NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2017] NZLCDT 41
LCDT 026/17

UNDER	The Lawyers and Conveyancers Act 2006
IN THE MATTER	Of Disciplinary Proceedings under Part 7 of the Act
BETWEEN	**NATIONAL STANDARDS COMMITTEE** Applicant
AND	**JINYUE (PAUL) YOUNG** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS
Ms F Freeman
Ms C Rowe
Ms S Sage
Mr I Williams

HEARING 20 & 21 November 2017

HELD AT Auckland

DATE OF DECISION 22 December 2017

COUNSEL
Mr S Waalkens for the Standards Committee
Practitioner in person

DECISION OF TRIBUNAL ON CHARGES

Introduction

[1] Mr Young faced three charges of misconduct pursuant to s 7(1)(a)(ii) of the Act,[1] and one charge of negligence pursuant to s 241 of the Act.

[2] If the Tribunal found the conduct to be unconnected with the provision of Legal Services, the Standards Committee charged an alternative (fifth) misconduct charge pursuant to s 7(1)(b) of the Act. This charge is a composite charge which provides alternatives for each of Charges 1 to 4.

[3] All charges were denied by Mr Young.

[4] More specifically, a description of the charges is set out in the opening submissions of counsel for the Standards Committee, Mr Waalkens, in paragraphs 2.1 to 2.4 which we adopt and set out as follows:

> 2.1 Charge one alleges that the Practitioner engaged in misconduct by swearing an affidavit of documents confirming that he had discovered all documents he was required to, when in fact there were relevant documents not listed in the affidavit. As such, the Committee alleges that the Practitioner wilfully or recklessly breached his duty of absolute honesty to the Court and misled the Court, breaching rule 13.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**).
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> 2.2 Charge two alleges that the Practitioner engaged in misconduct by threatening to use the complaints process for an improper purpose, by sending an email to another solicitor as set out in paragraph 6 below, wilfully or recklessly breaching rules 2.10 and 10 of the Rules.
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> 2.3 Charge three alleges that the Practitioner was incompetent or negligent by engaging in a sustained course of conduct in a misconceived effort to have a consent order set aside, and that his incompetence or negligence was to such a degree or so frequent so as to reflect on the Practitioner's fitness to practice or as to bring the profession into disrepute, pursuant to s 241 of the Act.
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> 2.4 Charge four alleges that the Practitioner engaged in misconduct by making various serious allegations against the plaintiff and her counsel in the proceedings and her counsel without a clear evidential foundation

[1] Lawyers & Conveyancers Act 2006.

for those allegations, wilfully or recklessly breaching s 4(a) of the Act and rules 2, 10, 10.1, 13.2, 13.8 and 13.8.1 of the Rules.

Background

[5] Mr Young was admitted as a Barrister and Solicitor of the High Court of New Zealand on 27 September 2013 but did not begin to practise until 2014.

[6] From April 2013 Mr Young was involved in a dispute between his wife's company (King David Ltd) and Ms Zhang, the client of Mr D, the complainant in this matter. King David Ltd attempted to withdraw from an agreement for sale and purchase, which Ms Zhang alleged was completed, and in respect of which she had paid a deposit. The proceedings were issued for breach of the contract; the relief included specific performance. There was also a further cause of action against Mr Young personally for "tortious interference with contractual relations".

[7] As part of the discovery process Mr Young swore an affidavit of documents on 8 December 2014.

[8] It transpired, during the hearing in July 2016, that various emails and two faxes had not been discovered, having been in the practitioner's possession.

[9] Mr Young alleged that he had provided all documents in his possession to Mr J who was instructed to act for his wife's company. Mr J prepared the affidavit on behalf of the company and sent it to Mr Young and his wife Ms Ying.

[10] Mr J, who was called as a late witness before the Tribunal, to clarify some of these matters, said that he had been aware at the time that Mr Young, as an inexperienced litigator would probably follow, as a precedent, the document that he had prepared. He says he would have pointed out the differences between Mr Young's affidavit and King David Ltd's affidavit. He says he certainly emphasised to Mr Young that all documents had to be disclosed, even if negative to the case.

[11] Mr J said he most certainly did not prepare Mr Young's affidavit of documents.

[12] The “missing” documents were provided to Mr D (counsel for Ms Z) by the real estate agent, at the Court hearing. The emails and faxes were unhelpful to King David Ltd’s and Mr Young’s case. They led to settlement discussions.

[13] After negotiations on the morning of the second day of hearing a consent memorandum was presented to the Court.

[14] Mr J’s recollection of the time for negotiations on that second morning was approximately an hour, although he recalled that the consent memorandum was not put to the Judge until after the morning adjournment at 11.45 am. The Minute was dictated by Her Honour Duffy J. at that time and it included a reservation by Her Honour of leave to return to the Court if required[2].

[15] Mr Young’s recollection was that the negotiation was only for about 20 minutes and says that he and his wife were jet lagged and felt pressured. Mr D’s recollection was that the negotiations began about 9.30 am, before Court was due to start, that there was no evidence that day, and the orders were made at 11.45 am.

[16] Almost immediately, Mr Young and his wife Ms Ying (on behalf of the company King David Ltd) had “settlor’s regret”.

[17] Mr Young’s actions from this point form the basis for the three further charges. These fall into two categories. Charge 3 relates to the course of conduct through the Courts alleged to be incompetent or negligent. Charges 2 and 4 relate to misconduct, in his treatment of professional colleagues by the making of threats (Charge 2); and the making of allegations without clear evidential foundation, against the plaintiff in the proceedings, and her counsel (Charge 4).

Incompetence and Negligence Charge

[18] On 9 July Mr Young wrote to the High Court seeking to withdraw the signatures of himself and his wife from the settlement agreement. The matter was referred to Venning J, Chief High Court Judge, who responded on 12 July that it was not possible for him to intervene and suggesting the practitioner take legal advice.

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[2] Somewhat bizarrely, Mr Young contended to the Tribunal that the ‘leave’ provision was added by Her Honour the next day, despite there being no evidence of that.

[19] Subsequently Mr Young attempted to file an application in the High Court, apparently electronically and without a filing fee, and thus it was not accepted. In that application he sought to set aside the consent orders on the following grounds:

1. Incompetence in the plaintiff's interpreter at the hearing.

2. Fraud or deception on the part of the plaintiff or Mr D (counsel) during the hearing.

3. Failure to provide the common bundle, as directed, in advance of the hearing[3].

4. That he and his wife had been told an incorrect story about the plaintiff to induce them into signing the original sale and purchase agreement.

[20] Four days later, on 29 July, Mr Young filed a notice of appeal in the Court of Appeal seeking to set aside the consent orders. On 29 August, the Court of Appeal issued a Minute questioning jurisdiction and inviting submissions given that there did not appear to have been any application filed and determined in the High Court.

[21] After considering a memorandum filed by Mr Young on 2 September, on 7 September the Court of Appeal dismissed the appeal for lack of jurisdiction.

[22] On 12 September 2016 Mr Young's wife breached the Consent Orders by transferring (as director of King David Ltd) the property to another company instead of to the plaintiff. The plaintiff applied for Mr Young and Ms Ying to be found in contempt of court.

[23] On 21 September Mr Young and Ms Ying were served with a sealed Order reflecting the Consent Order made by Duffy J on 5 July.

[24] In the memorandum to the Court, following the plaintiff's application to find Ms Ying in contempt, Mr Young asserted that:

[3] Despite the fact that Mr Young and Ms Ying were overseas until the day before the hearing in any event.

(a) His wife had been entitled to sell the properties, they had not received the sealed Consent Order at that time.

(b) Mr D, counsel for the plaintiff, had "made up evidence" and colluded with King David Ltd's own counsel, Mr J.

(c) Duffy J had "erased all her negative comments against the second defendant from the note of evidence (sic)".

[25] Mr Young did not appear on 26 September when the matter was called in the High Court. The contempt of court proceedings was heard before Palmer J on 28 October and 17 November 2016.

[26] In this second High Court proceeding, Mr Young and Ms Ying were represented by counsel. Ms Ying was found to be in contempt, by transferring the property but Mr Young was not found to be in contempt. His Honour commented as follows:

> "I do not consider Mr Young committed a contempt. He did not effect the transfers of the property so he did not directly breach the consent orders. **He did encourage that, by propagating his extraordinary and irrational theory that the orders were "pending".** But his evidence, and that of Ms Ying is that he also advised her directly against selling the property. His actions were concerning and in attempting to have the hearing resumed two days after the consent orders were made, and his incompetent attempts to challenge the consent orders through the Chief High Court Judge, the improper filing in the High Court and the "doomed appeal" in the Court of Appeal. Those actions are grounds for grave doubts as to his professional competence, consistent with his admission under oath that he is not a prudent solicitor. I forward this judgment and the notes of evidence to the NZ Law Society for the consideration of the professional disciplinary consequences of that. I do not consider his actions constitute contempt of court."[4] (emphasis ours)

[27] His Honour Palmer J also refused to set aside the Consent Orders on the basis that the grounds presented by Mr Young and his wife were unsustainable:

> "Based on their own accounts, I consider Ms Ying's and Mr Young's actions in entering into the settlement agreement and requesting orders from the Court were casual to the point of recklessness. That is particularly so of Mr Young who is currently admitted to practice law in New Zealand. But that was their choice. They both need to understand that they cannot escape from binding legal obligations to which they have formally sought the Court's agreement. Just because they subsequently decide they don't like them." (supra note 2 at para [37]).

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[4] *Zhang v King David Investments Ltd* [2016] NZHC 3018 [44].

[28] Mr Young was not prepared to leave the matter there and filed an appeal against Palmer J's decision on 15 December 2016 and an amended appeal on 25 January 2017. He also filed an application for a stay of the judgment in the High Court on 15 December 2016.

[29] The Court of Appeal noted that Mr Young and Ms Ying had brought an appeal without consent of the liquidator of King David Ltd, which had by then gone into liquidation. The Court noted that:

> "Indeed, Mr Young and Ms Ying accept that "King David Ltd (in liquidation)" should be struck out as an appellant. But they say that the "old King David Ltd" should remain a party. **That is not a competent proposition**. There is only one King David Ltd. It is in liquidation. Absent authority from the liquidator, it cannot appeal." (emphasis ours)

[30] The Court then went on to refer to the notice of appeal as "*… A prolix mixture of fact, law, submission and accusation*." They referred to the amended notice of appeal in these terms. "*If possible that document is worse. It runs to some 20 pages*."

[31] In relation to the stay application, in dismissing it Palmer J commented:

> "Mr Young is a practising lawyer. But the application filed did not comply with the requirements of an interlocutory application under Rule 7.19 of the High Court Rules. It did not refer to any particular enactments or principles of law or judicial decisions on which they relied … The purported application for a stay was not a valid application."

[32] The Standards Committee point to the documents drafted by Mr Young in all of these proceedings as "… *largely nonsensical and discursive*."

[33] To a large degree, Mr Young accepts these criticisms. In his response to the charges he admits many of the particulars pleaded: that his correspondence and his drafting is incoherent and misconceived, deficient, and non-compliant with the Rules. There are also significant passages of irrelevant material.

Conduct Towards Mr Z, Solicitor

[34] Contemporaneously with his attempts to set aside the consent order Mr Young also attempted to lapse the plaintiff's caveat over the title of the property concerned.

[35] It would appear he did so as counsel for King David Ltd, or Ms Ying. A letter of engagement was signed on behalf of his employer accepting instructions from Ms Ying to apply to lapse a caveat. On 12 October 2016 Mr Young emailed Mr Z, solicitor for the plaintiff as follows:

> "Can you please assist your client to remove the caveat by 4.00 pm today … otherwise I will complain to the Law Society tonight and you and Jie will be liable for the penalty of $555 a day."

[36] It is this conduct which is alleged to support Charge 2, namely an improper threat.

[37] It is clear that Mr Young, throughout all of the litigation and attempts at appeal which followed the consent order, was acting as a lawyer, thus invoking the s 7(1)(a) professional conduct provisions.

Allegations Made Without Foundation

[38] It is asserted that Mr Young made allegations about the plaintiff and her counsel and later his previous counsel and even the Judge, when he was seeking to set aside the Consent Orders.

[39] The practitioner repeated some of these allegations, particularly against Mr D in his response to the Standards Committee investigation of the complaint. In fact (although it is not part of the charges and therefore not relevant evidence for liability purposes), we note that the allegations were repeated in Mr Young's evidence and submissions before the Tribunal.

Issues for Determination

1. In respect of each of the Charges 1 to 4, was the lawyer acting in a professional or private capacity? Should s 7(1)(a) or s 7(1)(b) apply?

2. If, in respect of any of the charges, s 7(1)(b) applies, does the conduct reach the threshold of finding the lawyer not a fit and proper person to practise as a lawyer?

3. In relation to Charge 1, have the Standards Committee established on the balance of probabilities that Mr Young knowingly misled the Court? In other words, was this a wilful or reckless breach of Rule 13.1 or does liability fall at a lower standard of negligence or unsatisfactory conduct?

4. (a) Did the lawyer breach Rules 2.10 and 10 of the Rules, in the threat made to Mr Z?

   (b) If so, did he do so recklessly or wilfully?

5. During the course of conduct pleaded, and largely admitted by the lawyer, was he negligent or incompetent "to such a degree or so frequently as to reflect on his fitness to practice or as to bring his … profession into disrepute?"[5]

6. (a) Did the lawyer make serious allegations against Ms Zhang and her counsel without clear evidential foundation, thereby breaching s 4(a) LCA and Rules 2; 10; 10.1; 13.2.1; 13.8 and 13.8.1?

   (b) If so were those breaches wilful or reckless?

7. Does Charge 5 need to be considered?

Issue 1 – Professional or Personal Conduct?

Section 7 of the LCA defines misconduct in both contexts:

> **7 Misconduct defined in relation to lawyer and incorporated law firm**
>
> (1) In this Act, **misconduct**, in relation to a lawyer or an incorporated law firm, –
>
> (a) means conduct of a lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct –
>
> (i) that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable;
>
> …
>
> (b) includes –

[5] Section 241(c) LCA.

…

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

[40] Dealing first with the conduct alleged in Charges 2, 3 and 4, which concerned the lawyer's conduct from the time following the making of the consent orders in the High Court relating to the original litigation, we consider that the lawyer was acting in his professional capacity.

[41] From that time, he effectively took over the carriage of the litigation on behalf of his wife in her capacity as director of King David Ltd, and himself. Thus, he was providing regulated services in terms of s 7(1)(a).

[42] In relation to the conduct in Charge 2, Mr Young's firm was acting, in the attempt to have the caveat removed. When he made the threat, he was writing to Mr Z to achieve that end. He was clearly acting as a lawyer on behalf of another person. A letter of engagement had been signed.

[43] In respect of the various applications to the High Court and Court of Appeal, the documents were prepared and filed by him on behalf of King David Ltd, as well as himself.

[44] In relation to Charge 1, the position is more complex. It is necessary to carefully consider the dicta in the two recent decisions of the High Court and Court of Appeal respectively in *Deliu*[6] and *Orlov.*[7]

[45] In *Orlov,* the Court was considering the conduct of the practitioner in making a complaint to the Human Rights Review Tribunal, which was acknowledged to be a personal claim. At para [110] the Court had this to say:

> "But again, given that the person alleged to have discriminated is a Judge, the person complaining is a practitioner, and the context is litigation in which both were involved, we do not consider it as a claim "unconnected to the provision" of

[6] *Deliu v National Standards Committee and Auckland Standards Committee No. 1 of the New Zealand Law Society* [2017] NZHC 2318.
[7] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606.

> Legal Services. Rather, it directly stems from litigation and puts what happened in litigation squarely in issue."

[46] And later at para [112]:

> "It is necessary to return to the proposition that the two definitions in ss.7(1)(a)(i) and 7(1)(b)(i) cover the entire field. Mr Orlov's conduct will come under ss.7(1)(b)(i) only if it is not the provision of regulated services (which it is not) **and** (emphasis ours) if it is unconnected with the provision of Legal Services. It is this aspect of the definitions that we consider is crucial. Whilst not regulated services, the conduct is very much connected with the provision of such services and therefore comes within the s.7(1)(a)(i) limb of professional misconduct."

[47] In the *Deliu* decision, although Her Honour Justice Hinton adopted a slightly different approach to the interpretation of s 7(1)(a)(i) from the Full Court in *Orlov*, it was still found that Mr Deliu, in making similar complaints about Judges as had Mr Orlov, fell within the definition of professional rather than personal conduct.

[48] Her Honour undertook the following analysis:

> "[57] The Full Court said that Mr Orlov was not providing regulated services, but he was doing work connected to regulated services and s 7(1)(a) could be read as if it says "providing regulated services or work connected to the provision of regulated services".[8] The underlined words are added in effect to the provision. The Full Court found Mr Orlov's conduct therefore fell within s 7(1)(a). The Tribunal adopted that reasoning in this case.[9]
>
> [58] I have some difficulty in reading the section in that way. Mr Morgan QC candidly said he agreed, when pressed. If the work was not "regulated services", then it would seem to me s 7(1)(a) would not apply. I agree with the Full Court, and disagree with Mr Deliu, that this would leave a nonsensical lacuna in the section. Mr Deliu said s 7(1)(b) would simply pick up any misconduct left over after applying (a), and that (b) would include those charges. That is clearly not correct. As recorded above, s 7(1)(b) does not apply. The Full Court in *Orlov* (and the Tribunal here) has already said so, and I agree. It is disingenuous on Mr Deliu's part to submit on appeal that s 7(1)(b) would apply.
>
> [59] In my view, the correct answer here, applying in part the same reasoning by which the Full Court reached its conclusion, is that the conduct at issue was in fact "at a time of provision of regulated services". "Regulated services' means "… legal services". "Legal services" are "services a person provides by carrying out legal work for another person". "Legal work" "includes reserved areas of work and any work that is incidental to any of that work". "Reserved areas" means "the work carried out by a person in giving legal advice to any other person in relation to the directions or management of proceedings the person is considering bringing or has decided to bring or appearing as an advocate for any other person".

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[8] *Orlov Full Court decision*, above n 7, at [96]-[115].
[9] *Judges' Charges Tribunal decision*, above n 6, at [22]-[23], [123]-[124].

> [60] The definition of "legal work", as noted above, is not limited to "reserved areas". It "includes" reserved areas and any incidental work. When Mr Deliu wrote his letters of complaint and took the other actions regarding Harrison and Randerson JJ, that was "legal work" in the generally understood sense of those words, ie: work carried out as a lawyer for the benefit of clients. The Tribunal found that Mr Deliu (along with Mr Orlov) was trying to secure an advantage for himself. He was also clearly trying to secure an advantage for his clients. Alternatively, the letters and court proceedings were "legal work" in the sense of work incidental to reserved areas of work, ie: incidental to giving legal advice to his clients generally, regarding appearing as an advocate for them. Either way, the relevant conduct was "regulated services".

[49] In swearing the affidavit of documents in the proceedings involving his wife's company that is the subject of Charge 1, we noted that Mr Young was not providing regulated services for another person, although he was clearly intending to assist his wife's case. However, we have noted that this very point was considered by Her Honour Hinton J in *Deliu*[10] as follows:

> "[61] The only problem that seems to arise with fitting under the head of "regulated services" in this context, is whether the reference to legal services involving legal work for any other person means there must be an identifiable person. It seems to me that is not necessary, and if a lawyer is carrying out legal work for their clients generally (i.e. for other people), which Mr Deliu was clearly doing in writing his letters of complaint, then that is "legal services" and therefore "regulated services".
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> [62] The words "at a time" which appear in s 7(1)(a) also support a wider reading of what is covered by the subsection. The subsection does not just say, as it could have done, "that occurs when providing regulated services" but rather "that occurs at a time when providing regulated services".

[50] We consider that, in preparing the affidavit of documents, although representing himself, the conduct was incidental to provision of regulated services, when considered in the broad sense mandated by *Orlov*. That decision gives the clear direction that the two types of misconduct referred to in s 7 must cover all situations, and held: "… *We think this structure supports giving a broad scope to professional misconduct with a consequent limiting of personal misconduct to situations clearly outside the work environment.*"[11]

[51] The preparation and swearing of an affidavit is not the type of personal conduct which has in the past been captured by s 7(1)(b), such as sexual or behavioural misconduct, or what has been referred to as "moral obloquy".

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[10] See above n 6 at [61] and [62].
[11] See above n 7 at [107].

[52] From the above we conclude that all four charges should fall to be considered under the provisions of s 7(1)(a) or the pleaded alternatives where appropriate.

[53] Accordingly, Issue 2 does not fall for consideration. If we are wrong in our interpretation of the lawyer's conduct in relation to Charge 1, we accept that the omission of documents, by a very inexperienced lawyer, would not reach the threshold of justifying a finding that he was not a fit and proper person to be a lawyer.

Issue 3 – Charge 1, Level of Liability

[54] Charge 1 relates to the omissions from the affidavit of documents.

[55] At the time of swearing the affidavit Mr Young had only been employed as a solicitor for a matter of months. Whilst ignorance, the High Court rules, is no excuse, we do make some allowance for his complete inexperience, particularly in the area of litigation.

[56] It is apparent that the practitioner simply followed the form of affidavit which had been prepared by Mr J to be sworn on Ms Ying's part for King David Ltd. Although Mr J told us that he had attempted to point out the differences between the practitioner's position and King David Ltd's, it is not clear to us that Mr Young would have understood these. It is probably opportune at this point to note that Mr Young's facility with the English language is limited in some respects, particularly in relation to idiom. An example of the misunderstandings this has caused will be referred to under the consideration of Charge 4.

[57] Although Mr Young denies having misled the Court, he largely relies, in his response and submissions, on his assertion that he was not carrying out regulated services because he was representing himself. However, we have already found against him on this point.

[58] The practitioner appears to acknowledge that there were documents omitted from his affidavit but he also attempted to say that he had simply sent all of the documents to Mr J, and that Mr J had prepared his affidavits. In this conflict of evidence, we prefer the evidence of Mr J that, while he was aware Mr Young might

copy the form of the affidavit prepared by him he did not in fact prepare the actual affidavit of documents sworn by Mr Young.

[59] Unfortunately, this is not the only example of Mr Young seeking to shift responsibility from himself to a colleague.

[60] The emails and faxes which involved Mr Young, his wife and real estate agents were clearly relevant to the proceedings and required to be disclosed. Since they were sent or received by him the practitioner was clearly aware of their existence. As pointed out by counsel for the Standards Committee, the practitioner did not deny having the documents when the issue was raised with the presiding Judge.

[61] While the Tribunal accepts that Mr Young ought to have known these documents should have been included in his affidavit, we are not persuaded that his failure to include them was either wilful or reckless such as to constitute misconduct. Given his level of inexperience and competence, we consider the more likely explanation for their omission was Mr Young's negligence or incompetence. The question then arises as to whether this instance is of such a degree as to reflect on his fitness to practice or as to bring his profession into disrepute.

[62] Mr Waalkens on behalf of the Standards Committee referred the Tribunal to the *W*[12] decision, which endorsed the objective test, of whether the conduct falls below what is to be expected of the legal profession and whether the public would think less of the profession if the particular conduct were to be viewed as acceptable.

[63] This can be compared with the dictum in *Lagolago*.[13] That case concerned the practitioner's conduct in litigation, as in the present matter. Many of the negligence cases in the past have been concerned with the transactional areas of the law such as conveyancing. It is generally thought that in litigation more leeway must be given, having regard to its particular stresses and structure, particularly the courtroom component of that practice. However, we note that this charge concerns the preparation of a document well in advance of the hearing and with time for reflection.

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[12] *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514 at [82].
[13] *Lagolago v Wellington Standards Committee 2* [2016] NZHC 2867, in which the Tribunal's finding of negligence was overturned by the High Court.

[64] On balance, we consider the level of culpability, in failing to disclose the documents falls within the definition of "unsatisfactory conduct", being "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".[14] We reach this conclusion, having regard to the decision on negligence in *Lagolago*.[15]

Issue 4(a) – Charge 2, Did the Lawyer Breach the Stated Rules?

[65] Rule 2.10 provides:

> "2.10 A lawyer must not use, or threaten to use, the complaints or disciplinary process for an improper purpose.
>
> Rule 10 states "a lawyer must promote and maintain proper standards of professional in the lawyer's dealings".
>
> **Respect and Courtesy**
>
> 10.1 A lawyer must treat other lawyers with respect and courtesy.

[66] The email which is alleged to offend these rules was sent by the practitioner on 12 October 2016 to Mr Z (solicitor to Ms Jie Zhang, the plaintiff in the litigation) and said:

> "Can you please assist your client to remove the caveat by 4.00 pm today … otherwise I will complain to the Law Society tonight and you and Jie will be liable for the penalty of $555 a day."

[67] In responding to the charge, Mr Young stated that his threat was comparable to another case in which the LCRO[16] upheld a decision of the Standards Committee to take a matter no further. In a separate correspondence with the Standards Committee Mr Young apologised if he had threatened anyone.

[68] It was submitted by Mr Waalkens that:

> "The practitioner's threat to complain to the Law Society was directly linked to a request to remove the caveat, such that, the Committee submits that it was a threat for an improper purpose."

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[14] Section 12(a) LCA.
[15] See above n 13.
[16] Legal Complaints Review Officer.

[69] We note that recently, "improper purpose" was discussed in a decision of the LCRO.[17] He stated:

> "[78] In my view an improper purpose and threatening to make a complaint will arise when, in making a threat, a lawyer makes a connection between the threat and an unrelated strategic advantage that the lawyer is trying to accomplish."

[70] We endorse that analysis and note that it is entirely applicable to the threat made in the present case. Further we endorse the earlier comments of the LCRO[18] where he said:

> "The Rules are not concerned with equipping practitioners with tools to achieve outcomes for their clients. They are about the maintenance of professional standards."

[71] Mr Young ought to have known, that, in order to maintain his standards of courtesy and respect to a colleague, he must be satisfied that a breach of the conduct rules has indeed occurred. He must not merely cast such an allegation around in the hope of frightening another practitioner into complying with his request. It is that collateral purpose which crosses the line into "improper" threat.

[72] We consider the practitioner crossed the line in this case, and in so doing breached Rules 2.10 and 10 of the Rules.

Issue 4(b) – Was the Practitioner's Breach of Rules 2.7 and 10 Respectively a Reckless or Wilful One?

[73] We accept the submissions set out in the Standards Committee opening, on the approach to be taken to wilfulness and recklessness, as set out in *Zaitman v Law Institute of Victoria:*[19]

> "… While the solicitor who does not knowingly act in contravention must be shown to have foreseen that what he was doing might amount to a relative contravention, there is no need to go further and establish that the solicitor foresaw the contravention as "probable"; it is enough that he foresaw it as "possible" and then went ahead without checking … it will be enough if the solicitor … is shown to have been aware of the possibility that what he was doing or failing to do might be a contravention and then to have proceeded with reckless indifference as to whether it was or not."

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[17] SC v JT LCRO 382/2013 (30 June 2017).
[18] See above n 17 at [53].
[19] *Zaitman v Law Institute of Victoria* [1994] VIC SC 778 (9 December 1994) at [52].

[74] As to the practitioner's state of knowledge of the Rules, the Court in that case held as follows:

> "It matters not, then, that he was unaware of the specific requirements on the occasion of this particular transaction; for if, as I think, he must be taken to have been aware that there were rules in this area, he must be taken also to have appreciated the possibility that, if he proceeded without looking to see what those rules required of him, he might put himself in breach. To go ahead, then, without checking the rules was to take that risk; it was to proceed with reckless indifference as to whether what he was doing was or was not in contravention of such rules as were relevant."

[75] Even if Mr Young made reference to another decision at the time, it does not greatly assist him, except in dispelling the notion of wilfulness. The decision was not on point, and the very fact that a complaint had been made in the circumstances of that decision, of which he was aware, ought to have alerted Mr Young to take more care with his professional responsibilities.

[76] Thus we find that he recklessly breached the two rules relied upon and in doing so is guilty of misconduct pursuant to s 7(1)(a)(ii).

Issue 5 – Negligence or Incompetence?

[77] In paragraph [62], we have set out the test for negligence in the *W*[20] decision. Paragraphs [18] to [34] inclusive, detail the course of conduct which is alleged to have been negligent pursuant to s 241(c).

[78] The unusual nature of the conduct which followed the making of the consent order and Mr Young's attempt to have it set aside, is demonstrated by the documents Mr Young attempted to file in both the High Court and Court of Appeal, and by his interchanges with staff at the Courts.

[79] The picture which emerges is one of incoherence, confusion and lack of understanding by Mr Young of proper process. Furthermore, the outcome of his efforts was 100% failure. Regrettably, we must accept the submission made by Mr Waalkens that "*for the most part the documents were largely nonsensical and discursive*." They contain large tracts of irrelevant material.

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[20] See above n 12.

[80] We are mindful that in assessing Mr Young's conduct we must reach our own independent conclusion without merely referring to the comments of the Judges who dealt with the proceedings.[21] However, we are permitted to accept evidence of the comments of Courts on relevant matters, and attribute such weight as we see fit.[22]

[81] The Judges who were the recipients of Mr Young's arguments did not mince words:

> "His actions were concerning in attempting to have the hearing resumed in the two days after the consent orders were made, and his incompetent attempts to challenge the consent orders through the Chief High Court Judge, the improper filing in the High Court and doomed "appeal" in the Court of Appeal. Those actions are grounds for grave doubts as to his professional competence, consistent with his submission under oath that he is not a prudent solicitor. I forward this Judgment and the Notes of Evidence to the New Zealand Law Society for the consideration of the professional disciplinary consequences of that. But I do not consider his actions constitute contempt of court."[23]

[82] In the Court of Appeal the judgment was delivered by Kos P, who commented that Mr Young was "… *ill equipped by experience, and on the material before us, to act in litigation"*.[24]

[83] We also note that in some of his material placed before the Court the Appeal Mr Young effectively misled them, ie: by saying "*the appellants received no response and then formally applied leave to set aside the consent order on 25/7/16 but still receive no response*".[25] He was referring, erroneously or misguidedly, to his application to the High Court, which had not been accepted for filing, having been tendered electronically and without the proper fee.

[84] And in a further memorandum to the Court on 26 September 2016 Mr Young said "*Though Judge Duffy erased all her negative comments against the second defendant from the note of evidence (sic) the Chief Judge directed me to complain to the misconduct committee* …".

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[21] *Dorbu v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* High Court Auckland CIV-2009-404-7381, Brewer J (11 May 2011).
[22] Section 239(1) of the Act and *Deliu v National Standards Committee* [2015] NZCA 399 at [34].
[23] Palmer J in *Zhang v King David Investments Ltd (in liquidation)* Jin Wue Young and Hsiang-Fen Ying [2016] NZHC 3018, 13 December 2016.
[24] *King David Investments (in liquidation) v Young, Ying and Zhang* [2017] NZCA 37, 2 March 2017.
[25] Standards Committee bundle of documents page 83, memorandum to the Court of Appeal dated 2 September 2016.

[85] Thus in the course of his incompetently drafted documents he has not only also made scurrilous comments about a Judge but also misconstrued and distorted advice given to him by the Chief High Court Judge.

[86] Of the pleaded particulars, the following are admitted by the practitioner:

(a) He admitted his correspondence with the High Court was incoherent and misconceived.

(b) He admitted at least in part that his application of 25 July 2016 was misconceived.

(c) He admitted that his appeal to the Court of Appeal was misconceived.

(d) He admitted that he accepted under oath that he was not prudent, although attempted to blame language difficulties, despite the transcript disclosing that those difficulties themselves were canvassed and the word explained.

(e) He admitted that his notice of appeal against the decision of Palmer J, to the Court of Appeal, of 15 December 2016 was deficient and filed without the liquidators' consent.

(f) He admitted that his application dated 15 December 2016 for a stay of execution of the decision of Palmer J was invalid, without merit and did not comply with the rules.

(g) He partly admitted that his ex-parte application of 15 March 2017 was without merit and did not comply with the High Court Rules and that the affidavit filed with it did not support the order sought.

(h) He admitted that his memorandum accompanying the ex-parte application contained personal attacks on the plaintiff.

[87] We are cognisant of the latitude to be extended to litigators in considering issues of negligence.

[88] We accept the submission of counsel for the Standards Committee that it was Mr Young's "*duty to understand and comply with the relevant legislation and ethical obligations on him. His lack of experience does not excuse what the Committee submits was a higher degree of persistent incompetence*".

[89] We have regard to the comments in *W.*[26] That decision concerned the previous legislative provision.[27] The wording remains the same under s 241(c) and thus the comments of the Full Court are, with respect, pertinent.

[90] The Court discussed the statutory purpose of negligence by a practitioner coming within the scope of professional discipline, as it first did with the enacting of the 1982 Act[28]. The clear purpose was for public protection, and to ensure that negligence did not remain within the realms of tort or contract law, as between the solicitor and client.

[91] In accepting that purpose, the Court then found it "…*inappropriate to apply epithets such as "gross" or "reprehensible" to the standard of negligence which tends to bring the profession into disrepute. They may guide the interpretation of what is* ***misconduct****, but s 106(3)(c) is intended to apply to a different category of conduct.".(emphasis ours)*

[92] Later in the decision the Court stated:

> "[81] The use of the epithet "reprehensible" is appropriate in the case of professional misconduct, but it is not a useful description to assist in deciding the degree of negligence that warrants a disciplinary finding measured by whether it reflects on fitness to practise or tends to bring the profession into disrepute. That means a "tendency" to distract from (sic), or lower, the reputation of the legal profession in New Zealand. Professional misconduct will have this effect, but behaviour which does not necessarily amount to professional misconduct may be in a separate category of offending in terms of s.106(3)(c). Reliance on epithets is not helpful in this context. No gloss should be placed on the statutory test."

[93] Although the *W*[29] decision was concerned with conveyancing and in particular refinancing transactions, the comments are, in our view equally applicable when

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[26] See above n 12.
[27] Section 106(3)(c) Law Practitioners Act 1982.
[28] See above n 27.
[29] See above n 12.

considering the issue of the tendency to damage the reputation of the profession. At para [91] the Court said:

> "In our view it was negligence of a degree that tends to affect the good reputation and standing of the legal profession generally in the eyes of reasonable and responsible members of the public. Members of the public would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions which, if known by the public generally, would lead them to think that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing the reputation of the profession in the eyes of the general public."

[94] The actions of the practitioner in this matter included: failing to understand the binding nature of a consent order; failing to properly file applications both in the High Court and Court of Appeal; failing to express those in logical and coherent form and in accordance with the relevant rules; and repeatedly relying upon grounds which were irrelevant or unsustainable. We consider such actions would be regarded as entirely unacceptable by members of the public, who are entitled to expect competence in a practitioner. At the very least the public is entitled to expect that a practitioner who is out of his or her depth will seek advice from a competent and experienced colleague or refuse to undertake the work for which he or she is unsuited and inexperienced. Further, the public are entitled to expect that a practitioner can express him or herself in a coherent or cogent manner, since communication of and understanding of legal principles are at the basis of any form of legal practice. Nor is Mr Young excused by the fact that he was acting for himself and his wife. To the contrary, there is an expectation that every practitioner, on every occasion he or she appears in Court, or prepares documents, must perform competently.

[95] We find, on the balance of probabilities, to the high standard required with a serious allegation of this sought, that the Standards Committee has satisfied us that the practitioner's conduct in the proceedings described was negligent or incompetent or both, to such a degree that it reflects on his fitness to practice or as to bring the profession into disrepute. We rely on our own assessment of the conduct and the deficiencies noted above. That assessment is supported and bolstered by the comments of the various judges who have expressed concerns about the lawyer's competence, as quoted above.

Issue 6(a) – Serious Allegations Without Clear Evidential Foundation

[96] The statutory provisions and rules relied on are as follows:

> **4 Fundamental obligations of lawyers**
>
> Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:
>
> (a) The obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:

[97] Rule 10 reads:

> 10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.
>
> 10.1 A lawyer must treat other lawyers with respect and courtesy.

[98] Rule 13 reads:

> 13.2.1 A lawyer must treat others involved in Court processes with respect.
>
> …
>
> 13.8 A lawyer engaged in litigation must not attack a person's reputation without good cause in Court or in documents filed in Court proceedings.
>
> 13.8.1 A lawyer must not be party to the filing of any document in Court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist."[30]

[99] The evidence of such allegations resides in three documents drafted by Mr Young, namely:

1. His application to the High Court to set aside the consent orders, dated 25 July 2016.

2. His complaint to the New Zealand Law Society Lawyers Complaints Service about Mr D, Ms Zhang's counsel, dated 16 August 2016.

3. His memorandum filed in the High Court dated 26 September 2016.

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[30] LCA (Lawyers: Conduct and Client Care) Rules 2008.

[100] In the first document Mr Young refers to Mr D as having made "false allegation" and "fake evidence". Later he referred to:

> "… As misled by D. It is D's tactic to make up something and allege his opponent has admitted to the said lies. D also repeated the same false facts many times to make it real, as Mal Zedong says "if you tell a lie a thousand times, it will be truth". He repeatedly misled the Court that the contract was entered "vis a vis"."

[101] Mr Young's literal and dogmatic interpretation of the phrase "vis a vis" featured strongly in his allegations against Mr D, and indeed at the Tribunal hearing. Mr Young, in cross-examining Mr D asked him what he had meant when he had said that the agreement for sale and purchase was "entered into vis a vis". This question related to para [2] of the amended claim between the parties where it was pleaded:[31]

> "… The plaintiff and first defendant entered into a contract vis a vis a 9th edition standard form REINZ/ADLS agreement for sale and purchase of real estate …"

[102] Mr D's answer to this question was that in using that phrase he had meant "through". It seems that Mr Young had translated the phrase literally as "face to face". Mr Young and his wife, never having met the plaintiff prior to signing the agreement on behalf of the company, considered an allegation that it had been entered into "face to face", to be a "lie". Mr Young considered this to be one of the foundation points of his allegations that Mr D had "mislead the Court". Mr Young seemed unable to accept that the term "vis a vis" had simply been (inappropriately) used for a different meaning than he was attributing to it. It was a meaning not otherwise to be sensibly understood from the balance of the pleading in the statement of claim, the legal submissions or the evidence. Yet Mr Young was unable to depart from his interpretation, even after some lengthy discussion and engagement with members of the Tribunal at the hearing. Whether his approach is due to a personality trait or language difficulties, it is seriously problematic for a lawyer.

[103] We note that his conduct at the hearing is not part of the assessment of this charge, however his inability to accept the possibility of misinterpretations and instead accuse a colleague of deception is apparent, because he repeated it in his complaint about Mr D to the Complaints Service in December 2016, where he says,[32] under the heading "Did D mislead the Court?":

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[31] Standards Committee bundle of documents page 43.
[32] Standards Committee bundle of documents page 201.

> "… The plaintiff witnessed in the HC hearing that she had never met the vendor, but D described in the statement of claims (sic) and amended statement of claims (sic) that "they entered contract vis a vis", ie: face to face. D made up the facts to make the contract valid."

[104] Mr Young makes further scurrilous accusations against Mr D in the course of his complaint which we do not propose to record.

[105] The third document being the memorandum of 26 September 2016 repeats the allegation concerning "vis a vis" and Mr Young informs the High Court "*D dared to make up evidence to "prove" the second defendant threatened the plaintiff. He also dared to make up the fact that the sale and purchase agreement was entered vis a vis … I am suspicious the error was made deliberately or was made in collusion with my counsel who knew I was suffering from jetlag and insomnia*." Later he said "*Mr D refused to correct the errors he made in Court. Is this contempt of Court?*" and in the same paragraph referred to the hearing Judge Her Honour Duffy J as follows:

> "Though Judge Duffy erased all her negative comments against the second defendant from note of evidence (sic), the Chief Judge directed me to complain to the Misconduct Committee …"

[106] Having had the lengthy emails of complaint and request to avoid the Consent Orders referred to him, His Honour, in explaining to Mr Young how he was unable to intervene noted in his letter to Mr Young the following:

> "It is not for me to advise you what you should do if you are now dissatisfied with the agreement that was made. You should take legal advice.
>
> If you have a complaint against the conduct of the Judge who was presiding then you have the right to complain to the Judicial Conduct Commissioner under the provisions of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004."

[107] The provision of this information can hardly be described as a "direction to complain" and yet this is how Mr Young reframed the suggestion in his memorandum.

[108] There are numerous further examples of allegations made by Mr Young without proper foundation. He uses labels such as "fraud or deception"[33] without proper consideration of the Rule or of the foundation of the allegations he has made. Mr Young appears to use these terms simply to describe the views of others who

[33] Standards Committee bundle of documents page 41.

disagree with his perspective. He appears not to understand the difference between disputed facts and deliberate fraud.

[109] In submissions, Mr Waalkens referred us to the decision of *Gazley,*[34] and the citations therein. In particular we note the following dicta which refers to the privileges and professional duties enjoyed and owed by members of the Bar, being grounded in the public policy of freedom of speech, and noting*: "the privilege and immunity bring with them professional responsibility not to make allegations "without a sufficient basis" or "without reasonable grounds".* This responsibility applies irrespective of the persons against whom the allegations are made.

[110] Mr Waalkens submits that it is clear from the material referred to that the practitioner "*took no care to ensure his accusations against the … parties were based in evidence*".

[111] We agree with this submission and find that the charge is made out on the balance of probabilities.

Issue 6(b) – Were the Breaches Wilful or Reckless?

[112] We consider Mr Young had absolutely no regard to his professional obligations pursuant to the above rules.

[113] We regard him as having recklessly breached those rules and thus a finding of misconduct is established.

Issue 7

[114] In the circumstances in which we have found all of the practitioner's conduct to be of a professional nature we do not consider that Charge 5 requires determination. If we are incorrect in our assessment, particularly of Charge 1 which is more finely balanced, we would say that we do not consider that the practitioner's conduct in relation to that charge would have reached the threshold of reflecting on his fitness to practice and thus the charge would have to be dismissed.

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[34] *Gazley v Wellington District Law Society* [1976] 1 NZLR 452.

Summary

Charge 1 is found proven to the standard of unsatisfactory conduct.

Charge 2 is found proven to the standard of misconduct.

Charge 3 is found proven to be negligence such as to justify a finding under s 241(c).

Charge 4 is found proven to the standard of misconduct.

Directions

[115] Having found against the practitioner on four charges we invite counsel for the Standards Committee to file submissions on penalty by 25 January 2018. The practitioner may file any submissions in response within a further 14 days. A penalty hearing will be set down for half-a-day after 12 February 2018.

DATED at AUCKLAND this 22nd day of December 2017

Judge D F Clarkson
Chair