

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [City] Standards Committee [X]

**BETWEEN**

**PR**

Applicant

**AND**

**HG**

Respondent

**The names and identifying details of the parties in this decision have been changed.**

**DECISION**

**Introduction**

[1] Ms PR has applied for a review of a decision by the [City] Standards Committee [X] which determined Mr HG's complaint on the basis that there had been unsatisfactory conduct on her part in that she had filed documents in Court alleging deceit, without having taken appropriate steps to ensure that reasonable grounds for making the allegation existed.

**Background**

[2] Ms NC as instructing solicitor instructed Ms RM<sup>1</sup> and Ms PR as counsel for Ms XY, formerly Mrs SR, in 2010. Ms XY is a [Country] citizen. She lives overseas. For the purposes of this review Ms XY has agreed to a very limited waiver of her privilege. Given the limits imposed by Ms XY's claims to privilege, what follows is as much as can relevantly be discerned from the materials that are available on review.

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<sup>1</sup> Although Ms RM was also instructed, her conduct is not the subject of Mr HG's complaint.

[3] While she and Mr SR were married Mr HG had the use of some of their money. The precise arrangements and amounts are unclear because they were not documented at the time. Ms XY became concerned about the accuracy of Mr HG's position as set out in undated spreadsheets, referred to as a loan schedule (the schedule) prepared by Mr HG's accountants in 2007 or 2008. On their own, the spreadsheets for Loans #1 and #2, which refer to loans to fund purchases of land, appear to indicate Mr HG had not repaid just under \$600,000.

[4] The schedule purported to evidence the amount set out in a deed entered into between Mr HG and Mr SR, which recorded the amount Mr HG had not repaid was \$300,000 (the deed). A copy of the deed provided in the course of this review bears the date 2007, and appears to have been signed by Mr HG and Mr SR after the amount recorded was increased by a handwritten amendment from \$200,000 to \$300,000, presumably before either of them signed it. There is an apparent discrepancy between the schedule and the deed (the apparent discrepancy).

[5] In 2008 Ms XY relied on the deed to settle proceedings in the United States against Mr SR in which she sought to secure her share of their relationship property after they had separated (the [Country] proceeding). Their settlement left it open to either of them to pursue the other for money received under certain "notes/receivables" held by Mr SR in trust for him and Ms XY.<sup>2</sup> In Ms XY's view at least, the deed was one such note or receivable.

[6] In the course of the [Country] proceeding Ms XY was provided with "extensive disclosure of records and information" from Mr SR. It is said that the [Country] proceeding took 17 months to settle, with depositions being taken in the [Country] and [NZ City]. Ms XY is said to have been provided with a:<sup>3</sup>

... broad and liberal opportunity to make claims and discover income and asset information<sup>4</sup> during the dependency of the divorce case. Once concluded, [Ms XY] signed a settlement agreement acknowledging that she had been fully informed about the assets, their values, liabilities, income, expenses and her rights to same.

[7] I take it there were other heads of claim. However, for the purposes of this review, Mr HG's responsibility for the apparent discrepancy was the matter that then came to occupy Ms XY's mind, because she had settled that particular aspect of her claim against Mr SR for \$150,000 in 2008 based on the premise that the \$300,000

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<sup>2</sup> Statement of Claim, clause [17].

<sup>3</sup> Letter MZ to SR (27 March 2015).

<sup>4</sup> From Mr SR.

recorded in the deed was correct. There is no evidence that explains when Ms XY first saw the schedule.

[8] However, presumably based on further analysis of the materials she had, Ms XY, came to distrust the schedule, and thus the deed. She was not satisfied that either accurately recorded the debt position of Mr HG to the SRs jointly. Ms XY did not have access to all the information she needed to be able to assess whether the schedule or the deed was correct. She only had access to financial information from the SRs' side, and what she knew from her own apparently limited involvement in financial matters while they were married. For example, Ms SR was aware that Mr HG operated a New Zealand bank account under a company name into which she and Mr SR channelled money while they were together. It appears likely she may not have had access to all the materials that would have enabled her to reconcile the financial position to be sure Mr HG had paid all of the money back. Her position is based on her needing access to the corresponding information from Mr HG and his related companies and other entities, to complete her reconciliation.

[9] Mr HG's evidence is that he and Mr SR have remained friendly throughout. There is no evidence to suggest that Mr SR was concerned about what Mr HG had received, what he had repaid and what, if anything, might still be owing. The handwritten change to the deed suggests a fairly relaxed approach to Mr HG's level of indebtedness on Mr SR's part.

[10] Ms XY's position was that Mr HG had been spending the SRs' joint money in New Zealand, and that neither Mr HG nor Mr SR had made her fully aware of the details. Ms XY says Mr HG had made comments in her presence to the effect that he could not afford to buy more land, from which she reasoned that his income was not sufficient to have repaid the amounts of money he claimed to have repaid in the schedule. In short, without further detail from Mr HG, she could not resolve the apparent discrepancy.

[11] Although privilege limits what Ms PR can disclose, I take it that as a minimum the materials she had available to her included Ms XY's instructions included her own account of events, whatever materials she obtained in the [Country] proceeding and whatever materials she was able to access directly, for example details of any joint accounts in her and Mr SR's name, the schedule and the deed.

[12] In 2010, Ms XY instructed Ms NC to write to Mr HG asking him to explain various unexplained drawings apparently from accounts funded by the SRs, and

undocumented advances made to him using the SRs' joint money between 2003 and 2007. Ms NC's letter to Mr HG is dated 23 December 2013.

[13] Ms NC said that Ms XY had reason to believe that Mr SR's reconciliation was not an accurate representation of the loans and repayments, and sought cooperation from Mr HG and his wife in ascertaining the true nature and extent of the loans, underlying or related transactions and repayments made by Mr HG and related entities. The letter concludes with an indication that Ms XY was willing to resolve issues through discussion, and "without the need for any further litigation", but declaring her then current intention was "to issue proceedings should she not have the opportunity of receiving information about these transactions".<sup>5</sup>

[14] Ms PR says by that stage she had seen various materials including the schedule and the deed. I take it from Ms NC's letter that she, Ms RM and Ms PR and any accountant they may have engaged had been unable to resolve the apparent discrepancy. Ms PR says Mr HG did not respond to Ms NC's inquiries. Mr HG says he replied suggesting Ms XY's enquiries be directed to Mr SR. For the purposes of this review, the difference is inconsequential because Mr HG does not contend that he provided explanations, information or otherwise cooperated with Ms XY as she had requested.

[15] Between 2010 and 2012 Ms RM and Ms PR made a number of enquiries, and had a number of meetings.<sup>6</sup> Ms PR says she is limited by Ms XY's privilege from detailing what those enquiries were, or who the meetings were with. However, it is clear from the fact that she commenced proceedings in 2012 that Ms XY's concerns had not been alleged, and she wanted a formal accounting from Mr HG, to at least explain the apparent discrepancy.

[16] On Ms XY's instructions, Ms RM and Ms PR settled a statement of claim dated 21 September 2012 (the statement of claim) and commenced a civil proceeding in the High Court in 2012 (the proceeding) against Mr HG. Ms NC's name appeared on the proceeding as solicitor on the Court's record. Ms RM and Ms PR were named as counsel acting.

[17] The statement of claim proceeded on the basis that Mr HG had been the recipient of substantial financial support from Ms XY and Mr SR. The schedule and deed did not adequately explain the apparent discrepancy. Ms XY alleged that two advances had been mis-recorded in the schedule which would have affected her

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<sup>5</sup> Letter AB Law to NZLS (11 March 2015).

<sup>6</sup> Letter AB Law to NZLS (11 March 2015).

entitlement to joint funds by around \$300,000. Orders were sought directing Mr HG to account for the apparent discrepancy. Three heads of claim were pleaded against Mr HG: breach of contract, deceit and negligent misrepresentation. It is the second of those, the allegation of deceit, that became central to Mr HG's complaint about Ms PR's conduct.

[18] The allegation of deceit was pleaded as follows:

29. In entering into the agreement [Mr HG] represented to [Ms XY] that the sum due and owing was the sum of NZ\$300,000.
30. He made this representation knowing that it was false.

[19] Mr HG filed a statement of defence, which is consistent with his assertion that "There was no grounds to file this claim against us whatsoever".<sup>7</sup>

[20] Mr HG contends that the schedule, which his accountants had prepared, was the only evidential basis for the allegation of deceit. Mr HG describes the schedule as "A copy of the loan statement that [Mr SR] provided to settle his divorce with [Ms XY] in the [Country] courts back in 2008".<sup>8</sup>

[21] After the statement of claim had been filed a forensic accountant, Mr AJ, was instructed on Ms XY's part "in late 2012 – early 2013".<sup>9</sup>

[22] Discovery was contentious, and revealed absences and what appeared to be internal inconsistencies in information received from Mr HG. Ms PR referred in correspondence at the time to substantial sums being brought into the account from unidentified sources during particular periods, and inconsistencies with GST returns. Ms XY maintained she had a clear recollection of Mr HG saying "the HGs were not in any financial position to fund the purchase of Lot #2". Ms PR's view was that the financial records Mr HG had provided supported Ms XY's position that the schedule and deed represented the only attempt to reconcile the loans and repayments. Ms PR said the schedule and the deed were prepared for the purpose of settling the matrimonial property claims between Ms XY and Mr SR and were "prepared well after the facts and without the involvement of Mrs XY".<sup>10</sup>

[23] Mr AJ swore an affidavit dated 28 January 2014 saying that Mr HG had provided "some financial information concerning his accounts".<sup>11</sup> He describes

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<sup>7</sup> Letter HG to AB Law (20 December 2014).

<sup>8</sup> Letter HG to AB Law (20 December 2014).

<sup>9</sup> Letter AB Law to NZLS (11 March 2015), at 2.7.

<sup>10</sup> Letter PR to CD Law (15 August 2013).

<sup>11</sup> Affidavit AJ at [4].

Mr HG's accounting position as "exceptionally complicated".<sup>12</sup> He refers to partnerships, trusts and companies, some of which had provided no financial information. He refers to undocumented lending from Ms XY and Mr SR which did not appear in any of the financial accounts for any of the businesses which he had seen up to that point. He said he was unable to see how repayments had been dealt with or funded, and refers to "very large sums of money"<sup>13</sup> being involved. He hazarded those might relate to foreign exchange transactions. He described a "significant increase in the revenue of the group"<sup>14</sup> in 2008 for which he could not account on the information Mr HG had provided.

[24] It is clear from Mr AJ's affidavit that he had attempted to trace the flow of money through Mr HG, his companies and associated entities, but lacked sufficient information to be able to resolve the accounting position as it might affect Ms XY's entitlements to the SRs' joint funds. This is relevant because of the terms on which she and Mr SR settled their property disputes.<sup>15</sup>

[25] In his affidavit, Mr AJ also referred to incomplete invoices, potential third-parties from whom discovery might be sought, and says his analysis of the accounting information he had at that stage received from Mr HG led him to believe "some form of external funding"<sup>16</sup> was involved. Mr AJ refers to a number of financial transactions across several years that did not make sense to him on the available information, and postulates that some current accounts may have been funded by loans from Ms XY and Mr SR that do not appear elsewhere in the financial statements.

[26] Mr AJ refers to Mr HG's group of entities' internal accounting, explains where he considers information should be held, and speaks of Ms XY's allegation that there is a "circular money arrangement"<sup>17</sup> between Mr SR and Mr HG. Mr AJ says that Mr HG had made no attempt to "provide financial statements for the non-corporate entities despite their involvement in the Group's financial structure and their significance in some cases as shareholders".<sup>18</sup> His affidavit refers to Mr HG's comment that no financial accounts had been prepared for some of the trusts, describing that as "a very casual approach to accounting for what appears to be substantial receivable balances owed by the various entities".<sup>19</sup> Mr AJ's view is that the accountant who set up the complicated structure would have kept a record which should be produced in the

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<sup>12</sup> At [5].

<sup>13</sup> At [9].

<sup>14</sup> At [8].

<sup>15</sup> Statement of Claim at [17].

<sup>16</sup> At [18].

<sup>17</sup> At [26].

<sup>18</sup> At [27].

<sup>19</sup> At [27].

course of the process of discovery. There is no evidence available on review of whether Mr DQ, the Chief Financial Officer (CFO), or Mr HG's accountants, produced any such record.

[27] Mr HG refers to Ms PR having raised questions about the complex nature of how his CFO ran his group of companies, and says that Ms PR and Ms XY could never understand those complexities. Mr HG says he suggested Mr AJ and Mr DQ discuss the group's internal accounting, but that did not happen.

[28] The High Court ordered further discovery on the basis of concerns set out in Mr AJ's affidavit. Those included the "number and complexity of [Mr HG's] corporate entities" which made tracing difficult, and the fact that Mr HG had not arranged for financial accounts to be prepared for all the related entities.<sup>20</sup>

[29] Mr HG did not engage an independent accounting expert, although a letter to Ms PR from his lawyer dated 18 December 2013 responds to a number of the issues she had raised. Mr HG's lawyer said Mr HG had been unable to recall any payments from Mr SR that had not been recorded on bank records, and invited Ms XY to identify any record she may have access to the "marital financial records in her possession".<sup>21</sup> It appears Mr HG had been in touch with Mr SR, because a number of his responses refer to Mr SR being unable to remember details. Suggestions are made about who else Ms XY might contact for information. The letter includes a statement that Ms XY's calculations of Mr HG's combined income was not correct, and said Mr HG had "agreed to supply the names and addresses of customers". No conditions were attached to that disclosure, but Ms PR says when the list arrived it contained customer names only, no addresses.<sup>22</sup>

[30] Mr HG contends that all of Ms PR's enquiries "uncovered nothing". Mr HG's position is that the evidence he had produced to the [Country] courts recorded that all the loans had been repaid. That comment completely misses Ms XY's point, and does nothing to further her reconciliation.

[31] Nonetheless, Mr HG describes the proceeding and discovery processes and interrogatories, as nothing more than a "fishing expedition" into his personal and business affairs going back over ten years. Mr HG refers to "relentless interrogatories" that "turned up nothing valid", which completely misses the point of Mr AJ's evidence that accounting information and records should have been available but were not.

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<sup>20</sup> Letter CD Law to PR (31 January 2014).

<sup>21</sup> Letter CD Law to PR (18 December 2013) at [43].

<sup>22</sup> Evidence of PR, review hearing.

[32] Mr HG says that his accounts disclosed nothing more than an:<sup>23</sup>

... anomaly due to a simple accountant's error of approx \$9k. Once this was identified we immediately offered to make good with [Ms XY] paying her half plus interest to settle. This was rejected.

[33] After further discovery and interrogatories were complete, Ms PR drafted and filed an amended statement of claim in the proceeding dated 27 August 2014 (the amended statement of claim) based on all the material that was available at that stage, including what had been disclosed in discovery and Mr AJ's analysis of those materials. The amended statement of claim contained the same three heads of claim, including the allegation of deceit pleaded in exactly the same terms as had appeared in the statement of claim, but almost doubled the value of Ms XY's claims.

[34] Mr HG says that in response to the allegations in the amended statement of claim his lawyer wrote to Ms PR. Mr HG says that immediately upon being put on notice that Mr HG would be notifying the NZLS she immediately tried to withdraw part of the claim because she knew she had been caught out without evidence. He links this to the private investigator having been retained to gather evidence and infers Ms PR still had no evidence she could rely on to support the deceit claim.<sup>24</sup>

[35] Mr HG sent an email to his lawyer on 2 September 2014 referring to enquiries made of his staff and others by the private investigator on Ms PR's instructions.<sup>25</sup> Mr HG's lawyer sent that email on to Ms PR and her instructing solicitor. Ms PR made enquiries of the private investigator, based on Mr HG's allegation that the investigator had "given away information indiscriminately about [Mr and Mrs HG's] personal affairs".

[36] Mr HG draws the inference from part of the claim being withdrawn five days after the amended statement of claim was filed, and little else, that Ms PR knew she had taken things too far and acted illegally. Mr HG also links the timing of the withdrawal of the claim to the private investigator's local inquiries, which he describes as a public spectacle resulting in him having to respond to enquiries from people that wanted to know what was going on.

#### *Ms XY's Will-say statement*

[37] Ms XY prepared a privileged "will say statement" in advance of a settlement conference. In that statement Ms XY refers to Mr SR trusting Mr HG implicitly, and

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<sup>23</sup> Letter HG to AB Law (20 December 2014).

<sup>24</sup> Letter HG to NZLS – complaint.

<sup>25</sup> As Mr HG's lawyer removed the clients' addresses I assume part of the private investigator's work was to find the people on the list, which would not have assisted the private investigator's inquiries.



making advances from the money that belonged to her and Mr SR, to fund purchases of land. She contended Mr HG's financial position as disclosed by the company records and Mr AJ's analysis of the information Mr HG had produced in discovery, was weak. She says she was concerned both about Mr SR's substantial lending to Mr HG with no security, and avoidance of regulatory oversight of proposed land purchases.

[38] Ms XY referred to repayment arrangements and discussions between Mr HG and Mr SR, and says that in some cases she was not present. She describes in some detail what she did know of the lending to Mr HG, saying that Mr SR sent money directly to Mr HG for the payment of a deposit. She firmly believed there was more. She refers to "the HGs" having signing authority on a New Zealand bank account held by Mr SR and Ms XY, and that she and Mr SR regularly topped that account up from their [Country] accounts. Ms XY says that arrangement meant the identity of the true purchaser of that land would not be visible to the regulator.

[39] Ms XY said she had repeatedly requested a full accounting from Mr SR, and what she received made no sense. She refers to her settlement with Mr SR, shifts in his accounting explanations, and the arrangements between Mr SR and Mr HG that disadvantaged her, and made her believe the HGs owed her and Mr SR less than they actually did. She says that the HGs were "perpetually short of cash", that they only paid back a very small amount of what they owed to Ms XY and Mr SR, and that even the \$150,000 she received was a payment made by Mr SR, not Mr HG. Ms XY referred to her instructions to the lawyers to seek an explanation from Mr HG in 2010, following his lack of response, apparent anomalies in his accounting and payments for artworks received in advance, that she believes he may have contributed to property purchased on his own account or the SRs'.

#### *Settlement of the proceeding*

[40] A judicial settlement conference was convened on 22 September 2014 at which Ms XY and Mr HG settled their differences.

[41] Mr HG says Ms PR and Ms XY "had no evidence", and that Ms XY's new partner had "fabricated evidence".

[42] Mr HG says settlement included Ms XY agreeing to make a contribution to Mr HG's costs,<sup>26</sup> and signing "a document formally withdrawing all allegations of deceit against us".<sup>27</sup>

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<sup>26</sup> Submissions to the Committee dated 18 December 2015 made on behalf of Ms NC assert at paragraph [20] that Mr HG agreed to settle "without any issues as to costs".

<sup>27</sup> Mr HG later produced such a document to the Committee.

[43] Ms PR says that is only part of the story and the terms of the settlement Ms XY and Mr HG reached were confidential.<sup>28</sup>

[44] The trial that had been set down for 1 December 2014 was vacated.

[45] However, Mr HG says that Ms PR knows that when he had supplied information in all the course of discovery, he still had produced no evidence whatsoever to support their allegations. .

*Events following settlement*

[46] Mr HG's position is that no evidence had been disclosed in the course of the discovery process because there was none. He remained dissatisfied with Ms PR's conduct, and made that clear to her in correspondence.<sup>29</sup> He wanted her to contribute to the costs he had incurred in defending the proceeding because she had failed to take appropriate steps to ensure that reasonable grounds for making the allegations existed as rule 13.8.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) requires of her.

*Ms PR's reply*

[47] Ms PR's lawyer responded to Mr HG's concerns on 16 December 2014 saying that Ms PR was very conscious of her professional obligations, and had met her obligations to Ms XY and the Court. Before the proceeding was commenced, Ms PR says she had available to her Ms XY's instructions and various documents. She was unable to provide further detail because Ms XY had not waived her right to claim solicitor/client privilege in relation to her engagement of Ms PR.

[48] Counsel explained that Ms PR had:

... reviewed the information available to her and considered there were reasonable grounds to make the allegations she did on her client's behalf in the statements of claim filed, and those made in correspondence. Following the issue of proceedings, Ms [PR]/her instructing solicitors engaged an expert forensic accountant who had concerns about aspects of the claim which justified bringing and continuing the deceit cause of action in various iterations of the statement of claim. In addition, the initial claim was filed with input (and approval) of a senior barrister.

[49] Counsel said that Ms PR did not rely solely only on Ms XY's instructions, but took additional steps to verify her instructions. *Medcalf v Mardell*<sup>30</sup> is relied on as

<sup>28</sup> Letter AB Law to NZLS (11 March 2015).

<sup>29</sup> Mr HG did not provide a copy of his letter to Ms PR, but the response from Ms PR's lawyer dated 16 December 2014 says it is responding to his "December 2014 letter".

<sup>30</sup> *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120.

authority setting out the steps lawyers should take before issuing proceedings containing damaging allegations. Counsel argues that Ms PR acted in accordance with the directions of the House of Lords in that case.

[50] Once the deceit allegation had been made, counsel said that Ms PR had advised Ms XY it should be withdrawn “only after further inquiry and very extensive discovery”. Counsel argues Ms PR’s conduct was “consistent with what is expected of responsible counsel”.

[51] The allegation that Ms PR had misused confidential information was also denied.

*Mr HG’s Reply*

[52] Mr HG replied on 20 December 2014. His position was that the affidavit sworn and filed by Ms XY’s forensic accountant “spoke of nothing other than misunderstanding as to the working nature” of Mr HG’s business which he describes as “complex accounting”. Mr HG’s view is that the complexity of the accounting meant Ms XY’s forensic accountant “could not clearly show that we were party to deceit or not”. Mr HG believes that the company’s CFO could have explained the “inner workings” of Mr HG’s business to Ms XY’s forensic accountant, but no one asked him to.

[53] Mr HG said he was not aware of any other evidence against him and does not accept Ms PR had sufficient evidence to support the allegation of deceit at any point. Mr HG says that anything disclosed in the discovery process was disclosed too late to be relied on as a basis for making the allegation of deceit. He contends that subsequent inquiries by the private investigator “established without question” the sources of money coming into his business.

[54] Mr HG brushes aside objections based on privilege and client confidentiality and contends Ms PR’s conduct was unacceptable and impliedly illegal. Mr HG infers “there has been secret information discovered that we are not privy to...”. He wants to see any evidence Ms PR relied on for making the allegation of deceit. He contends if there is more relevant information, it is not protected by privilege or client confidentiality, and should have been disclosed pursuant to Ms PR’s obligations on discovery.

[55] Mr HG retracted his earlier request for compensation, but requested full reimbursement of his legal and accounting costs (in excess of \$60,000) and an apology to him, his wife and Mr SR. Mr HG said if matters were not resolved to his satisfaction

by 1 January 2015 he would make a complaint to the New Zealand Law Society (NZLS).

[56] In an email to Ms PR's lawyers dated 23 December 2014, Mr HG said he was sorry if Ms PR "ended up being hijacked by her clients", and expressing the view that "she should have used her discretion earlier on". He is critical of Ms PR's moral (rather than professional) judgement, and objects to Ms PR keeping secret information that she did not disclose in the process of discovery.

### **Complaint**

[57] Mr HG sent his complaint dated 12 December 2014 to NZLS by email on 4 January 2015. He included various documents, including excerpts of correspondence from his own lawyer, and lawyers representing Ms PR. The latter recorded that Ms XY had not waived her solicitor/client privilege.<sup>31</sup>

[58] Mr HG drew attention to rule 13.8.1 of the Rules, and selectively repeated events referred to above. He was critical of Ms PR for having taken on Ms XY's case, the manner in which she conducted it, and in particular the deceit claim pleaded against him. He referred to the statement of claim, the discovery process and the amended statement of claim. He says the latter alleges "deceit - effectively fraud and theft of millions", all "without any supporting evidence whatsoever". He is also critical of the way the private investigator conducted his inquiries saying the whole situation caused him and his family "enormous harm".

[59] Mr HG contends that Ms PR was careless with his confidential information, and misused her position. He wants Ms PR held "fully accountable". He also wants her to pay him compensation, and provide an assurance that "this will not happen to another family".

### *Ms PR's response*

[60] Ms PR's lawyer's reply to NZLS sets out the steps Ms PR, Ms NC and Ms RM took before proceedings were commenced. She says proceedings were issued after instructions had been taken from Ms XY, a letter written to Mr HG, enquiries made, and meetings had with others. Ms PR's belief is that she complied with rule 13.8.1, and certainly had it in mind at the time the statement of claim and amended statement of

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<sup>31</sup> Email AB Law to HG (23 December 2014).

claim were drafted and filed. Counsel says Ms PR's understanding of her professional obligations at the time accorded with the House of Lords' comments.<sup>32</sup>

Counsel is bound to exercise an objective professional judgment whether it is in all the circumstances proper to lend his name to the allegation. As the rule recognises, counsel could not properly judge it proper to make such an allegation unless he had material before him which he judged to be reasonably credible and which appeared to justify the allegation. ... at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it.

[61] Counsel explains that the deceit allegation related to Mr HG having knowingly misrepresented the outstanding loan amount was \$300,000, while further significant amounts were still owing, and should have been part of the matrimonial property owing to Ms XY. The basis for this belief was material which Ms XY provided to Ms PR. Although Ms XY had not waived privilege over her communications with Ms PR, the following was disclosed to NZLS within the framework of the complaint process.<sup>33</sup>

- (a) Mrs [XY] strongly believed that the loan reconciliation (annexed to the statement of claim) was not an accurate representation of the loans made to Mr [HG] and/or the repayments he made and that accordingly the loan agreement was not a proper representation of amounts due from Mr [HG] to Mr [SR] and her.
- (b) Mrs [XY] was concerned that Mr [SR] himself may have been advancing sums to Mr [HG] only for Mr [HG] to then re-advance those sums to Mr [SR] as purported loan repayments – as part of a money-go-round intended to withhold from Mrs [SR]/[XY] her proper share of the matrimonial estate.
- (c) Mrs [XY]'s understanding was that Mr [HG]'s [business] was not performing sufficiently well to enable Mr [HG] to have made the purported repayments that he says he did. In this regard, Ms [PR] and Ms [NC] instructed [Mr AJ], a chartered/forensic accountant to analyse the financial information which had been provided by Mr [HG]. Mr [AJ] observed that Mr [HG]'s financial affairs were complicated and that it was extremely difficult to ascertain how the various payments have been dealt with or how they have been funded. Mr [AJ] confirmed that based on the tax returns and financial records the business had not earned sufficient to repay the loans. Based on summaries of total after-tax business income available to the [HG]s, Mr [AJ] concluded that for the 2005/2006 and 2006/2007 years there would have been no funds available from business income sources to fund purported loan repayments made during those years (see affidavit of [Mr AJ] 28 January 2014 at paragraph 20).

[62] Counsel for Ms PR asserts that the privileged communications passing between Ms PR and Ms XY “would provide a more complete picture of the basis of the

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<sup>32</sup> Above n 30, at [22].

<sup>33</sup> Letter AB Law to Complaints Service (11 March 2015) at [3.3].

claim”.<sup>34</sup> To the extent that materials can be provided, counsel supplied correspondence and documents summarising the evidence at various stages of the proceeding and Ms PR’s understanding of the case at various times.

[63] Based on materials provided by Ms XY, and later by Mr AJ, Ms PR formed the view that there “was a strong prima facie case to justify bringing and maintaining the pleading of deceit”.<sup>35</sup> Counsel says that Ms PR also faced difficulties accessing some materials Mr HG is believed to, or should, have had.

[64] Counsel refers to a second amended statement of claim prepared in September 2014, and the deceit allegation against Mr HG being withdrawn. The second amended statement of claim was drafted after Ms PR had considered “all the material and information available to her at that point in time”.<sup>36</sup> However, until then, Ms PR believed that the deceit allegation was appropriate in all of the circumstances, and had complied with her obligations under rule 13.8.1.

[65] With respect to the allegation that Ms PR had misused confidential information, counsel says there is no evidential basis for this assertion, and no professional obligation was breached by Ms PR.

#### *Complainant’s reply*

[66] Mr HG responded by letter dated 27 March 2015. He repeated a number of his earlier comments, and says he responded to the 2010 letter after speaking with Mr SR. He expresses the view that as the settlement had been reached in the [Country] courts, all accounting and statements provided, and any dispute had to be referred to the [Country] Court in accordance with the settlement agreement between the SRs.

[67] The copy of a letter that had been sent to Mr SR from his [Country] lawyer, also bearing the date 27 March 2015, referred to “extensive disclosure” in the [Country] proceeding. In his 27 March 2015 letter, Mr HG repeated his view that there was no real evidence to support the claims, “only Ms XY’s fabricated conspiracy against us”, and that the allegations “of deceit [were] based on nothing”. He objects to Ms PR alleging fraud against him. He says that the combined income before tax for him and his wife was over \$1.3 million, almost double Mr AJ’s calculations. He objects to Mr AJ’s analysis.

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<sup>34</sup> At [3.4].

<sup>35</sup> At [3.5].

<sup>36</sup> At [3.7].

[68] Mr HG also provided a copy of an acknowledgement apparently signed by Ms XY arising from the settlement conference in which she formally withdrew the allegation of deceit against him.

*Ms PR's Reply*

[69] Counsel for Ms PR responded on 31 March 2015 refuting Mr HG's assertion that evidence did not exist, and repeating that Ms PR had partly based her assessment of the deceit cause of action on her communications with Ms XY which she was prevented by legal professional privilege from making extensive reference to. Counsel distinguished between confidentiality and privilege. She also observed that Mr HG appeared to be "impugning Ms XY's integrity",<sup>37</sup> and emphasised that the focus of the disciplinary process is on Ms PR's conduct, not that of her client, who is not a party to the disciplinary inquiry.

*Committee's request for further information*

[70] The Committee requested a formal list of documents, which Ms PR provided in a slightly modified form to protect Ms XY's privilege. Ms PR's request for an oral hearing was declined. Mr HG wanted to see any information, privileged or not and maintained Ms XY's case was based on fabricated evidence.

*Submissions by Mr HG*

[71] Mr HG's submissions to the Committee are dated 11 December 2015. He repeated a great deal of what he had previously said, and elaborated still further on that. He confirmed that he looked after Mr SR's property affairs in New Zealand and speculated that Ms XY's objective was to obtain further information on which to found "further litigation against Mr SR in the [Country] courts seeking millions". Mr HG said he sought advice from his own lawyer, and Mr SR's lawyers both in New Zealand and [Country], and decided to proceed on the basis that the letter was simply a ploy "to extract further information about Mr SR's affairs". Mr HG suggested Ms XY's lawyers colluded with her in that.

[72] For the first time, Mr HG provided a copy of Ms NC's 2010 letter attaching a copy of the deed and schedule. Mr HG says that, through his accountant, he provided the information to Mr SR that was conveyed in the spreadsheet, and that it was supported by bank statements, his own and the SRs'.

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<sup>37</sup> Letter AB Law to Complaints Service (31 March 2015) at [2].

[73] Mr HG asserted that Ms PR's claims to privilege make a mockery of the complaints process. He contends that Ms PR was not authorised to disclose confidential information relating to his affairs, family, business, or clients in breach of rules 8.4 and 8.5. Mr HG refers to huge embarrassment, reputational and business damage and says Ms PR is responsible.

[74] Mr HG contends that the seriousness of the breaches makes reimbursement of around \$80,000 worth of fees from Ms PR a reasonable request. He says he is not claiming compensation for stress and inconvenience, just out-of-pocket expenses.

[75] Mr HG says he has promised to report back on the outcome of the disciplinary process to Mr SR, his attorney, Mr HG's family, his staff, his accountants and various others who are "curious as to the outcome".

[76] Mr HG says he can:

... live with being out of pocket, but ... will never accept that New Zealanders should accept such as demonstrated by Ms [PR] as conduct that is tolerated by the New Zealand Law Society.

[77] Mr HG wants an example made of Ms PR.

*Evidence by, and submissions on behalf of, Ms PR*

[78] On 18 December 2015 counsel for Ms PR filed submissions, an affidavit by Ms PR and a list of privileged documents. A possible further affidavit was foreshadowed.

[79] Ms PR's affidavit, sworn 18 December 2015 confirms Ms XY had agreed to a partial waiver of privilege to enable Ms PR to disclose the circumstances of her litigation with Mr HG. Ms PR confirmed that she was unable to put the complete factual situation before the Committee because her ability to do so was "necessarily restricted" by her duty to protect Ms XY's privilege.

[80] Ms PR confirms she and Ms RM finalised the statement of claim together, and were both satisfied there were appropriate grounds on which to plead the three causes of action, including deceit. She refers to the factual basis of the claim, and the three amounts that Ms XY asserted had not been repaid in accordance with the deed Mr HG had signed. She says that to the best of her knowledge those sums were correctly claimed against Mr HG at the time.



[81] Ms PR says she understands, and understood at the time the claim was filed, that her obligation was to satisfy herself that, at that preparatory stage, there was reasonably credible material available to her which appeared to justify making the allegation. She says she was so satisfied. Ms PR says she understood the test related to the material she had at the time that the pleading was prepared, rather than, as Mr HG put it, that “no ground actually existed on which Ms XY could make the allegation”.<sup>38</sup>

[82] Ms PR says her view was formed on the basis of:

- (a) Her discussions with Ms RM, who had discussed the position with the attorney who had acted for Ms XY in the [Country] proceeding.
- (b) Meetings with Mr and Ms XY in person and over Skype.
- (c) An analysis prepared by the XY’s “as to the veracity of the amounts said to have been advanced and repaid”, which contained evidence of errors in the schedules as set out in the statement of claim.
- (d) Ms XY’s evidence of statements made to her by Mr HG.
- (e) Documents including:
  1. The agreement between Mr HG and Mr SR.
  2. Some evidential material from the [Country] proceeding.
  3. Documentary evidence relating to the undocumented loans between 2003 and 2004.
  4. The schedule.
  5. Discussions with her instructing solicitor, who had been Ms XY’s lawyer at the time she settled the [Country] proceeding.
  6. Documentary evidence relating to the purchase of two blocks of land by Mr HG and/or by Mr HG on trust for Mr and Mrs SR.

[83] Ms PR says “All this information suggested Mr HG may not have repaid the full amounts that he claimed he had repaid from his own funds”.<sup>39</sup>

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<sup>38</sup> PR affidavit, at [10].

<sup>39</sup> At [11].

[84] Ms PR referred to the two year delay in issuing proceedings, correspondence with Mr HG in 2010, preparation of a draft statement of claim, and then a deterioration in Ms XY's state of health which delayed the proceeding being filed. She says she and Ms RM revised the statement of claim before it was issued in September 2012.

[85] Ms PR says all of the material, together with interviews with Ms XY, helped her and Ms RM to reach the conclusion that there was a credible and reasonable basis to include the deceit allegation in the statement of claim in all the circumstances. She refers to an understanding that Mr SR had paid the deposit for the purchase of one of the pieces of land directly, but that the deposit was returned to Mr SR, he then advanced the same amount of money to Mr HG who used it to pay the deposit again. Her instructions were that "Mr SR's either paying directly for the land or otherwise facilitating or participating in its purchase would constitute a breach of the Overseas Investment Act by both parties".<sup>40</sup>

[86] Ms PR says her research into the law supported that view.

[87] She also considered it relevant that:<sup>41</sup>

... large sums of money were advanced on an oral agreement which was only recorded long after the fact by Mr [SR] and Mr [HG] as part of the [SR]s' relationship property proceedings. Mrs [SR] (now [XY]) was strongly of the belief that Mr [HG] had not earned sufficient money during the time that she had been associated with them in order to make the repayments that he had supposedly made. The total amount loaned was \$1.710 million and the schedule showed that Mr [HG] had apparently repaid \$1.4 million.

[88] Ms PR says she understands her ethical obligations and "considered that in the circumstances set out above this was a reasonable pleading".<sup>42</sup> She refers to the discovery process, which she says was concluded shortly before the settlement conference, to Mr AJ's affidavit and the lack of evidence supporting Mr HG's income being sufficient to have made the payments allegedly made.

[89] By the time the amended statement of claim was prepared and filed, Ms PR says she was acting as senior counsel, and she considered it was appropriate to retain the deceit allegation.

[90] However, Ms PR said once she had reviewed all of the available material in preparing for the settlement conference, she "had some concern that there was insufficient evidence in the available discovery to maintain the pleading".<sup>43</sup> She then

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<sup>40</sup> At [14].

<sup>41</sup> At [15].

<sup>42</sup> At [17].

<sup>43</sup> At [20].

prepared a second amended claim from which she removed the allegation, and reduced the amount Ms XY was seeking from Mr HG.

[91] Ms PR considers that in doing so, she appropriately discharged her obligations pursuant to rule 13.8.1.

[92] With respect to the allegation of breach of confidence, Ms PR says that her instructing solicitor instructed the private investigator, although she knew that he had been retained. She did not provide the private investigator with any personal or account information relating to the HGs, and was not aware of the private investigator ever having been authorised to disclose confidential information to anyone he approached. Ms PR says she is not certain what information he may have had, but she believes he spoke directly with Ms XY.

[93] Ms PR says she understands the investigator approached a number of people in [City], some of whom Ms XY knew of or had met. Those people are said to have paid reasonably large deposits to Mr HG, but not completed their purchases. In some cases Mr HG appeared to have held deposits for a number of years. Ms PR says Mr AJ's advice was that deposits of that type, which were not taxed, but remained on the books of companies controlled by Mr HG, may have enabled him to fund the alleged repayment of advances from the SRs.<sup>44</sup> Ms PR says that the "origin of the funds deemed to be customer deposits remained unresolved".<sup>45</sup>

[94] Ms PR is not certain which professional rule might apply in the circumstances, but says when Mr HG's solicitor raised the issue she contacted the investigator directly, and he denied having made any inappropriate comments.

[95] After the proceeding settled, Ms PR says Mr HG approached her, initially in late 2014, asking for money. Ms PR says she refused to pay Mr HG any money then, and has not paid him any since. She says she believes that she discharged her ethical obligation to the Court appropriately bearing in mind her obligations to act in Ms XY's best interests.

[96] The submissions filed on Ms PR's behalf refer to and adopt the letter from Ms PR's lawyers dated 11 March 2015, cite rule 13.8.1 and *Medcalf v Mardell*, and rely on the evidence set out in Ms PR's affidavit.

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<sup>44</sup> At the review hearing Mr HG referred to this pool of other peoples' money as a "slush fund".

<sup>45</sup> At [24].

[97] The test is said to be:<sup>46</sup>

... not whether or not the allegations were ultimately found to be correct or justified; rather, it is whether counsel had reasonably credible information before him or her at the time of the pleading which could appear to justify the allegation.

[98] Deceit is said to be “one specific cause of action ... within its own context”<sup>47</sup>, rather than one of the cluster of types of conduct contemplated by rule 13.8.1. Counsel submits that the key issue is whether Ms PR “had reasonably credible information/reasonable grounds on which to base the pleading of deceit, regardless of whether the pleading ultimately turned out to be sustainable on the facts”.<sup>48</sup>

[99] Ms XY’s views on the situation, and those formed by Mr AJ somewhat later lending some support to her concerns, were referred to. The list of privileged materials provided with the submissions was also referred to, and is said to make it “abundantly clear that there were many communications between”<sup>49</sup> Ms XY and her lawyers in which her concerns were discussed and properly considered. Counsel for Ms PR contends there was frequent reference to the deceit cause of action and the evidence to support it.

[100] Reference is also made to the private investigator and his enquiries aimed at verifying the financial position of Mr HG and related entities. Counsel contends that the protections provided by rule 8.8 do not apply in the circumstances of Mr HG’s complaint.

[101] Counsel also addressed the “numerous additional assertions and allegations”<sup>50</sup> made by Mr HG in the course of his dealings with Ms PR, and the complaint process. Counsel says proceedings were issued because Mr HG did not take up the invitation to respond or meet to discuss the issues raised by Ms XY. At the review hearing Ms PR said she took Mr HG’s failure to respond as part of the material she considered. The suggestion that pre-commencement discovery under the High Court Rules was appropriate is rejected, as are complaints about obligations not owed to Mr HG.

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<sup>46</sup> Submissions on behalf of Practitioner at [2.6.]

<sup>47</sup> At [2.7].

<sup>48</sup> At [2.8].

<sup>49</sup> At [2.14].

<sup>50</sup> At [3.1].

[102] Counsel submits that no referral to the Tribunal or finding of unsatisfactory conduct is appropriate, but if the latter were to be an outcome, the only consequential order might be costs of \$2,000. As to publication, counsel contends there is no public interest in identifying Ms PR as the subject of any determination in circumstances where any contravention could only be based on inadvertency.

[103] It is noted that the list of privileged documents records communications between Ms PR and other lawyers, the XYs, Mr AJ, and the private investigator. Privilege is claimed either on the basis of litigation or the relationship between solicitor and client.

*Mr HG's further comments*

[104] Mr HG wrote again on 5 February 2016 referring to "serious omissions and inaccuracies" with respect to the materials filed on behalf of Ms PR. His comments include the manufacture of evidence, sham, and unfounded proceedings. Mr HG observes that the list records communications that occurred after the statement of claim was filed in September 2012. He enclosed copies of selected documents including some of the correspondence his lawyer had sent to Ms PR, which variously acknowledge an accounting inaccuracy of \$8,980 in the records maintained for one of Mr HG's businesses, express suspicions of impure motives from the withdrawal of claims, and seek costs against Ms XY.

**Standards Committee decision**

[105] The Committee considered all of the material provided by the parties, the complaints about Ms PR and Ms NC, and whether either lawyer had been a party to filing either of the statements of claim, without having taken appropriate steps to ensure there were reasonable grounds for making the allegation of deceit. It also broadly addressed the issues Mr HG had raised in the course of the complaint process and the allegations of breach of confidentiality and privilege.

[106] The Committee noted the difficulties presented by privilege. In substance, the Committee's view was:

30. In pleading the tort of deceit Ms [PR] needed to establish that Mr [HG] represented in the [Deed] the amount outstanding under the various advances from Mr [SR] was \$300,000 knowing that the amount was greater and that Mrs [XY] entered into the Marital Settlement Agreement, accepting \$150,000, relying on the [Deed]. With that criteria in mind the discrete issue for the Committee to consider was whether Ms [PR] had taken appropriate steps to ensure that reasonable grounds for making the allegation against Mr [HG] existed at the time.

...

33. After considering the material provided by the parties, the Committee was not persuaded that there had been reasonable grounds to support such a serious allegation against Mr [HG] as the tort of deceit. The particulars relied on in support of the claim referred to three amounts that Mrs [XY] asserted were not repaid in accordance with the [Deed] Mr [HG] had signed. While the material Mrs [XY] held may have suggested that Mr [HG] had not repaid the amounts he claimed he had repaid from its own funds, this in itself did not point to Mr [HG]'s alleged dishonesty. In the Committee's view, evidence held by Mrs [XY] that Mr [HG] had not made certain repayments did not support an allegation of deceit. The statements of claim appeared to acknowledge that details of any such amounts were not known to Mrs [XY].

...

35. What concerned the Committee was the lack of *independent* evidence that existed prior to the original statement of claim being filed. The list of documents provided by Ms [PR] mainly referred to correspondence with Mrs [XY]. Ms [PR] also detailed the documentary evidence that Mr and Mrs [XY] had collected for her and Mrs [RM], Ms [PR] appeared to rely on information collated by her client. There was no evidence of any independent testing of that information prior to drafting the statement of claim. There was no evidence that Mr [HG] had been deceitful. The pleading was based on an absence of any evidence available to Mrs [XY] at the time to prove that Mr [HG] had made certain repayments.

[107] The Committee's view was that Ms PR should have applied for pre-commencement discovery, and could have filed the statement of claim without pleading the tort of deceit, then filed an amended statement of claim alleging deceit if the evidence supported such an allegation. The Committee concluded that Ms PR had not taken appropriate steps to ensure that reasonable grounds for making the allegation of deceit in the statement of claim existed.

[108] The Committee found that Ms PR had contravened rule 13.8.1 and thus there had been unsatisfactory conduct on her part pursuant to section 12(c) of the Act.

[109] The Committee decided to take no further action with respect to the allegations regarding use of information by the private investigator, or any of the other allegations raised by Mr HG.

[110] The Committee imposed orders on Ms PR pursuant to s 156(1) of the Act: a censure, orders to pay a fine and costs. The Committee did not order publication of Ms PR's name.

**Application for review**

[111] Ms PR applied to this Office for a review of the Committee's determination, summarising the basis of her application in the following way:

- (a) There were reasonable grounds to support the cause of action in deceit originally alleged against Mr HG.
- (b) The Committee applied an incorrect legal test when assessing if Ms PR's conduct was in breach of rule 13.8.1, which requires the lawyer to have taken appropriate steps to ensure reasonable grounds for making the allegation exist. The Committee has imposed a more onerous requirement that the lawyer must have evidence independent of her clients to support the allegation when the leading authority is clear that counsel should not necessarily have before him/her evidence in admissible form, but rather they should have material of such a character as to lead responsible counsel to conclude serious allegations could properly be based on it.
- (c) The Committee also failed to give proper consideration and/or insufficient weight to:
  - 1. The situation where privilege has been claimed. In this respect the Committee failed to follow the approach laid down in *Medcalf v Mardell*.
  - 2. The fact that Ms [RM] was still retained as senior counsel at the time the initial statement of claim was issued.
- (d) The Committee suggested obtaining pre-trial discovery when that was problematic and not in accordance with the High Court rules.
- (e) Ms PR also asked to be heard at the hearing before the Committee but was not permitted to do so.

[112] Ms PR asks this Office to reverse the Committee's decision as to outcome and penalty.

[113] Ms PR refers to Ms XY's view that the amount of \$300,000 was deliberately understated by both parties to the deed, Mr HG and Mr SR.

[114] Ms PR argues that rule 13.8.1 does not impose a requirement on counsel to establish “independent evidence” to justify the filing of a document alleging dishonesty, and emphasises the constraints imposed on counsel where privilege is claimed but not waived by the client.

[115] Ms PR argues error of law, in two regards. The requirement for independent evidence and independent testing is said to be incorrect, because rule 13.8.1 contains no such constraint and says only that “appropriate steps” should be taken.

[116] The distinction between commencing and pursuing allegations at trial is mentioned, and the removal of the deceit allegation from the second amended statement of claim that Ms PR prepared in advance of trial is mentioned. The logical difficulty with the assumption that withdrawal is an indication of a lack of justification in the first place is highlighted.

[117] It is argued that proper weight must be given to privilege claims and the difficulties those create for a lawyer charged with conduct issues, with reliance placed on comments made by Lord Bingham:<sup>51</sup>

... the court must be very slow to conclude that a practitioner could have had no sufficient material. Speculation is one thing, the drawing of influences sufficiently strong to support orders potentially very damaging to the practitioner concerned is another.

[118] It was considered relevant in that case that decision-makers should proceed:<sup>52</sup>

... unless, proceeding with extreme care, it is (a) satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order and (b) that it is in all the circumstances fair to make the order.

[119] While there should be no absolute bar on an opposing party in litigation, such as Mr HG, from making a claim, the existence of privileged material required:<sup>53</sup>

... the court to take into account the possibility of the existence of such material and to give the lawyers the benefit of every reasonably conceivable doubt that it might raise.

[120] Counsel contends the Committee had assumed that there was nothing in the material provided to Ms PR by Ms XY that could possibly constitute reasonable grounds for making the allegation of deceit. Ms XY’s will say statement was referred to, and what could have been her evidence at the trial, if that had proceeded. In particular comments made by Mr HG in Ms XY’s presence at various times, for

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<sup>51</sup> Above n 30 at [23].

<sup>52</sup> At [23].

<sup>53</sup> At [61].



example at the time land was purchased in the HGs' names using the SRs' money, when Mr HG is said to have said in Ms XY's presence that he "simply did not have the money" to buy the land. Ms XY also contended that she had knowledge of Mr HG's indebtedness that was not consistent with the \$300,000 he had acknowledged in the deed. Counsel says it is not whether that information was right or wrong, ultimately, but that it provides grounds that should have prevented the Committee from assuming that Ms PR and her instructing solicitor "would not have had similar material and instructions (privileged) at the time that the first statement of claim was issued".<sup>54</sup>

[121] Counsel argues weight should be given to Ms RM's involvement as senior counsel at the time the first statement of claim was drafted and issued, and the fact that she had discussions with Ms XY's [Country] attorney which tended to support the view formed by both counsel that the allegation of deceit was properly made.

#### *Mr HG's response*

[122] Mr HG replied to Ms PR's review application on 26 April 2016, saying he relies on all of the materials he submitted to the Committee. Mr HG would like an apology. He maintains the deceit allegation was based on no facts that Ms XY had in her possession. He contends that the Committee did not apply the incorrect legal test. He refers to the impacts on him, his family and this business of the litigation.

[123] Mr HG had more to say on 3 May 2016, adding that the statement Ms PR referred to, as part of Ms XY's case was no more than a passing statement he had made many years before. He does not think that the material on which Ms PR says she has relied is of "such character" as to form a proper basis.

[124] Mr HG says that claims to privilege give "instant asylum to those in question", and "effectively ties the investigators hands from ever taking the matter any further". He argues that would exempt all lawyers whose clients claim privilege from being held accountable.

#### **Review Hearing**

[125] Both parties attended a review hearing in Auckland on 28 March 2017. Ms PR was represented by Mr ZW. Mr HG attended with a support person.

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<sup>54</sup> Supporting Reasons for Application at [2.13].

## Nature and scope of review

[126] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>55</sup>

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[127] More recently, the High Court has described a review by this Office in the following way:<sup>56</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

[128] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

- (a) Consider all of the available material afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

## Review issue

[129] I have carefully considered the Committee’s decision, and all of the information provided to the Committee and in the course of this review including the parties’ evidence and submissions at the review hearing.

<sup>55</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>56</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[130] The Committee was correct to take most of Mr HG's allegations no further. For example, the allegation of breach of professional conduct rules around confidentiality, and inadequate advice do not relate to obligations owed to Mr HG. He is not Ms PR's client. There is no suggestion that Ms XY has any such concern.

[131] The only issue to be determined on review is whether Ms PR can demonstrate compliance with rule 13.8.1, taking into account the constraints imposed by Ms XY not having unconditionally waived her privilege.

### **Analysis**

[132] It is appropriate to note that rule 13.8.1 appears in chapter 13 of the Rules. Chapter 13 sets out rules that relate to "Lawyers as officers of court". The duty in 13.8.1 is primarily owed to the court, rather than Mr HG. There is no doubt that rule 13.8.1 applies to the deceit allegation, or that Ms PR was a party to filing the statement of claim and amended statement of claim. The narrow point is whether Ms PR took "... appropriate steps to ensure that reasonable grounds for making the [deceit] allegation exist".

[133] If she had not taken appropriate steps, the rule prohibited her from filing any document in court containing such an allegation.

[134] Ms PR relies on the House of Lords decision in *Medcalf v Mardell*. In that matter, the House of Lords considered paragraph 606(c) of the Code of Conduct of the Bar of England and Wales and a barrister's duties in considering whether or not to draft a document including an allegation of fraud.<sup>57</sup> Paragraph 606(c) states that a barrister should not draft a document containing any allegation of fraud unless she has "clear instructions to make such an allegation" and has before her "reasonably credible material which as it stands establishes a prima facie case of fraud". In *Medcalf*, the Court of Appeal took the view that in making such an allegation a barrister should have before her "evidence which can be put before the court to make good the allegation".<sup>58</sup>

[135] The House of Lords rejected that interpretation. Lord Bingham of Cornhill, with whom the other law lords agreed, said that:<sup>59</sup>

... the requirement is not that counsel should necessarily have before [her] evidence in admissible form but that [she] should have material of such a character as to lead responsible counsel to conclude that serious allegations should properly be based upon it.

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<sup>57</sup> Above n 30, at [11].

<sup>58</sup> *Medcalf v Mardell (No 2)* [2000] All ER (D) 1969 at [40].

<sup>59</sup> At [22].

[136] In Lord Bingham's words "counsel is bound to exercise an objective professional judgment whether it is in all circumstances proper to lend [her] name to the allegation".<sup>60</sup> That judgement will depend on the individual facts of each case.

[137] Although paragraph 606 refers specifically to fraud, the same principle would presumably apply to deceit.

[138] Rule 13.8.1 focuses on allegations of fraud and their ilk. Reading rules 13.8 and 13.8.1 together and contextually, the requirement before pleading fraud is to take appropriate steps to ensure that reasonable grounds for making the allegation exist and, in the end, not to allege it without good cause.

[139] My understanding of the relevant principles, based on *Medcalf* and my reading of *Schmidt v Pepper New Zealand (Custodians)*,<sup>61</sup> which briefly echoes the essence of *Medcalf*, is:

- (a) The duty of an advocate is to represent the client with proper competence, and promote and protect fearlessly and by all proper and lawful means, that client's best interests (the duty).
- (b) Performance of the duty is in the public interest.
- (c) Making allegations of dishonesty without adequate grounds may be improper conduct; but given the duty, not making them, when it is proper to do so, may amount to dereliction of the advocate's duty to the court and to her client.
- (d) The question is whether, at the material time, the advocate had material of any kind which justified the allegations;
- (e) Often the decision will turn on circumstantial evidence and may be finely balanced, so that the decision may be a difficult matter of judgement on which reasonable minds may differ.
- (f) An advocate's good faith belief in the course taken is material.
- (g) Absence of good faith could be demonstrated when it was unquestionably apparent that the belief fell outside the range of views that could reasonably be entertained, and importantly the law reports are replete with cases thought to be hopeless before trial but which were

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<sup>60</sup> At [49].

<sup>61</sup> *Schmidt v Pepper Custodians & Ors* [2012] NZCA 565 at [15].

decided the other way when trial was allowed.

[140] Based on the above, the key question is whether, at the material time, given the steps she had taken Ms PR had material of any kind which justified the allegation of deceit.

[141] By the time the statement of defence was filed, Ms PR had the material listed in para [81] above, and most significantly:

- (a) The schedule which said nearly \$600,000 was due.
- (b) The deed which said Mr HG owed Mr SR \$200,000 with that figure being increased by a handwritten amendment to \$300,000.
- (c) Materials from Ms XY's [Country] proceeding evidencing parts of the flip side of Mr HG's financial position with Mr SR.
- (d) Ms XY's own recollections of comments made by Mr SR and Mr HG.
- (e) Ms XY's knowledge of people who had paid money to Mr HG but some time later had still not received the goods.
- (f) Mr HG's failure to cooperate with Ms XY's inquiries by providing the information Ms XY was missing to enable her to complete her reconciliation.

[142] Given she had access to those materials, and others, for example from other third parties who were willing to cooperate, Ms PR's duty to the court and her client as an advocate, was to represent Ms XY with proper competence and promote and protect fearlessly and by all proper and lawful means Ms XY's best interests.

[143] The decision to plead deceit may or may not have been finely balanced. It is impossible to say without knowing exactly what materials Ms PR had. However, the necessary elements to prove deceit are:

- (a) Conduct; and
- (b) Intention.

[144] In a civil claim such as this, Ms XY would have had to prove both elements to the civil standard, which is the balance of probabilities (as opposed to the criminal standard, beyond reasonable doubt). Materials that supported conduct on Mr HG's part included the schedule, the deed, Ms XY's recollections and to an extent Mr HG's

refusal to cooperate in circumstances where he and Mr SR shared an apparently deep trust that Ms XY did not share.

[145] The statement of claim as pleaded contemplated a range of possibilities. Breach of contract, deceit and negligent misstatement. To put it another way, Ms XY's case was that the information in the deed was wrong, deliberately or carelessly. The latter two would be harder to prove because the defendant's state of mind would have to be admitted, or inferred from the evidence at trial (rather than the materials available at the time the proceeding commenced). If the proceeding had not settled, it would presumably have gone to trial. Witnesses may well have been cross examined. Those opportunities did not eventuate, but were plainly foreshadowed by the allegation of deceit having been pleaded.

[146] It may well have been that the decision to plead deceit was a difficult matter of judgement on which reasonable minds differed. It is entirely possible that Ms RM, Ms PR and Ms NC took some time to reach agreement on the claims to be pleaded.

[147] However, Ms PR's evidence is that she believed when she made it in good faith that the deceit allegation was properly made. Her good faith is material to the assessment of her conduct. The evidence does not demonstrate an absence of good faith. Given the materials available to her, it was not unquestionably apparent that Ms PR's belief fell outside the range of views that could reasonably be entertained. It was not until discovery and other enquiries on Ms XY's behalf, including those being carried out by the private investigators, were as complete as they could be in the time available, and Ms PR had considered all of the available materials, that she was in a position to advise on whether the deceit allegation should remain.

[148] Although Ms PR says she removed the deceit allegation when she drafted the second amended statement of claim, and that the proceeding settled, I am mindful that "The law reports are replete with cases which were thought to be hopeless before investigating but were decided the other way after the court allowed the matter to be tried". There is no such evidence to suggest Ms XY's concerns about deceit have finally been put to rest.

[149] In summary, I am not convinced by Mr HG's assertion that there were no grounds whatsoever on which to file the statement of claim alleging deceit on his part.

[150] Given Ms PR's duties to the Court and Ms XY I am not satisfied that it was improper for her to file the statement of claim alleging deceit. Mr HG had signed a deed saying he owed the SRs first \$200,000 then \$300,000, and then produced a schedule that did not tally and recorded an apparent discrepancy. Any material that

emerged in discovery that was inconsistent with \$300,000 being the correct amount would have supported the allegation of deceit to a greater or lesser extent. Only Mr AJ could reliably make that accounting call for Ms XY. There is no evidence to assist with what he did when, within the timeframe between the amended statement of claim being filed and the settlement conference.

[151] However, in the circumstances I am not satisfied that Ms PR's belief fell outside the range of views that she could reasonably have entertained given the materials available to her. In my view, failure to plead deceit in the statement of claim and the amended statement of claim may well have amounted to dereliction of Ms PR's duty to Ms XY.

[152] Ms PR's ability to identify precisely what steps she took is compromised by Ms XY's claims to privilege. However, the evidence shows those steps resulted in materials, in the widest sense, being available to Ms PR (and Ms RM and Ms NC) that enabled them to ensure that reasonable grounds for making the deceit allegation existed at the time the statement of claim and amended statement of claim were filed, even without giving Ms PR the benefit of every reasonably conceivable doubt.

[153] On that basis, the Committee's decision is reversed. The orders fall away.

### **Decision**

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

**DATED** this 6<sup>th</sup> day of April 2017

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

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

Ms PR as the Applicant  
Ms LT and ZW as Representatives for the Applicant  
Mr HG as the Respondent  
[City] Standards Committee [X]  
New Zealand Law Society