckland CIV 2003-404-5647, 17 December 2003.

Civil appeal against a District Court judgment where a Judge had declined to strike out a claim on the view that the various defences raised needed to be determined after viva voce evidence. A different District Court Judge had given leave to appeal observing that little would be achieved by the Court hearing viva voce evidence. Harrison J agreed saying that the claim had no prospects of success for a number of obvious and independent reasons. He said the proceedings should never have been brought and he ordered the Plaintiffs to pay the Defendant's reasonable legal costs on a Solicitor/client basis.

[19] *Impact Collections Limited v Bank of New Zealand* HC Auckland CIV 2003-404-4785, 18 February 2004.

Civil action against the BNZ which had been struck out by the District Court. That Court ruled that the bank owed no legal duty to the Plaintiff and assignments relied upon were ineffective and champertous.

Harrison J agreed with the District Court. After analysis he decided the bank could not arguably have owed a legal duty and further pointed out that the Plaintiff had not identified any evidential basis for alleging a breach. He also agreed that the Plaintiff's conduct savours of maintenance and champerty and further that there was no loss suffered by the Plaintiff. The BNZ sought costs on an indemnity basis saying that the

Plaintiff's appeal, like its originating claim was hopeless and Harrison J awarded the bank costs in the stun of $8,500.

[20] *McGregor v Rodney District Council* [2004] NZRMA 481.

Appeal from a decision of the Environment Court. The Judge dismissed the appeal in. a reserved and reported judgment awarding costs on the ordinary basis but adding an observation that as the appeal was hopeless and devoid of merit he would have granted costs on a Solicitor/client basis if it had been requested.

[21] *Francis v Attorney General* HC Auckland CIV 2003-404-558, 14 May 2004.

Application for judicial review of a decision in the District Court where that Court had ordered the Plaintiff to pay costs in the sum of $2,035 in a civil action. It was a truly hopeless case with the Judge awarding standard costs but again noting that he would have awarded costs on a Solicitor/client basis if it had been sought.

[22] *Harris v Police* HC Auckland CRI 2005-404-50, 25 February 2005

Bail appeal on charges of kidnapping and wounding with intent. Bail had been refused in the District Court. That Court took the view there was a real risk of the Defendant offending whilst on bail because he had a history of doing that very thing. There was a strong Crown case and Harrison J described Counsel as having advanced a forceful argument on behalf of the Appellant but the appeal was hopeless.

[23] *Te Puaha O Waikato Whanui Trust v Franklin District Council* HC Auckland CIV 2004-404-4435, 3 May 2005

Wrangle over the Public Works Act when the Franklin District Council sold the camping ground at Port Waikato to its existing lessee. The Judge concluded the trust had failed to prove its case because the Council was not acting unlawfully in passing the relevant resolutions. The Judge was careful to explain that he was not determining that a claim under the Public Works Act would necessarily fail and nor was he saying that a claim under the Local Government Act would fail, he was simply recording that on the case as framed and argued he was not satisfied the Council had acted unlawfully. Indemnity costs were sought, but the Judge declined them despite the case being hopeless because of the trust's limited financial resources.

[24] *Paper Reclaim Limited v Aotea International Limited* HC Auckland CIV 2004-404-4728, 14 February 2005 and 22 April 2005.

This major piece of litigation which is much reported had a side claim being an application to set aside the judgment given at first instance on the grounds of fraud. The Judge concluded that the application had no prospects of success and was independently frivolous, vexatious and an abuse of process. He suggested $15,000 costs recording that both he and Randerson J. had previously advised the parties that the proceeding was fundamentally misconceived. Ultimately he awarded $20,000 costs against the unsuccessful party's offer to pay $15,000 costs and the successful party seeking $80,000 costs.

[25] *Palmer & Ors v The District Court at Henderson & Ors* HC Auckland CIV 2004-404-778, 21 September 2005

The Plaintiffs brought a civil action in the District Court. They lost. They appealed, the appeal was dismissed. They then brought this action for judicial review which was a challenge to the original decision in the District Court and a miscellany of other claims against other Defendants. Palmer is a vexatious litigant currently serving preventive detention. He brought the action in person. It was hopeless, but no costs were awarded because Palmer had nothing.

[26] *Poipoi v Police* HC Hamilton CRI 2005-419-149, 10 November 2005

Bail appeal pending trial. Bail had been refused in the District Court with the Judge in that Court observing that the Applicant was a career car thief with a shocking criminal record. The Appellant had the onus of satisfying the Court that he should be admitted to bail because he had 26 convictions for offending on bail. The appeal was hopeless and dismissed with Harrison J directing the Registry to send a copy of the decision to the Legal Services Agency observing it was inappropriate that the state should fund the cost of hopeless appeals.

[27] *Barge v Freeport Development Limited* HC Auckland CIV 2002-404-1771, 6 December 2005 and 22 February 2006

This was an application for an order staying execution pending appeal. Another Judge had found in the Plaintiff's favour but had recused himself The Judge suggested a compromise which would have preserved the position pending an appeal but that was

rejected by the Applicant. The Judge dismissed the application but imposed a condition designed to provide security to the Applicants in the event that the appeal was successful — routine application of ordinary principle.

In a subsequent judgment he also dismissed an application for his recusal and determined costs — routine judgment against a recalcitrant party.

[28] *Charan v Ministry of Fisheries* HC Auckland CRI 2006-404-183, 29 September 2006

Hopelessly misconceived appeal against an infringement fee of $250.

[29] *Furlan v Commissioner of Inland Revenue* HC Gisborne CRI 2006-416-10 and 11, 3 November 2006

Application for special leave to appeal to the Court of Appeal. The Furlans had been convicted of a tax offence in the District Court. They had appealed unsuccessfully to the High Court where Baragwanath J had dismissed their appeal. They then filed the application for leave to appeal. The matter was previously before Harrison J who had told them that they needed to identify an arguable question of law and gave them an adjournment to do so. They did not and instead asked Harrison J to recuse himself and then wanted another adjournment. He dismissed the application awarding costs sought and recording he would have awarded costs in a higher figure if sought.

[30] *Keesing v Police* HC Auckland CRI 2006-404-417, 16 April 2007

Appeal against conviction for theft. The Appellant did not appear so it was dismissed.

[31] *Breeze v Ricketts* HC Auckland CIV 2007-404-1979, 19 April 2007

Husband and wife type case with injunction sought to prevent sale of relationship property/permit sale of property. Orders sought granted. Because one of the parties' conduct had caused or unnecessarily added to cost, costs were awarded on a reasonable Solicitor/client basis.

[32] *McKay Shipping Limited v Miu and Fung* HC Auckland CIV 2007-404-1038, 28 June 2007

The Plaintiff company was the victim of fraud by the Defendants The Plaintiff company obtained a Mareva injunction which the Defendants failed to observe. The Judge struck out the defences, ordered substituted service, adjourned the proceeding for a hearing to determine quantum and awarded indemnity costs.

[33] *Van Delden v Lockett* HC Auckland CIV 2007-404-6384, 6 December 2007

This was an application by liquidators for an injunction to preserve their position because a search warrant had been issued for the return of property by one Lockett who had obtained the warrant. Lockett's case could only be described as hopeless and it seems Lockett was a vexatious litigant even if he had not been declared as such by that point.

The Judge records:

> For today's purposes, Mr Manning's (Counsel for the liquidators) argument is neatly distilled in the liquidator's Amended Statement of Claim. He identifies three grounds upon which the District Court's decision is reviewable for invalidity. In my judgment, any one of those three grounds is of itself not only strong but would be decisive in favour of the liquidators if it proves necessary for them to seek permanent relief.

Counsel for the liquidators sought costs on an indemnity basis which he duly awarded saying that Mr Lockett's application for a search warrant should never have been made to the District Court and that his defence to the application was without merit or hope.

[34] *Christieson v Commissioner of Inland Revenue* HC Hamilton CIV 2007-419-913, 27 February 2008

It is enough merely to recite the first paragraph which reads:

> … Christieson has applied to judicially review a decision of the Commissioner of Inland Revenue. In reality his claim did no more than dispute facts but without seeking leave to cross examine the Commissioner's deponent whose unchallenged evidence answered Mr Christieson's case. Within thirty minutes of opening, and after taking instructions, Mr David Hayes for Mr Christieson advised that the claim was abandoned. Judgment is accordingly entered for the Commissioner.

The Judge was critical of Mr Hayes saying:

> It is plain that this proceeding should never have been brought. It was without any hope from the outset. The first and elementary step to be undertaken by Mr Christieson's advisors was to calculate when in fact the time limits expired. This was a uniquely simple exercise. The relevant statutory provisions are

> unambiguous. ... Mr Hayes says he originally believed that the expiry dates were later than those which applied. I need say nothing more than that this explanation is unsatisfactory from Counsel appearing in the High Court for parties seeking to pursue the important remedy of judicial review of a statutory decision made by the Commissioner.

The Judge awarded indemnity costs.

[35] *WLP v LP* HC Auckland CIV 2007-404-1657 and 1660, 19 March 2008

This was an appeal by a violent father from orders in the Family Court making parenting orders. Counsel for the Applicant was a Mr Graham who evidently made a complete mess of the entire proceeding including the appeal before Harrison J. The Judge said:

> This judgment speaks for itself in exposing the lack of merit in all grounds advanced in support of the appeals. Mr Graham's submissions were at times so obscure and contrary to what must have been his knowledge of events and of the record that I inferred that he was guilty of misleading conduct. On reflection, though, I think this was more the result of ineptitude than design.

The Judge went on to refer his decision to the legal aid authorities.

[36] *Siemer v Stiassney* HC Auckland CIV 2008-404-104, 20 March 2008 and 21 May 2008

This is notorious litigation which has now plagued the Supreme Court for several years. Siemer is a vexatious litigation.

Siemer filed a Statement of Claim. The Defendants filed applications to strike it out. The Judge described Siemer's documents as a lengthy and discursive litany of personal attacks on the integrity, fitness for office and competence of a number of Judges of the High Court, the Court of Appeal and the Supreme Court. The documents were scandalous. The defects in the pleadings so fundamental they could never be remedied. He struck them out and awarded costs on an indemnity basis.

[37] *Central Equipment Company Limited v Commissioner of Inland Revenue* HC Tauranga CIV 2003-470-856 and 923, 15 May 2008

An Associate Judge wound a company up. There was an appeal to the Court of Appeal. That was dismissed. Other proceedings were then struck out by the Associate Judge, this was an application for review of the Associate Judge's decisions and it was also struck out.

[38] *Lymburn v Attorney General* HC Auckland CIV 2005-404-460, 15 July 2008

> A civil action against the Attorney General. Directions had been made about filing an Amended Statement of Claim. A Third Amended Statement of Claim had been filed but it did not cure issues. Judge Doogue issued a Minute that the proceedings were in an unsatisfactory state and gave the Plaintiff a final chance to get her house in order rather than striking them out and warned her that she was at risk of having them dismissed. Judge Doogue's forbearance was exhausted and he did finally strike them out. This was an application to review Judge Doogue's decision. It was struck out.

One case cannot be found. That is the case of Sharma v Cameron which we assume is likely to be a typographical error in the reference. The judgments run from 2001, when Justice Harrison was appointed to the High Court, to 2009.