NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 27

LCDT 014/15

IN THE MATTER OF	the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982
BETWEEN	**THE NATIONAL STANDARDS COMMITTEE 1** Applicant
AND	**FRANCISC CATALIN DELIU** of Auckland, Barrister Practitioner

CHAIR

Ms M Scholtens QC

MEMBERS OF TRIBUNAL

Ms S Hughes QC

Ms J Gray

Mr P Shaw

Mr W Smith

HEARING at Auckland

DATE 22 February 2016

DATE OF DECISION 15 September 2016

APPEARANCES

Mr P Morgan QC for the National Standards Committee

Mr F Deliu, respondent, in person

DECISION OF THE TRIBUNAL ('INCOMPETENCE CHARGES') – LCDT 014/15

Index

Index continued

The 'Incompetence' Charges

[1] The practitioner faces a total of four charges. They relate to conduct in six pieces of litigation over the period 2008-2009. The alleged behaviour spans both the Law Practitioners Act 1982 (Charges 1 and 2) and the Lawyers and Conveyancers Act 2006 (Charges 3 and 4). The primary charges, charges 1 and 3, allege a pattern of behaviour which would constitute negligence or incompetence in his professional capacity of such a degree and/or so frequent as to reflect upon his fitness to practise and/or as to bring the legal profession into disrepute.

[2] Charges 2 and 4 are alternative charges. They allege that the same pattern of behaviour would constitute conduct unbecoming a barrister or solicitor under the 1982 Act and/or unsatisfactory conduct under the 2006 Act, being conduct which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[3] The practitioner denies the charges, says there is no evidence to support them, and raises a number of defences to certain particulars of the charges. First, that he was not providing regulated services in certain instances, secondly, that delay or abuse of process should result in the charges being dismissed, and finally he says that because he wins more cases than any other private lawyer in New Zealand, the charges of incompetence are a nonsense.

[4] The charges are reproduced as **Appendix A** to this decision.

Other related charges

[5] These charges were heard by the same Tribunal that considered consolidated charges LCDT 008/12 ('the Judges charges') and LCDT 010/10 over 10 days, from 30 September to 9 October, and 10 December 2015. The decisions on the three sets of charges are given together.

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

Application by the practitioner for an order that there is no case to answer

[7] On 19 February 2016, prior to the hearing of the charges set down to begin on 22 February, the practitioner filed submissions arguing there was no case for him to answer. These raised similar arguments to those made earlier in an application by the practitioner for a stay or dismissal of the charges.

[8] The Tribunal had then expressed the view that it would prefer that the application be dealt with at the substantive hearing when the evidence could be tested and evaluated holistically. However, the practitioner urged the Tribunal to determine the application and after hearing submissions it was dismissed.[1]

[9] The practitioner appealed that ruling to the High Court. On 18 February 2016 Justice Peters adjourned the appeal noting that, if the practitioner succeeded before the Tribunal (whether on his renewed application or on the merits), the appeal would fall away. If not, the appeal could be heard and determined with any others that may be filed.[2]

[10] The practitioner subsequently made an oral application at the close of the Standards Committee's case. The practitioner's submissions in support raised two grounds. First, that the only evidence before the Tribunal were copies of judgments and these are not admissible to prove the facts now in issue. Secondly, he submitted that in some instances he was acting for himself. Therefore he was not providing "regulated services" and so not caught by s 12(a) of the Lawyers and Conveyancers Act 2006 (relating to charge 4[3]).

[11] The practitioner did not seek that the Tribunal rule on his application at the end of the Committee's case. He elected not to call any evidence or make himself available for cross-examination. He proceeded to close his case. Written submissions from the Committee, and the practitioner in reply, were timetabled.[4] Accordingly the Tribunal will determine whether there is a case to answer on the

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1 [2015] NZLCDT 31 (28 September 2015).
2 Deliu v National Standards Committee [2016] NZHC 204, para [11].
3 The argument was also relevant to charge/particular 1.04(c) (2.04(c)) as that was properly considered under the 2006 Act.
4 This approach accords with the views of Woodhouse J in *Hall v Wellington Standards Committee (No 2)* [2013] NZAR 743. Note that the Full Court in *Orlov v NZ Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606 (FC HC) at [67] were not persuaded that it was open to a practitioner to reserve the ability to call evidence in the event the 'no case' submission was unsuccessful. They did not determine the point however.

material before it, and then, if so, whether the Committee has proved the charges on the balance of probabilities, on that same material.

[12] We note first that the Full Court in *Orlov* considered that, in light of the statutory purpose and scheme, the "no case to answer" jurisdiction should be seen as limited to matters akin to a strike out.

> It is for weeding out the obviously deficient (which should be rare) or those where some technical impediment can be argued. Otherwise it is proper that the practitioner fully participate thereby enabling the Disciplinary Tribunal to rule on the substance, and to give better effect to the Act's purposes.[5]

[13] In this instance, none of the matters raised are really in the category of "obviously deficient".

[14] The Court also noted that the practitioner could not be made to co-operate, but that "consequences properly flow if he does not".[6] This point becomes relevant when we discuss the nature of the evidence.

[15] First, we discuss the primary submissions of the practitioner in relation to his 'no case to answer'/stay arguments under the following headings:

10.1 Judgments as evidence

10.2 Not providing "regulated services"

10.3 Delay

Judgments as evidence

[16] Whether judgments can be admitted as evidence and, if so, what weight they should be given will depend on the particular charge and the use to which the judgments are to be put. The practitioner submitted they should not be treated as admissible, and referred us to a number of early cases. We consider the current position is summarised in the two judgments cited below.

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5 Orlov v NZ Lawyers and Conveyancers Disciplinary Tribunal [2015] 2 NZLR 606 (FC, HC) at [64].
6 At [65].

[17] First, the Court of Appeal in *Deliu v The National Standards Committee of the New Zealand Law Society* which said: [7]

> …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…

[18] In footnote 31 the Court added:

> We note that the Tribunal must exercise its discretion to admit otherwise inadmissible evidence under s 239 of the Act in accordance with the interests of justice. The centrality of the evidence to the case and the effects of an inability to cross-examine may be material considerations in its assessment: *Commerce Commission v Fletcher Challenge (No 1)* (1989) 2 PRNZ 1 (HC) at 4; and *Callplus Ltd v Telecom New Zealand Ltd* (2000) 15 PRNZ 14 (HC) at [47] (concerning a materially similar provision in the Commerce Act 1986).

[19] Second, the Full Court of the High Court in *Orlov*:[8]

> We consider that [s239](1) [of the 2006 Act] governs s 50 of the Evidence Act 2006. The judgments may be accepted by the Disciplinary Tribunal as evidence. It then simply becomes a question of weight to be given to the conclusions contained therein. This assessment will inevitably be case specific and turn very much on the particular proposition for which the judgment is being relied on. We therefore reject this challenge to the extent it is an admissibility challenge.

[20] In line with these authorities, we consider we have the discretion to consider the judgments under s 239 of the Act where they are relevant. They are public records under s 138 of the Evidence Act. Whether and to the extent it will be appropriate to take them into account will depend on the particular facts that the Committee seeks to prove and how each judgment is relevant to those facts. We are mindful that s 239 is subject to the requirement to observe the rules of natural justice.

Not providing "regulated services"

[21] This issue is relevant only for charges relating to conduct occurring after 1 August 2008 and only if the Tribunal is considering charge 4 (the alternative to charge 3 – unsatisfactory conduct, occurring at a time when the practitioner was providing

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[7] Deliu v The National Standards Committee of the New Zealand Law Society [2015] NZCA 399, para [34].
[8] Orlov v NZ Lawyers and Conveyancers Disciplinary Tribunal [2015] 2 NZLR 606 (FC,HC) para [80].

regulated services – s 12(a)). It may also be relevant for particular 2.04(c) given the timing of the making of the affidavit referred to was after 1 August 2008.

[22] The practitioner submits that for particular 2.04(c), at least, he was acting for himself, and thus not providing "regulated services" as defined. In that instance he made an affidavit in support of an application for the Judge to recuse himself from a proceeding in which he was counsel for the plaintiffs.

[23] Section 3 definition of "regulated services" includes "legal services", being "services that a person provides by carrying out legal work for any other person". He emphasises these services must be provided to a person other than himself. Counsel for the Committee submits the matter has been determined for the Tribunal 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. In that case, the High Court determined that conduct which is "very much connected with the provision of such services" comes within the s 7(1)(a)(i) limb of misconduct, which uses the same language as s 12(a).

[24] We consider the practitioner's argument can only be made in respect of particular 2.04(c) as it is plain that the practitioner was acting for various clients in relation to the conduct which is the subject of all other charges post 1 August 2008. In relation to 2.04(c) the practitioner was seeking to recuse the Judge from dealing with proceedings, due to alleged bias against himself and his Maori clients. However we consider it plain that the affidavit that is the subject of the particular was made in connection with the provision of legal services, irrespective of whether it was made on the instruction of the practitioner's clients or of his own initiative. It cannot be seen as "unconnected" to the provision of legal services, and so, consistent with the judgment in *Orlov,* the practitioner was providing regulated services in relation to all the relevant charges.

Delay

[25] The effect of delay was argued before the Tribunal on the original application for a stay or dismissal. However, it was not raised directly by the practitioner in his written 'no case to answer' submissions as delay is not relevant to such an

application. It was, however, an important plank of his defence to the charges. It was also a matter of concern to the Tribunal and counsel for the Standards Committee was asked to address the point. The practitioner then made submissions in support of delay as a ground for stay or dismissal.

[26] Counsel for the Committee accepted that disciplinary charges should be heard and determined expeditiously – s 120(3) of the Act. However, he submitted that failure to lay charges expeditiously did not necessarily lead to an order to stay or dismiss the charges. Two things, he submitted, were relevant: first the reasons for the delay and any contribution made to it by the practitioner and secondly, what remedy is appropriate for any delay.

[27] Both the practitioner and counsel for the Standards Committee referred to the leading case of *Chow v Canterbury District Law Society*[9]. Counsel for the Standards Committee also referred to the principles in relevant New Zealand authorities, reviewed in *Samoa Law Society v Ponifasio*[10].

Reasons for delay

[28] A chronology including relevant litigation touching on these charges is attached as **Appendix B**.

[29] The complaint was received in September 2009 and charges were filed in the Tribunal in July 2015. Thus from receipt of complaint to laying of charges was a very lengthy period of more than six years. Ms Ollivier gave evidence for the Committee on this point. In summary, the primary contributing reasons for delay were the multiple challenges to the process taken by the practitioner and their, some-times slow progression, and his opposition to the Committee's application to access evidence from the Court files. The intervening and unsuccessful endeavours of the New Zealand Law Society ("NZLS") to take what may have been overlapping charges directly to the High Court made it proper to await the judgment in that proceeding before proceeding with charges that might not ultimately be required to be heard.

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9 [2006] NZAR 160 (CA).
10 [2014] WSCA 9 at paras [17] and [18].

[30] After six or seven months of the complaint being made to the Auckland Complaints Committee, the matter was transferred to the National Standards Committee. After communications with the practitioner a hearing of the National Standards Committee took place on 8 November 2010 which the practitioner attended in person. The purpose of the hearing was to receive the practitioner's response to certain matters of concern that had been advised to him in writing, as anticipated by s 152(1) of the Act. The hearing involved the subject matter of these charges. On 12 November 2010 the Standards Committee issued a Notice of Determination to refer the complaint matters to the Tribunal.

[31] The inquiry and hearing process had accounted for a 14 month period. While it would be preferable that inquiries and hearings were able to be conducted more expeditiously, it is accepted that this was a somewhat complex matter with a considerable amount of input by the practitioner.

[32] That determination was then referred to the Legal Complaints Review Officer by the practitioner for review. The Review Officer's decision was issued on 21 October 2011 being a further 11 months delay.[11] The practitioner argued that the Committee did not need to hold off laying charges pending the review. We do not think that the Committee could be criticised for doing so in the circumstances. This is particularly so given the judicial review proceedings referred to below, which were on foot during this period.

[33] Parallel to the complaints process were the practitioners' various High Court proceedings. Most relevantly on 17 September 2010, prior to the 8 November Standards Committee hearing, the practitioner applied for judicial review by the High Court of various preliminary decisions made by the Standards Committee.[12] His proceedings were later amended to include review of the Committee determinations to lay these and other charges. The proceedings also included seven "civil" claims primarily for damages. The Court of Appeal recorded in one of the practitioner's appeals that his objective was to prevent the Tribunal ever hearing the disciplinary charges.[13]

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11 The LCRO's decision was also subject to judicial review by the practitioner: *Deliu v NZLS* CIV-2012-404-121.
12 *Deliu v NZLS* (Auckland, CIV-2010-404-6182).
13 *Deliu v NZLS* [2015] NZCA 12, 13 February 2015, paras [19], [32].

[34] The Law Society applied for separate trials on the judicial review matters, and on 4 November 2011 Peters J so ordered.[14] The practitioner appealed that decision to the Court of Appeal, which dismissed the appeal on 9 August 2012.[15] The practitioner then sought leave to appeal this judgment to the Supreme Court. Leave was declined on 30 October 2012.[16] Accordingly the practitioner's judicial review proceedings were on foot for more than two years before the preliminary question of separate trials was resolved.

[35] Meantime without prejudice discussions took place between counsel and the practitioner between October 2011 and April 2012.

[36] The evidence from Ms Ollivier for the Committee is that, prior to laying of charges or seeking orders of the High Court, it wished to obtain access to High Court files relating, among other things, to most of the proceedings that are referred to in the present charges. An application was made to the Registrar in April 2012 but a direction was made by a Judge that an originating application must be filed and served. This was done in July 2012.[17] The practitioner opposed that application. It had its first hearing in November 2012 with a first decision of Justice Toogood on 13 December 2012 relating to preliminary issues raised by the practitioner.[18]

[37] The practitioner also brought further judicial review proceedings against the NZLS Board's decision to instruct counsel to commence proceedings against him, as well as its concurrent decision to apply to inspect certain court files.

[38] The practitioner appealed against the interlocutory orders of Justice Toogood and the appeal was heard on 22 May 2013.[19] The next day, Justice Toogood delivered a further judgment.[20] He decided to hear both the practitioner's recent application for judicial review together with the application for access in June 2013. Accordingly events had overtaken the need for the practitioner's appeal and it was abandoned.

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14 *Deliu v NZLS* (Auckland, CIV-2010-404-6182) 4 November 2011.
15 *Deliu v NZLS* [2012] NZCA 359.
16 *Deliu v NZLS* [2012] NZSC 90.
17 *National Standards Committee v Deliu* (Auckland, CIV-2012-404-3785).
18 *National Standards Committee (No 1) v Deliu* [2012] NZHC 3378.
19 *Deliu v National Standards Committee (No. 1)* CA 51/2013, [2013] NZCA 287, 5 July 2013.
20 *National Standards Committee (No. 1) v Deliu (No. 2)* [2013] NZHC 1184.

[39] Following a 3 day hearing in June, Justice Toogood issued two further judgments on 25 September 2013. He dismissed the practitioner's application for judicial review.[21] In relation to the court file access proceedings, he granted the NZLS access to the relevant files because he found the application was brought for the purpose of assisting the NZLS in the proper exercise of its statutory functions.[22]

[40] However in relation to the Committee's application, he considered he was not in a position to approach the application to access the files on the same basis given the (then) part-heard application for review of the Standards Committee decisions by Justice Katz. Accordingly he reserved the application for further submissions and consideration after the judgment was issued in that proceeding (in HC Auckland CIV 2010-404-6182).[23]

[41] After the appeals from the split hearing decision had been resolved, there followed a number of interlocutory applications in the primary judicial review proceedings until those proceedings came to trial. Then, on 13 February 2014, Justice Katz decided to, and did, adjourn the proceedings until after the determination of charges by this Tribunal.

[42] Justice Katz' minute of 13 February 2014 records the reasons for the delay to that date including the practitioner's conduct of the proceeding and his unavailability. The practitioner then appealed the decision to adjourn the proceeding. That appeal was heard on 13 October 2014 and dismissed on 13 February 2015.[24] The practitioner then made an application for leave to appeal to the Supreme Court. That application was dismissed on 2 June 2015.[25] An application for recall was dismissed on 14 July 2015. So these unsuccessful challenges brought by the practitioner delayed progress of these prosecutions by a further 17 months.

[43] Meantime, in early 2014 the New Zealand Law Society took its signalled application directly to the High Court to suspend or strike-off the practitioner based on a number of allegations of incompetence and other conduct. The High Court granted

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21 *Deliu v Executive Board of the New Zealand Law Society* [2013] 3 NZLR 833.
22 *National Standards Committee (No 1) v Deliu (No 3)* [2013] NZHC 2503.
23 At [41].
24 *Deliu v New Zealand Law Society* [2015] NZCA 12, 13 February 2015.
25 *Deliu v New Zealand Law Society* [2015] NZSC 75.

the practitioner's summary judgment application in October 2014.[26] The Court held that such matters were better determined in the first instance by this Tribunal.[27] The charges before this Tribunal were ultimately laid in July 2015, shortly after the Supreme Court declined leave to the practitioner to appeal the adjournment of the judicial review proceedings.

Parties' submissions and discussion

[44] As the Court of Appeal held in *Chow,* there is a statutory obligation to proceed promptly, and to ensure a complaint is dealt with "as soon as practicable". The extent of any delay which may be appropriate will depend on all the circumstances.[28] However the issue of remedy is to be approached on the basis of an application of administrative law principles. Importantly these take place in the disciplinary context which means proceedings are not punitive in nature, but essentially protective of societal interests. All the relevant factors are to be considered, including the extent of, and effects of, delay, plus the nature and seriousness of the charges.[29]

[45] In his oral submissions the practitioner submitted the period of delay was so lengthy that this Tribunal could infer specific prejudice to him. As to length of delay, he submitted that whether the period of delay was five or six years made no difference to the inevitable conclusion that the delay had prejudiced him. As to prejudice, he submitted the long delay meant he was unable to recall specific details from the relevant cases, and that the Committee could not excuse its delay by relying on his opposition to its attempts to access court files or his attempts to stop the laying of charges.

[46] In his reply submissions, the practitioner observed that his judicial review proceedings commenced in 2010 challenged not only the matters resulting in the charges before this Tribunal, but also the process relating to complaints which resulted in charges LCDT 010/10 and LCDT 008/12, heard by this Tribunal in November and December 2015. He observed that the proceedings did not stand in the way of charges being laid for those matters in 2010 and 2012 respectively. Thus,

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26 *New Zealand Law Society v Deliu* [2015] 2 NZLR 224.
27 The matters before the High Court included some of the matters subsequently brought before this Tribunal in LCDT 014/15.
28 *Chow v Canterbury District Law Society* [2006] NZAR 160 (CA) [34] – [35].
29 At [36] – [37].

the practitioner submitted, it follows that the judicial review proceedings did not prevent the prosecution from acting with diligence to lay charges.

[47] The practitioner submits that the current charges could have been laid notwithstanding this other litigation and counsel for the Committee accepts that this is so. However, the Committee says, to what purpose? Counsel for the Committee submits it is unrealistic to expect a Tribunal of five to hear and determine charges in a proceeding which had been estimated to take weeks to hear when there were so many collateral challenges to the process which might result in the hearing being a nullity. While the Tribunal has had concerns about the delays, it accepts that there have been unusual complexities surrounding the various complaints and the primary delay has been caused by the practitioner's multiple proceedings in the courts, with the consequent focus of the Standards Committee in responding to the immediate issues raised particularly as if the practitioner's challenge had been upheld, such a hearing would have been for no point. The Standards Committee's inability to access the court files was the collateral result of Justice Toogood's order that the primary judicial review proceedings should be dealt with first. Thus, the practitioner submits, by arguing in favour of the adjournment to the judicial review proceedings granted by Justice Katz, the Standards Committee created the very scenario it now complains about. It did not appeal from the decision of Justice Toogood and so, from September 2013 at the very latest, when Toogood J issued his interim judgment, it has had no excuse not to lay charges.

[48] The Committee sought those files as part of its investigation into, in part, the charges before us. We anticipate it may have taken some time to assess whether the evidence available was sufficient nevertheless. Then the application directly to the High Court was made, which also had implications for these charges.

[49] The practitioner does not accept that there is any relevance of the "failed attempt to disbar me" in the High Court. He refers to extracts from the transcripts of an interlocutory hearing before the Tribunal in LCDT 010/10 and 008/12 as indicating that neither he nor the Standards Committee saw any duplication between those charges and the High Court matter. That is correct but irrelevant. The reference was to the 010/10 and 008/12 charges then before the Tribunal. These charges were not at that stage before the Tribunal. They were only laid after the High Court

proceedings were dismissed. Both the Committee and the practitioner acknowledged, as at the date of that hearing on 19 June 2014, there was no duplication between the charges then before the Tribunal and those before the High Court.

[50] The charges were laid on 3 July 2015, one month after the Supreme Court declined the practitioner leave to appeal from the decision of the Court of Appeal declining the practitioner's appeal against the orders of Katz J adjourning the part-heard judicial review of the investigations and decisions to lay charges. As we see it, criticism for the delay in laying charges which are subject to challenge, while unfortunate, cannot be laid substantially at the door of the Standards Committee.

[51] In summary, we agree with counsel for the Committee's submission:

> … while the delay is absolutely described as long, there were good reasons for it, and … Mr Deliu contributed to it in pursuit of his collateral challenges; a material reason was Mr Deliu's challenges to the Standards Committee's process, opposition to the application to access evidence from the court files, and the slow progression of his application for judicial review. The intervening application by the New Zealand Law Society in 2014 made it proper to await the judgment of the High Court in that proceeding before proceeding with charges that may have overlapped with the High Court application.

Prejudice to the practitioner?

[52] The practitioner submits that he is prejudiced by the delay. He has deposed that the charges relate to events more than seven years ago. He has been gone from the firm in which he practiced when the matters arose for some years and does not have access to those files. Nor does he have access to clients who have not waived legal professional privilege. He says that he is not able to secure the cooperation of Mr Orlov, his previous employer.

[53] Counsel for the Standards Committee submits the practitioner is not prejudiced in his defence. He submits:

(a) The charges did not require him to access privileged information and adduce evidence of his instructions from former clients – the charges are about his conduct as an advocate appearing in court, preparing and presenting legal proceedings and arguments. To the degree that client

instructions may affect his explanation the Tribunal can take that into account.

(b) The practitioner had the option of obtaining records from the files and Mr Orlov when the inquiry commenced in 2009 and as it progressed – he has not explained why he did not do so.

(c) The practitioner had the option of consenting to the Committee's application to access the High Court files. Instead he elected to block access. He cannot now rely on an absence of information that was within his power to obtain.

(d) The practitioner has access to his communications with the Complaints Service dating back to 2009, the recording of his appearance before the Committee on 8 November 2010 and the various affidavits he has made about the subject matter of the charges, if he needs to refresh his memory.

(e) The practitioner can provide evidence in answer to the charges as his second affidavit made on 4 September 2015 in support of his application for a stay in these proceedings more than adequately demonstrates.

(f) Claims of Mr Orlov being unavailable have proven not to be the case.[30]

(g) As lawyer for a party, the practitioner was entitled to access the court files. He could obtain whatever material he sought fit.

[54] In summary counsel for the Committee submits that there are reasons for the delay, the practitioner has contributed to them and there is no real prejudice. Delay can only be relevant to penalty if the charges are proven.

Decision on delay

[55] We consider the lengthy delay is in large part the making of the practitioner. We have taken into account in assessing each of the charges whether he has been

[30] The reference is to Mr Orlov appearing as a witness under summons before this Tribunal hearing the 010/10 and 008/12 charges.

hampered by the length of time that has passed in recalling detail, accessing files etc. We are not persuaded that his ability to defend these charges has been improperly compromised.

[56] We also agree with the points made by counsel for the Committee noted in paragraph [53] above. If the practitioner considered material from the court file would be relevant to responding to the case for the Committee, then he could have obtained it. Likewise Mr Orlov could have been summonsed as a witness.

[57] The charges relate to the practitioner's fitness to practise. They are serious charges, and the context of the protection of the public is uppermost in our minds. We do not consider the delay to warrant a stay or dismissal of the charges.

Evidence

[58] The Standard's Committee's sole witness, Ms Ollivier, provided a primary affidavit of 22 June 2015 outlining the background to the charges and exhibiting three volumes of documents comprising various court judgments and documents from the Standards Committee investigation. These included the transcript of the practitioner's appearance before the Standards Committee on 8 November 2010, and his affidavit to the High Court of 22 February 2013 in support of his application for an adjournment and stay of the proceedings seeking access to the court file. In that affidavit he reviewed his role in the cases the subject of these charges and exhibited 318 pages of exhibits.

[59] In her reply affidavit of 14 September 2015 Ms Ollivier identified further affidavits of the practitioner which are available to the Tribunal and which gave evidence of aspects of the proceedings which are the subject of these charges. In particular, the practitioner's affidavit in support of the application for Justice Harrison's recusal dated 9 September 2008, the affidavit made on 19 August 2013 as witness for Mr Orlov in LCDT 002/11, and his 31 page affidavit (excluding exhibits) made on 8 October 2012 in CIV 2012-404-4030.

[60] Ms Ollivier was not required for cross-examination.

[61] The practitioner made four affidavits dated 3, 4 and 18 September 2015, and 5 February 2016. He chose not to present for cross-examination.

[62] In particular, material before the Tribunal where the practitioner has responded to some extent to the charges includes:

(a) The transcript of the hearing of the National Standards Committee on 8 November 2010.

(b) The practitioner's affidavit dated 22 February 2013 before Toogood J relating to access to court files.

(c) The practitioner's four affidavits before this Tribunal, particularly his second affidavit of 4 September 2015.

(d) Various other documents produced by Ms Ollivier for the Standards Committee which include emails and other material received from the practitioner.

[63] We note the practitioner's concern that what he has said previously was not in response to the charges as currently framed. That is true in relation to the 8 November 2010 hearing and 22 February 2013 affidavit. He was there responding in broad terms to criticisms in the cases now the subject of charges. Further he has had ample opportunity to update his evidence.

[64] Counsel for the Committee submitted to us that Justice Toogood's decision to deny access to the court files until the outcome of the judicial review proceeding effectively blocked the Committee's access to the files without Mr Deliu's consent. On the other hand, the practitioner submits the Committee accepted defeat. It decided not to appeal the position taken by Justice Toogood and, he submits, had bound itself to the need for receipt of the court files in order to have sufficient evidence to bring charges and prosecute the matters now before the Tribunal.

[65] We understand the practitioner's objection to the Committee accessing the court files rested on his view that the process that had been followed in investigating him and (ultimately) bringing charges was procedurally unlawful. We have some

concerns about his efforts to inhibit the Committee given the jurisdiction is the protection of the public, not the practitioner. However the Committee is required to act within the law and we accept for present purposes that the practitioner was entitled to resist the application. That said, it does not follow that the Committee cannot use material that it has received from other sources (usually the practitioner) but which might also be on the court file, without the consent of the court. This was a point argued by the practitioner. It is not accepted.

[66] We understand he also argues that the fact of the application meant that the Committee considered they needed the court files in order to prove the charges. Accordingly its decision to lay charges, and/or prosecute them through the Tribunal, was in bad faith. The practitioner emphasised this point in a further "supplementary submission" filed after his "final submissions" (submission in reply) on 29 February 2015 and after all aspects of the hearing was complete. In what we have seen as typically intemperate language, the practitioner referred to judgments where the Court accepted that "both parties need to have relevant parts of the court files before the disciplinary body" in order to provide adequate proof. Accordingly he submits he cannot be found guilty without due consideration of the files.

[67] To his credit counsel for the Committee did not feel obligated to respond. The Committee's position was clear from the earlier submissions. It would have been useful to have access to the court files. However it considered it could and should proceed on the basis of what it has been able to produce.

[68] We propose to examine each particular of each charge (or groups of particulars where that is appropriate) against the whole of the material available to us. We recognise there may be issues such as an inability to cross-examine the particular judge, the absence of some key or relevant documents, and/or the fact that we have not heard fully from the practitioner, who did not submit to cross-examination. We will consider whether a prima facie case has been made out. If so, we will then decide whether the charges have been proved on the balance of probabilities.

Lack of expert evidence

[69] Finally on the subject of evidence, the practitioner submitted that the Committee needed to produce expert evidence on what the standard of competence was and whether the conduct of the practitioner did not meet that standard. He referred to the decision of the Full Court of the High Court in *Auckland District Law Society v Neutze*[31] as a "direct example of how it would bring a negligence/incompetence case properly".

[70] In particular he referred to a reference to opinion evidence by senior and experienced litigation practitioners. He also drew attention to the fact that there were witnesses of fact called and considerably more evidence before the Court such as copies of submissions filed, transcripts of trials etc. He also noted a more constrained approach to the admissibility of statements in judgments.

[71] The Court did appear to have expert opinion evidence. However it is clear that the Court understood that it was its responsibility to form its own view on all the evidence and material before it on matters of incompetence or negligence. As with the Court, the issue of the practitioner's negligence or incompetence and the seriousness of it, and the frequency of it, are matters for the assessment of this Tribunal based on the evidence it has before it. We are not able to delegate that function to an expert witness and then decide whether or not we accept that witness' evidence.

[72] We also accept the submission of Counsel for the Committee that, given the limitations that exist on the evidence in this case, and in particular the lack of much of the supporting documentation that might otherwise have been available, we do not see that expert evidence would have advanced this Tribunal's fact finding role. The Tribunal has the knowledge and experience to determine the matters that are in issue.

[73] On the subsidiary matters, the Tribunal notes that *Neutze* was an application for the exercise of the Court's summary jurisdiction under s 94 of the Law Practitioner's Act 1982 seeking suspension of the practitioner. The jurisdiction is quite different from that of the Tribunal. Furthermore the *Neutze* charges involved the daily

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31 *Auckland District Law Society v Neutze* [2006] 2 NZLR 551.

conduct of hearings and behaviour that had, for example, resulted in a trial being aborted. It was quite different from the sort of conduct that has resulted in charges before this Tribunal, as recognised by Asher J in the *NZLS* application.[32]

Charge 1 – negligence or incompetence (alternative charge 2 – conduct unbecoming) (1982 Act)

[74] Charge 1 reads as follows:

> The National Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, under section 112(1)(c) of the Law Practitioners Act 1982, with negligence or incompetence in his professional capacity, between 1 November 2007 and 31 July 2008, of such as degree and/or so frequent as to reflect upon his fitness to practise and/or as to bring the legal profession into disrepute.

[75] Section 112(1) of the Law Practitioners Act 1982 (the 1982 Act) reads:

> (1) Subject to this Part of this Act, if after inquiring 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 a solicitor; or
>
> (c) **Is of the opinion that the practitioner has been guilty of negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute;** or …
>
> it may if it thinks fit make an order under this section.
>
> (Emphasis added: bold is charge 1, alternate (charge 2) underlined)

[76] The particulars of this charge under the 1982 Act relate to certain actions of the practitioner in his professional role acting for the parent plaintiffs in *RL v The Chief Executive, Ministry of Social Development* (Auckland High Court, CIV 2007-404-7031), and for individuals connected with a company in liquidation in *ANZA Distributing (NZ) Ltd (in liquidation) v USG Interiors Pacific Limited* (Auckland High Court, CIV 2007-404-00374). These later particulars formed part of charges 3 and 4 but, given they relate to conduct occurring before 1 August 2008, are more properly dealt with under charges 1 and 2.

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[32] *New Zealand Law Society v Deliu* [2015] 2 NZLR 244 at [82].

Particulars 1.01 and 1.02 (alternative 2.01 and 2.02) – argued for unfit parents to represent children, and for removal of litigation guardian

[77] Four particulars are pleaded in relation to *RL*. We deal with the first two together as they are closely related.

> 1.01 [The practitioner] incompetently argued for the parents to represent their children, when the parents had previously been found by the Family Court to be unfit to have the care of their children.
>
> 1.02 Without having reasonable grounds to do so, [the practitioner] made an application for the removal of … the litigation guardian, during the course of a telephone conference held on 13 February 2008 before Justice Winkelmann.

Evidence relevant to particulars 1.01 and 1.02

[78] The primary evidence is the judgment of Winkelmann J in *L v Chief Executive of the Ministry of Social Development.*[33] The following are facts recorded in the judgment. The practitioner acted for the first and second plaintiffs, who were the parents of the third, fourth and fifth plaintiffs aged 14, 10 and 6 respectively. The proceedings sought to judicially review a declaration of the Family Court under s 67 of the Children, Young Persons and their Families Act 1989 that the children were in need of care and protection. They also sought to review decisions by the Chief Executive of the Ministry along the way to making the declaration. While the practitioner acted for the parents in the applications referred to below, there is only limited evidence of any involvement in the drafting and commencement of the proceedings. In his affidavit of 22 February 2013 made in CIV-2012-404-3785 (the proceedings re access to court files) which is exhibited to Ms Olliver's affidavit (the 22 February 2013 "access" affidavit), he deposes that Mr Orlov drafted the statement of claim and the practitioner deferred to him. The practitioner was to be involved as Mr Orlov's junior.

[79] The Court refers to an earlier application for orders that there was no need for representation for the children or alternatively that the parents be appointed litigation

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[33] *L v Chief Executive of the Ministry of Social Development* (2008) 27 FRNZ 328.

guardians. That application was heard by Baragwanath J who said of the contention by counsel for the first and second plaintiffs:

> That the very parents who have been found rightly or wrongly by the Family Court to be unfit to have the care of their children should represent them in this Court is self-evidently untenable.

[80] The practitioner discusses his recollection of this hearing in his 22 February 2013 "access" affidavit. While he raises a number of matters of concern to him about that hearing, he does not touch upon any disquiet from the Judge about the parents representing their children in a proceeding challenging the process leading to a declaration that they are unfit to have care of those same children. The Tribunal observes that even in 2013 the practitioner displayed an overriding concern for his own position and a lack of appreciation of the "self-evidently untenable" nature of the application he was advancing.

[81] The practitioner does, however, explain the Judge's concern as to whether the parents could represent the children in his appearance before the Standards Committee on 8 November 2010. He notes the Court ruling that the parents were in conflict with the position of the children because the Family Court had just determined there were concerns about the parents' abilities to care for the children.[34]

[82] The Judge made an order appointing Mr M to represent the children.

[83] In the decision of Winkelmann J the Court was asked to deal with the parents' application to remove Mr M as litigation guardian, among other matters. The practitioner appeared for the parents (by telephone conference) on these matters.

[84] Mr M indicated he was not prepared to adopt the proceedings on the children's behalf. As a result, the Court found the proceedings were a nullity. They were irregularly commenced, in breach of r 85 HCR which provides that a minor may not conduct a proceeding without a litigation guardian except in limited circumstances.[35] It noted that those circumstances did not apply in this case. It observed that while r 86 provides that the Court may allow a minor to conduct a proceeding without a litigation guardian, that application had been made by the parents and declined by

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[34] Exhibit OL10, Transcript p7.
[35] *L* n 34 at [7].

Baragwanath J. The whole scheme of the rules was that the litigation guardian is to be appointed before the proceeding is commenced.

[85] We bear in mind that, at the time of filing the statement of claim, an application had apparently been made for the parents to be appointed as litigation guardians, or alternatively for an order that no representation be required. Accordingly it cannot be said with certainty that the r 85 HCR requirements were disregarded or overlooked by the practitioner at the time of commencement.

[86] We accept the practitioner's submission that Mr Orlov's name is on the statement of claim and there is no evidence he had anything other than a junior support role in the commencement of the proceeding.

[87] The judgment records that Mr M addressed the merits of the proceedings, in particular the basis for the Family Court's order. He referred to the findings of domestic violence and alcohol abuse in the family home, and the likelihood of both physical and emotional harm if the children were returned to their parental environment. He was satisfied that the children's development and emotional and mental wellbeing would likely be impaired if they were returned to their parents' care. That impairment was "serious and avoidable".[36]

[88] According to the judgment, the practitioner's application to remove Mr M was made during the course of the telephone conference. The Judge records it was signalled in a memorandum filed the day before and there was no objection to the short notice. She noted the grounds in support advanced by the practitioner were that Mr M was not representing the interests of the children as he was required to do; that he had not addressed the merits of the claim; and that he was not placing the views of the children before the Court. The Judge did not accept any of these as made out. She recorded the reasons given by Mr M for declining to adopt the proceedings as "compelling".[37]

[89] The Committee submits that the application for removal of Mr M was misconceived. The judgment recognised that Mr M had done all of the things that the practitioner was arguing Mr M failed to do. As the application was only made at the

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[36] At [4]-[8].
[37] At [14]-[15].

telephone conference, the practitioner presumably would have had that relevant information.

[90] The practitioner's closing submissions on these particulars (and in response to the bulk of the submissions of the Committee) was simply to state there was nothing in them that merited addressing. The reasons were the Tribunal does not have before it:

(a) the court documents in question;

(b) viva voce evidence from those involved;

(c) cross-examination of the Judges;

(d) transcripts of the hearings;

(e) expert evidence; or

(f) "anything else even remotely resembling a proper way to analyse the charges".

Discussion

[91] The Tribunal agrees with Baragwanath J that the notion that the parents should represent the interests of those children as co-plaintiffs in a challenge to the fitness orders is self-evidently untenable. We see no difficulty in accepting the facts of the application underpinning his view from the evidence before us, including the decision of Winkelmann J and the references by the practitioner in the affidavit and transcript referred to. We see no prejudice to the practitioner in his inability to cross-examine either of the Judges. He has chosen not to dispute the evidence. Accordingly we consider a prima facie case exists and, further, that the first particular is proved as a matter of fact.

[92] The next question for the Tribunal is whether it is established that the practitioner argued for the parents to represent their children and applied to remove the litigation guardian without reasonable grounds. We consider it is established. The practitioner's own affidavits support the underlying facts recorded in the judgment. It

is apparent on the face of the judgment that the application to remove the litigation guardian was without any reasonable grounds in support. As the application was not made until the telephone conference, it is reasonable to assume that all the information available to the Judge was also available to the practitioner. It is understood the application was oral and the practitioner has not challenged that.

[93] We are satisfied that a prima facie case exists that the practitioner made the application without reasonable grounds. We expect that, if he had such grounds, he would have provided them to the Tribunal. In the absence of any such evidence, the second particular is established.

Particular 1.03 (alternative 2.03) - misconceived and hyperbolic submission

[94] This particular alleges the practitioner:

> Filed a misconceived and hyperbolic submission that failed to address the issues and advance his clients' case as follows:
>
> > … 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.
> >
> > 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, supremacist 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 Maori people have been placed in a situation of social inequality by the English 'settlers' that is no longer an argument but simply a fact. Their social problems need to be addressed in a humane and culturally sensitive matter 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[38]

[95] The judgment of Harrison J of 24 July 2008 determined the defendants' applications to strike out the parents' application for judicial review of the Chief Executive and Family Court. The practitioner did not appear. The judgment recorded that the practitioner and Mr Orlov were unavailable to appear at short notice and alternative counsel was instructed. However the submission quoted from was filed by

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[38] *RL and anr v Chief Executive of the Ministry of Social Development and ors* CIV 2007-404-7031 Auckland, 24 July 2008, Harrison J at [53].

the practitioner in opposition to the application to strike out and recorded in the judgment.

[96] The practitioner made no further submissions on this particular.

Tribunal's findings

[97] We consider no issue of adequacy of evidence arises in this matter. We are satisfied that we can accept the judgment as accurately recording the written submission made. We are satisfied that the submission quoted was filed by the practitioner. The practitioner did not deny this.

[98] The s 13 principles are important context to the practise of law under the CYPF Act. The practitioner's submissions were not in accord with that context. His focus was not on the interests and needs of the children. Nor could it conceivably be of assistance to his clients.

[99] We are of the view that the practitioner's submissions, as recorded in the judgment, can fairly be described as misconceived and hyperbolic. The factual basis of the charge is prima facie proved and proved to the requisite standard.

Particular 1.04 (alternative 2.04) – allegations against High Court Judge, contentious affidavit in client's case

[100] This particular relates to the practitioner's application for the recusal of Justice Harrison from dealing with the matter of costs following the striking out of the judicial review proceedings. The particulars allege that, in support of his client's application for the recusal of Justice Harrison:

(a) Without sufficient foundation, he alleged that Justice Harrison was discriminating against him because of his "foreign sounding name" and that Justice Harrison was racially biased against Maori.

(b) Without sufficient foundation, he alleged that Justice Harrison had breached his "international human rights".

(c) In breach of Rule 8.06 of the Rules of Professional Conduct for Barristers and Solicitors 7th ed., without first informing the court and seeking a direction to permit him to continue acting, he made an affirmation, in support of his clients' application for recusal, that contained evidence of a contentious nature.

Evidence – 1.04 (a) and (b)

[101] These particulars are evidenced by the judgment of Harrison J on costs in the *RL* matter.[39] The Judge refers to the recusal application which was filed in the name of "Equity Law". The Judge noted the practitioner's name did not appear on the document. The Judge then referred to the 37 page memorandum of submissions in support, signed and filed by the practitioner but without identifying his capacity. The Court treated the application as made by the practitioner as counsel for the parents.

[102] At para [7] the Court records the practitioner's "apparent" submission that the Judge discriminates against counsel who argue hopeless "human rights cases". He quotes the practitioner at [8]:

> … Justice Harrison is discriminating against me, possibly on the basis of my foreign nationality, since his Honour knows Mr Orlov is not originally from New Zealand and Harrison J also referred in the [L] case to my misunderstanding of New Zealand, though I have never actually been face-to-face with his Honour, so I can only assume His Honour saw my foreign-sounding name or otherwise inquired as to where I am from.

[103] The Judge then notes that the practitioner expresses "a regrettable fear of personal persecution if he appears before me" which is articulated in submissions and recorded as follows at [9]:

> It is submitted that I no longer can safely appear before His Honour, as if I do so I submit that it is reasonable for me to fear for:
>
> - My liberty and freedom as His Honour may be very well arbitrarily and capriciously hold me in contempt and incarcerate me if His Honour does not like me or my arguments,
>
> - My political beliefs and freedom of speech may be in peril,

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[39] *RL and anr v Chief Executive of the Ministry of Social Development and ors* CIV 2007-404-7031, Auckland, 13 October 2008, Harrison J.

- My financial health and ability to earn a living for my family may be at risk,

- My client's (and the bar's) respect for me may be in danger,

- My reputation and professional licence may be unsafe, my contractual relationship with the Legal Services Agency may be jeopardised.

In my submission, the doctrine of incorporation makes binding on New Zealand the international instruments cited and therefore Justice Harrison's action are a breach of my international human rights, as well as disallowing me to discharge my statutory and ethical duties.

[104] Then in para [10] the Court records that the practitioner developed his fear of prosecution, "evolving into a submission of actual or apparent racism", with these observations:

I once heard of an offer the then-fascist President of South Africa once made to a future Nobel Peace Prize Winner:

> In February 1985 President P W Botha offered Mandela conditional release in return for renouncing armed struggle. Coetzee and other ministers had advised Botha against this, saying that Mandela would never commit his organisation to giving up the armed struggle in exchange for personal freedom. Mandela indeed spurned the offer, releasing a statement via his daughter Zindzi saying 'What freedom am I being offered while the organisation of the people remains banned? Only free men can negotiate. A prisoner cannot enter into contracts.'
>
> Sparks, Allister (1994). Tomorrow is Another Country.
>
> Struik.

With respect, New Zealand is not 1980s South Africa and my submission is that if I do not have the basic freedom to speak and make bona fide arguments in Justice Harrison's courtroom, then it is inevitable that I will one day be held in contempt of court by His Honour because I unequivocally cannot abdicate my right to speak and argue as a freeman.

…

His Honour appears to be passed of as a statement of fact (and conclusion) [sic] the fact that Maori (children) have never suffered injustice whereas many Maori and non-Maori citizens, judges, politicians and other eminent people have stated that Maori people have past been wronged, [sic] and some argue reasonably that there are continuing and ongoing breaches of their rights.

> Therefore, the Judge is I submit doing what is impermissible for a judicial officer to do in a purportedly democratic society which is to penalise me by way of costs awards and/or law society complaints for my alleged political beliefs and/or human rights claims.
>
> This is my submission eerily similar to that which the South African apartheid, Stalinist and other tyrannous regimes in the dustbin of history did. In my submission, it is not Justice Harrison who gets to be the final arbiter to determine hundreds of years of Maori-Pakeha relations as just and so in my submission even an alien such as myself is entitled to argue Maoris have not always been treated equally.
>
> I note that Justice Harrison's statement that all people are equal before the law is contradicted by His Honour's own actions of punishing me via various mechanisms, for making the radical suggestion that people are not. This brings to mind the famous Orwellian quote in Animal Farm that 'all people are equal, but some people are more equal than others.'
>
> In my submission, in terms of human rights in general, and Maori rights specifically, Justice Harrison is discriminating against me, a lawyer representing Maori interests, by using law society complaints, possible personal costs awards and other tools to prevent me advancing my aboriginal minority client's causes. This is also a breach of the [Ls] rights.

[105] The practitioner submits there is no direct evidence to support this particular.

Discussion

[106] First, we consider the quoted record of the submissions in the judgment is sufficient evidence of the fact of the submissions made by the practitioner to the Court. The practitioner does not argue that he did not make the submissions. It is clear from other evidence, including the judgments of the Court of Appeal, that the submissions to the High Court were part of the practitioner's response to the situation he found himself in.

[107] Thus we consider we may accept that the judgment accurately records the written submissions of counsel. If it did not, then it was within the practitioner's power to demonstrate that it did not. The Committee cannot be criticised for not providing a copy of the submissions made in circumstances where the practitioner inhibited the Committee's attempts to access the court file.

[108] Secondly, we agree with Counsel for the Committee that other material collectively provides some evidence. In the various documents such as submissions to the Standards Committee the practitioner generally accepts that he did these

things. His primary response is to say it is Justice Harrison who has either committed a fraud or is incompetent or negligent. Or that Justice Harrison was "found to be wrong" by the Court of Appeal. His focus seems to be very much on the Judge's subsequent award of costs against him (which was set aside on appeal).

[109] In particular, in the practitioner's second affidavit to this Tribunal he accuses the Judge of a fraud (that there was an application for costs against the practitioner) and claims that this is an illustration of where a Judge's opinion is inconsistent with reality. He provided what he considered to be, and which was not, "definitive proof" of there being no such application, being a copy of the register of documents filed in the proceeding. The register (a document from one of the court files that the practitioner had prevented the Committee from accessing) did not record any application for costs as having been filed and therefore, as we understand the practitioner's reasoning, the Judge had either lied or set up a ruse so that he could award costs against the practitioner.

[110] The practitioner repeated this theme in his oral submissions. He emphasised that the Court of Appeal had reversed Justice Harrison, in part on the grounds that he had relied on the wrong provision to make the order for costs.[40] This the practitioner saw as a demonstration that the Judge had erred in citing s 131(4) of the Care of Children Act 2004 as the central basis for ordering a contribution to costs of Court appointed Counsel.

[111] We fail to see the relevance of this. It is clear that the practitioner was deeply aggrieved by the initial order of costs against him. It is also clear that the judgment of the High Court ordering costs was reversed on appeal, although that Court described the success of the appeal as 'modest', expressing grave doubts as to whether the litigation in the High Court should be pursued. However this charge is about the submissions made by the practitioner to the Court on the application for recusal. It is a matter for our expert assessment as to the propriety of those submissions. The subsequent decisions of the Court as to strike out and costs, which do not directly relate to the particular, are not relevant.

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[40] *Deliu v Chief Executive of the Ministry of Social Development* (2012) 21 PRNZ 294 at [31].

[112] We understand that the practitioner appears to see the High Court decision (and its subsequent treatment on appeal) as confirmatory evidence of the Judge's bias against him. That perception, if it continues, is of itself concerning. We observe that we see nothing in the judgments of the various Courts to indicate a bias against the practitioner. What we see are concerns expressed about the conduct of the practitioner and the impact of that conduct on his client's interests and, at times, on the proper functioning of the court in the public interest of the proper administration of justice. Those are matters that can properly attract the attention of the professional disciplinary bodies.

[113] The practitioner replied to the Committee's submission that he was irrelevantly focussed on the conduct of the Judge. He submits that if the prosecution relies on a judgment, then it opens the door for the practitioner to argue the Court of Appeal judgment demonstrates that the High Court did not know what law applied. He submits: "On the Committee's theory the Harrison J judgment per se proves I am guilty. Yet, the Court of Appeal agreed with me that he was wrong". The practitioner is misguided. The judgment simply evidences the particular statements made by the practitioner in his submissions and which are the subject of the charge. Those statements stand to be judged as evidencing incompetence, negligence, or conduct that reflects on the practitioner's fitness to practise, or conduct which brings the profession into disrepute. We are not aware of any evidence that mitigates the content of those statements either in subsequent decisions or the evidence on behalf of the practitioner.

[114] In his reply submission the practitioner, again seeming to misunderstand the charge, submitted that the Tribunal did not have the "underlying paperwork" that shows what law the practitioner supposedly said to Justice Harrison applied. He submitted:

> So the accusation is really that Harrison J said that I said X law applied when his Honour felt Y law applied. Alas for the prosecution case the Court of Appeal held X law applied.

To reiterate, the charge is that the practitioner said what the particulars allege. They do not relate to submissions as to the relevant law, rather to the assertions and

allegations itemised and quoted in the judgment, which are primarily about the Judge and in the context of a recusal application.

[115] In his reply submissions the practitioner further records that he considers this particular is a "breach of double jeopardy" as it accuses him of "saying naughty words about Justice Harrison", which is the subject of charges in LCDT 008/12. This too is rejected. There is some overlap in relation to the factual matters underlying the charges, which warranted ensuring the same Tribunal dealt with all matters. However the charge itself relates to a specific submission that is not part of the 008/12 charges.

Conclusion

[116] We consider the Standards Committee have demonstrated both a prima facie case, and on the balance of probabilities, that the allegations made in the submissions of the practitioner, as recorded in the judgment, were made by the practitioner, alleged discrimination and breach of rights as stated, without foundation.

Particular 1.04 (c) – affirmation without consent

[117] Paragraph (c) of particular 1.04 relates to an affidavit filed by the practitioner in support of the recusal application. It is dated 9 September 2008 and so is dealt with under charges 3 and 4

Particulars 3.13 to 3.19 (and alternatives 4.13 to 4.19): ANZA Distributing (NZ) Ltd (in liquidation) v USG Interiors Pacific Limited (Auckland High Court, CIV 2007-404-00374)

[118] These seven particulars relate to litigation which, as the judgment of Cooper J dated 3 November 2008 records, was commenced in June 2007 by USG who sought an order putting ANZA into liquidation. That was granted on 2 April 2008. Since commencement of the liquidation, by a series of interlocutory applications, some filed in the name of ANZA, some filed in the name of other parties, solicitors acting for a Mr and Mrs Misbin sought various orders which may broadly be described as seeking to have the effect of terminating the liquidation.

[119] Counsel for the Committee noted in closing that the timing of the particulars were prior to 1 August 2008 and so they were more properly dealt with as part of charges 1 and 2, under the 1982 Act. We agree and see no difficulty in treating them that way.

[120] The particulars relevant to this litigation, which are conveniently dealt with together, are as follows:

> 3.13 Following an order that Anza Distributing (NZ) Limited ("Anza") be placed in liquidation, made by Associate Judge Robinson on 2 April 2008, [the practitioner] filed an application on 11 June 2008 seeking leave to file "various proceedings" in the name of the company.
>
> 3.14 He sought to join a new applicant, Mr Misbin. Mr Misbin was neither a director nor a shareholder of Anza, and had no standing to make any of the applications.
>
> 3.15 He filed a memorandum on 19 June 2008 that showed a different intituling, showing a second applicant and a defendant who were not shown in the intituling of the application.
>
> 3.16 The applications made by him were filed as interlocutory applications on the Court's liquidation file, but they were not properly brought as interlocutory applications, because, if they were capable of being brought at all, they were required as a matter of proper procedure to be brought by way of originating application under Part 4 of the High Court Rules.
>
> 3.17 The liquidator's permission should have first been sought to file the applications, not only because of the issue about Anza's status as a purported applicant, but because they were proceedings being commenced in relation to the property of a company in liquidation, and permission was required under s.248(1)(c)(i) of the Companies Act 1993. This demonstrated either ignorance by him of the effect of an order of liquidation, or it amounted to a misrepresentation of his authority.
>
> 3.18 He filed a memorandum dated 3 July 2008 that erroneously maintained that the orders made by Associate Judge Robinson could be challenged by an application for judicial review, whereas the order had been made in open court, so that any challenge could only be by way of an appeal.
>
> 3.19 As a result, his clients were ordered to pay increased costs.

[121] The judgment records at para [13] that the practitioner and Mr Orlov were appointed as counsel by ANZA following the liquidation. A number of applications were recorded as made by Mr Orlov and we are not concerned with them as there is no evidence that the practitioner was involved.

[122] As the Judge noted at para [3], it is axiomatic that since the order made on 2 April 2008, no application whether originating or interlocutory, could have been made on behalf of ANZA without the liquidator's consent. He noted that Mr HA Misbin had no standing to make any applications having been neither a director nor a shareholder of the respondent. He observed that procedural irregularities had added substantially to the costs of what should have been a comparatively straightforward liquidation.

[123] The judgment refers to the subject matter of particular 3.13 at paras [30] - [31]

> [30] … the next document on the file was an application (filed on 11 June) for leave to file "various proceedings" in the name of the company. This document was filed by Mr Deliu in purported reliance upon s 284(1)(a) of the Companies Act. On this document, Ms Misbin made her formal debut in the proceeding, being named as first applicant. Mr Misbin was the second applicant and the only respondents were the liquidators.
>
> [31] The application, again expressed to be an interlocutory application, sought orders on the following terms:
>
> 1. THE First and/or Second Applicants be granted leave and/or orders to bring and/or continue to bring proceedings in the District Court to set aside summary judgment obtained by USG Interiors Pacific Limited, 20th March 2007;
>
> 2. THE First and/or Second Applicants be given leave to continue in the name of ANZA Distributing New Zealand Limited in the proceedings filed in the High Court for Judicial Review (CIV 2007-404-3474);
>
> 3. THE First and/or Second Applicants be given leave to continue or to file the appeal against the decision of Associate Judge Robinson given on 12th March 2008, and all other applications;
>
> 4. THE First and/or Second Applicants be given leave to commence a claim in the name of ANZA Distributing New Zealand Limited against USG Interiors Pacific Limited in various breaches of contract or tort as contained in the affidavit of Harvey Allen Misbin as already filed and to be filed;

[124] The judgment then refers to the subject matter of particular 3.15 at paras [32]:

> [32] Mr Deliu next filed a memorandum dated 19 June 2008. This memorandum was intituled so as to name ANZA as the first applicant, Mr Misbin as the second applicant and USG as the only respondent. No previous document on the file had been so intituled. That memorandum referred to various applications that had previously been filed, asserting:
>
> > All of the above proceedings were filed in anticipation that either the liquidators agreed to the Misbins to bring [sic] the various proceedings, or, in the event that the liquidators were removed.

[125] The third memorandum, dated 3 July, and which is the subject of particular 3.18, is referred to at para [35]:

> … [Mr Deliu] sought to rely on *Nottingham v Registered Securities Ltd In Liquidation)* (1998) 12 PRNZ 625 which he claimed made it plain that a Master's refusal to set aside a summary judgment entered by default, to stay the execution of that judgment and to set aside a subsequently issued bankruptcy notice should proceed by way of "judicial review", rather than appeal. Mr Deliu foreshadowed the filing of a notice of proceeding and statement of claim to "replace the interlocutory application" in which Mr and Mrs Misbin would be the first and second plaintiffs, with ANZA being a proposed third plaintiff "subject to the upcoming leave application hearing".

[126] The Court noted at [36] that the orders were made in open court. Consequently the only appropriate procedure for challenging the decision was by way of appeal to the Court of Appeal.

[127] At [58]:

> Mr Deliu's reliance, at one stage, on the decision in *Nottingham …* as showing that the proper course to follow to challenge Robinson AJ's decision was by way of an application for review, and not an appeal, is a further indication of the inept way these proceedings have been conducted. Since the decision was made in open court there is no doubt that the appropriate course to follow was by way [of] appeal to the Court of Appeal. *Nottingham* is not authority to the contrary. The Court in that case simply held that review was necessary rather than appeal because the decision in question was made in chambers.

[128] Mr Chambers appeared on instructions for the parties represented by Messrs Orlov and Deliu at the hearing of the applications. In the end, he conceded that there were no proper grounds on which the Court could grant the application to remove the liquidators. All other applications were withdrawn or dismissed.

[129] Relevant to the particulars of this charge, the Judge said this at paras [53] to [59]:

> [53] These conclusions deal with the applications on their "merits", such as they are. It is however appropriate to record some further observations about the procedures that have been followed in this case. It will be apparent from the account set out earlier in this judgment that the various applications filed down to the application of 11 June were all misconceived because they named the company as an applicant, without the liquidators' permission. But the problems were more wide ranging than that. All of the applications, including that of 11 June, were filed as interlocutory applications on the Court's liquidation file. They were not

properly brought as interlocutory applications, and should not have been received as such for filing by the Registrar.

[54] Nor of course should they have been filed as interlocutory applications by the applicants' solicitors. Rather, they should have been brought by way of originating application under Part 4 of the High Court Rules, or not brought at all (the purported review of Robinson AJ's decision). And the liquidators' permission should have been sought at the outset in respect of the applications to commence proceedings in the name of ANZA not only because of the issue about ANZA's role as a purported applicant (as with the 7 May application), but because they were proceedings being commenced in relation to the property of a company in liquidation: see s 248(1)(c)(i) of the Companies Act 1993.

[55] With respect to Mr Deliu's memorandum of 19 June the liquidator's permission should have been sought prior to the commencement of any application reliant on that permission being obtained. Similarly, it was quite wrong for there to be any assumption that the liquidators would be removed, justifying the filing of further applications in ANZA's name.

[56] The catalogue of errors does not stop there. Mr Misbin was neither a director nor a shareholder of ANZA, so he had no standing to make any of the applications. As a former director, it may be that Ms Misbin could have taken action to appeal the order placing ANZA in liquidation or for the removal of the liquidators. The appeal however was commenced in the name of the company and it was not until 16 May that an attempt to add Ms Misbin as a party was made. Although Mr Misbin purported to be representing her interests throughout she filed no affidavit or other document from which the Court could safely assume that she was interested in the proceedings and wished them to be pursued. Mr Misbin continued, wrongly, as an applicant throughout.

[57] There was plainly no warrant for the High Court or the Attorney General to be named as parties to any of these applications, and I note generally that the applicants' solicitors appear to think that the names of parties may be added to or subtracted to interlocutory applications at will, notwithstanding the names in which the proceeding has been commenced. This is quite wrong. The proceedings must continue in the names of the original parties unless and until those parties are altered by order of the Court. I should also add that it was quite wrong of the solicitors to purport to bring actions in the name of the company when at no stage prior to the commencement of the liquidation had they been instructed to do so. In the circumstances, unless one assumes ignorance of the effect of the liquidation, that action on their part amounted to a misrepresentation to the Court as to their authority.

[58] Mr Deliu's reliance, at one stage, on the decision in *Nottingham v Registered Securities Limited (In Liquidation)* as showing that the proper course to follow to challenge Robinson AJ's decision was by way of an application for review, and not an appeal, is a further indication of the inept way these proceedings have been conducted. Since the decision was made in open court there is no doubt that the appropriate course to follow was by way of appeal to the Court of Appeal. *Nottingham* is not an authority to the contrary. The Court in that case simply held that review

> was necessary rather than appeal because the decision in question was made in chambers.
>
> [59] It will be apparent from what I have earlier held that the applications were completely lacking in merit. In addition, the criticisms I have felt obliged to make as to the procedural steps taken, some of which, most regrettably, echo concerns expressed by Judge Joyce (but evidently not heeded) in relation to the proceedings in the District Court, give rise to a real concern that the Court's processes have been abused.

[130] Both ANZA and USG sought costs on an indemnity or increased basis against Mr and Mrs Misbin and/or their solicitors. These were the subject of Judgment (No 2) of Cooper J on costs.[41]

[131] The practitioner filed a 42 page submission, plus appendices (which we have), and appeared in person. However Mr Orlov indicated that, if there were to be an award of costs other than against the Misbins, then the award should be made against him and not the practitioner, since it was he who had taken all the important decisions in respect of the conduct of the litigation. The practitioner had only done what Mr Orlov directed. The Judge observed that he -

> was not in a position to go behind that submission although I do observe that counsel are not absolved from their duties to the Court by virtue of the fact that they are pursuing instructions obtained from other counsel.

[132] That said, he gave the practitioner credit for the fact that his 11 June memo was the first occasion on which leave was sought to proceed in the name of the company. In his closing submissions before this Tribunal the practitioner highlighted this observation, asserting that "even where the Judgment/evidence determines I did not breach my duties to the Court I am still guilty!" We understood this latter reference to mean he considered the charges laid in this Tribunal were inconsistent with Cooper J's judgment on costs.

[133] The practitioner also appeared to consider the judgment to be inadequate as evidence because it was only a summary of the issues. He highlighted the Court's reference to his much broader submissions.

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[41] *ANZA Distributing (NZ) Ltd (in liquidation) v USG Interiors Pacific Limited (No 2)* (Auckland, CIV 2007-404-003474) 18 September 2009.

[134] He may have overlooked that in this instance we have the benefit of those submissions in full. They were provided to the Standards Committee following the 8 November 2010 hearing and were produced to the Tribunal by Ms Ollivier. Most relevantly the practitioner set out the work that he personally had done on the file.

[135] The practitioner relevantly indicated that he had assisted Mr Orlov with the following:

(a) The application of 11 June 2008. He submitted (in effect) that he could not be held responsible for its flaws. He did not prepare his own intitulings, the Court could amend the parties under the Rules, and he could not be expected to learn the entire procedural posture of a file simply to file a memorandum or basic application on a colleague's instructions. He saw the error as to parties as the equivalent of a typographical or spelling mistake or omission that did not warrant "a five-figure costs award".

(b) The memorandum of 19 June 2008. The practitioner saw nothing wrong with this "simple and short" memorandum, as to make it so wholly out of alignment with reasonable litigation practice as to subject him to a "five-figure" costs award. He sought to withdraw the judicial review proceedings "without prejudice" until the applications for leave and to remove the liquidators could be heard, or stay the proceedings meantime.

(c) The memorandum of 3 July 2008. The practitioner continued to defend his position in relation to the *Nottingham* judgment by submitting that the judgment demonstrated the Court of Appeal exercised its powers to hear the case even though it ought to have proceeded by way of review by a High Court Judge. He submitted it resulted in no wasted costs and that citing a case in argument that the Judge does not accept cannot be a breach of duty to the Court – it would apply to every lawyer on the losing side of the case.

[136] He submitted to the Court at para [28]:

> … because I was never handling the Misbin case file day-to-day, I cannot be expected to have questioned Mr Orlov (my closest working colleague; or Mr Gates my principal for that matter) as to the propriety of every action he had taken on the file when he asked me to do a minor task for him. I submit that is not only an unreasonable burden to place on a practitioner, but also would cause acrimony and discord in a solicitors' office (which we were working in at the time). I was simply given rudimentary tasks to help him with which I did to the best of my ability under the circumstances, i.e. pressed for time. In my submission that cannot rise to the level of advancing materially and abuse of process or otherwise be a dereliction of duties as there is no basis to find an ulterior motive or purpose. …

[137] He submitted he could not have added substantially to the costs of anyone.

[138] The Court ordered increased costs of $10,320.00 and $10,800.00 to the liquidators and USG respectively, payable by Mr and Mrs Misbin and Mr Orlov jointly and severally.

[139] In his affidavit of 22 February 2013, the practitioner emphasised that this was Mr Orlov's case, and that he was not a commercial litigator. He was uneasy about dealing with the matters but was assured by Mr Orlov they were routine or mundane. He deposed that Mr Orlov dictated the memoranda, he "had a look, the document seemed reasonable" and presumably (and oddly) he signed it over his own name. He had no part in the production of the intituling, said he "helped tidy up the file" with regard to the application for judicial review, and Justice Cooper completely misinterpreted his argument re *Nottingham.*

[140] He considers that he was ultimately exonerated in the September 2009 judgment (where costs were awarded against Mr Orlov but not the practitioner). On the subject of intituling, he refers to a Court of Appeal judgment, not involving Mr Orlov or himself, where the Court refers to the confusion surrounding the proper appellant (ultimately the Department of Corrections). The argument was around which organ of the state should be cited as appellant. It is a very different case from citing persons as plaintiffs who have limited or no relationship to a company that is in liquidation as

representing that company without consent of the liquidator. The difference is clear from the decision of the Court[42]:

> We regard this point as a procedural technicality. There is no suggestion of prejudice to Mr Hall in consequence of the error. Moreover, we accept Mr Lillico's submission that the Solicitor-General has a legitimate interest in the subject matter of this appeal given her wider responsibilities in the administration of criminal justice and the specific role of the Solicitor-General under, for example, s 115A (2) of the SPA. The Solicitor-General or Crown counsel may properly appear on behalf of the Department of Corrections to present the appeal. We amend the initialling to substitute "the Department of Corrections" for "the Solicitor-General"

[141] Even so, the practitioner deposed at para [6(g)] that:

> … mistakes of this nature are often made, but not treated as a big deal, except curiously when it comes to myself and Mr Orlov, which begs the question why.

[142] He deposes that he "successfully defended costs in ANZA".

[143] We find there is sufficient information in the judgments, the submissions of the practitioner as to costs, the affidavit evidence of the practitioner before this Tribunal and his submissions to be satisfied that the facts as set out in the particulars are proved.

Decision on Charge 1

[144] We find the factual elements of each of the particulars of charge 1 proven.

[145] The charge has three elements:

(a) The conduct was incompetent or negligent;

(b) It was conduct in the practitioner's professional capacity;

(c) It was of such a degree or so frequent that;

(i) it tends to bring the profession into disrepute; or alternatively

(ii) it reflects on the practitioner's fitness to practise.

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[42] *Department of Corrections v Hall* [2012] NZCA 309, 3 July 2012 at [19].

[146] We consider the individual instances of conduct could be described as incompetent or negligent conduct, in the ordinary meaning of those terms.

[147] We consider the conduct was all in the practitioner's professional capacity. It was either in the course of, or related to, his representation of clients before the courts.

[148] As for the further elements, we adopt the test in *W v Auckland Standards Committee 3.*[43] Whether the conduct is of such a degree that it tends to bring the profession into disrepute must be determined objectively, taking into account the context in which the relevant conduct occurred. The subjective views of the practitioner, or other parties involved, are irrelevant.[44]

[149] An assessment of the degree of seriousness and/or frequency of the negligence or incompetence is required.[45] Not all instances of negligence or incompetence will attract disciplinary action. A charge under s 112(1)(c) may be established in the absence of deliberate wrongdoing or gross negligence, so long as negligence or incompetence is established to such a degree as to reflect on fitness to practise, or as to tend to bring the profession into disrepute.[46]

[150] Following *W,* we ask whether reasonable members of the public, when informed of all the relevant circumstances, would view the practitioner's conduct as tending to bring the profession into disrepute. To inform this, we consider whether the degree of seriousness and/or frequency of the instances taken together are sufficient to meet the threshold for incompetence.

[151] The practitioner's conduct in relation to the *RL* litigation was in the context of acting as counsel in litigation. More particularly, in his role first as counsel in an important, expert and protective jurisdiction relating to the care of children, and second as counsel invoking the supervisory jurisdiction of the High Court in judicial review of related actions.

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43 *W v Auckland Standards Committee 3* [2012] NZAR 1071 (CA).
44 At [45].
45 At [41].
46 At [43].

[152] At a general level, it seems unnecessary to say that the public would expect those representing people in the Family Court and appeal jurisdictions relating to children and families to understand the jurisdiction and to conduct cases, and make applications and submissions, in a way that best advances their client's interests and the principles of that jurisdiction, including the primary importance of the welfare and interests of the children.

[153] Likewise when invoking the supervisory jurisdiction of the High Court in judicial review, and indeed in any litigation, counsel is expected to conduct that litigation in a way that meets counsel's obligations to the court, and which serves the client's best interests.

[154] That said, this Tribunal has acknowledged that it will be relatively rare for it to find that counsel involved in contested litigation has met the negligence and incompetence criteria in preparing and filing pleadings and appearing at a subsequent hearing.[47] We recognise that counsel must be given latitude arising from the possible range of views about matters such as the viability of the cause of action and the likelihood of success.

[155] We are also mindful that the complexities and pressures of practise make a "counsel of perfection" unrealistic. The judgement calls behind decisions to file material that is determined to be irrelevant or inadmissible are difficult to assess or second guess. Normally such actions will have consequences in costs. However there will be instances where the pleadings and/or conduct of the case are objectively so egregiously flawed or unlikely to succeed that disciplinary intervention is warranted.

[156] In terms of seriousness, the submissions made to the Court on recusal went well beyond those that would be expected where issues that might necessitate recusal arise. They were unacceptable in both content and tone. The allegations of racism, and prejudice and partiality on the part of the Judge against counsel with a foreign-sounding name, are particularly concerning.

[157] These were serious and unsubstantiated allegations made in open court. They risked undermining the position of the Judge and accordingly confidence in the court

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[47] *Wellington Standards Committee 2 v Lagolago* [2015] NZLCDT 25 at [85]-[88].

processes and the administration of justice. This is not conduct that is expected from a member of the profession. It does not meet the practitioner's obligations as an officer of the court. It would diminish the public's view of the profession.

[158] In our view, objective, informed members of the public would say that the making of such self-centred, exaggerated and extreme submissions in open court in the circumstances would bring the profession into disrepute. Members of the public would not expect a member of the profession to risk undermining the dignity of the court and public confidence in the administration of justice in this way.

[159] There is only one such instance of this conduct in these set of charges. So while serious, it is not repeated. A pattern of such behaviour, should it be demonstrated, might also reflect on the practitioner's fitness to practise.

[160] The Full Court in *Orlov* noted that similar allegations were very serious.[48]

[161] We consider the practitioner was also out of line to allege in the circumstances that the Judge had breached his "international human rights" without any foundation and again in open court.

[162] As to the first particular for *RL*, the practitioner argued for the parents to represent their children, when the parents had previously been found by the Family Court to be unfit to have the care of their children. This was plainly an untenable argument to make, and not one that members of the public would expect from a competent practitioner. The Judge rightly observed that even a passing familiarity with the Children, Young Persons and their Families Act 1989 should have been sufficient for the practitioner not to have made such a misconceived submission.

[163] Similarly, the application to remove the litigation guardian was also without merit, and no reasonable basis for it is apparent or has been raised. It was an incompetent application.

[164] The "misconceived and hyperbolic" submission itself demonstrated that the practitioner failed to recognise that this was a proceeding where the focus was on the welfare of the children, not on the parents or historical grievances.

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[48] *Orlov* n5 at [145], [157].

[165] By itself it could be seen as a lapse in judgement, and not the appropriate action of an officer of the court. However we are satisfied that an objective, informed lay person would consider that, combined with other like conduct, it could meet the test of incompetence of such a degree as to reflect on the practitioner's fitness to practise or as to tend to bring the profession into disrepute.

[166] In relation to the *ANZA* case (particulars *3.13 to 3.19*), in some respects the practitioner's defence was more egregious than his offending. The import of the particulars is that he made irregular applications, including attempting to join Mr Mishbin who lacked any standing, filing documents with different parties named who were not joined, interlocutory applications that should have been brought by way of originating application, and did nothing about obtaining the liquidator's permission to proceed. His response is that it wasn't his fault – he was not expert in the area and just signed the documents put in front of him. This is an extraordinary admission. As the Court noted, counsel are not absolved from their duties to the Court by virtue of the fact that they are pursuing instructions obtained from other counsel. Lack of experience, lack of supervision and lack of time are good reasons for declining to accept instructions. Neither the client, the court nor the public is served when counsel are unable to competently deal with the matters at hand and what's more, in this case, even recognise the significance of the steps being taken.

[167] While a good deal of the responsibility for this must lie with Mr Orlov, the practitioner holds to the argument that he is blameless, and that Cooper J found him so. This is disappointing as, given the time that has passed since the conduct occurred and the experience the practitioner has obtained since, we would hope to see a degree of insight into the nature and causes of the behaviour the subject of the charges. We do not accept his exculpatory submissions.

[168] We consider that informed lay persons would not expect this sort of behaviour from a member of the profession. It may speak of a failure of supervision and judgement but however the behaviour arose we consider it to be sufficiently serious to bring the profession into disrepute in the eyes of the informed lay person.

[169] In terms of frequency, we are considering effectively five examples of conduct arising from one case and seven from another, over a very short time span. Twelve instances of potential incompetence in two cases over such a short period is alarming.

[170] One of those particulars, the unsubstantiated submissions made in the *RL* recusal application alleging discrimination based on a dislike of counsel or counsel's nationality, and partiality on the basis of race, we consider to be very serious. The fact they were made in court, as opposed to, for example, the confidential processes of the Judicial Conduct Commissioner, is of some significance. They were public assertions under the cloak of the privilege of the courtroom. The Judge had to deal with them in a public judgment.

[171] We consider that the twelve instances taken together, relating to two proceedings and arising over a short period, together with the seriousness of the alleged discrimination submissions, meet the test required to find charge 1 proved.

[172] Accordingly we find charge 1 proved.

Charge 3 – negligence or incompetence (alternative charge 4 – unsatisfactory conduct) (2006 Act)

[173] Charge 3 alleges negligence or incompetence in the practitioner's professional capacity under s 241(c) of the Act being of such a degree and/or so frequent as to reflect upon his fitness to practise and/or to bring the legal profession into disrepute. This is the equivalent of charge 1, but under the 2006 Act. It applies to conduct after 1 August 2008.

[174] Twenty-one particulars are alleged, focusing on the practitioner's actions in five cases from August 2008 to February 2009.

[175] In the alternative, charge 4 asserts the same particulars give rise to unsatisfactory conduct under ss 12(a) and 241(b) of the Act.

[176] Section 241(b) and (c) provides:

> If the Disciplinary Tribunal, after hearing any charge against a person who is a practitioner or former practitioner or an employee or former employee of a practitioner or incorporated firm, is satisfied that it has been proved on the balance of probabilities that the person–
>
> …
>
> (b) has been guilty of unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct; or
>
> (c) has been guilty of negligence or incompetence in his or her professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute; or
>
> …
>
> it may, if it thinks fit, make any 1 or more of the orders authorised by section 242.

Particular 3.01/4.01 – Berg v Franix Construction Ltd (Auckland High Court, CIV 2008-404-3421)

[177] This particular reads:

> In a case concerning a failure to annex documents to a payment claim, as required by s 20(3) of the Construction Contracts Act 2002, on 23 September 2008 he filed voluminous and largely irrelevant written submissions on other points, which caused the Judge who heard the appeal to refuse his successful clients costs.

Evidence

[178] The judgment of Wylie J records the relevant facts as follows:

> [17] …. Detailed submissions were filed by counsel then retained on 22 August 2008. However, the appellant then changed his counsel, and belatedly on 23 September 2008, the day before the hearing, some 76 pages of supplementary submissions and materials were filed by Mr Deliu on behalf of the appellant. Further, when the hearing commenced this morning, a further set of supplementary submissions was filed by Mr Deliu.
>
> [19] In the event, I have concluded that in very large part, the supplementary submissions filed by Mr Deliu were irrelevant, and that they contained material of little, if any, assistance to the Court.
>
> [20] Notwithstanding the wide ranging submissions presented by Mr Deliu, in my view this case be approached on a relatively straightforward basis.
>
> …

> [36] Nor was the point raised in the voluminous written submissions filed on behalf of the appellant. It was touched on by Mr Deliu in oral submissions and I requested that both counsel should consider the issue in more detail over the luncheon adjournment.
>
> …
>
> [45] The conclusion I have reached makes it unnecessary to deal with the host of other arguments raised by Mr Deliu for the appellant. As I have already indicated, they were, in my view, largely irrelevant.
>
> …
>
> [48] Normally, of course, costs follow the event and an award will be made in favour of the successful party. I have, however, decided in this case that that course is not appropriate. First, the documents filed either by or on behalf of the appellant are in many respects obtuse. They do not focus on the key issue in this case. Secondly, the submissions were filed very late, and that fact has undoubtedly put the respondent to some difficulty and expense.

[179] The practitioner makes a one paragraph comment in respect of this charge in his affidavit of 4 September 2015. He deposes that the Judge does not analyse why his submissions were irrelevant. Nor does the Judge record that the practitioner received instructions the day before the hearing "… and had literally less than a day to repair the poor job that previous counsel … had done; which I did by winning the appeal".

[180] He had more to say in his affidavit of 22 February 2013:

> 7. The next case is *Berg.*
>
> a. This was an appeal of a summary judgment decision in a construction contracts context. I literally got the brief the afternoon before the hearing. Mr Chambers has been conducting it but Mr Orlov was concerned that he had not done a good job and wanted me to take it over. I literally had no construction contracts knowledge, but am an excellent procedural lawyer so when I read the large file I decided to approach it from a natural justice viewpoint. I could not seek an adjournment because the client was also in the bankruptcy list the next day so if the appeal did not succeed then he would likely be bankrupted. The instructions were firm to press ahead.
>
> b. Counsel on the other side Mr Ropati was experienced in this area. So, I was trying to win an appeal in an area of law I knew nothing about really and indeed attacking a summary judgment decision. Things were looking grim, frankly, but there was no way I was

> going to lose because in reading the file both the night before and indeed on the day I noticed a number of arguable breaches of due process.
>
> c. Ultimately, one of them succeeded based in part on my application of the legislation. I was thus able to defeat experienced counsel trying to uphold a summary judgment decision and grasp the law better than him on less than 24 hours notice. As I have said, the problem is not that I am incompetent it is that I am too competent (and admittedly perhaps perceived as arrogant about it, but in my culture when you excel at something it is not shameful to be proud of it).
>
> d. Yes Justice Wylie may not have liked some of my arguments, but with respect so what? In every case a Judge does not agree with at least one set of arguments, I do not believe 50% of lawyers are incompetent. In the end I won a case that was virtually unwinnable and saved my client from bankruptcy. I am proud of that as one of countless time's I have made a positive difference in people's lives and that is why I fight so hard because I believe in justice.

Submissions for the Standards Committee

[181] Counsel for the Committee submitted that the fact the practitioner's client was successful does not reflect any credit on the practitioner who missed the key point in voluminous written material filed before the hearing, which the Judge described as irrelevant.

[182] Counsel also pointed to the practitioner's evidence about the matter, which boiled down to the fact that it wasn't his area of expertise, he received the brief the day before the hearing, and despite everything he "won".

[183] Counsel also noted that this is an example of how expert evidence could not have been given about this matter in the absence of the ability to inspect the file. Because of the approach of the practitioner, the Tribunal is left with the comments of the Judge and the response of the practitioner.

Submissions for the practitioner

[184] The practitioner's submission emphasised the obligation on the Committee to prove its case, and for the admission of any 'evidence' under s 239 to be subject to the rules of natural justice. He observed ironically that "Even when I win I am guilty!"

Discussion

[185] The relevant facts in relation to this particular, and our consideration of them are, in summary –

(a) The practitioner belatedly filed 76 pages of supplementary submissions and material the day before the hearing and following a change of counsel. This is recorded in the judgment, and we see no reason why it would not be correct. The practitioner has not denied it. He has confirmed that he did file submissions the day prior to the hearing but says that was when he received the brief from Mr Orlov due to a change in counsel. The Judge noted that the practitioner's firm had been on the record as the appellants solicitors since 1 August, some 7 weeks.

(b) The judgment records a further set of supplementary submissions were filed by the practitioner the day of the hearing. Again, there is no reason to doubt this fact and it was not denied.

(c) The Court concluded the submissions were largely irrelevant and of no assistance. That was the Court's opinion. The practitioner points out that it is not explained. We do not have the submissions so we are not able to assess whether we agree that they meet that description nor whether and how in particular they might be considered indicative of negligence, incompetence or conduct unbecoming of a practitioner. However those submissions would likely be on the court file and so available to the practitioner if he wished to produce them to counter the prima facie case against him.

(d) We do know from the judgment, and can accept in the circumstances, that the Court determined the case on a very simple point, which it said was not referred to in any of the practitioner's written material. The Judge referred to material filed on behalf of the appellant as "obtuse", and the submissions filed very late were irrelevant and put the respondent to difficulty and expense. That was the view of the Court and, as a result, the practitioner's client did not receive the usual award of costs.

[186] We do not consider any question of a want of natural justice arises. The use by the Committee of the extracts from the judgments in support of these charges has been well signalled, contentious and debated.[49]

[187] Counsel for the Committee submits it may rely on the judgment as a piece of evidence in support of a prima facie case; in particular that the submissions were voluminous and irrelevant – they did not refer to the point on which the appellant was ultimately successful. The practitioner's client was deprived of costs as a result of the way the practitioner conducted the case.

[188] Can we accept the Court's view without more? It is clear that the practitioner could have accessed the submissions from the court file at any time. He argues it is not his case to prove. There is some force in the Committee's submission that the practitioner has blocked the Committee's ability to access the submissions through the access proceedings. On the other hand, once the judicial review proceedings were adjourned to enable the Tribunal to adjudicate on the charges first, it was possibly open to the Committee to revert to Toogood J and seek a review of his ruling in light of the changed circumstances. However that may or may not have resulted in the Committee accessing the court file and thus the submissions.

[189] The Committee submits, and we agree, that in the absence of any other evidence (as here) in a special jurisdiction where it is not open to the practitioner to sit back and engage in tactical manoeuvres it is a piece of evidence the Committee may point to, and the Tribunal may take into account, in support of the charge being proven on its merits. This is a jurisdiction where the Tribunal endeavours to arrive at the truth. The nature of the hearing and the purpose of it is described in the judgment of Hardie Boys J in *Auckland District Law Society v Leary* as follows:

> It is to be remembered that this is not a criminal prosecution. It is a special jurisdiction having the principal protective purpose I have already discussed. That purpose requires that there be a full investigation of allegations of misconduct, and that the Court should be slow to adopt a course which may inhibit such investigation. The interests of justice extend far beyond the interest of the practitioner. This I perceive to be the basis for what was said … in *In re C (A Solicitor)* …, that a practitioner against whom a prima facie case is made out must be prepared to answer the charge, and may not simply rely on a submission that it has not been proven beyond reasonable doubt. I also

[49] Eg *Deliu v National Standards Committee of the New Zealand Law Society* [2015] NZCA 399, [33] – [36].

refer to this passage from … *R v Veron; ex parte Law Society of New South Wales* …:

> From the earliest times, and as far back as the recollection of the individual judges of the Court goes, disciplinary proceedings in this jurisdiction in this State have always been conducted upon affidavit evidence and not otherwise. They are not conducted as if the Law Society … was a prosecutor in a criminal cause or as if we were engaged upon a trial of civil issues at *nisi prius*. The jurisdiction is a special one and it is not open to the respondent when called upon to show cause, as an officer of the Court, to lie by and engage in a battle of tactics, as was the case here, and endeavour to meet the charge by mere argument.

The principle that underlies these statements in my view means that I should adopt the course that will best ensure that the truth is arrived at.[50]

[190] In the circumstances we consider the Committee has demonstrated a scenario that requires an answer. We do not consider that the practitioner is able to hide behind the order of the Court when he is entitled to obtain the relevant material that would assist the Tribunal to assess the relevance, competence or otherwise of his submissions. His failure to do so should not work to his advantage. That would undermine the purpose of the Act, and this Tribunal, in seeking to ensure the public is protected.

[191] We consider there is a prima facie case in support of the particular and, in the absence of the relevant material which we are satisfied is within the ability of the practitioner to provide, we consider we can accept the facts as proved to the requisite standard for the purpose of assessing the overall charge.

Particulars 3.02 – 3.06 (and alternatives 4.02 – 4.06): Chopra v The Chief Executive of the Department of Labour (Auckland High Court, CIV 2009-404-911)

[192] The practitioner acted for the plaintiffs in a proceeding which, according to the first of three judgments relied on by the Committee, pleaded allegations against the Chief Executive on judicial review grounds as well as the civil torts of breach of statutory duty and unlawful interference with contractual relations. An allegation of breach of the New Zealand Bill of Rights Act 1990 was also pleaded. The issue (according to the second judgment) was whether a visa officer, acting under s 14(c) of

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[50] *Auckland District Law Society v Leary* (M1471/84, Auckland Registry) 12 November 1985, Hardie Boys J.

the Immigration Act 1987, was required to issue a returning resident's visa to an applicant if that applicant is the holder of a valid residence permit.

[193] The five particulars relating to this part of the charge are as follows:

> 3.02 He drafted, filed and relied on an incoherent statement of claim, containing a "barrage of allegations" in a "scatter-gun approach".
>
> 3.03 He drafted, filed and relied on affidavits that contained irrelevant and inadmissible contents, and that failed to exhibit the decision under challenge.
>
> 3.04 In breach of Rules 5.2 and 13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Conduct and Client Care Rules"), he attempted to evade responsibility for the affidavits by attributing them to his clients.
>
> 3.05 He argued for relief that plainly would not be granted by the Court.
>
> 3.06 His incompetence resulted in a costs order of $10,000 and disbursements of $1,675.67 against his client.

[194] Again we note that Counsel for the Committee submitted that, while the conduct of itself in each particular might not be sufficient to prove incompetence or negligence, it should be considered together with the other matters where the relevant facts are proved. We agree with that approach.

Evidence

[195] The primary evidence is the judgments of the Court in this matter. The decision of Wylie J on 30 June 2009 contains the following observations:

> [25] The pleadings filed on Mr Chopra's behalf in this proceeding are far from clear. They are under the Judicature Amendment Act 1972 and they comprise a potpourri of alleged administrative law errors. The prayer for relief seeks a direction that Immigration New Zealand reconsider the decision to decline the returning resident's visa, and a declaration that Mr Chopra is entitled to a returning resident's visa. The various administrative law allegations are run together with assertions of breach of statutory duty, breach of the New Zealand Bill of Rights Act, unlawful interference with contractual relations, and tortious breach of statutory duty. In respect of some of these, damages are claimed.
>
> [26] The judicial review part of the proceedings and the damages claim are being dealt with separately pursuant to an earlier order of the Court.

[27] It is possible to discern from the pleadings that Mr Chopra's base complaint is that the immigration officer considering the matter should have issued him with a returning resident's visa because, at the time of application, he was the holder of a residence permit. The pleadings, however, are at best rough and ready. They do not deal with the base allegations in any particularly coherent way. The Judicature Amendment Act 1972 details the procedure to be followed when an application for review is made – s 9. The Courts are properly critical of proceedings which raise a "barrage of allegations" in a "scatter-gun approach" (to adopt the language of Gendall J in *Walsh v Pharmaceutical Management Agency* HC WN CIV 2007-485-1386 3 April 2008). The judicial review proceedings in the present case can properly be described in those terms.

[28] The plaintiffs' affidavits are even more unsatisfactory. They comprise a mixture of the inadmissible and the irrelevant. Inexplicably, the affidavits do not even exhibit the decision made on 25 November 2008 which is the subject of the application for review. Were it not for the fact that a comprehensive affidavit has been filed on behalf of the defendant, that decision would not be before the Court. Indeed, the only coherent record of what occurred is that contained in Mr Wilson's affidavit.

[29] Counsel for the plaintiff sought to avoid responsibility for the affidavits by asserting that his client had filed them directly. That assertion is, at least in part, patently incorrect. Two of the affidavits are filed by a barrister who shares chambers with the plaintiffs' counsel. Moreover, counsel are responsible for the papers filed in Court and, frankly, the Court is entitled to expect that papers filed will comply with the relevant rules, and the Evidence Act, and that they will fully and fairly inform the Court and the defendant about what allegations are being made and why. If counsel do not fulfil their responsibilities, then they must expect either that their pleadings will be struck out, or that they will be required to provide further and better particulars, and/or that such affidavits as are filed will not be read. There is also a strong possibility of costs.

[30] Ms Casey charitably elected not to take issue with the pleadings or the affidavits so I will take the matters I have raised no further in this case.

[31] Despite the plaintiffs' counsel's determined endeavours to obfuscate matters, in essence, the plaintiffs' case was remarkably simple. It is said that Mr Chopra had a residence permit granted to him on 8 November 2008. That residence permit had not been revoked by the Minister as at the 25 November 2008 and Mr Wilson, as the visa officer dealing with Mr Chopra's application for a returning resident's visa, was obliged, under s 14C(2) of the Act, to issue Mr Chopra with a returning resident's visa.

…

[44] I also record that, in any event, I would not have been prepared to grant to Mr Chopra the relief sought on his behalf. He was seeking, in effect, an order that Immigration New Zealand grant him a returning resident's visa. Such an order would have the effect of placing Mr Chopra in a stronger position than he could possibly be entitled to. His indefinite returning resident's visa was cancelled by operation of the Act on 5 May

> 2008. If the Court were to now order the issue of a returning resident's visa, then Mr Chopra would be entitled under s 18 to a residence permit on his return in this country, subject only to s 7. While s 7(3)(a)(i) is on its face discretionary, it must be doubtful whether Immigration New Zealand would refuse to issue a permit under s 18 when the High Court had ordered the issue of the visa upon which the permit would be based. Mr Chopra would thus be entitled to a residence permit issued on the basis of a Court ordered visa. Revocation of either the permit, or the visa would not be available under s 20 or 20A of the Act because none of the specified grounds would be available. In effect, the order sought would have the effect of overturning the deportation order made by the Minister, and conferring on Mr Chopra the right to remain in New Zealand despite the deportation order made against him.

[196] The judgment as to costs contains the following:

> [12] I accept that the argument advanced for the Chopras was not totally devoid of merit. However that does not mean that a costs award is inappropriate. Further, as I noted in the substantive decision, the papers filed on the Chopras' behalf were unsatisfactory, and the relief sought could never have been obtained.

[197] To this evidence we can add what the practitioner said to the National Standards Committee at the 8 November 2010 hearing, and evidence in his affidavits of 22 February 2013 and 4 September 2015.

3.02: 'barrage of allegations' in a 'scattergun approach'.

[198] As noted above, Wylie J described the pleadings at [25] as follows:

> The various administrative law allegations are run together with assertions of breach of statutory duty, breach of the New Zealand Bill of Rights Act, unlawful interference with contractual relations, and tortious breach of statutory duty. In respect of some of these, damages are claimed.

[199] A similar description of the proceedings appears in the judgment of Duffy J. We are content to accept that is a fair description of the nature of the pleadings, which we have not seen.

[200] The practitioner gave a quite lengthy explanation of his approach to the Standards Committee. He described it (in part) as follows:

> Now I can't predict in advance exactly which one the Judge will like so I have to put in everything that I think is even remotely arguable and then argue them and then let the judge decide which … are successful and which are unsuccessful.

[201] He considered it quite a simple point which he wasn't trying to obfuscate, and while Justice Wylie didn't like any of his arguments, the practitioner asserted, and continues to assert, that the Judge got it wrong.

[202] The practitioner accepted that his approach was to plead all available grounds to ensure he had covered the ones that might ultimately find favour with the Court. In support of his approach he referred to an extract from a Judicial Review text which he submitted recommended that lawyers plead as many grounds as possible for that reason.[51] We accept there is the flavour of that in the paragraph referred to, but consider the text is not as expansive as the practitioner submits. Rather it encourages some focus to the pleadings and cautions against the possible distraction of too many grounds:

> **Choosing grounds of review**
>
> 11.06 The overlapping of grounds of judicial review creates a situation rather like the outside of a complex building. An observer can walk around the outside at such a distance as to be able to see the whole of the building visible from each angle as the observer walks around it. As the observer walks, the building changes its appearance. From some particular views it will look more pleasing and understandable to the observer's eye and brain. The particularly pleasing and understandable views will become more and then less apparent as the observer walks. The art of choosing grounds of review is to identify the grounds that are the most pleasing and understandable on the facts and focus on them. Other grounds which are less pleasing and understandable but still somewhat pleasing and understandable can be added since these may well be the ones the judge finds most pleasing, but adding these grounds can be distracting.

[203] The practitioner also refers to comments of the Chief Justice made in the course of an unrelated hearing in the Supreme Court in which the practitioner appeared as counsel.[52] The exchange was recorded in the transcript as follows:

> Tipping J [to practitioner]: You seem to me to have been looking through the index of a possible judicial review textbook and thinking of all the possible heads you can bring the same point under.
>
> Elias CJ: Well, I've done that many times.
>
> Tipping J: That's a very candid observation.

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[51] GDS Taylor *Judicial Review: A New Zealand Perspective* (LexisNexis, Wellington) 11.06.

[52] *Huang v Minister of Immigration* SC 74/2008; [2009] NZSC 77, hearing on 29 April 2009.

[204] The practitioner submits that if the Chief Justice can do it (assuming this amounts to a 'scattergun approach'), it cannot be evidence of negligence or incompetence on his part. Counsel for the Committee submits it is a matter of degree.

[205] We agree, it is a matter of degree. All we have is the description of the pleadings in the two judgments, together with the practitioner's own description of his approach. These are consistent with the description of a 'scattergun' approach to the pleadings. It is nevertheless not feasible to assess the degree to which the conduct alleged exceeded the bounds of competence etc without the pleadings. That said, we consider that the opinion of the Court on the matter is sufficient to raise a prima facie case for satisfying the alleged facts. The practitioner could have provided us with the pleadings. As discussed earlier, given our special jurisdiction, we consider we can accept that description in the absence of a contradiction by evidence which was within the practitioner's ability to provide, and given the practitioner actively opposed the information being made available to the Standards Committee.

[206] There is a prima facie case to support these particulars. In the absence of further evidence which is within the power of the practitioner, we consider the facts to be proved to the requisite standard.

3.03 and 3.04: he drafted, filed and relied on affidavits that contained irrelevant and inadmissible contents, and that failed to exhibit the decision under challenge, and he attempted to evade responsibility for the affidavits by attributing them to his clients.

Evidence

[207] See paragraphs [28] and [29] of Wylie J's judgment cited earlier.

[208] The practitioner deposes in his affidavit of 4 September 2015 that his client's wife filed her own affidavit and that there was no need for him to produce the decision which was the subject of his application for review because the Crown did. He annexes an email dated 8 November 2008 to Mary Ollivier, sent after the hearing before the Standards Committee that day, which refers to the "limited evidence" filed by the plaintiff in support of urgency. A minute of Potter J dated 28 May 2009 timetabling the remaining evidence was provided. This noted that evidence had been filed for the plaintiff and the Crown assumed it was complete. However time was

provided for further evidence from the plaintiff, if needed, before the Crown was to file its evidence.

Discussion

[209] From the practitioner's evidence in this Tribunal it seems clear that the original affidavit on behalf of the plaintiff, or one addressing the substantive merits of the proceeding which was anticipated before the Crown evidence, ought to have exhibited the decision which was the subject of review. We see this as an unfortunate omission, of itself not particularly serious as the decision-maker in judicial review proceedings is expected to file evidence to describe the decision-making process and reasons for the decision.[53]

[210] With respect to the affidavits, the practitioner's first submission in defence was that the Judge should not have criticised him because the Judge did not know that the practitioner had not in fact drafted the affidavit. He explained to the Standards Committee on 8 November 2010, and deposed in part in his affidavit of 22 February 2013, that his client (the wife) sent him the affidavit which exhibited her husband's affidavit (from India) and he received both by email and filed them in support of an urgent hearing. He emphasised it was not an affidavit on the merits of the judicial review, but we do not see that as especially relevant. He said he told his client not to proceed in this way, apparently recognising that the affidavit contained irrelevant and inadmissible information, but was "overruled"[54] (by his client). He asserted on 8 November 2010 that, although he was running the litigation, he was "not responsible for people's affidavits". Indeed he seemed to consider he had no responsibility for them: "How could I be responsible in fact I'm not supposed to put in peoples' evidence. I'm supposed to be independent. I'm supposed to put in submissions"[55].

[211] We agree with counsel for the Committee. Where the practitioner's client prepares an affidavit, he tells her not to proceed this way and is "overruled', the practitioner by then filing the affidavit with irrelevant and inadmissible evidence is breaching his duty to the Court. That is the import of Rules 5.2 and 13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008.

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53 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, para [105].
54 Practitioner's affidavit of 22 February 2013 para 8[c].
55 Exhibit OL10, Transcript p 31.

[212] Again, we do not have the affidavit to assess how egregious was the breach. We know the Judge commented on it in both the merits judgment and the judgment on costs. We therefore consider there is sufficient evidence to find a prima facie case and that both the particulars are proved as matters of fact.

3.05: He argued for relief that plainly would not be granted by the court

[213] This is explained by the Court in its judgment at para [44] quoted above. We agree that the remedy sought, as explained, was beyond the jurisdiction of the Court on judicial review.

[214] It was also mentioned in the costs judgment when referring to criticism of the papers filed on the plaintiffs' behalf.[56]

[215] The practitioner disagrees that the remedy pleaded was unavailable, but does not give a coherent response to this point.

[216] Applying the reasoning referred to earlier, we accept as proved (both prima facie and to the required standard) that an unavailable remedy was pleaded as a matter of fact.

3.06: Costs of $10,000.00 plus disbursements of $1,675.67 were ordered against his client as a result of his incompetence.

[217] The evidence is the costs decision of Wylie J.[57]

[218] We are not satisfied that the costs order can be said to be the result of the practitioner's incompetence. His clients lost their case. Costs against them would normally follow. The Chief Executive was entitled to and did obtain costs on a 2B basis. The practitioner made an argument for not being subject to costs which was unsuccessful. However we cannot say it was incompetent or that the costs order resulted from his incompetence. While the Judge referred to the papers filed as "unsatisfactory" and the relief sought as unobtainable, he also said the argument advanced was not totally devoid of merit. We are not satisfied that the inference can

[56] *Chopra v Chief Executive of the Department of Labour* (CIV 2009-404-000911, 14 August 2009), Wylie J para [12].
[57] Idem.

be drawn that, had the case been competently presented, an order for costs would not have been made.

[219] Particular 3.06 is not proved.

Particulars 3.07 – 3.12 (and alternatives 4.07 – 4.12):* C v C *(Auckland High Court, CIV 2008-404-2469)

[220] The particulars relating to this matter are as follows:

> 3.07 On 13 August 2008, he filed an "omnibus" interlocutory application, which was later directed by Potter J to be the subject of three separate applications, with supporting affidavits. On 22 August 2008, he unnecessarily sought clarification of the directions. He failed to comply with the directions. As a result, his client's application was not permitted.
>
> 3.08 His arguments about jurisdiction and service were misconceived because they were premised on errors shown in the address for service in documents that he had filed.
>
> 3.09 In breach of Rule 13.8 of the Conduct and Client Care Rules, without sufficient foundation, he made allegations of unethical conduct by lawyers for the opposing party that served to increase the prospects of a costs award being made against his client.
>
> 3.10 He failed to appreciate that the case was about a discretionary decision that could not engage the principles relied on by him.
>
> 3.11 He argued for costs to be ordered against opposing lawyers when there was no basis for such an order to be made, and which was retaliatory.
>
> 3.12 As a result, his clients were exposed to an order to pay increased or indemnity costs.

[221] Ms C was a client of Mr Orlov and the practitioner (as counsel). On 16 July 2008 Harrison J dismissed Ms C's appeal from a decision of the Family Court, dismissing her application for interim maintenance under s 82 of the Family Proceedings Act 1980. That decision is relevant to the LCDT 008/12 charges. These particulars relate to the next stage in that litigation, in particular two judgments of Hugh Williams J.

[222] Following the judgment of 16 July, the practitioner filed an 'omnibus' application seeking orders recusing Harrison J from dealing with any matter of costs,

for leave to appeal the 16 July judgment to the Court of Appeal, and to permit cross-examination in relation to any application for costs.

[223] In a judgment dated 19 November 2008, Hugh Williams J dealt with the interlocutory application for leave to appeal to the Court of Appeal. It was argued by Mr Orlov.

[224] Also determined was a cross application by Mr C that the other interlocutory applications brought on behalf of Ms C be stayed. This was based on the failure by the practitioner on behalf of his client to comply with directions made earlier by Potter J in relation to those applications.

[225] The second judgment of Hugh Williams J was dated 3 April 2009. It dealt with an application by Mr C for indemnity costs against Mrs C and her legal advisors.

[226] The Standards Committee rely in particular on paragraphs [95] to [109] from Hugh Williams J's judgment of 3 April:

> [95] A further aspect of [the orderly disposal of litigation] relates to the way in which submissions were prepared and presented. Some of the flavour can be gleaned from the summary earlier appearing but, additionally, there appears to be an habitual disproportionality in the approach of Messrs Deliu and Orlov to this and other proceedings.
>
> [96] Reduced to its essentials, however important to Ms C, this was a commonplace application to the Family Court for the exercise of a discretion in her favour to award her interim maintenance for a period. The application failed because the evidence was insufficient to support it. That arose either because Ms C did not have the requisite evidence, or those responsible for drafting her papers failed to put it before the Court.
>
> [97] As earlier mentioned, an appeal against that decision – even if brought for the underlying reason now suggested – always had low probability of achieving the result Ms C sought. Dispassionate professional evaluation of the Family Court judgment would have shown that.
>
> [98] Further, as also mentioned, Ms C's application for leave to appeal was misguided and had no realistic chance of success, again something that disinterested professional assessment and advice would have shown.
>
> [99] It appears that pleadings and submissions filed by Messrs Orlov and Deliu commonly seek to invoke International Conventions on human rights, the rights of children and women and civil and political rights. They frequently put before the Court elevated declarations from international conferences on such matters as counsel's rights and

obligations and *ex cathedra* speeches by Judges and others in high places. Frequent recourse is made to the New Zealand Bill of Rights Act 1990, especially s 27. The pleadings and submissions filed in this case reflect that approach.

[100] This is not, as they claim – and claimed in this case – fearless advocacy in support of their clients' position. It is more a tribute to counsel's search engines than to their professional judgment. Here, it is simply a failure to recognise that what was at issue – a discretionary decision that inadequate evidence had been adduced to justify the making of an interim maintenance order under a domestic statute. This came nowhere near engaging the elevated declarations of principles emanating from the sources summarised.

[101] But, once invoked, they needed to be dealt with by Mr Knight – and the necessity so to do affected the temper of his submissions. Then they needed to be dealt with by the Court.

[102] Such a disproportionate approach to this litigation was unhelpful, to put it at its mildest, in delineating the issues, focusing on them and achieving a result.

…

[106] As far as Ms C is concerned, she has now confirmed that all the actions taken by her legal advisers resulted from her instructions. She must therefore be taken to have knowingly exposed herself to an order for costs against her resulting from the failure of her appeal and her application for leave to appeal. Her exposure is that of a normal unsuccessful litigant for the period during the progress of her proceeding in this Court when she may not have been legally aided. Even now, it is difficult to calculate whether that applies to any of the periods since 5 May 2008, the date on which her appeal was lodged.

[107] Any order for costs during any part of the period since that date when she has been legally aided is limited by the requirement that any order against her must be reasonable in all the circumstances "including the means of all the parties and their conduct in connection with the dispute" and orders for costs against a legally aided person are debarred in a civil proceeding unless the Court is satisfied there are "exceptional" circumstances, in the determination of which the statutory criteria must be considered (Legal Services Act 2000 s 40).

[108] In this case, application of those principles to the circumstances is relatively straightforward since the court has already taken a view that, even if the bringing of the appeal to hearing might – just – have been merited, no action in this Court following dismissal of the appeal on 16 July 2008 could have been justified (apart from any argument on Mr C's costs application against his former wife pursuant to the leave reserved).

[109] The Court therefore holds that, in this case, the cut-off date is 16 July 2008. Subject to the costs question later detailed, all costs reasonably incurred by Mr C after that date are potentially recoverable from Ms C or

> from counsel. (Despite their names appearing on the various documents filed, Ms C's solicitors do not appear to have had any involvement of any substance in the carriage of these proceedings and accordingly the application for costs against them is dismissed).

[227] As recorded in paragraph [95] of the judgment, it also included a lengthy summary of the way in which submissions were prepared and presented, which we have considered.

[228] There is evidence from the practitioner in the record. He gave a lengthy explanation to the Standards Committee in November 2010. He referred to it in his affidavits of 22 February 2013 and 4 September 2015. We refer to this as we consider the particulars

Particular 3.07: the 'Omnibus' application for directions

Evidence

[229] It is clear from the record that the practitioner filed an application which contained what amounted to three separate interlocutory applications. He accepts that he did. Directions were given by Potter J and it appears from the November transcript that the practitioner accepts that he did not comply with them, but argued that it did not cause prejudice.

[230] The Standards Committee point to the judgment of Hugh Williams J of 19 November where the Judge said:

> [36] As mentioned, Mr Deliu filed what Potter J described as "omnibus" applications on 13 August 2008.
>
> [37] Each of those applications raised different legal and factual issues and thus, for good reason, Potter J directed on 18 August 2008 that separate applications be filed with separate timetable orders leading to separate hearings for the widely varying applications. In particular, she directed that each of the three separate applications should be filed by 25 August 2008 with supporting affidavits.
>
> [38] That has not occurred. As a result on 15 September 2008, Mr Knight filed applications to strike out or dismiss those applications (and amended his application on 26 September 2008).

> [39] True, on 22 August 2008, Mr Deliu filed a memorandum seeking clarification of some of Potter J's directions and also asking for a "direction as to what was wrong with my interlocutory application dated 13 August 2008".
>
> [40] The directions were clear on their face. No clarification was needed. Courts adjudicate on compliance with the Rules of documents filed by counsel, they do not advise counsel concerning the form of such documents.
>
> [41] In those circumstances, there was no basis other than to conclude that there had been a failure on the part of Ms C and her counsel to comply with Potter J's directions. Accordingly, on 12 November 2008, an order was made under r 258 staying both the recusal application and that seeking cross-examination of Mr C and his solicitors and counsel before costs were determined.

And further in his 3 April 2009 judgment:

> [71] Flowing on from that, the application for leave to appeal was initially included in the "omnibus" application, but when Potter J, properly, directed the filing of separate applications for the separate matters raised in the "omnibus" application, rather than comply Mr Deliu essentially queried the reasons for Potter J taking the view she did.
>
> [72] Those reasons should have been apparent to competent counsel. The directions should have been complied with.

[231] In response the practitioner told the Standards Committee that he had seen such applications made this way many times before. He said that Potter J gave him "a bit of a hard time about it". He couldn't remember why he didn't comply with her directions to file separate proceedings, but asked what prejudice it would cause? He considered the recusal application would not need to be pursued as Harrison J had apparently handed the file to another judge. He also thought that at that point the client was not pursuing the application for cross-examination either. So only the leave was live. But that said, he indicated he did not recall why he did not comply with the directions.

[232] In his affidavit of 22 February 2013 he deposed at para [4](l):

> … omnibus applications are proper in the jurisdiction where I was trained and just because a New Zealand judge (who no doubt has never practiced in that other jurisdiction) does not think it proper does not mean I am incompetent, indeed it is my opinion that to think there is only one way to do something is very insular and frankly parochial and narrow-minded thinking not befitting a great country such as this that welcomes different ideas.

[233] We interpolate to note this is an example of two habits that we observed over the course of the three sets of charges against this practitioner. First, the practitioner's habit of presuming that others did not have the experience that he did. Second, that his failure to follow the rules was of no consequence other than to reflect adversely on those who sought to enforce them.

[234] In the same paragraph the practitioner goes on to refer to his experience in New Zealand:

> I filed an omnibus application in *Solicitor General v Bujak* and succeeded against senior Crown counsel.[58] So, was I incompetent in *C* and competent in *Bujak* even though I did the exact same thing? I do hundreds of cases a year, some judges like my style and some do not, but that is a long bow from me not knowing what I am doing I think.

[235] Thus it is not disputed that the factual basis for this particular is proved. An omnibus application as described was filed by the practitioner. He did not comply with the directions. As a result, two of the applications were stayed, although he says they were no longer necessary.

[236] We find the facts of this particular proved.

Particular 3.08: misconceived arguments about jurisdiction and service

[237] The background to this particular is recorded in Hugh Williams' judgment of 3 April 2009 dealing with the application for indemnity costs against Ms C and her advisors (Mr Orlov and the practitioner). The judgment records a lengthy and quite extraordinary to-ing and fro-ing between the practitioner and counsel for Mr C. The practitioner's submissions on lack of jurisdiction are referred to at paras [23] and [24] as follows:

> [23] Mr Deliu commenced his very full submissions by challenging the Court's jurisdiction to hear Mr C's application. On 18 February 2009 he and Mr Orlov filed what was called a Notice of Appearance under Protest to Jurisdiction grounded on assertions they had always acted ethically on instructions but Mr C and his lawyers had acted improperly. It asserted the application was not properly served or brought with affidavit evidence in support, lacked particulars and, at the date the document was filed, submissions. In particular there were no identified breaches of duty to the Court, no basis for costs against the lawyers personally, no wasted

[58] [2012] NZHC 2453, Fogarty J.

> costs and the application was "frivolous, vexatious and/or an abuse of process". It said that "costs on the cost hearing and preparation are/will be sought on an indemnity basis against Mr Knight and Ms Ho and/or Mr C".
>
> [24] The assertions in relation to the application arose from the fact that the formal interlocutory application filed on Mr C's behalf on 15 September 2008 (later amended) sought an order "requiring the appellant to pay the respondent's costs of and incidental to this application on a solicitor/client basis" but it was only in a memorandum filed on 12 December 2008 that Mr Knight advised that in the alternative to seeking costs against Ms C, Mr C would "seek costs against Ms C's solicitors/counsel".

And at [26]:

> … Mr Deliu said the application was served on a Mr Gates but he was not counsel's address for service

And at [33]:

> After the luncheon adjournment, Mr Deliu said he had spoken briefly to Ms C and applied to strike out Mr Knight's application for failure to file submissions as required by r 7.39. He said Ms C had given instructions to Mr Deliu to present submissions associated with the Protest to Jurisdiction though she was prejudiced by the consequent necessity for Mr Deliu to research over the luncheon adjournment the matters raised by Mr Knight. He said Mr Orlov had withdrawn all instruction to Mr Deliu over the luncheon adjournment and maintained the protest to jurisdiction on the basis that he had never been served. Mr Deliu took the same position and sought a second hearing for himself and Ms C.

[238] The Court discussed and determined the matter at [52] to [61]. He found the documents filed on Mr C's behalf were properly served on the address for service.

> [52] Logically, the first matter which requires to be addressed is what Messrs Deliu and Orlov call their Protest to Jurisdiction. It largely stems from the service point earlier outlined – though other aspects will require discussion.
>
> [53] In the Family Court, at least up to 18 February 2008, documents filed on Ms C's behalf showed Mr Gates' firm as the solicitors acting for Ms C with Mr Orlov as instructing solicitor, though by 7 April 2008 Mr Deliu had, on the documents, taken over Mr Orlov's role. The physical address given was Level 4, Newcall Tower, 44 Khyber Pass Road, Newton, Auckland.
>
> [54] When the appeal was filed in this Court it showed a firm called "Equity Law" as solicitors for the appellant with Mr Orlov as instructing solicitor but by 26 June 2008 the frontispiece of documents filed showed Equity Law "a Division of the Provo Group and DJ Gates Law" – whatever that

might mean – as the solicitors involved. The physical address remained as previously.

[55] That formulation appears to have been maintained until submissions filed on 11 November 2008. They again showed Mr Gates' firm – now in Whangaparaoa instead of Khyber Pass Road – as the solicitor involved, with Mr Orlov as counsel.

[56] However, by the date the protest to Jurisdiction and supporting affidavit were filed, the frontspiece showed a Mr McClymont "via Frank Deliu" as the solicitor involved with Mr Orlov as counsel, though Mr Deliu signed the Protest to Jurisdiction. The notice gave the same Khyber Pass Road address and said "documents for service on Mr Evgeny Orlov" may be served at that address amongst other means.

[57] All of that took place with no formal notification of any change of representation or address for service. That is required by (now) r 5.40 in this Court and is also required by the service rules r 115ff of the Family Courts Rules 2002. Not only is formal notification of such changes required by the Rules, but there are good policy reasons for requiring formal notification, namely to avoid the type of service objections raised by Mr Deliu at this hearing.

[58] It is well-settled that failure to provide an address for service means documents served on previous solicitors still constitutes good service (*Re Salaman (An Infant)* [1923] NZLR 50, *McGechan on Procedure* para HR5.40.01 p 1-546).

[59] In those circumstances while, as a counsel of perfection, Mr Knight and his instructing solicitors should perhaps have noted the change in the solicitors seeming to be acting for Ms C between the firm acting in the Family Court and the firm which filed the notice of appeal, since the physical address was identical and Equity Law later proclaimed itself a division of Mr Gates' office, service of the various documents by Mr C and his advisers on the physical address in Khyber Pass Road complies with the Rules' requirement and is unexceptionable. That is particularly the case when, even in the October 2008 ADLS Directory of Barristers and Solicitors, Equity Law is still describing itself as a "branch office" of Mr Gates and is at the Khyber Pass Road address. The address and requirements for service given in the Protest to Jurisdiction is also strongly against the point raised by Mr Deliu.

[60] In strict terms, the address for service of Ms C was and remains Level 4, Newcall Tower, 44 Khyber Pass Road, Newton, Auckland, irrespective of which firm occupies that address.

[61] Since it is understood documents filed on Mr C's behalf were served at that address (or by fax or electronically as the documents filed on Ms C's behalf require), it must follow those documents were properly served on Ms C and her advisers.

[239] In his affidavit of 22 February 2013 the practitioner deposed that Mr Orlov refused to appear on the application for costs against the practitioner and Mr Orlov, because he had not been served. He explained at para [4](t):

> I did not want to be seen to be disrespecting the court and appeared under protest to jurisdiction (inter alia, there was no costs application, especially not inter partes against a non party).

[240] In his affidavit of 4 September 2015 he addresses particulars relating to the 3 April hearing (being his complete evidence related to the *C* charges in that affidavit) at paras [10] to [14] as follows:

> [10] As to the *C* case, I affirm under the pain and penalty of perjury that when I appeared before Justice Hugh Williams on 3 April 2009 I did so under protest to jurisdiction over me. My position was that I had not been served with any application for costs (a recurring theme) and that therefore the Court could not make any order against me.
>
> [11] At the very outset of the hearing I told the Judge that the only way I would stay would be if I could not be served in the course of the hearing (my concern being that counsel would realise I was right and would draft an application to serve me within the confines of the courthouse). May I be imprisoned for perjury if His Honour did not confirm to me that this would be the case.
>
> [12] I then asked him to record the hearing and to confirm that I would be provided with a copy upon request. His Honour confirmed this and duly pulled out a Dictaphone and recorded the hearing.
>
> [13] In the course of the hearing Mr Knight made an oral application for costs against me. The Judge allowed this and I was aghast (the Bench had that morning given me an undertaking that this would not be permitted).
>
> [14] After the hearing I asked for a copy of the recording to use in the appeal (to argue the Bench had breached its promise). I received an e-mail back from the Registry advising me that the copy had been accidentally deleted. I no longer have this e-mail, but as it was one of my first experiences of a judicial cover up in New Zealand I still remember these events lucidly.

[241] We are satisfied that the arguments recorded by the Court to protest service were made by the practitioner and were misconceived. The documents were served at the address for service and again there was no basis for complaint. The factual matters raised by the practitioner are not relevant to and do not undermine those findings.

[242] We consider the facts of this particular are proved.

Particular 3.09: allegations of unethical conduct by opposing party's lawyer made without foundation and which increased the risk of costs against his client

[243] In support of this particular, Counsel for the Standards Committee refers to the judgment of Hugh Williams J of 3 April 2009 dealing with the application by Mr C for indemnity costs against Ms C and her legal advisors. The Judge quotes from the practitioner's submission at para [25]:

> [25] Mr Deliu was critical of the lack of affidavit evidence in support of the costs application, a refusal to provide time-sheets, invoices and other material bearing on the reasonableness of the costs incurred, and questioned whether they had in fact been incurred. He submitted the application failed to specify what actions on the part of counsel were such as allegedly supported any application for personal costs, there was no specificity as to which actions were said to have wasted costs and Mr C and his advisers had attempted to block Ms C's legal aid. After detailed reference to a number of documents filed in the case – or in one case, perhaps, according to Mr Deliu, not filed – Mr Deliu submitted:
>
> > The application is therefore malicious, vexatious, frivolous, unsustainable in law and an abuse of this Court's processes rising to the level in which costs should in fact be ordered against Mr Knight and/or Ms Ho for what in my submission was [sic] their gross breaches in handling this costs "application" against me/us as even if I am wrong as to *mala fides*, gross negligence can suffice and their failures to file an application, with particulars, with grounds, with named lawyers, with evidence, with submissions, with some indication for me/us to prepare for 1 day of oral arguments is so far out of what would be expected from such experienced counsel and solicitor that it must be grossly negligent, though I submit in the first instance that it was in bad faith due to the failure to respond to my and Mr Orlov's queries. For a further example of arguable negligence, please see my memorandum of 17 September 2008 which to an extent Mr Knight conceded by re-filing less than a week later.
>
> Accordingly, Mr Deliu submitted, the striking-out application he had filed was justified.

[244] Counsel also drew our attention to para [51] where the Court recorded that the practitioner insisted on responding to a submission by counsel for Mr C to the effect that the practitioner had not submitted that accounts to Mr C were not real, and he (the practitioner) was not alleging fraud. His cross application for costs was not "retributive" but was seeking costs on costs for spending a day at a hearing with procedural deficiencies.

[245] In the absence of evidence from the practitioner that further explains the nature of his submissions, and the basis for the allegations of bad faith (apparently by failing to respond to queries), we agree that the quoted submission is likely to be accurate as a matter of fact. We are further satisfied that such behaviour amounts to a breach of Rule 13.8 of the Conduct and Client Care Rules. That rule provides:

> 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 allegations exist.
>
> 13.8.2 Allegations should not be made against persons not involved in the proceeding unless they are necessary to the conduct of the litigation and reasonable steps are taken to ensure the accuracy of the allegations and, where appropriate, the protection of the privacy of those persons. .

[246] The Court found that, even if the bringing of the appeal might – just – have been merited, no action following dismissal of the appeal on 16 July 2008 could have been justified apart from Mr C's costs application. The Court therefore held that all costs reasonably incurred by Mr C after that date were potentially recoverable from Ms C or from counsel.[59] He ordered that advice as to the timing and amounts of legal aid be advised to the Court, plus costs and disbursements of Mr C.

[247] The Judge observed at [112]:

> … once that further material is received consideration will be given, in accordance with the authorities discussed in this judgment, as to whether a costs order should be made against either of [Mr Orlov and/or Mr Deliu] and whether any such order would be on an increased or indemnity basis and whether any liability should be apportioned or be on a joint and several basis.

[248] The Court was more broadly concerned at the approach of counsel to their dealings with each other. Hugh Williams J referred to the importance of the obligation to advance ones client's interests resolutely, often in the face of the best efforts of other lawyers' clients' efforts to achieve mastery over their own. However at para [86] and [87] he emphasised that –

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[59] *C v C* (Auckland High Court, CIV 2008-404-2469) at [109].

> [86] … crucially, it is of the essence of professionalism that, in fulfilling their obligations to their clients, lawyers do not – unless the circumstances leave them with no choice – identify their interest with those of their clients and the interests of other lawyers' clients with the lawyers themselves. It is for that reason that, amongst other duties, the [Conduct and Care Rules] ch 10.1 requires lawyers to treat other lawyers with "respect and courtesy" and ch 13.2 requires lawyers not to act in a way that "undermines the processes of the Court or the dignity of the judiciary" and obliges lawyers to "treat others involved in Court processes with respect". In those respects (and others) the 2008 Rules do no more than codify previous rules and practices concerning lawyers' proper conduct.
>
> [87] This approach is essential for lawyers to retain the necessary dispassionate objectivity which enable them to fulfil their duties to their clients, their profession and the Courts.

[249] The judgment outlined a number of examples of approaches that the Judge saw becoming more prevalent and impacting on the efficient and dispassionate efforts of all involved in the justice system to access and achieve justice for the participants. At paras [93] and [94] the Court observed:

> [93] The attitudes and approaches under discussion have repeatedly manifested themselves in this case. As examples, a request on Mr C's behalf for a timetable extension was opposed by Mr Deliu on the basis that Mr C's advisers had contacted LSA and that it was "not only unethical but also unlawful contractual interference and a breach of privacy rights". A direction was sought that nobody on Mr C's part should communicate with LSA "les they will be held in contempt of Court". Ms C's lawyers had her put in evidence Law Society complaints, correspondence between counsel and solicitors repeating assertions of unethical conduct and exhibiting mutually recriminatory email correspondence with both counsel describing each other's actions as "silly" and as insulting their intelligence by "trying to defend the indefensible". In addition, the pleadings in this Court included Mr Deliu's recusal application on Ms C's behalf.
>
> [94] It may be natural for humans, once attacked, to retaliate – but it does nothing to assist orderly disposal of litigation which focuses on issues properly raised in it.

[250] The Tribunal considers that such attitudes and approaches will, in the absence of reasonable grounds and the taking of appropriate steps, lead to breaches of the professional standards required of lawyers in New Zealand.

[251] The practitioner's evidence of 22 February 2013 raised matters which confirmed the inappropriateness of his approach. At para [4](j) he deposed:

> Hugh Williams J then issued an interim judgment, which was quite curious because I recall asking him to issue a final judgment which I could appeal, which made absolutely no adverse findings against me. I wanted to sue Mr C, his counsel Mr Knight and his solicitor Ms Ho and go to the Supreme Court with any adverse determination against me and I prove this at "M"…

Exhibit M was an email chain between the practitioner and counsel for Mr C which indicated that the practitioner intended to take the costs matter to the Supreme Court no matter what the outcome. In an email dated 2 June 2009 he said:

> Hope you have advised your client of the risks of litigation – he surely will wonder why years from now he is a co-defendant in suits filed by me.

[252] While we were not able to question the practitioner on this evidence, we consider it is nothing short of bullying. It is not surprising that the matter was settled before a judgment could issue and why the practitioner seemed to consider this narrow escape from a costs award to be a win. We refer to his affidavit at para [4](k):

> … this was a case where no adverse *Harley v McDonald* findings were made against me and as such I believe the applicants have no proper factual basis to inspect the files, especially as …I only appeared on the ancillary costs issue which was ultimately settled in my favour.
>
> … However, pragmatically and mindful that I did not want my deep desire for justice to hurt my former client and colleague, based on a telephone call from Mr Orlov asking me to settle matters I reluctantly agreed and this is proven at "N". So finally, the parties settled their dispute including withdrawing the costs application against me …

[253] Finally we refer to para [4](l) where the practitioner addresses the charge that, in his words, he played the man and not the ball:

> … In that case Mr Knight accused me of incompetence so I appeared in person to defend myself and I took the Judge through the file for about an hour or two highlighting about a dozen or 15 mistakes that Mr Knight had made on the file. At one point during the hearing Hugh Williams J said to me "you are enjoying this aren't you" or words to that effect. To which I responded, "no, I am accused of incompetence but I conducted the file better than counsel accusing me and as such that is a defence under *Harley*" or words to that effect. His Honour said "fair enough" (verbatim). Mr Knight later stood up and said that in his 20 or 30 (I forget which) years of practice he had never been so insulted, but he did not rebut my allegations as to his incompetence.

[254] The judgment speaks for itself, but the practitioner's words underscore it. There were a number of steps taken by the practitioner which the Judge found a

competent practitioner would not have taken. The practitioner's approach would have increased the prospect of further costs against his client.

[255] We are satisfied on the basis of the judgment and the evidence of the practitioner that the facts supporting the particular are proved.

Particular 3.10: Failure to appreciate the case was about a discretionary decision and could not engage the principles he relied on

[256] Counsel for the Committee refers to Hugh Williams J's two judgments. First the judgment of 19 November 2008 records the practitioner's written submissions in support of what Counsel referred to as "a completely misconceived application for leave to appeal to the Court of Appeal". At para [19]:

> [19] Accepting that Ms C needed to demonstrate there was a point of law of such public or general importance as to justify the cost and the delay of a second appeal in order for leave for such an appeal to be granted (Judicature Act 1908, s 67, r 718E), the numerous grounds listed in the "omnibus" form of application were reduced in Mr Deliu's written, and Mr Orlov's oral, submissions to:
>
> (a) the refusal of interim maintenance was based primary on Ms C's lack of immigration status and failure to adduce evidence. These contravened procedural justice and fairness as taking the immigration status into account would breach s 21(1)(g) of the Human Rights Act 1993 prohibiting discrimination on the basis of ethnic or national origins;
>
> (b) Judge Ryan's decision was such that he effectively failed to exercise his discretion that being a matter of public interest as potentially amounting to discrimination of a sector of the public based on their immigration status;
>
> (c) Harrison J gave an opinion to the Legal Services Agency that the appeal was baseless. That affected Ms C's legal status. That was of public importance, as the Judge should not have done what he did. The judgment, he submitted, was "completely unprincipled".
>
> (d) That instead of dismissing the appeal, Harrison J should have directed the Family Court to set a hearing date for Ms C's substantive maintenance application.

[257] As it records, this is a reference to both the written submissions of the practitioner and the oral submissions of Mr Orlov who appeared. It is not a quote from

the written submissions so we do not know precisely what was put to the Court by the practitioner. However there is sufficient in the judgments and evidence to satisfy us that Mr Orlov's oral submissions were consistent with the practitioner's written submissions. At no stage did the practitioner submit that he took a different view of the law.

[258] We note paras [96] and [100] of the judgment, quoted earlier, which refer to the failure to recognise the discretionary nature of the decision.

[259] Counsel for the Committee also referred to paragraphs [95] to [102] of the 3 April 2009 judgment referred to earlier and the resulting liability of the client (particular 3.12) as evidenced by paragraph [109]. Again it is difficult to know to what extent Mr Orlov or the practitioner is responsible, but the judgment refers to them both.

[260] This particular is completely unanswered by the practitioner other than, perhaps, a reference in the November hearing transcript to the fact that legal aid had been granted for the proceeding following referral to a specialist advisor, and that his client had made it plain in an affidavit, referred to in the judgment, that they were simply following her instructions.

[261] In his reply submission, the practitioner responds to a submission from Counsel for the Committee to the effect that the allegations are unanswered by the practitioner despite his obligation to assist the Tribunal get to the truth. He says

> What is apparently meant is the Judge's version of what occurred in *C.* If that is the "truth" then we are truly in Kafka's The Trial.

He says nothing else about the allegations.

[262] We are satisfied that the practitioner failed to appreciate the discretionary nature of the decision appealed from. The Committee has met the requisite standard of proof for this particular.

<u>Particular 3.11: Argued for costs against the opposing lawyers with no basis, and which was retaliatory</u>

[263] As noted above, the judgment of 3 April 2009 records at para [51] the practitioner's submissions that the cross application for costs was not "retributive' but was seeking costs on costs for spending a day at a hearing with procedural "defects".

[264] The judgment refers to those alleged defects, including alleged failure to serve, which was not accepted, and lack of a formal notice of interlocutory application for costs in terms of the memorandum filed two months before the hearing. In his affidavit of 22 February 2013 the practitioner refers to there being no costs application (against counsel for Ms C), especially not inter partes against a non-party. The judgment notes that it would have been preferable for a formal amended interlocutory application for costs to be filed in terms of counsel's memorandum. However notification (two months) was given in that memorandum and the Court found the application fell within r 7.41(1)(c) and so was properly made.

[265] As noted above, the practitioner's evidence is that he spent considerable time taking the Court through the errors made by counsel for Mr C. However that had no impact on the result. It certainly appears as if the practitioner's approach was retaliatory, notwithstanding his recorded rejection of that categorisation.

[266] We consider a prima facie case is made out of the facts of this particular, and in the absence of further evidence from the practitioner, the facts are proved.

<u>Particular 3.12: As a result, his clients were exposed to an order to pay increased or indemnity costs</u>

[267] We note the resulting liability of the client is evidenced at para [109] of the 3 April judgment:

> … all costs reasonably incurred by Mr C after [16 July 2008, being the date of Harrison J's decision] are potentially recoverable from Ms C or from counsel.

[268] At para [110(c)] the Judge recorded that further information was to be provided and the file was to be referred back to the Judge:

> …for further consideration as to whether scale costs, increased costs or indemnity costs …should be ordered and, if so, for what period and against whom.

[269] At [111]:

> … The principles affecting whether increased or indemnity costs should be ordered will be considered, as will whether any order made should be apportioned between Ms C and counsel.

[270] We are satisfied that the facts of this particular are proved.

Particulars 3.20 to 3.21 **HAV v EAW** ***(FC Waitakere FAM 2006-090-1238), 27 FRNZ 729***

[271] This matter involved a contested parenting proceeding before Judge Burns in the Family Court which had been adjourned part-heard. The father had represented himself and was encouraged to obtain legal advice for the resumed hearing. This he did, and the practitioner appeared on his behalf. The judgment concerned an application by the father that Judge Burns recuse himself from any further involvement in the matter.

[272] The particulars are as follows:

> 3.20 The practitioner brought a meritless recusal application based on:
>
> (a) An allegation that his client had been deprived of the right to give evidence, when his client had filed lengthy affidavits.
>
> (b) The Judge's refusal to accept ten boxes of documents on the day of the hearing, to which no reference had been made in affidavits and to which little reference was made during the hearing.
>
> (c) Limitations on cross examination, when in fact his client had been allowed latitude in earlier cross examination.
>
> 3.21 He justified this conduct by claiming it was due to his client.

[273] The judgment carefully discussed each of the grounds apparently contended for by the practitioner.

[274] In relation to 3.20 (a) the Judge found there was no substance to the allegation that the father had been prevented from producing relevant evidence. He had already

filed lengthy affidavits with no constraints as to content and he was free to file further relevant evidence.

[275] In relation to 3.20 (b) the Judge noted the father had not given the other parties notice of his application to have 10 boxes of additional evidence admitted. They had had no opportunity to read the contents of the boxes. This would have inevitably meant that the hearing would have had to be adjourned because it would have taken many hours to peruse the large volume of material. In any event, nothing emerged in the evidence or questions from the father which justified the further admission of material. No reference was made to it. No proper basis was given to justify the Court exercising its discretion to admit the further evidence.

[276] In relation to 3.20 (c), the judgment records that the practitioner submitted there had been a denial of the father's right to fully/properly cross-examine. The practitioner submitted that the Court showed apparent bias towards the father as a lay litigant because there was a restriction on his cross-examination. He referred to the Court directing the father to provide a list of questions to determine their admissibility before the applicant continued his cross-examination. He submitted that this was impossible because this would have constrained the father from asking follow-up questions, or questions that may be of relevance. He also submitted this required the questions to be put in advance to the other parties, which would foreshadow tactical or strategic questions to be asked, and could be prejudicial to the father. He submitted that there was a lack of balance because the same restriction had not been placed on the mother.

[277] The Judge found the argument on this point to be without merit. At [29]:

> If Mr Deliu had taken the time to read the notes of evidence which are fully available to his client and himself, it would be transparently obvious that Mr V had a considerable amount of time to cross-examine the psychologist. That at no stage was he prevented from doing so. The transcript itself reveals that Mr V was struggling to deal with complex issues and ask relevant questions. In order to ensure the hearing remained focussed on the issues that the Court had to determine I asked Mr V over the afternoon adjournment to try and focus on what he was going to ask. This was not to prevent him from asking relevant questions but in fact to get him to focus on precisely the important issues that he wanted to raise.

[278] After dealing with each point raised by the practitioner, the Court observed at [42], and relevant to particular 3.21:

> … Mr Deliu has relied on the *Muir* decision but I suspect that he has not read it completely. The *Muir* decision did not uphold the application for recusal, and rejected it, and in that case the criticisms from Venning J of the particular litigant were stronger than the criticisms I have made of Mr V, and yet the application for recusal was not upheld. It does not create a precedent on which Mr Deliu can rely and the passages I have referred to above are particularly relevant to this case. Accordingly, I consider that the application is poorly framed and is virtually completely without merit. It has caused considerable delay in the significant issues of the children's contract with their father being heard, and I consider that the advice given by Mr Deliu to his client in pursuing this application is of concern. Mr Deliu in his oral submissions indicated that he was acting on instructions, and I was critical of him in the hearing for hiding behind his client's instructions. I do not consider that he has taken the proper role of a lawyer into account by advancing the case and making submissions he has, in my view, therefore been deemed to have fully considered the facts, researched the circumstances, fully read the notes of evidence, and therefore is putting his name and endorsing the merits of the application. To attempt to hide behind his client's instructions is without merit, and I do not consider he has acted appropriately as an officer of the Court in carrying out his role to independently and objectively assess the facts. …

[279] The Tribunal again had available to it the transcript of the explanation given to the Standards Committee at the 8 November 2010 meeting. The practitioner explained his concern for his client, who was in a vulnerable state and up until that point representing himself. His client considered he could not get a fair result from the Judge who had admitted evidence against his interest from a psychologist who had not interviewed the client. The practitioner considered it appropriate to act on those instructions. He said he discussed the merits and demerits of the application extensively with his client, but he was adamant. If he lost the recusal application, the client said he would take it on judicial review. The practitioner noted the Judge had said in the judgment that the practitioner should re-read the Law Society book on ethics. This offended the practitioner. In response to that criticism, he filed a further memorandum which he described as giving case law from Singapore and the United States, perhaps other jurisdictions, confirming that a lawyer is duty bound to follow a client's lawful instructions. He gave the Judge legal authority to support that what the practitioner was doing was lawful.

[280] The Tribunal also had the memorandum that was filed by the practitioner (provided to the Standards Committee later that day and exhibited to Ms Ollivier's affidavit as OL 8). It was dated 9 February 2009, which is five days after the decision

of Judge Burns, and debated the accuracy of the result. It is an oddly defensive document that focuses on points which indicate the practitioner is extremely sensitive to criticism and considers, without meritorious reasons, that he is treated differently from other counsel. The practitioner considered that the fact that the Judge took no further action against him as a result of these "follow-up submissions" was presumably because he, the practitioner, was right. That memorandum does not form part of the charges but is supporting evidence of what the practitioner submitted to the Court on the recusal application, and his approach to client instructions.

[281] We consider that the Committee has proved to the requisite standard that the practitioner did bring a meritless recusal application, and did seek to justify the conduct by claiming that his client had insisted on it.

Particular 1.04(c) - RL v The Chief Executive, Ministry of Social Development

[282] The facts around this proceeding are discussed earlier. This particular provides that, in support of his clients' application for the recusal of Justice Harrison:

> (c) In breach of Rule 8.06 of the Rules of Professional Conduct for Barristers and Solicitors 7th ed., without first informing the Court and seeking a direction to permit him to continue acting, he made an affirmation, in support of his clients' application for recusal, that contained evidence of a contentious nature.

[283] At paragraph [11] of the judgment on recusal and costs the Court referred to this affidavit as "[the practitioner's] own eight-page affidavit in support of the application for recusal together with a bundle of exhibits marked A-W, … the affidavits continue and repeat the underlying theme of fear of personal and professional persecution if they appear before me as counsel".

[284] The affidavit referred to is before the Tribunal as evidence in the 010/10 and 008/12 charges and referred to this Tribunal by Ms Ollivier in her reply affidavit. It is dated 9 September 2008, i.e. after the coming into force of the Lawyers and Conveyancers Act 2006 (the 2006 Act).

[285] Counsel for the Committee submitted that para (c) was more properly treated as a particular of charge 3, the relevant rule being Rule 13.5.2 of the Conduct and Client Care Rules. We accept that.

[286] Rule 13.5.2 provides:

> If, after a lawyer has commenced acting in a proceeding, it becomes apparent that the lawyer … is to give evidence of a contentious nature, the lawyer must immediately inform the court and, unless the court directs otherwise, cease acting.

[287] Without considering the affidavit itself, we consider there is sufficient evidence in the judgment, considered in light of the practitioner's various statements, to indicate that the practitioner gave evidence of a contentious nature by way of affidavit. There is no evidence to indicate that he advised the Court and obtained a direction that he could continue to act. He did continue to act, as is seen from the later judgments of the Courts. He could have advised the Tribunal of the position if it was otherwise.

[288] Consideration of the affidavit confirms that it was indeed of a contentious nature.

[289] We find a prima facie case to be proved, and proof of the particulars on the balance of probabilities.

Decision on Charges 3 and 4

Other arguments by the practitioner

Chopra

[290] In relation to *Chopra,* the practitioner argued that the Judge was wrong in criticising the practitioner because another judge came to the conclusion argued for by the practitioner in another case. Counsel for the Committee submitted that, even assuming that was so, it did not justify the practitioner's conduct.

[291] In his reply submissions the practitioner wrongly treated the Committee's submission as being that the practitioner could not use the later judgment in his defence because it was a judgment. He then embarked on an inappropriate rant

which we consider to be both typical of his approach to his own defence, and regrettable given his (historical) conduct of proceedings is in issue:

> 61. Also in that paragraph, and bordering on comical, the prosecutor asserts that the Randerson J judgment I referred to (which held the opposite of Wylie J in *Chopra*) cannot be used in my defence. So judgments can be used to prove my guilt but cannot be used to exonerate me. Stalin could not have said it better before sending a poor soul to the Gulag in that I cannot defend myself. The prosecution of course only wants lawyers who responsibly admit their guilt if a judge has dared accuse them. I do not. I am a freeman who is the equal of anybody in power. I bow to no Queen or her subjects. I feel I have been wrongly accused and assert my Magna Carta right to a fair trial. There will be a new way of thinking in New Zealand and this case will set the precedent that lawyers can defend themselves from judges. Future generations will benefit as the profession might gain a modicum of courage to stand up for itself from improper attacks from the judiciary.

[292] We agree with Counsel for the Committee that, even if another court took a different view of the merits of the practitioner's approach to the legal issues, that would not justify the conduct which is the subject of the charges. We are concerned with the drafting of incoherent and inadequate pleadings and the filing of irrelevant and inadmissible evidence.

[293] But in any event we have considered the merits of the point he makes.[60] Contrary to the practitioner's submission, Randerson J did not take a different approach to the same issue. He was dealing with a different issue under different provisions of the Act. His decision casts no doubt on the reasoning of Wylie J.[61]

C v C

[294] The practitioner's primary point on charge 3.07 was that there is nothing wrong with filing 'omnibus' applications. He did the same in *Bujak*. While not necessary to our deliberations on the charge, we have considered the two judgments

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[60] *Mistry v Minister of Immigration* CIV 2009-485-610, 17 November 2009.

[61] In *Mistry*, as Randerson J says at [8], the decision to revoke Mr and Mrs Mistry's residence permits was stayed *as a result of* Mr and Mrs Mistry's appeal to the Deportation Review Tribunal. It was during that stay of revocation that Mr and Mrs Mistry were entitled to be issued with new residence permits on their return to New Zealand pursuant to s 18.
In *Chopra*, as is clear from [14], the Deportation Review Tribunal had issued a decision to the effect that it had no jurisdiction to hear Mr Chopra's appeal. Mr Chopra was advised that he could appeal that decision to the High Court, and that "if he left New Zealand, he would not be able to return but that if he stayed in New Zealand, he would retain his various rights, including the appeal rights in relation to the residence permit revocation process."
Mr Chopra left New Zealand without lodging an appeal. Therefore, he was deemed to have been deported, and, as Wylie J says "thereafter s 7(1)(d) prohibited the issue of a further permit to him. Mr Willson, as the visa officer dealing with the application made by Mr Chopra under s 14C, could not issue him with a returning resident's visa because he knew of good reason why Mr Chopra would not be entitled to the grant of another residence permit when he returned", at [36].

in *Bujak*. We note the application for orders was of a different nature. The label "omnibus" was the practitioner's, not the Court's. Each of the orders sought related to similar subject matter. Plainly there are occasions when related interlocutory orders will be the subject of one application. The key point here is that Potter J directed the filing of separate applications for clearly expressed and sensible reasons. Had the practitioner simply complied it is unlikely there would have been cause for criticism.

[295] We agree with Hugh Williams J that Potter J's reasons for directing separate applications would have been apparent to competent counsel. Each required affidavit evidence (which strictly ought to have been filed with the application) and each required timetabling and separate hearings. The applications were for separate, unrelated orders. Further, if indeed the practitioner was only pursuing one application as he indicated in November 2010, then he ought to have filed a notice to that effect, in accordance with the timetable directions.

[296] In any event we do not consider that filing of the omnibus application to be the real issue here. It would not have caused concern had the practitioner complied with the orders of Potter J. Instead, he unnecessarily sought clarification of them, and failed to comply. As a result, his client's application was not heard.

HAV v EAW

[297] The practitioner can provide evidence in answer to the charges, as his second affidavit made on 4 September 2015 in support of his application for a stay in these proceedings more than adequately demonstrates. At paragraph [16] he refers to the memorandum to Judge Burns and claims he is not allowed to now divulge it. However the Tribunal has that memorandum as it was provided to Ms Ollivier to support his account to the National Standards Committee in November 2010, and is exhibited to her evidence.

[298] In his subsequent affidavits the practitioner refers generally to these matters but relies on client privilege. He deposes in his affidavit of 4 September 2015 at para [16] that he considered Judge Burns violated *R v Huang* [2009] NZCA 527 in making adverse remarks about him without first giving him an opportunity to be heard. We do not accept that the matter on its face comes within the *Huang* exception. The

practitioner did explain that he was acting on instructions. The key problem seemed to be that he had not read the Family Court transcript, or if he had, then his actions in seeking to disrupt the proceeding to the extent he was doing was, in the Judge's eyes, not in keeping with his primary duty as an officer of the court.

[299] In his closing submissions in reply the practitioner submitted:

> … Judge Burns has recently been held by the High Court to have illegally held a lawyer in contempt of Court *Richard Zhao Lawyers Ltd v Family Court at Auckland* [2015] NZHC 983. I urge this Tribunal not to rely on the opinion of a Judge who cannot even comply with basic natural justice when scandalizing lawyers. Mr Zhao has already been his victim, do not make me another.

[300] The practitioner, who was counsel in that case, does not do himself any favours with submissions that overstate the position. The relevant judgments of Judge Burns were quashed as a result of a mix of a procedural failure to give Mr Zhao an adequate opportunity to be heard before any judgment was issued requiring him to disgorge the funds he held for his former client (the second defendant), and the fact that the existence of a relevant undertaking and lien in relation to his outstanding fees had not been brought to the attention of the Family Court. Concessions were also made between the parties during the hearing causing the Judge to observe in his costs award that, had it not been for the sensible compromise, the relief he granted Mr Zhao may well have been significantly qualified. That result was reflected in the Court's costs award. In the Court of Appeal on a review against a security for costs decision, Justice French considered Mr Zhao as appellant faced considerable difficulties in seeking to have the costs decision overturned.

[301] We note that the High Court was not dealing with 'contempt of court' issues. See at [56];

> In quashing these decisions I do not purport to rule on the disciplinary or contempt issues raised between the parties. It may be that Ms Chen may seek to argue that Mr Zhao has been shown in any event to have been in contempt of Court, even if these particular decisions are quashed, and may wish to pursue complaints with the New Zealand Law Society.

[302] If the objective of the practitioner was to discredit the Judge so as to lessen the impact of the criticism, then it was ill-judged and misconceived.

Decision

[303] We adopt the *W* test as the relevant test. While it relates to the 1982 Act the provisions are effectively mirrored in the 2006 Act.

[304] Once again, the plaintiff's conduct is in the context of litigation. It is his incompetence in drafting pleadings, applications and submissions that is in issue, as well as his preparedness to put irrelevant and inadmissible evidence before the Court.

[305] The facts demonstrate a concerning number of meritless or irrelevant points taken over four matters in a confined timeframe. These have not served the practitioner's clients' interests, have exposed them to further costs in some cases, and have led to wasted court time. In terms of frequency the conduct is concerning over the time period.

[306] In terms of seriousness however, while the matters are concerning, on balance we consider them to be at the lower end of conduct in litigation that may be incompetent or negligent. We consider an informed member of the public would likely see the conduct as problematic and most unsatisfactory but not to the extent that it would bring the profession into disrepute, or to reflect on the practitioner's fitness to practice.

[307] We note the practitioner's defence that he is plainly a competent lawyer. The issue here is not his status generally as competent or incompetent, it is his conduct on these particular facts which are for consideration. His conduct in these matters does not reflect well on him.

[308] We do not find Charge 3 proved.

[309] However, in our view the matters do qualify for the alternative charge of unsatisfactory conduct. The conduct fell well short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[310] Accordingly we find Charge 4 proved.

Conclusion

[311] We find proved:-

(a) charge 1, unprofessional conduct under the 1982 Act, and comprising particulars 1.01 to 1.04 [(a) and (b)], and 3.13 to 3.19, (which relate to conduct that predates the coming into force of the 2006 Act); and

(b) charge 4, the lesser charge of unsatisfactory conduct under the 2006 Act, and comprising particulars 1.04 (c), 3.01 to 3.05, 3.07 to 3.12, and 3.20 to 3.21.

[312] Particular 3.06 is not proved.

[313] The alternative charges 2 and 3 are dismissed.

DATED at WELLINGTON this 15th day of September 2016

M T Scholtens QC
Chair

Appendix A

CHARGES – LCDT 014/15

CHARGE 1

1.0 The National Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, under section 112(1)(c) of the Law Practitioners Act 1982, with negligence or incompetence in his professional capacity, between 1 November 2007 and 31 July 2008, of such a degree and/or so frequent as to reflect upon his fitness to practise and/or as to bring the legal profession into disrepute.

The particulars of the charge are:

***RL v The Chief Executive, Ministry of Social Development* (Auckland High Court, CIV 2007-404-7031)**

1.01 He incompetently argued for the parents to represent their children, when the parents had previously been found by the Family Court to be unfit to have the care of their children.

1.02 Without having reasonable grounds to do so, he made an application for the removal of A M as litigation guardian, during the course of a telephone conference held on 13 February 2008 before Justice Winkelmann.

1.03 He filed a misconceived and hyperbolic submission that failed to address the issues and advance his clients' case, as follows:

> "... 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.
>
> 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, supremacist 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 Maori people have been placed in a situation of social inequality by the English 'settlers' that is no longer an argument but simply a fact. Their social problems need to be addressed in a humane and culturally sensitive matter 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."

1.04 In support of his clients' application for the recusal of Justice Harrison:

(a) Without sufficient foundation, he alleged that Justice Harrison was discriminating against him because of his "foreign sounding name" and that Justice Harrison was racially biased against Maori.

(b) Without sufficient foundation, he alleged that Justice Harrison had breached his "international human rights".

(c) In breach of Rule 8.06 of the Rules of Professional Conduct for Barristers and Solicitors 7th ed., without first informing the court and seeking a direction to permit him to continue acting, he made an affirmation, in support of his clients' application for recusal, that contained evidence of a contentious nature.

CHARGE 2
(Alternative to Charge 1)

2.0 The National Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, under section 112(1)(b) of the Law Practitioners Act 1982, with conduct unbecoming a barrister or a solicitor, between 1 November 2007 and 31 July 2008. **The particulars of the charge are** in paragraphs 1.01 to 1.04 inclusive, which are repeated and adopted for the purposes of this charge.

CHARGE 3

3.0 The National Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, under section 241(c) of the Lawyers and Conveyancers Act 2006, with negligence or incompetence in his professional capacity, after 1 August 2008, of such a degree and/or so frequent as to reflect upon his fitness to practise and/or as to bring the legal profession into disrepute.

Berg v Franix Construction Ltd **(Auckland High Court, CIV 2008-404-3421)**

3.01 In a case concerning a failure to annex documents to a payment claim, as required by s 20(3) of the Construction Contracts Act 2002, on 23 September 2008 he filed voluminous and largely irrelevant written submissions on other points, which caused the Judge who heard the appeal to refuse his successful client costs.

Chopra v The Chief Executive of the Department of Labour **(Auckland High Court CIV 2009-404-911)**

3.02 He drafted, filed and relied on an incoherent statement of claim, containing a "barrage of allegations" in a "scatter-gun approach".

3.03 He drafted, filed and relied on affidavits that contained irrelevant and inadmissible contents, and that failed to exhibit the decision under challenge.

3.04 In breach of Rules 5.2 and 13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Conduct and Client Care Rules"), he attempted to evade responsibility for the affidavits by attributing them to his clients.

3.05 He argued for relief that plainly would not be granted by the Court.

3.06 His incompetence resulted in a costs order of $10,000 and disbursements of $1,675.67 against his client.

***C v C* (Auckland High Court, CIV 2008-404-2469)**

3.07 On 13 August 2008, he filed an "omnibus" interlocutory application, which was later directed by Potter J to be the subject of three separate applications, with supporting affidavits. On 22 August 2008, he unnecessarily sought clarification of the directions. He failed to comply with the directions. As a result, his client's application was not permitted.

3.08 His arguments about jurisdiction and service were misconceived because they were premised on errors shown in the address for service in documents that he had filed.

3.09 In breach of Rule 13.8 of the Conduct and Client Care Rules, without sufficient foundation, he made allegations of unethical conduct by lawyers for the opposing party that served to increase the prospects of a costs award being made against his client.

3.10 He failed to appreciate that the case was about a discretionary decision that could not engage the principles relied on by him.

3.11 He argued for costs to be ordered against opposing lawyers when there was no basis for such an order to be made, and which was retaliatory.

3.12 As a result, his clients were exposed to an order to pay increased or indemnity costs.

***Anza Distributing (NZ) Limited (in liquidation) v USG Interiors Pacific Limited* (Auckland High Court, CIV 2007-404-00374)**

3.13 Following an order that Anza Distributing (NZ) Limited ("Anza") be placed in liquidation, made by Associate Judge Robinson on 2 April 2008, he filed an application on 11 June 2009 seeking leave to file "various proceedings" in the name of the company.

3.14 He sought to join a new applicant, Mr Misbin. Mr Misbin was neither a director nor a shareholder of Anza, and had no standing to make any of the applications.

3.15 He filed a memorandum on 19 June 2008 that showed a different intituling, showing a second applicant and a defendant who were not shown in the intituling of the application.

3.16 The applications made by him were filed as interlocutory applications on the Court's liquidation file, but they were not properly brought as interlocutory applications, because, if they were

capable of being brought at all, they were required as a matter of proper procedure to be brought by way of originating application under Part 4 of the High Court Rules.

3.17 The liquidator's permission should have first been sought to file the applications, not only because of the issue about Anza's status as a purported applicant, but because they were proceedings being commenced in relation to the property of a company in liquidation, and permission was required under s.248(1)(c)(i) of the Companies Act 1993. This demonstrated either ignorance by him of the effect of an order of liquidation, or it amounted to a misrepresentation of his authority.

3.18 He filed a memorandum dated 3 July 2008 that erroneously maintained that the orders made by Associate Judge Robinson could be challenged by an application for judicial review, whereas the order had been made in open court, so that any challenge could only be by way of an appeal.

3.19 As a result, his clients were ordered to pay increased costs.

***HAV v EAW* (FC Waitakere FAM 2006-090-1238)**

3.20 He brought a meritless recusal application based on:

(a) An allegation that his client had been deprived of the right to give evidence, when his client had filed lengthy affidavits.

(b) The Judge's refusal to accept ten boxes of documents on the day of the hearing, to which no reference had been made in affidavits and to which little reference was made during the hearing.

(c) Limitations on cross examination, when in fact his client had been allowed latitude in earlier cross examination.

3.21 He justified this conduct by claiming it was due to his client.

CHARGE 4
(Alternative to Charge 3)

4.0 The National Standards Committee charges Francisc Catalin Deliu, lawyer of Auckland, under section 12(a) and section 241(b) of the Lawyers and Conveyancers Act 2006, with unsatisfactory conduct, after 1 August 2008, that was not so gross, wilful or reckless as to amount to misconduct, but that occurred at a time when he was providing regulated services and was conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. **The particulars of the charge are** in paragraphs 3.01 to 3.29 inclusive, which are repeated and adopted for the purposes of this charge.

Appendix B

Chronology

DATE	EVENT
16 September 2009	Letter of complaint sent to Complaints Service
29 October 2009	Copy of complaint letter sent to the practitioner
1 April 2010	Letter from Mary Ollivier of National Standards Committee to the practitioner, advising NSC taking over matter
14 June 2010	Resolution of NSC: own motion inquiry
17 September 2010	The practitioner files in the High Court an application CIV-2010-404-6182 (judicial review of procedural steps taken thus far including to lay other charges); *later amended to include review of NSC decisions of 12 November 2010.*
1 October 2010	Notice of hearing before NSC
8 November 2010	Hearing, appearance by the practitioner before NSC
12 November 2010	Notice of determination by NSC to refer to Tribunal
21 October 2011	Decision by LCRO on the practitioner's review of NSC decision
4 November 2011	High Court (Peters J) orders separate trials for practitioner's judicial review matters and his civil claims for breach of statutory duty etc
12 April 2012	NZLS Board resolves to instruct counsel and to apply to the Court for access to files
13 April 2012	NSC letter to Registrar to access High Court files
3 July 2012	NSC (and NZLS Board) originating application to access High Court files (CIV-2012-404-3785)
9 August 2012	CA dismisses the practitioner's appeal against Peters J's order for separate trials on judicial review matters and his civil claims for breach of statutory duty etc

30 October 2012	SC declines leave to appeal CA dismissal of the practitioner's appeal against Peters J's order for separate trials on judicial review matters and his civil claims for breach of statutory duty etc
7 November 2012	First hearing in CIV-2012-404-3785 (file access)
13 December 2012	First judgment of High Court (Toogood J) in CIV-2012-404-3785 (file access) on preliminary issues (discovery; admissibility of evidence; cross-examination; representation by Mr Pyke)
20 December 2012	High Court (Allan J) finds NZLS policy not allowed by the Act: Standards Committee, not Complaints Service, must hear complaints against lawyers
3 May 2013	Katz J directs setting down of trial in CIV-2010-404-6182 (the practitioner's judicial review of early procedural steps taken by NSC)
22 May 2013	CA hears the practitioner's appeal against Toogood J's decision about preliminary issues on file access; but practitioner abandons appeal following second Toogood J judgment
23 May 2013	Second judgment of High Court (Toogood J) in CIV-2012-404-3785 (file access) on stay
10–12 June 2013	Second substantive hearing in CIV-2012-404-3785 (file access)
27 June 2013	High Court (Katz J) orders NZLS to plead to certain allegations in the practitioner's statement of claim but otherwise dismisses his interlocutory applications (discovery; admission of facts; interrogatories)
26 July 2013	Katz J dismisses the practitioner's recusal application against her
13 September 2013	High Court (Katz J) orders the practitioner to provide discovery of any recordings he has made of discussions with Mr Pyke; *On 13 February 2015 CA sets these aside*
25 September 2013	Third judgment of High Court (Toogood J) in CIV-2012-404-3785 (JR NZLS, file access), dismissing judicial review of NZLS Board decision to instruct counsel and to seek access to files, granting NZLS certain access; and adjourning NSC's application to access files until Katz J determines separate judicial review of various NSC decisions (CIV-2010-404-6182)
4 October 2013	High Court (Katz J) dismisses the practitioner's application to subpoena and cross examine NSC convenors in JR

19 November 2013	High Court (Keane J) dismisses the practitioner's application for judicial review of Tribunal's failure to determine protest to jurisdiction before setting down disciplinary proceedings
13 February 2014	Minute of Katz J adjourning the practitioner's application for review of NSC determination CIV-2010-404-6182 (part heard)
23 April 2014	The practitioner applies to the Tribunal for Mr Pyke to be debarred as counsel for prosecution in disciplinary proceedings
27 June 2014	Tribunal declines application for Mr Pyke to be debarred
8 October 2014	High Court (Asher J) grants summary judgment in favour of the practitioner against NZLS direct application for disciplinary action
13 October 2014	CA hearing of appeal against Katz J order adjourning the practitioner's review in CIV-2010-404-6182 and reduction in hearing time from 7 to 5 days
15 October 2014	High Court (Woolford J) allows the practitioner's appeal, debarring Mr Pyke from prosecuting for the NSC
4 November 2014	High Court (Thomas J) allows NSC to amend charges and admit judgments as evidence
4 February 2015	High Court (Thomas J) declines the practitioner leave to appeal her decision allowing NSC to amend charges and admit judgments as evidence
13 February 2015	CA dismisses the practitioner's appeal against Katz J orders adjourning judicial review
14 May 2015	High Court (Woolford J) dismisses the practitioner's appeal against decision to appoint members of current Tribunal
2 June 2015	SC declines leave to appeal CA dismissal of the practitioner's appeal against Katz J orders adjourning review proceedings
3 July 2015	Charges filed and served on the practitioner in 014/15
14 July 2015	SC dismisses the practitioner's application for recall of decision declining leave to appeal CA dismissal of the practitioner's appeal against Katz J adjournment orders
23 July 2015	The practitioner applies to Tribunal to stay or dismiss NSC charges (or to consolidate them with other charges)

28 August 2015	CA dismisses the practitioner's application for leave to appeal against High Court (Thomas J) decision allowing NSC to amend charges and to admit judgments as evidence
11 September 2015	High Court (Woodhouse J) dismisses the practitioner's application for Tribunal member disqualification and appeal against various interlocutory orders
28 September 2015	Tribunal dismisses application for stay or dismissal; leaves consolidation point open
30 September – 9 October 2015	**Tribunal hears evidence in LCDT 010/10 and 008/12**
10 December 2015	**Tribunal hears submissions in LCDT 010/10 and 008/12**
18 February 2016	Decision of High Court (Peters J) adjourning the practitioner's appeal against Tribunal refusal to stay or dismiss charges until after Tribunal hearing
22 February 2016	**Tribunal hearing in LCDT 014/15**