**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2013] NZLCDT 55
LCDT 017/13

**IN THE MATTER** of the Lawyers and Conveyancers Act 2006

**AND**

**IN THE MATTER** of **VINAY DEOBHAKTA** of Tauranga, Barrister and Solicitor

**CHAIR**
Mr D Mackenzie

**MEMBERS OF TRIBUNAL**
Mr C Lucas
Mr G McKenzie
Ms C Rowe
Mr W Smith

**HEARING** at AUCKLAND on 19 November 2013

**COUNSEL**
Mr L Clancy, for the Standards Committee
Mr D Hayes, for the respondent

**RESERVED DECISION OF THE LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[1] Mr Deobhakta faces a charge of misconduct under the Lawyers and Conveyancers Act 2006. In the alternative, he is charged with negligence or incompetence. The charges are based on allegations about Mr Deobhakta's conduct between May 2009 and April 2010, while acting for a client, Mr Zaheed.

[2] The allegations arose in the context of Mr Deobhakta advising Mr Zaheed about a claim the Inland Revenue Department ("IRD") was pursuing against Mr Zaheed regarding unpaid tax.

[3] The charges were defended and a hearing was held in Auckland on 19 November 2013. At the conclusion of the hearing the Tribunal reserved its decision.

[4] This determination now delivers the Tribunal's decision on the charges. It also notes the full reasons for the Tribunal's preliminary ruling that the charges as laid were not limited by the process the Standards Committee had followed in its preliminary investigations and decision to refer matters to the Tribunal for consideration.

***Preliminary Ruling***

[5] At the commencement of the hearing, counsel for Mr Deobhakta raised the issue of what matters the charges required his client to address. He noted that the charges as laid were based on facts and matters that were wide ranging. He contrasted this with the specifics of the complaint which had resulted in the charges.

[6] For Mr Deobhakta it was submitted that the Notice of Determination included with charges filed by the Standards Committee[1] referred to the two aspects of the complaint made against Mr Deobhakta which gave rise to the charges. Those two

[1] At pages 23 -25 of the Committee's Bundle.

matters of complaint were that Mr Deobhakta had not refunded a retainer of $15,000 to Mr Zaheed, as required by the terms of the retainer, and that he had acted unethically, possibly dishonestly, in relation to Mr Zaheed's cheque for $21,000 payable to IRD[2].

[7] It was submitted that matters particularised in the charge went beyond the scope of the two matters noted as the subject of complaint, and that this was prejudicial to Mr Deobhakta's position.

[8] It was also submitted for Mr Deobhakta that he had been quite clear about the scope of what he considered he was facing when he lodged his regulatory response[3] to the charges. In that response he had said:

> "Response to charges
>
> On the assumption the two charges correspond to the two complaints in the Notice of Determination dated 15 February 2012 paragraph 2 (a) and (b) the former lawyer pleads NOT GUILTY to both charges."

[9] It was submitted that the facts, matters, and particulars relied on in the charges had to be limited to matters falling within the ambit of paragraphs 2(a) and (b) of the Notice of Determination. That is, the failure to refund the $15,000 retainer and matters relating to the $21,000 cheque payable to IRD.

[10] The position of the Standards Committee was that the charges and associated particulars relied on properly arose from the Committee's investigation of the complaint, and were matters that were within the ambit of the issues referred to in its Notice of Determination

[11] The Tribunal retired to consider the points made, and determined that the charges as laid, and their associated facts, matters, and particulars, were properly laid in accordance with the obligations of the Standards Committee contained in the Lawyers and Conveyancers Act 2006 ("LCA"). The Tribunal reconvened and recorded that finding.

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[2] At page 23, paragraphs 2(a) and (b) of the Notice of Determination,
[3] This response was required by r 7 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008.

[12] The Tribunal reached the view it did on this preliminary matter based on the requirements of LCA, which provide a framework for the investigation and disposal of complaints against practitioners.

[13] When a complaint is made one of the steps a Standards Committee may take is to inquire into the complaint.[4] That will involve investigating and conducting a hearing, following which the Standards Committee may make, inter alia, a determination[5] that –

> "…the complaint …, or any issue involved in the complaint…, be considered by the Disciplinary Tribunal"[6]

[14] Where a Standards Committee makes a determination that the matter is to be determined by the Tribunal, the Committee must –

> "…frame an appropriate charge and lay it before the Disciplinary Tribunal…" [7]

and

> "…give written notice of that determination and a copy of the charge to the person to whom the charge relates…"[8]

[15] Given that the Standards Committee may investigate a complaint, including conducting a hearing in relation thereto, we cannot see how the scope of any charge arising from that investigation and hearing could be limited by the content of the complaint. The very purpose of the investigation and hearing is to decide whether there is anything arising out of the complaint that warrants a charge being considered by the Tribunal. The person making the complaint causes the process to start, but pending an investigation by the Standards Committee what may come out of that complaint can never be certain. The complainant's concerns could not themselves limit the charges that may result from the investigation and hearing undertaken by the Committee.

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[4] Lawyers and Conveyancers Act 2006, s 137(1)(a).
[5] Ibid, s 152(1).
[6] Ibid, s 152(2)(a).
[7] Ibid, s 154(1)(a).
[8] Ibid, s 154(1)(b).

[16] The Standards Committee is not deciding a complaint when it makes a determination to refer a matter to the Tribunal. Its determination is limited to referring the matter with "*an appropriate charge*".[9] What is "*appropriate"* will depend on the outcome of the investigation and hearing, not the actual complaint itself. In many cases a lay person making a complaint may not appreciate that a professional offence has been committed, and the complaint may well not reference such an issue as a result. That is something the subsequent investigation and hearing will identify, and then a charge will be framed and laid. As a consequence the facts, matters and particulars of charge may well extend further than what was said in the complaint itself.

[17] The Court of Appeal commented on this issue in *Orlov v New Zealand Law Society & Ors*[10] –

> "… a decision under s 152(2)(a) does not determine the outcome of the complaint. It only determines which body should be seized of it. The decision is procedural in nature and occurs at a very preliminary stage of what is a comprehensive statutory process involving several checks and balances in what the legislature saw as a more responsive regulatory regime."

[18] The reference of a matter arising from a complaint to the Tribunal, and the associated drafting of an appropriate charge, is a procedural matter only. No decision on the merits of the complaint is made by a Standards Committee in that situation.

[19] Consistent with this is that the Standards Committee is not limited to referring the complaint itself to the Tribunal, but may refer "*any issue involved in the complaint",* as contemplated by s 152(2)(a) LCA.

[20] As a consequence, when making a decision on what charge is appropriate under s 154(1)(a) LCA, the discretion of the Standards Committee is not affected by its procedural decision under s 152(2)(a). This position was also recently endorsed

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[9] Above, fn 7.
[10] *Orlov v New Zealand Law Society & Ors* [2013] 3 NZLR 562 at [50].

by the High Court in *Deliu v The New Zealand Lawyers and Conveyancers Disciplinary Tribunal and Another.*[11]

[21] The Tribunal formed the view that the charges and supporting particulars clearly set out what Mr Deobhakta faced and were within the ambit of the conduct considered by the Standards Committee during its investigation and hearing of the complaint against Mr Deobhakta. Following that process, and the determination to refer, the Committee laid the charges that it considered appropriate, as it was required to do, so that the merits of the various matters raised could be considered by the Tribunal. We see nothing in the charges that is not permissible.

[22] After receiving the complaint about Mr Deobhakta's conduct, and in particular his failure to refund what was alleged to have been a contingency fee, the Standards Committee embarked on an investigation and subsequently a preliminary hearing. As a consequence of all the matters it considered, the Committee determined that the issues raised should be referred to the Tribunal for its consideration. Charges were drafted and filed, and they included facts, matters, and particulars that had come to the Committee's attention during its investigation and preliminary hearing, and on which it based its disciplinary proceedings as shown by the form of charge lodged.

[23] The charges and their particulars specified matters arising in respect of: a retainer of $15,000 paid to Mr Deobhakta by Mr Zaheed and the operation of an associated contingency agreement; the circumstances involved in an allegation that a cheque for $21,000 plus $4,000 cash had been given to Mr Deobhakta in place of a cheque for $25,000; the attempts by Mr Deobhakta to obtain the consent of Mr Zaheed for Mr Deobhakta to use the funds represented by the cheque for $21,000 for a purpose not approved by Mr Zaheed; and the sending of abusive and offensive text messages by Mr Deobhakta to Mr Zaheed.

[24] The merits of the charges were for consideration by the Tribunal. The Committee did no more than receive the complaint, investigate it, and hold a preliminary hearing into the complaint. After deciding there were matters which

[11] *Deliu v The New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2013] NZHC 3053 at [65].

needed to be determined by the Tribunal, the Committee drafted the charges which were then placed before the Tribunal for consideration.

[25] Mr Deobhakta could not properly claim to have been taken by surprise by the charges, nor could he properly insist that the charges he faced must be limited by the words of the original complaint. The charges and particulars have emerged from the process commenced by the complaint, and they make it clear what he faces. They are matters which arose out of the complaint. The charges reflect the subsequent investigation and hearing that have resulted in the Committee's determination to refer the matter to the Tribunal, and for which, in our view, appropriate charges have been drafted and laid.

***Background to Charges***

[26] Mr Deobhakta was acting for his client, Mr Zaheed, who was being investigated for tax fraud by IRD. After engaging with IRD to enquire about the case against Mr Zaheed, Mr Deobhakta indicated to him that he considered a fee of $15,000 would be necessary to resolve the matter.

[27] There were some attempts to settle the matter with IRD to avoid Mr Zaheed being prosecuted. The plan was to have IRD agree a figure that Mr Zaheed could pay to IRD in satisfaction of unpaid tax, and for Mr Zaheed to meet this amount in agreed instalments.

[28] A settlement proposal of $75,000 was suggested by Mr Zaheed, involving an offer of three instalments of $25,000 each. It was not clear that IRD would accept such a settlement proposal, but in an attempt to advance the position with IRD, Mr Zaheed obtained some funds from friends to facilitate such a settlement.

[29] Mr Zaheed's evidence was that he was provided with $25,000 by some friends. The funds were on deposit in his produce shop bank account, and he arranged for a bank cheque against that amount payable to the IRD as the first instalment. Mr Zaheed was not clear whether the $25,000 was actually his, and due to friends by way of wages which they let him retain, or was given to him and then deposited into his produce shop account. Whichever scenario is correct,

Mr Zaheed's lack of clarity on this point does not affect our view of his credibility as a witness, nor is the issue itself of great moment in this case. A copy of a cheque for $25,000, dated 18 November 2009 and payable to IRD, was included in material filed with the charges.[12]

[30] Mr Zaheed said that when he met Mr Deobhakta on 18 November 2009, to pass over the $25,000 cheque for IRD which he had obtained, he was asked by Mr Deobhakta to substitute that cheque with another cheque payable to IRD for $21,000, plus $4,000 in cash.

[31] Mr Zaheed said he did as requested and returned to his bank to exchange the $25,000 cheque for a fresh bank cheque payable to IRD for $21,000, plus $4,000 cash. Mr Zaheed's evidence was that he then gave that cheque for $21,000 plus $4,000 cash to Mr Deobhakta. Mr Deobhakta denied that he had asked for a $25,000 cheque to IRD to be replaced with a cheque for $21,000 to the IRD plus $4,000 cash. He acknowledged receiving a $21,000 cheque payable to IRD, but denied receiving $4,000 in cash.

[32] IRD did not accept the cheque for $21,000 at that time, advising that it should be held by Mr Deobhakta on behalf of Mr Zaheed until IRD had made a decision as to whether it would accept a settlement proposal. Mr Zaheed did not know what happened to the $4,000 cash, but said that Mr Deobhakta had described it to him as being necessary to pay "*a commission*". Mr Deobhakta denied this, saying he had not received $4,000 cash.

[33] A copy of this second cheque for $21,000 payable to IRD, also dated 18 November 2009, was included in the material filed with the charges.[13]

[34] Mr Deobhakta later asked Mr Zaheed for permission to use the funds represented by the $21,000 cheque payable to IRD for another purpose. Mr Deobhakta said that by this time it was clear that a settlement with IRD was unlikely, so there was no immediate use for the $21,000 as part of an IRD settlement.

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[12] Affidavit of Abdul Zaheed dated 8 July 2013, exhibit "AZ1".
[13] Affidavit of Abdul Zaheed dated 8 July 2013, exhibit "AZ2".

[35] Mr Deobhakta told Mr Zaheed that he was assisting the New Zealand government to obtain evidence against a corrupt immigration officer, and needed the funds to assist with that task. He suggested that if Mr Zaheed cooperated and made the funds available, the government would be advised and that would help him with his IRD issue. Mr Zaheed consulted some friends about this request from Mr Deobhakta, including a Mr Monir Khan, who gave evidence to the Tribunal.

[36] Mr Zaheed was also given a document setting out Mr Deobhakta's request to be allowed to use the $21,000 for this other purpose. Mr Khan's evidence confirmed that Mr Deobhakta had asked Mr Zaheed, at the meeting where this document was given to Mr Zaheed, for permission to use the $21,000 in that way.

[37] Mr Deobhakta's evidence was that he had thought the $21,000 had been provided to Mr Zaheed by the Bangladesh community to assist Mr Zaheed with his IRD matter, and thus that community had some control in the ultimate disposition of the funds. He had prepared a written proposal dated 23 November 2009, headed "*Punjab Tour*"[14] which set out his request to the community to be able to cash the $21,000 cheque and use it in the operation he said he was involved in for the New Zealand government.

[38] According to Mr Deobhakta, the money was to be used to make payments to an immigration official who was suspected of corruption, and the payment would facilitate a case against that official. We note that there was no evidence before the Tribunal regarding this alleged corruption and the proposal to apply the funds in this way, other than from Mr Deobhakta.

[39] Sensibly, in our view, Mr Zaheed refused to agree to his funds being used for this purpose. He said that the funds were provided by his friends to assist him in his dealings with IRD, and they were not available for another purpose. He said that as the funds were not community funds he could not understand why Mr Deobhakta was seeking permission to use the funds from what was described in Mr Deobhakta's document as the "*Bangladesh Community*". Mr Khan confirmed that the Bangladesh Community had no involvement and that it had given no assistance to Mr Zaheed.

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[14] Ibid, exhibit "AZ4".

[40] Mr Zaheed continued to resist Mr Deobhakta's attempts to utilise the $21,000 for other than an IRD settlement, and eventually he got the funds back from Mr Deobhakta when it became clear that settlement with IRD was not going to be possible. In December 2009 Mr Zaheed was served with criminal proceedings regarding unpaid tax, and he was eventually convicted on the tax matters.

[41] With regard to the legal advice Mr Deobhakta provided to Mr Zaheed regarding his IRD matter, Mr Deobhakta had acknowledged that he would work on a contingency basis. This was not agreed at the outset, but when Mr Zaheed became concerned that his position did not appear to have advanced with IRD he sought and obtained the agreement of Mr Deobhakta that a $15,000 retainer he had paid to Mr Deobhakta would be refunded if certain outcomes were not achieved. This was set out in an agreement signed by Mr Deobhakta and Mr Zaheed on 5 December 2009, and headed "Abdul Zaheed - Contingency Agreement".[15]

[42] The contingency agreement acknowledged that Mr Deobhakta had received a retainer of $15,000 from Mr Zaheed and that it would be refunded if certain "*aims*" were not *"sought".* Those aims were Mr Zaheed avoiding being prosecuted in respect of criminal charges and a satisfactory settlement with IRD being achieved. No settlement with IRD was achieved and Mr Zaheed was prosecuted and convicted regarding his tax issues with IRD. Mr Zaheed considered that he should in that case receive a refund of his $15,000 retainer, believing that was what the contingency agreement provided.

[43] The $15,000 retainer was not repaid by Mr Deobhakta, who claimed that he was not required to repay it in terms of the contingency arrangement agreed. Mr Deobhakta said that his only responsibility was to "*aim*" to achieve a settlement and no criminal prosecution, and that he had always sought that outcome while completing his legal work for Mr Zaheed. He also noted that the fact of Mr Zaheed going to another legal adviser interfered with his efforts to achieve a satisfactory outcome, and that in those circumstances he had no refund obligation under the contingency arrangement.

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[15] Affidavit of Abdul Zaheed dated 8 July 2013, exhibit "AZ3":

[44] When he was served with a notice of prosecution for the IRD matter in late December 2009 Mr Zaheed had instructed another lawyer, but Mr Deobhakta continued to communicate with him regarding the IRD. Ultimately Mr Deobhakta's communications became abusive and offensive when it became apparent that Mr Zaheed was receiving alternative legal representation regarding his prosecution.

***Discussion***

[45] The Standards Committee submitted that Mr Deobhakta's:

(a) requirement for his client to exchange the $25,000 cheque payable to IRD for a cheque for $21,000 payable to IRD, plus cash of $4,000 for an unknown purpose for which he had not properly accounted to his client;

(b) subsequent requests to his client for consent to use the $21,000 for another purpose;

(c) refusal to refund the fee of $15,000 on the basis that it was a fee paid in respect of a contingency which had not occurred; and,

(d) abusive and offensive texts to his client when his legal services were no longer required;

represented a serious departure from acceptable standards, or were reflective of serious negligence or incompetence.

[46] Mr Deobhakta submitted that he did not require a $25,000 cheque to be exchanged for a cheque for $21,000 plus $4,000 cash, that he had not received $4,000 cash as suggested, and that his requests to use the $21,000 for the alternative purpose outlined was bona fide, and when his request was declined he accepted that position. He also said that he was not in breach of the contingency fee agreement, as he had completed what was required under that agreement to justify his fee, and he noted that it was not possible for him to repay the fee even if it had

been due because of his bankruptcy. Mr Deobhakta accepted that his texts to his client were abusive and offensive.

[47] If true, the request said to have been made by Mr Deobhakta to Mr Zaheed to exchange the $25,000 bank cheque payable to IRD for one of $21,000 plus $4,000 in cash is a disturbing feature, aggravated by the failure to account for the $4,000 in cash.

[48] We prefer Mr Zaheed's evidence on this matter. Mr Deobhakta denied that he had asked for the $25,000 bank cheque to be exchanged for $21,000 plus $4,000 cash, but apart from that he could not offer anything to support his position. He said that he had "*lost*" Mr Zaheed's file which had been mistakenly taken by a creditor and subsequently destroyed.[16]

[49] On the other hand, Mr Zaheed, who appeared to us to be a credible witness, was able to provide documentary evidence of the bank cheque for $25,000 payable to IRD dated 18 November 2009 and of the bank cheque for $21,000 payable to IRD, also dated 18 November 2009, which he said replaced, together with $4,000 cash, the $25,000 cheque. That document trail supports what Mr Zaheed said in his evidence.

[50] Mr Deobhakta had been given funds to advance Mr Zaheed's settlement proposition with IRD. Even if a settlement was not possible, which was Mr Deobhakta's evidence, to try to seek some authority to use Mr Zaheed's funds for another purpose was unusual, particularly where Mr Zaheed had made it clear that the funds were not available for another purpose and that no other party was able to agree to the alternative use proposed. Mr Zaheed faced a serious issue with IRD, and for Mr Deobhakta to suggest diverting Mr Zaheed's funds arranged to attempt settlement with IRD to another purpose unrelated and of no real value to Mr Zaheed is a significant failure in Mr Deobhakta's duty to his client.

[51] That alternative use of the funds involved a scheme which Mr Deobhakta claimed would benefit the New Zealand government. There was no evidence, other

[16] Affidavit of Vinay Avinash Deobhakta dated 27 September 2013, at [7].

than from Mr Deobhakta, regarding these matters, and the suggested scheme was an inappropriate basis for a barrister to seek to utilise a client's funds for an alternative purpose of doubtful value to the client. The fact that Mr Deobhakta did not take the $21,000 when told it was unavailable is a mitigating factor, but the request was inappropriate, and it remains uncertain as to what may have happened to the $4,000 Mr Zaheed says accompanied the cheque he gave to Mr Deobhakta.

[52] So far as the contingency agreement was concerned, its terms were reasonably clear. Both parties, by signing it, have acknowledged that $15,000 had been paid by Mr Zaheed to Mr Deobhakta as a retainer by 5 December 2009. Mr Deobhakta agreed in the document that he would refund the retainer if certain "*aims*" were not "***sought***".[17] Those aims were noted as the avoidance of criminal charges by IRD, and the claim by IRD being settled for an amount satisfactory to both IRD and Mr Zaheed.

[53] In summary, Mr Deobhakta suggested that all he was required to do by the contingency agreement was to seek these outcomes, not necessarily achieve them. He said he would never have guaranteed the result, but he could guarantee what he would "*aim to do*".[18] That does appear to be somewhat misleading for a client, and certainly there is no real contingency at all in such a situation. Mr Zaheed clearly was misled, as he thought he would get his fees back unless Mr Deobhakta could achieve a settlement and he escaped prosecution.

[54] Mr Zaheed was also misled in another way. Mr Deobhakta knew that he was on the point of being declared bankrupt when he signed the contingency agreement (he was declared bankrupt 4 days later), so it was worthless as a means of Mr Zaheed protecting his right to recover fees paid. Mr Deobhakta admitted that he was well aware of this at the time he signed the agreement.[19]

[55] When criminal proceedings were issued against Mr Zaheed in respect of his tax affairs, and Mr Zaheed obtained advice from another lawyer, the relationship

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[17] Affidavit of Abdul Zaheed dated 8 July 2013 where the Contingency Agreement forms exhibit "AZ3"
[18] Fn 16, at [9].
[19] Mr Deobhakta said during cross examination that he knew repayment would not be available, and that signing the contingency agreement was an attempt by him to take off the pressure arising from Mr Zaheed's approaches to him.

between Mr Deobhakta and Mr Zaheed broke down completely. There was evidence before the Tribunal of some extremely abusive text messages from Mr Deobhakta to Mr Zaheed. Mr Deobhakta admitted that the messages, some of which contained gross expletives, were entirely inappropriate.

***Determination***

[56] The Standards Committee contends that Mr Deobhakta was guilty of conduct that amounted to misconduct (or in the alternative serious negligence or incompetence) in seeking to use the $21,000 constituted by a cheque provided by Mr Zaheed for an unrelated purpose, not accounting for $4,000 in cash said to accompany that cheque, failing to refund the contingency fee, and sending his client extremely offensive texts.[20]

[57] Misconduct is noted in the relevant section of LCA[21] as being conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable.

[58] That reflects the judicial definition of misconduct set out by Viscount Maugham in *Myers v Elman*[22]. More recently, a deliberate departure from accepted standards, or such serious negligence as, although not deliberate, to portray indifference to and an abuse of professional privileges have been used to define misconduct[23].

[59] The essential feature of misconduct under s 7(1)(a) LCA is that the conduct be of a nature that indicates a serious deficiency in observing normally accepted standards.

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[20] Some of the content of these texts is set out in Mr Zaheed's affidavit of 8 July 2013, exhibit "AZ5", with the more extreme texts showing March 2010 dates.
[21] Section 7(1)(a) Lawyers and Conveyancers Act 2006.
[22] *Myers v Elman* [1940] AC282, at 288.
[23] *Re A (Barrister and Solicitor of Auckland* [2002] NZAR 452; *Complaints Committee No.1 of the Auckland District Law Society v C* [2008] 3 NZLR 105

[60] In our view, Mr Deobhakta has failed to observe required standards in trying to influence his client to let him use $21,000 for the alternative purpose he proposed, failing to account for the $4,000 cash his client says he gave him (which we have accepted), misleading his client as to the affect of a contingency agreement he drew up and signed, and sending his client abusive and obscene texts. This course of conduct amounts to misconduct in our view, and we find the charge proven accordingly, on the balance of probabilities as required by s 241 LCA.

***Directions***

[61] The Case manager is to liaise with counsel as to dates on which they are available for a penalty hearing.

[62] Once a hearing date has been established, the Standards Committee is to file and serve its submissions on penalty and costs by a day that is at least 14 days prior to that hearing.

[63] The practitioner's submissions on penalty should be filed and served at least 4 days prior to the hearing.

[64] Leave is reserved for either party to apply to vary this timetable should that become necessary.

***Section 257 Costs***

[65] Costs under s 257 LCA will be certified at the penalty hearing, but as at 1 December 2013 they were $4,192.00.

**DATED** at AUCKLAND this 18th day of December 2013

D J Mackenzie
Chair