**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2022] NZLCDT 3
LCDT 010/20

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| **IN THE MATTER** | of the Lawyers and Conveyancers Act 2006 |
| **BETWEEN** | **AUCKLAND STANDARDS COMMITTEE 2**<br>Applicant |
| **AND** | **BARRY EDWARD BRILL**<br>Practitioner |

**CHAIR**
Judge D F Clarkson

**MEMBERS OF TRIBUNAL**
Hon P Heath QC
Mr S Hunter QC
Ms M Noble
Prof D Scott

**HEARING HELD AT** Specialist Courts and Tribunals Centre, Auckland

**DATE OF HEARING** 7 September 2020

**FURTHER SUBMISSIONS ON CHARGE AS AMENDED, ON THE PAPERS**
Filed 6 September 2021 (for the Practitioner) and
20 September 2021 for the Standards Committee

**DATE OF DECISION** 21 January 2022

**COUNSEL**
Mr L Radich and Mr M Djurich for the Auckland Standards Committee
Mr W Pyke for the Practitioner

## DECISION OF THE TRIBUNAL

### *Introduction*

[1] Mr Brill is charged with practising outside the understood terms of his practising certificate. The New Zealand Law Society (Law Society) alleges that he was not approved to practise on his own account, and that in doing so he recklessly or wilfully breached provisions of the LCA[1] or the Conduct and Client Care Rules made under the Act, (the Rules). In particular, s 9 of the LCA provides that it is misconduct for an employed lawyer (as opposed to a lawyer in practice on his or her own account) to provide regulated services to the public other than in the course of his or her employment by another lawyer, a law firm, or other specified entities none of which is relevant here.

[2] For many years Mr Brill described himself to the Law Society as an employee and as an in-house counsel. He paid practising fees on that basis. In these proceedings Mr Brill has asserted his eligibility to practise on his own account via what he describes as "*grandfathering*" provisions dating back to the 1955 Law Practitioners Act.[2]

[3] Although stating more than once, including in his oral evidence that he did not wish to practise on his own account, particularly bringing with it the obligations under Rule 4,[3] Mr Brill argues, however, that his eligibility to do so provides him with a defence to the s 9 charge[4] and to the two s 7 charges.

[4] As we set out in our decision of 23 July 2021,[5] concerns raised after the first part of the hearing of this matter in September 2020, led to a contested application to amend the charge. The application was mostly successful, but we declined to allow

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[1] Lawyers and Conveyancers Act 2006, "LCA", ss 9 and 7.
[2] Section 55(7) of the Law Practitioners Act 1982 and s 22 of the Law Practitioners Act 1955.
[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, "CCC Rules"
[4] Providing legal services to the public rather than to his employer.
[5] *Auckland Standards Committee 2 v Brill* [2021] NZLCDT 22.

some particulars to be canvassed as part of the charge itself, indicating that they might prove relevant as part of the overall context to be considered if the matter went to penalty stage.

[5] The charge as amended is annexed as Appendix 1 to this decision. For clarity we should state that although the various allegations are framed within the body of one charge, there are in substance three alleged breaches of the LCA and the Rules.

[6] First, it is alleged that Mr Brill provided regulated services to the public whilst an employee and other than in the course of his employment, in breach of s 9 of the LCA. Second, the Committee alleges that Mr Brill failed to provide client service information and to act independently, in breach of s 7(1)(a)(ii) of the LCA and Rules 3.4, 3.5 and 5. Third, the Committee says that Mr Brill failed to comply with a restriction to his practising certificate, in breach of s 7(1)(a)(iii) of the LCA.

[7] Each of these alleged breaches is charged alternatively as misconduct or unsatisfactory conduct. We consider each of the alleged breaches below, although as will be seen we consider that our finding on the first makes consideration of the third unnecessary.

***Issues***

[8] In order to determine whether the Standards Committee has established, on the balance of probabilities either misconduct or unsatisfactory conduct under any of the foregoing heads, the following issues have to be determined.

**Section 9**

1. Was Mr Brill an employee of B E Brill Ltd in terms of the Register kept by the Law Society and the terms, if any, of the practising certificate issued to Mr Brill?

2. Did the practitioner provide regulated services to "*the public*" other than in the terms of his employment with B E Brill Ltd?

**Section 7(1)(a)(ii)**

3. Did Mr Brill wilfully or recklessly breach the Rules pleaded in paragraph [32] of the charge?

4. If not, was there a breach simpliciter?

**Section 7(1)(a)(iii)**

5. If the s 9 charge is not upheld did Mr Brill fail to comply with the restriction to his practising certificate?

    a. Was there a restriction?

    b. Did he breach it?

    c. If so, was it a wilful or reckless breach?

***Background***

[9] The Law Society Registry records demonstrate that the practitioner has been (for the purposes of dates charged) employed as an in-house lawyer by his own company B E Brill Ltd[6] from 28 February 2007 to 30 June 2013. At this date the practitioner allowed his practising certificate to lapse; and in July 2013 he sought to make a fresh application rather than a continuation, given the lapsed period.

[10] In his application, Mr Brill stated under the heading "*Practice/Employment Details ... organisation name*" that he was employed by B E Brill Ltd. In the box provided for "*Position*" Mr Brill stated "*Director, General Counsel*" with a date of commencement of 1998.

[11] Later, under the heading of "*Employment History*" he stated, "*Organisation B E Brill Ltd*" and under "*Position"* put "*General Counsel".*

[12] Under the "*Mode of Practice*" portion of the form, relating to In-House Lawyer, to the question "*Will you be engaged as an In-House Lawyer (meaning a lawyer who*

[6] Mr Brill was sole director and majority shareholder in this company.

*is engaged by a non-lawyer and who, in the course of his or her engagement provides regulated services to the non-lawyer on a full-time or part-time basis)*?" he answered "*Yes, under a contract for service*".

[13] Still under the Mode of Practice section, in answer to the question "*Will you be in practice on your own account?*" Mr Brill answered "*No*". He then stated that the following sections on Practice as a Barrister and Practice on own account as a Barrister and Solicitor were "*Not applicable*".

[14] In an email from the Law Society of 24 July 2013, Mr Brill was advised that in order to hold a practising certificate where there is a contract for service, that he must be approved to practise on his own account.

[15] He responded in an email of 25 July 2013, whereby he clarified his relationship with his "*employer*" as a contract of service.

[16] In a further email of 30 July 2013 Mr Brill stated he was employed as an in-house lawyer who in the course of his engagement provided regulated and other services to B E Brill Ltd on a part-time basis.

[17] In answer to a question about the nature of the services provided to B E Brill Ltd, Mr Brill advised the Law Society on 1 August 2013 that he undertook general consultancy work for B E Brill Ltd and its related companies and that involved "… *some legal advice, drafting documents, debt collecting and administrative services. BE Brill Ltd does not offer legal services (whether regulated or not) to the public*".

[18] Some three years earlier, there had been communication between Mr Brill and the Law Society in September 2010, following a media report in which Mr Brill was named. In an email to the practitioner on 10 September 2010, Mr Brill was advised "*As you can understand, our concern is that you are an inhouse lawyer, and therefore, only able to provide legal advice to your employer BE Brill Ltd. Refer Chapter 15.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*…".

[19] When Mr Brill was advised on 28 August 2013 that his practising certificate had been approved, he was reminded that he was only able to advise his employer

BE Brill, and "*not advise outside of BE Brill*". He was sent a brochure entitled "*Life In-House*". That brochure outlined the differences in role of an in-house lawyer from a lawyer in private practice and went on to discuss the "*strong public policy reasons for the prohibition*" against providing services to anyone else other than the practitioner's employer.

[20] Finally, in response to a query, Mr Brill was advised on 17 March 2016 that there were two modes of practice namely, employed and practice on own account. He was advised that Law Society records indicated he was not approved to practice on own account and "… therefore, you can only practice as an employee ...".

[21] It is accepted that between 2 March 2015 and 20 September 2017 Mr Brill represented the plaintiffs and appeared as counsel in "leaky building" litigation (the "Bridgewater Litigation") which began in the High Court and proceeded to the Court of Appeal and a subsequent application for leave to appeal to the Supreme Court.

[22] Some of the Court documents refer to Mr Brill's company, B E Brill Ltd, but it is accepted that the company had no role or status in the litigation. B E Brill Ltd is not a law firm or otherwise an entity that might provide legal services.

[23] Apart from his wife, there were eight people or entities represented by Mr Brill. These were acquaintances or neighbours of the practitioner and his wife. Mr Brill asserts that, as such, they cannot be said to constitute "the public".

[24] In September of 2018 the Practice Approval Committee (PAC) of the Law Society became aware of Mr Brill's role as counsel in this litigation. The concern was raised with Mr Brill that at a time when he had assured the PAC that he was only providing legal services to his employer, and when he had said that he only wished to retain his practising certificate for personal reasons,[7] that he appeared to have been also acting as counsel in the litigation.

[25] Mr Brill denied that he was infringing s 9 of the LCA, which he stated "... *should not attempt to circumscribe the non-public and non-economic activities of members of the Society or their relationships with family, friends or neighbours*."

[7] Mr Brill had earlier advised that he wished to reach the milestone of holding a practising certificate for 50 years.

[26] On 15 November 2018, Mr Brill was interviewed at some length by the PAC. In the course of the interview he stated his awareness of two types of practising certificates, one for employees and one for those practising on own account. He said he had practised on his own account, but not since the 1970s so he was well beyond the "*ten-year limit*". He described his activities as an in-house lawyer for B E Brill Ltd, an investment company. He stated that he was the sole employee of the company.

[27] Mr Brill accepted that he was not entitled to pass himself off "*as being in public practice*". He accepted that in the litigation he was shown as being the solicitor on the record, that he made submissions and appeared as counsel.

[28] In later submissions to the Standards Committee, in 2019, Mr Brill reiterated: *"I did not provide regulated legal services in my capacity as an employee of BE Brill Ltd. As I am lawfully entitled to practise on my own account as either a barrister or solicitor, no breach of section 9 has occurred".*

[29] Following the filing of these charges, Mr Brill stated, in his formal Response and in his affidavit[8] that he was not an employee of B E Brill Ltd, but was a director of the company, that he "*undertook occasional work for the company (most of which was wholly unrelated to legal services)*", and that he was "*self-employed*".

[30] For completeness we note that the Bridgewater litigation was ultimately unsuccessful. The parties represented by Mr Brill received substantial adverse costs awards after they pursued arguments which the Court of Appeal referred to as bordering on "pointless", "vexatious" and "frivolous"[9].

**The Scheme of the Act and Modes of Practice**

[31] The LCA makes extensive provision for the Law Society to regulate the profession (s 69) and for the making of Rules to assist with this (s 94). The Act and the Rules provide for a division between employed lawyers and those practising on their own account.

[8] Affidavit B E Brill 16 July 2020.
[9] *Butcher and others v Body Corporate 342525* [2018] NZCA 19 at [83].

[32] The Practice Rules[10] allow the Law Society to charge variable fees to lawyers who practise in different ways (Rule 5) and to keep a register of how lawyers are practising, including whether a lawyer is in practice in his or her own account (Rule 10).

[33] The Act also allows the Law Society to set requirements "*to be met before a practitioner may practise as such on his or her own account, whether as a sole practitioner, in partnership, or otherwise*" (s 94(i)).

[34] Practitioners have a basic professional obligation to cooperate with the Law Society as the profession's governing body and to provide it with accurate information. The Law Society has an obligation to keep an accurate and up-to-date public register concerning the status of lawyers. Because of this, there is a specific obligation in the Practice Rules (Reg 11) for lawyers to advise the Law Society "as soon as practicable" if any of the information on the Law Society Register about the lawyer changes. We note that at the time of the hearing the register contained on the Law Society's website stated that Mr Brill was an "*In-house Lawyer at BE Brill Ltd*".

***Discussion of the Issues***

**Issue 1 – Was Mr Brill an "employee"?**

[35] As can be seen from the narration of the background in this decision, Mr Brill has repeatedly told the Law Society that he was an employee of B E Brill Ltd. He has done this in letters, in signed forms, including declarations, and in person at interview. Further, at one point he provided the Law Society with a copy of an employment agreement which he initially presented as being in place between himself and B E Brill Ltd.

[36] On the other hand, Mr Brill has never contended that he is in practice on his own account. Indeed, he has specifically said that he does not want to be.

[37] Nor has Mr Brill sought to satisfy the Law Society that he is eligible to practise on his own account in terms of the current requirements for that status.

[10] Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008.

[38] Mr Brill has not paid the fees payable by lawyers in practice on their own account and he has not met the obligations under s 44(1)(a) in Schedule 1 of the Act that sole practitioners must appoint an attorney. For a number of years Mr Brill has advised his professional body, with whom he is bound to be entirely truthful, that he was an in-house lawyer employed by B E Brill Ltd. He was accordingly recorded on the Law Society Register on that basis. He still is.

[39] We do not consider that the Law Society needs to go beyond the words of its members, particularly when said member has declared them to be "*true and correct*", by investigating details of an employment relationship. It is not for the Law Society to ascertain whether, in terms of the Employment Relations Act or any other statute, tax or otherwise, Mr Brill has properly characterised himself. The Law Society was entitled to rely on the repeated assertions made to it that Mr Brill was an employee and it was in this mode that Mr Brill was permitted to practise.

[40] Mr Brill cannot claim to be uninformed on the matter. He had been engaged with the Law Society for some years on the subject, culminating in the email sent to him by the Law Society on 17 March 2016 when he was reminded of the two modes of practice and advised that he was not approved to practise on his own account and therefore could only practise as an employee. We conclude that for the purposes of the Rules, Mr Brill was an employed lawyer or an "employee" rather than a person in practice on his own account.

**Issue 2 – Did Mr Brill provide regulated services to the "public"?**

[41] No issue seems to be taken that what Mr Brill did in conducting litigation as an advocate fell within reserved areas of work and thus was the provision of regulated services.

[42] Where Mr Brill resists the charge, is in relation to the definition of "*public*". He is critical of the "*failure*" of the Committee to call evidence to demonstrate that his wife or their co-parties in the Bridgewater proceedings were "*the public*".

[43] As we have noted above, Mr Brill represented eight persons or entities in the Bridgewater litigation in addition to his wife. These were friends or neighbours in the Bridgewater complex and in one case a trustee company. When asked about his

relationship with these parties, Mr Brill described some of them as his friends and others as “a neighbour” or “just a neighbour”.

[44] We do not consider that there was any need for the Standards Committee to call evidence about the persons represented by Mr Brill. There is no dispute about who they were or their relationship with Mr Brill. Mr Brill’s case is that because his clients were friends and/or neighbours they were “*a particular group*” and that “*a precise group*” was the “*exact opposite of “the public*”.

[45] Mr Brill submits that the purpose of s 9 is “… *to protect the public against persons holding themselves out as lawyers when not entitled to do so*”. And that “*the Practice Rules are to prevent non-lawyers from holding themselves out or acting as if they were lawyers, not to prevent lawyers entitled to practice from doing so”.*

[46] Mr Brill was (and is) a lawyer. He was not, however, a lawyer entitled to practise on his own account and had been repeatedly told so.

[47] We do not accept Mr Brill’s submission that his clients in the Bridgewater litigation were not “the public” for the purposes of the Act and the Rules. Leaving the difficult issue of Mr Brill’s wife to one side, the other parties he represented were in our view clearly “the public”. The fact they came together as a group for the purposes of the litigation and their relationship as neighbours does not change this.

[48] The primary purpose of the LCA is to protect the public. One of the ways this is done is by regulations which set out information that lawyers must provide to the members of the public who engage them, i.e. their clients. This information, which should be set out in the engagement letter, includes the standards to which the lawyer must adhere, the availability of insurance, and the complaints process.

[49] Sending an engagement letter is a routine matter for lawyers in practice on their own account. Mr Brill did not comply with this obligation. There is no reason why the parties Mr Brill represented in the Bridgewater litigation should have been deprived of this protection. We consider they fell within the definition of “the public” and as an employed lawyer Mr Brill was not entitled to provide services to them.

[50] The concerns underlying the prohibition on rendering services to the public by employees of organisations which are not law firms is self-evident. Unlike law firms, those organisations are not comprised of persons bound by the Conduct and Client Care Rules. They are unlikely to have the same systems in place to ensure that the Rules are complied with. They are less likely to carry professional indemnity insurance which would protect the client in the event of negligence. The provisions as to terms of engagement are not applicable to organisations other than law firms.

[51] Consumers of legal services are entitled to be represented by duly authorised practitioners who are aware of and adhere to basic professional requirements. Mr Brill's clients were not given any of the usual client care advice and were exposed to substantial adverse costs awards after Mr Brill pursued arguments which the Court of Appeal referred to as bordering on "pointless", "vexatious" and "frivolous"[11].

[52] Mr Brill has stated a number of times that he was entitled to act as he did in the litigation because he was "*acting as a lawyer in his own right in the proceedings* …" and has on occasions adopted a demeanour of injured innocence. This is at odds with his failure to disclose to the Committee, despite being involved in lengthy correspondence with them, that he was engaged in the Bridgewater litigation. For example, in a letter to Mr Brill in early August 2017, Ms Inder on behalf of the Law Society required further information from him relating to "*the nature of your legal practice, the service it provides and why you require a practising certificate*". In his response on 21 August, Mr Brill stated that he had "*not offered legal services to the public since 1975*". He attached a copy of his employment contract and went on to say "*the principal reason I wish to retain my practising certificate is personal and perhaps sentimental. Upon eventual retirement, I would like to have remained qualified including staying current on legal education for 50 years* …" On being cross-examined about the omission of his reference to the litigation that he had been conducting for the previous two years, Mr Brill conceded "*Yes, if I was writing it again I would have put in additional reason that I was engaged in a current litigation but I didn't mention it then and I'm not sure whether it was present in my mind as I related to this inquiry or not. If it was I might have decided that it was best to say nothing* …".[12]

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[11] See above n 9.
[12] NOE p 29.

[53] We find that misconduct pursuant to s 9 has been established by the Standards Committee on the balance of probabilities. Having found Mr Brill to be an employee in terms of that section, we consider it is quite clear he provided services to the public in the conduct by him of the litigation of the Bridgewater proceedings.

[54] In his closing submissions Mr Pyke, on behalf of Mr Brill states that his client does not rely on the exception in s 10(3):[13]

> **10 Exceptions to section 9**
>
> …
>
> (3) Nothing in section 9 prevents a lawyer who is both an employee and a lawyer practising on his or her own account from providing regulated services to the public in his or her capacity as a lawyer practising on his or her own account.
>
> …

[55] It is a proper concession. We do not consider Mr Brill could have properly availed himself of subsection (3) because that subsection applies to a lawyer who is actually practising on his own account as well as having the status of an employee under s 9. Mr Brill does not fulfil these criteria. Even assuming in Mr Brill's favour that he is eligible to practise on his own account (under "grandfathering" provisions or otherwise) he has not undertaken prerequisite activities for approval of a practitioner to practise on own account.[14]

**Issues 3 and 4 – Did the Practitioner wilfully or recklessly breach the Rules, Regulations or the LCA?[15]**

[56] This issue relates to the particulars of the charge set out at paragraph [32]. Only subsections (a) and (b) remain for consideration, as a result of our decision on Amendment of Charges dated 23 July 2021. Although we noted that the remaining factors might ultimately be considered as aggravating features of the practitioner's conduct should there be a finding against him, we removed from consideration breaches of the Rules contained in those remaining three sub-paragraphs.

[57] Rules 3.4 and 3.5 require a lawyer to provide in advance, in writing, "*client information on the principal aspects of client service* …". The Rule then sets out the

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[13] Section 9 is subject to the exceptions set out in s 10.
[14] For example, he has not attended the Stepping Up course prescribed by the NZLS.
[15] Section 7(1)(a)(ii).

matters to be covered which is the basis for fee charging, professional indemnity arrangements of the lawyer's practice, information about the fidelity fund and the proceedings for handling of complaints. Rule 3.5 extends this to include further information including any obligations which are limited or liability excluded.

[58] Mr Brill's response to this is firstly, that he was employed by the Bridgewater plaintiffs under a contract for services "… *to advance a claim based on their commonality of private interests*"[16] noting that there is no requirement for such an agreement to be in writing.[17] He then says that would place him in the position of an in-house lawyer for that group as part of a part-time contract and therefore that he was not providing legal services to the public and was not bound by Rules 3.4 and 3.5. If the Tribunal rejects this argument, he submits that he was "*entitled to practice on his own account but that he was not providing legal services to the public and therefore again Rules 3.4 and 3.5 do not apply*".

[59] We regard this construction of the arrangement as entirely artificial and as an after the event justification on his Mr Brill's part. Indeed, in his own evidence before the Tribunal Mr Brill said:

> A: "I believed that I was entering into an in-house lawyer relationship with the plaintiffs. I now believe as a matter of law that I might have been mistaken.
>
> Q: So I just want to be clear of your position now, are you saying that you were never in a relationship of in-house lawyer with the plaintiffs?
>
> A: In my opinion I was not."

[60] Mr Brill went on to discuss having an oral contract with the plaintiffs to represent them.

[61] There is no evidence, apart from Mr Brill's belated assertion, that any of the plaintiffs considered that they were so engaging Mr Brill.

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[16] With reference to Rule 15.1.1 of the CCC Rules.
[17] We record, for completeness, that no written agreement between the Plaintiffs and Mr Brill was produced in evidence.

[62] He has therefore technically breached Rules 3.4 and 3.5 by the failure to provide such information. Clearly this breach is considered to be at a lower level than the actual breach of s 9.

[63] We turn to the breach of Rule 5 of the Conduct and Client Care Rules. This Rule deals with the prohibition on a lawyer acting where there are conflicting interests. Rule 5.4 states:

> **Conflicting interests**
>
> 5.4 A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.
>
> 5.4.1 Where a lawyer has an interest that touches on the matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client or prospective client irrespective of whether a conflict exists.
>
> 5.4.2 A lawyer must not act for a client in any transaction in which the lawyer has an interest unless the matter is not contentious and the interests of the lawyer and the client correspond in all respects.
>
> 5.4.3 A lawyer must not enter into any financial, business, or property transaction or relationship with a client if there is a possibility of the relationship of confidence and trust between lawyer and client being compromised.
>
> 5.4.4 A lawyer who enters into any financial, business, or property transaction or relationship with a client must advise the client of the right to receive independent advice in respect of the matter and explain to the client that should a conflict of interest arise the lawyer must cease to act for the client on the matter and, without the client's informed consent, on any other matters. This rule 5.4.4 does not apply where—
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> (a) the client and the lawyer have a close personal relationship; or
>
> (b) the transaction is a contract for the supply by the client of goods or services in the normal course of the client's business; or
>
> (c) a lawyer subscribes for or otherwise acquires shares in a listed company for which the lawyer's practice acts.
>
> 5.4.5 In this rule, a lawyer is deemed to be a party to a transaction if the transaction is between entities that are related to the lawyer by control (including a trusteeship, directorship, or the holding of a power of attorney) or ownership (including a shareholding), or between parties with whom the lawyer or client has a close personal relationship.

[64] Mr Brill states in affidavits and submissions that there is no evidence that he compromised the co-party's interests. He asserts that the interests of himself and his

wife were "*wholly intertwined*". He went on to say that the interests of the owners of the other units (the co-plaintiffs) "*were in all material respects identical to those of himself and his wife*". He accepted in evidence that it would have been preferable had they been separately represented because that would have bought a further perspective to bear, and more "*firepower to our case as well as the undoubted benefits of an independent view*".[18]

[65] Rule 5.6 may also be relevant. It reads:

> **Third party conflicts of interest**
>
> 5.6 A lawyer must ensure that the existence of a close personal relationship with a third party does not compromise the discharge of the duties owed to a client.
>
> 5.6.1 A lawyer must not act if there is a conflict of interest or an appearance of a conflict of interest between a client and a third party with whom the lawyer has a close personal relationship.
>
> 5.6.2 Where a person with whom the lawyer has a close personal relationship has an interest in the matter being dealt with or proposed to be dealt with on behalf of the client, the existence of that close personal relationship and the nature of the interest must be disclosed to the client or prospective client irrespective of whether an actual conflict of interest exists.
>
> 5.6.3 A lawyer is not precluded from acting for a client solely because another lawyer in the lawyer's practice has a close personal relationship with a person whose interests conflict with the interests of the lawyer's client.
>
> 5.6.4 Where lawyers are in a close personal relationship with each other they must not act for different parties in a matter unless the clients of both lawyers give their informed consent to their respective lawyers acting. Where both lawyers are retained by their respective clients before the close personal relationship is established, then, in the absence of both clients' consent to their respective lawyers continuing to act, the lawyer retained later in time must cease to act.
>
> 5.6.5 A lawyer is not precluded from acting for a client because another lawyer in his or her practice has a close personal relationship with the lawyer acting for the opposing party.

[66] It is apparent that the quoted Rules deal with the risk of compromising influences or potential conflicts of interest as well as actual established conflicts. A lawyer needs to avoid both. Mr Brill was clearly in a close personal relationship with his wife. We have no evidence of how this might have, or indeed did influence decisions which he might make and the advice given to the other co-plaintiffs.

[18] Affidavit of B E Brill, 16 July 2020 at para [43].

It would seem Mr Brill was drawing attention to close personal relationships, because that was the very basis on which he asserted that he was not providing services to members of "the public".

[67] It must be obvious that when pursuing litigation in which a lawyer has a personal and pecuniary interest, that he or she cannot represent someone else, even if the interests appear aligned at the outset. Conduct of litigation involves dozens of choices and decisions. Litigation is always contentious, and the interests of the lawyer and the client may not necessarily correspond in all respects where there is a personal interest.

[68] The point is, and he acknowledged it himself in his own affidavit, that an independent voice for the co-plaintiffs would have been wise and protective of them. The parties represented by Mr Brill incurred adverse costs awards of, on his evidence, between $100,000 and $130,000. This was a 50 per cent uplift, imposed by Muir J, because of the manner in which the proceedings had been conducted by Mr Brill on behalf of the plaintiffs.

[69] Although it is fair to note that such costs awards were offset by the benefits of the pro bono representation provided by Mr Brill, the comments made by the Court of Appeal which have been already referred to, demonstrate the risks against which the conflict rule is intended to protect members of the public.

[70] At the end of the day the Tribunal has assessed the breaches of these two Rules, the latter being more serious than the former.

[71] However, we consider that they do not meet the standards of misconduct, namely a wilful or reckless breach. They do however meet the definition of unsatisfactory conduct in s 12(a), "*being conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer*" or (b)(ii) "*unprofessional conduct*".

**Issue 5 – Section 7(1)(a)(iii)**

[72] We consider that this charge to a large extent duplicates the s 9 charge and we have determined that they ought to be considered in the alternative.

Because we have made a misconduct finding under s 9 we do not propose to consider a breach of s 7(1)(a)(iii) because that may risk the unfairness of a duplication of the charges against the practitioner.

***Summary of Decision***

1. We find misconduct proved under s 9.

2. We find that unsatisfactory conduct is proved in relation to the breaches of Rules 3.4, 3.5 and 5 respectively.

3. We treat the charge under s 7(1)(a)(iii) as an alternative to the s 9 charge and therefore decline to consider it.

***Directions***

1. The Standards Committee are to file submissions as to penalty within 21 days of the date of release of this decision.

2. The practitioner has a further 21 days to respond.

3. Counsel are to confer with the Tribunal case manager to set a penalty hearing of half a day for this matter.

**DATED** at AUCKLAND this 21st day of January 2022

Judge DF Clarkson
Chairperson

Appendix 1

# Charges

Auckland Standards Committee 2 (**Standards Committee**) hereby charges Barry Brill (**Practitioner**) with:

**Charge:** Misconduct within the meaning of ss 9(1)(i) ~~and/or (1A)(a)(i)~~ and/or ss 7(1)(a)(ii) and/or (iii) of the Lawyers and Conveyancers Act 2006 (**Act**);

In the alternative:

Unsatisfactory conduct within the meaning of ss 12(c) and/or 12(d) of the Act.

**Particulars**

1. At all material times the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand.

2. At all material times the Practitioner held a practising certificate that entitled him to practise as an in-house lawyer only.

3. From 1 April 2004 the Practitioner was ~~employed by BE Brill Limited, a company of which he is~~ the sole director and majority shareholder of BE Brill Limited.

4. From at least 28 February 2007 the Practitioner was employed by BE Brill Limited.

~~4.~~5. BE Brill Limited is not an incorporated law firm.

~~5.~~6. The Practitioner was not approved to practise on his own account.

~~6.~~7. Between 2 March 2015 and ~~23~~0 September~~November~~ 2017 the Practitioner represented and appeared as counsel for the plaintiffs and/or defendants in the High Court and as counsel for the appellants in the Court of Appeal and Supreme Court on the following proceedings:

(a) *Wheeldon v Body Corporate 342525* [2015] NZHC 884;

(b) *Wheeldon v Body Corporate 342525* [2016] NZCA 247;

(c) *Wheeldon v Body Corporate 342525* [2016] NZSC 125;

(d) *Butcher v Body Corporate 342525* [2016] NZHC 3128;

(e) *Wheeldon v Body Corporate 342525* [2017] NZHC 87.

~~7.~~8. The Practitioner represented the following parties in the above proceedings:

(a) Derek Peter Wheeldon and Carol Ann Wheeldon;

(b) Anthony John Butcher and Ruth Barbara Rogers;

(c) Larry Lawrence Small and KM Trustees Services Limited;

(d) Ivor Anthony Millington;

(e) Neville Eade; and

(f) Robyn Kathleen Stent.

~~8.~~9. Pursuant to a deed of agreement dated 4 March 2014, Mr and Mrs Wheeldon had assigned the claim that was the subject of the above proceedings to Robyn Kathleen Stent.

~~9.~~10. The same deed of agreement appointed the Practitioner to pursue the claim by Mr and Mrs Wheeldon pursuant to a power of attorney.

~~10.~~11. The Practitioner is the husband of Robyn Kathleen Stent.

~~11.~~12. Neither the Practitioner nor the Practitioner's employer BE Brill Limited were named as a party to any of the proceedings.

~~12.~~13. The judgments from the High Court, Court of Appeal and Supreme Court noted the solicitors for the relevant plaintiffs and/or appellants as BE Brill Limited, Paihia.

~~13.~~14. On 21 August 2017 the Practitioner wrote to the Practice Approval Committee in response to an enquiry by the Committee as to the nature of his legal practice.

~~14.~~15. In his letter dated 21 August 2017, the Practitioner stated that his "practice" was not specialised and generally comprised advice or representation in respect of matters that involved the investment business of his employer or its associates.

~~15.~~16. In his letter dated 21 August 2017, the Practitioner stated he had been providing legal services to various employers since 1983 but had not offered legal services to the public since 1975.

~~16.~~17. In his letter dated 21 August 2017, the Practitioner further noted that the principal reason for wishing to retain his practising certificate was personal as upon his eventual retirement he would like to have remained qualified for 50 years.

~~17.~~18. On 20 September 2017, one month after his letter to the Practice Approval Committee, the Practitioner appeared in the Court of Appeal as counsel for the appellants on the following proceedings:

(a) *Butcher v Body Corporate 342525* [2018] NZCA 19; [2017] NZCA 423; and

(b) *Wheeldon v Body Corporate 342525* [2018] NZCA 20; [2017] NZCA 424.

~~18.~~19. The Practitioner represented the same parties listed at paragraph ~~8~~7 above in the Court of Appeal proceedings.

~~19.~~20. The judgments from the Court of Appeal named the Practitioner as counsel for the appellants.

~~20.~~21. The judgments from the Court of Appeal noted the solicitors for the appellants as BE Brill Ltd, Paihia.

~~21.~~22. On 20 December 2018, the Standards Committee received a referral dated 19 December 2018 from the Practice Approval Committee, expressing concern that the Practitioner was practising outside the scope of what was permitted as an in-house lawyer.

~~22.~~23. On 14 February 2019 the Standards Committee resolved to commence an own motion investigation pursuant to s 130(c) of the Act.

24. Following investigation, the Standards Committee on 2 December 2019 determined the matter should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal pursuant to s 152(2)(a) of the Act.

*Misconduct pursuant to section 9 of the Act*

~~23.~~25. One of the purposes of the Act as set out in s 3(1)(b), is to protect the consumers of legal services.

~~24.~~26. Pursuant to Rule 15.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 **(the Conduct and Client Care Rules)**, an in-house lawyer is a lawyer who is engaged by a non-lawyer, and who, in the course of his or her engagement, provides regulated services to the non-lawyer on a full-time or part-time basis.

~~25.~~27. Between March 2015 and ~~November~~ September 2017, the Practitioner was an in-house lawyer employed by BE Brill Limited.

~~26.~~28. Pursuant to ss 9 and 10 of the Act, with limited exceptions, an ~~in-house lawyer~~employee is only permitted to provide regulated services to their employer.

29. Pursuant to s 9 of the Act, an ~~in-house lawyer~~employee is guilty of misconduct if he provides regulated services to the public other than in the course of his employment.

~~27.~~30. Between 2015 and September 2017, the Practitioner provided regulated services to the parties listed at paragraph 8.

~~28.~~31. In doing so, t~~T~~he Practitioner provided regulated services to the public which included the following reserved areas of work:

(a) appearing as an advocate for other people before any New Zealand court and/or;

(b) representing other people involved in proceedings before any New Zealand court

*Misconduct pursuant to s7(1)(a)(ii)*

~~(b)~~

32. The Practitioner's conduct amounted to misconduct under s 7(1)(a)(ii) in that he wilfully or recklessly contravened any of the following Rules and/or Regulations:

(a) Rule 3.4 and 3.5 of the Conduct and Client Care Rules, in that the Pracitioner did not provide information in writing on the principal aspects of client service; and/or

(b) Rule 5 of the Conduct and Client Care Rules, by failing to be independent and free from compromising influence or loyalties when providing regulated services; and/or;

~~(c) Rules 2.5, 2.6 and 11.1 of the Conduct and Client Care Rules, by engaging in conduct that was misleading or deceptive when renewing his practising certificate and in correspondence with the NZLS and in the Bridgewater proceedings; and/or~~

~~(d) Regulation 8 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations Act 2008 (**the Practice Rules**), by failing to disclose, as soon as practicable, information about any matter that might affect his continuing eligibility to hold a practising certificate; and/or~~

~~(e) Regulation 11 of the Practice Rules, by failing to advise, as soon as practicable, of any changes to the information the Law Society keeps on the register about him.~~

33. Alternatively, if misconduct is not established pursuant to s7(1)(a)(ii), the conduct amounted to unsatisfactory conduct pursuant to s12 (c).

*Misconduct pursuant to s7(1)(a)(iii)*

34. Between 2 March 2015 and 20 September 2017 the Practitioner's practising certificate permitted him to provide regulated services as an in-house lawyer to BE Brill Limited only.

35. Between 2 March 2015 and 20 September 2017, the Pracitioner provided regulated services to the parties listed at paragraph 8.

36. The Practitioner's conduct amounted to misconduct under s7(1)(a)(iii) in that he wilfully or recklessly, failed to comply with a restriction to his practising certificate.

~~(c)~~

~~(d)~~ 37.Alternatively, if misconduct is not established pursuant to s7(1)(a)(iii), the conduct amounted to unsatisfactory conduct pursuant to s 12(d).