

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2018] NZLCDT 1

LCDT 003/17

UNDER

The Lawyers and Conveyancers
Act 2006

BETWEEN

**WELLINGTON STANDARDS
COMMITTEE 2**

Applicant

AND

IAN DAVID HAY

Respondent

CHAIR

Judge D F Clarkson

MEMBERS

Mr J Bishop

Mr W Chapman

Ms J Gray

Ms P Walker

HEARING 16 and 17 November and 8 December 2017

HELD AT Tribunals Centre Wellington

DATE OF DECISION 19 January 2018

COUNSEL

Ms S Carter for the Standards Committee

Mr J Upton QC for the Respondent

DECISION OF THE TRIBUNAL ON DISCIPLINARY CHARGE

Introduction

[1] Mr Hay has been charged with one count of misconduct, which is framed in the alternative, to encompass behaviour which is either professional (on two possible grounds¹) or personal².

[2] Unsatisfactory conduct is pleaded as a third alternative but can only apply if the conduct is found to be “professional”.³

[3] The Standards Committee alleges that Mr Hay, together with Barrie Skinner, then the complainant’s accountant, and currently serving a lengthy prison sentence for fraudulent tax avoidance and perverting the course of justice, devised and carried out a scheme to obtain \$200,000 from the complainant Ms C.

[4] Barrie Skinner proposed to Ms C that she invest in a “property development” in Queenstown, which would yield her 10% and was for a term of one year. Ms C was nervous, but was reassured, because the money would be going to Mr Ian Hay, who was a lawyer, and who had agreed to give her a personal guarantee. Ms C was also under the misapprehension that she was “investing in property”.

[5] She sought no independent legal advice. A key focus of the evidence was whether she had been told to do so, and what Mr Hay knew about the status of her advice.

[6] The use to which the funds were put, and Mr Hay’s dealings with Ms C, before she finally took formal steps to recover her funds, were also important features of the Standards Committee’s case.

[7] Mr Hay declared in bankruptcy, and his dealings with the Official Assignee were also the subject of evidence, relevant to credibility. As an ancillary matter, and also

¹ Namely conduct caught by s 7(1)(a)(i) or s 7(1)(a)(ii) Lawyers and Conveyancers Act 2006 (LCA). The charge was amended on 4 August 2017.

² Conduct caught by s 7(1)(b)(ii) LCA.

³ Section 241(b) and s 12 LCA.

bearing on credibility, was the allegation that Mr Hay attempted to have the complainant, Ms C, influenced into withdrawing the complaint, and as to his dealings with one of his own witnesses, Barrie Skinner's wife.

Issues for Determination

1. Was Ian Hay acting in a personal or professional capacity at each stage of the transaction involving the borrowing of \$200,000 from Ms C, and the subsequent uses to which the funds were put?
2. (a) If in a professional capacity, was Ms C Mr Hay's client?
(b) If not a client, what professional obligations did Ian Hay owe to Ms C?
(c) If such obligations existed, did he fulfil them?
3. If Ian Hay failed to fulfil professional obligations or breached regulations, was there a wilful or reckless breach; or alternatively, was his conduct disgraceful or dishonourable as judged by lawyers of good standing?
4. If Ian Hay was acting in a personal capacity, was his conduct such as to justify a finding that he is not a fit and proper person or is otherwise unsuited to be a lawyer?
5. Did Ian Hay take any steps to influence the complainant to withdraw her complaint to the New Zealand Law Society?
6. Did Ian Hay attempt to mislead the Tribunal by the manner in which he obtained evidence from one of his witnesses?

Background

[8] Mr Hay is an experienced solicitor practising in Wellington as a sole practitioner.

[9] In addition to his legal practice Mr Hay had, at the time of the transactions occurring in 2011, a number of other business interests. He and his wife owned the Empire Cinema in Island Bay and the café attached to that business, through their ownership of the two companies operating the cinema and café. In addition they had investment properties in Kelburn and Greytown. Mr Hay also describes a joint venture arrangement with an Australian manufacturer of wall panels. Then there was the

failed attempt to develop a property in Queenstown, in respect of which Ms C thought she was investing.

[10] Mr Hay was the sole director of his trustee company, IDH Trustees Limited (IDHT).

[11] Although Mr Hay denies that at the time he received the advance from Ms C in December of 2011 that he was “in strife” financially, he spent the first four pages of his affidavit describing the circumstances to which he attributed his financial collapse by 2014. We note that the difficulties are described by Mr Hay as beginning with the global financial collapse in 2008, the death of one of his major referrers of work in 2009 and the “several hundreds of thousands of dollars” required by his wife and himself to renovate the cinema between 2010 and 2012.

[12] Although his practice was profitable, it is clear from the report of the inspector appointed by the New Zealand Law Society (NZLS), Mr Potaka, that at the time of the advance of \$200,000 by Ms C to Mr Hay, he had significant debts facing him.

[13] Mr Hay was a friend of and shared a number of clients with Barrie Skinner who was an accountant in partnership with a Mr Rowley in Wellington. They were clearly quite close friends because after Mr Skinner was convicted of the serious offences and sentenced to a lengthy imprisonment in July 2012, Mr Hay continued to be in touch with him and to visit him in prison. They had met in the 1990s and referred each other clients.

[14] It was in March 2011 that Mr Skinner and his partner were formally charged following an investigation by the Inland Revenue Department (IRD). This was some nine months before the loan advance by Ms C.

[15] Although Mr Hay has denied representing Mr Skinner in the criminal proceedings, and (thus having a detailed knowledge of the situation, which could have been conveyed to Ms C), the evidence established that he was still on the record as solicitor for Mr Skinner in November 2011. It is also clear that Mr Skinner’s financial position at that time was also precarious, a decision on an adjournment application recording that he was personally \$492,000 in debt.

[16] The circumstances surrounding Ms C’s advance and the loan agreement are set out in Ms Carter’s opening submissions and adopted by the Tribunal as follows:

- “25. The circumstances surrounding the loan agreement are set out in the two affidavits of Ms C.
26. Ms C states that in August 2011 Mr Skinner recommended that she invest her money with Mr Hay for a property development in Queenstown.
27. Ms C met with Mr Skinner and Mr Hay at Wellington Airport in or around November 2011. This was the only time Ms C met with Mr Hay. Ms C states the meeting was relatively short, and the only investment discussed was the property development in Queenstown. Mr Hay states that they also discussed other business opportunities, however Ms C strongly denies this.
28. Ms C states that at the meeting at Wellington Airport, Mr Hay told her he wanted an investment of \$400,000 to invest in build (sic) on a property in Queenstown. She states that Mr Skinner told her that Mr Hay had been building houses for a number of years, and he himself had invested money with Mr Hay in the past and had achieved a return of 10% on his investment.
29. Ms C’s evidence is that Mr Hay had represented to her that the loan was specifically for a property development in Queenstown. Mr Hay says that the loan was not “tied” to any particular project.”

[17] While this was Mr Hay’s evidence at the hearing, in his responses to the NZLS both in February 2015 and September 2016 Mr Hay clearly stated that the funds were to be applied towards the purchase and development of a property in Queenstown and that Mr Skinner had informed Ms C of such purpose.

[18] It is also noteworthy that when asked about the loan by the Official Assignee in December 2014 “*Mr Hay represented that the funds went into a property development in Queenstown that failed*”.⁴

[19] The meeting at the airport was very brief (some 20 minutes or so before Ms C’s plane was due to depart) and extremely informal, being conducted at the bar with only a few minutes discussion about the actual investment.

[20] Following this meeting Ms C departed to consider her position. There is a very firm conflict in the evidence between that of Mr Hay who asserts that he cautioned Ms C to obtain independent legal advice and that of Ms C who emphatically rejects that such a suggestion was made to her at any time by Mr Hay or Mr Skinner.

⁴ Affidavit of Ms Beeby.

[21] Following the airport meeting Mr Skinner followed up with a number of calls to Ms C. It is her evidence that he said this was prompted by Mr Hay's impatience and Christmas approaching.

[22] Ms C decided to advance \$200,000 to Mr Hay after he had promised to provide a personal guarantee for the loan.

[23] Ms C's evidence was that she was extremely nervous about the investment, that she would "*never have invested in anything other than property*" but was reassured by Mr Hay's status as a lawyer and his personal guarantee. She was also obviously keen to find an investment that returned at a somewhat higher rate than she was currently earning on her funds and conveyed this to her personal banker.

[24] An email chain between Ms C and the banker was the subject of evidence and argument. Ms C indicated that the first email was effectively composed for her by Mr Skinner and she "cut and pasted", concerning the terms of the investment and by this time had received through Mr Skinner's office, a loan agreement which she forwarded to the bank. The banker, quite properly, advised Ms C to obtain independent legal advice on the investment. Ms C reassured the banker that she had done so and that it "was all good". Ms C is clear that she was able to reassure the banker in this way because she thought she had had legal advice from the fact that Mr Hay was a lawyer and she thought he had prepared the loan agreement that, she says, was what in her mind constituted legal advice, separate from her own lawyer who she did not consult.

[25] Some two months prior to this, Mr Skinner had formed a company for Ms C, which he told her was a way of saving tax (which she did not understand) and would also facilitate the transfer of her funds into an investment via the company which he told her would avoid the need for her to obtain the permission of the other trustee of her family trust (her lawyer), which was the actual owner of the funds. The inference could be taken that this mechanism was put in place by Mr Skinner specifically to avoid the involvement of Ms C's lawyer, but without more direct evidence on the point is not possible for the Tribunal to reach a clear view on this matter.

[26] Mr Hay was forwarded the email chain between Ms C and her banker and relied on it as demonstrating that she had confirmed she had received independent advice. We make comment on this conclusion later in the decision when discussing Mr Hay's conduct.

[27] Preparation of the loan agreement became a mystery. Mr Hay initially confirmed to the Standards Committee that the loan agreement had been prepared by his office. He retracted that acknowledgement subsequently, when he says a search by a technician of his computer files failed to locate the loan agreement. The agreement made its way to Ms C via Mr Skinner, but this was not unusual because he seemed to be acting as an intermediary between Ms C and Mr Hay throughout the loan advance period, and indeed beyond, even after he was imprisoned.

[28] It was not until Ms C received the personal guarantee, which was prepared and signed by Mr Hay, that Ms C placed the money into his bank account. The loan agreement itself was not in fact signed by Mr Hay. Despite that, he received the funds and immediately applied them for purposes which were largely unconnected with the Queenstown property purchase.

[29] The report of the NZLS investigator confirms the following: C H Limited (Ms C's company) deposited into the account of IDHT the \$200,000 in three sums between 22 and 29 December 2011.

[30] Immediately after the first two deposits, on 22 December 2011, Mr Hay made out four cash cheques to himself for \$1,500, \$15,000, \$10,000 and \$15,000 respectively. On 22 December a \$15,000 cash deposit was entered into Mr Hay's office account which was at the time overdrawn to the extent of \$63,858.71 (with an overdraft limit of \$65,000).

[31] On the same date a cheque for \$26,000 was drawn from the IDHT account and paid to Nelson Rock. That is a company, the sole director of which is Adrian Skinner, Barrie Skinner's brother. Mr A Skinner has sworn an affidavit in which he provides an explanation for this payment, in relation to services provided by him to Mr Hay. We will refer to the Tribunal's view of that evidence at a later stage.

[32] Although \$52,500 was paid as a deposit on two sections in Queenstown, this was later forfeited when the purchase did not proceed (due to Mr Hay being unable to obtain further funds). In summary, the investigator reports that only \$76,010 of the \$200,000 funds introduced, were used for the Queenstown project. It would seem significant funds were diverted into the Empire Cinema accounts, however these appeared to have been repaid to the IDHT account in 2013. The investigator reports on three bank accounts relating to Empire Cinema which were, at the time of the

advance, in overdraft to the tune of \$19,112.70, \$1,350,000 and \$265,476.81 respectively.

[33] Payments in early 2012 were also made to Goldberg Holdings Limited the sole director of which is also Adrian Skinner. These totalled \$16,000.

[34] Similarly, payments to Tasman Holdings Limited on 22 and 23 December 2011 were made for a total of \$11,000, again Adrian Skinner is the sole director although previous directors have been Barrie Skinner and David Rowley his partner.

[35] In his evidence, Mr Hay contended that most of the payments that were not directly identifiable as Queenstown related, were in connection with the wall panel business which he said he had also discussed with Ms C at their initial meeting. This is denied by Ms C who says she only heard of the wall panel business when she attempted to obtain repayment of her funds sometime later and she was told by Mr Hay that he was awaiting payment from Australia, which was connected with the wall panel business. Mr Hay conceded that Ms C might well have missed the reference to the wall panel business at their initial meeting and with hindsight accepts that he ought to have provided more information to her at the time.

[36] Since Ms C had simply been told by Mr Skinner that he was being “investigated by the IRD”, which she took to be a normal audit, she was shocked to find that he had been convicted of criminal offences, in July 2012. She emailed Mr Hay to ask whether this conviction would have any impact on her investment. Mr Hay responded that the investment was separate from Mr Skinner and unaffected. The Standards Committee suggest this was misleading, given that a substantial portion of the funds had been paid to entities closely related to Mr Skinner and his practice.

[37] At times Ms C had to prompt Mr Hay in relation to interest payments during the term of the agreement and she made inquiries about the progress of the development. She was reassured by Mr Hay that either things were going well or were a little behind schedule. Ms C was shocked to find that during the Standards Committee investigation process that the development had never proceeded, although there were two attempts at pursuing it.

[38] In December 2012 Ms C contacted Mr Hay to inquire about repayment of the principal. His response was to state that he thought the term was 18 months but would get onto it.

[39] On 24 December 2012 Barrie Skinner called Ms C from prison on behalf of Mr Hay. He told Ms C that the development was behind schedule and would not be completed until the end of March 2013, following which she would receive repayment in full.

[40] Mr Skinner followed this up with a letter in late December 2012 in which he stated that Mr Hay had asked him to talk to her about the loan. He advised that the development was running about 90 days behind schedule and settlement was due in March 2013. While Mr Hay denies a direct role in these communications, he does accept that he spoke with Mr Skinner around mid-December to ascertain the term of the loan. This is somewhat surprising given that he had told Ms C that Mr Skinner had nothing to do with the loan, and one would have expected an experienced solicitor to understand the terms of a loan, plainly stated in a loan agreement. Mr Hay reluctantly agreed that his discussion with Mr Skinner had prompted the latter to contact Ms C to delay repayment.

[41] From January to March 2013 Ms C says that she made numerous attempts to contact Mr Hay, because she had received no further interest payments nor repayment of the loan. She says she rang at times up to four times a day and was basically fobbed off by his office. He was not available to talk to her, although he did email her on a number of occasions indicating he was refinancing the loan and would pay the interest in due course. He also explained that he was waiting for payment from people who owed him money.

[42] Finally, in April of 2013, Ms C contacted her own lawyers to make a formal demand for repayment. Although three months interest was paid the principal was not repaid and summary judgment was granted in Ms C's favour in September 2013 against Mr Hay personally on the basis of his guarantee.

[43] No payment has ever been made to Ms C under that judgment and Mr Hay was adjudicated bankrupt on the application of another creditor on 2 September 2014.

[44] In late September 2014 Ms C made a complaint to the NZLS.

[45] On or about 28 November 2014 Ms C received a call from Barrie Skinner's former wife, whom she had known for some years.

[46] According to Ms C, Mrs Skinner had received a phone call from her ex-husband from jail. Barrie Skinner had said that Ian Hay had asked him to get a message to Ms C, because he was not allowed to talk to her because of the complaint. Mr Skinner asked his ex-wife to pass on a message to the effect that if she put the complaint on hold Mr Hay would repay her money, but that he would not be able to repay her if he were to be “disbarred”. Mrs Skinner expressed her reluctance in passing on the message and indicated that she did not think Ms C ought to pay too much attention to the request. Ms C was upset by what she saw as the undermining tactics behind this call.

[47] In response to this evidence, Mr Hay filed with the Tribunal an affidavit by Mrs Skinner. In that affidavit, rather than referring to Ms C’s affidavit, which we have paraphrased, Mrs Skinner referred to the wording of the original **charge** which read somewhat differently:

“[98] On or about 28 November 2014, Susanna Skinner, Barrie Skinner’s ex-wife, telephoned Ms C in order to pass on a message from Mr Hay. Mr Hay asked Ms C not to continue with her complaint to the NZLS, and advised that he would pay the amount he owed, but would not be able to do so if he was disbarred.”

[48] In response to that wording in the pleading, Mrs Skinner stated:

“I did not have such a conversation with Ms C on behalf of Ian Hay on or around 28 November 2014, or at any other time for that matter. I certainly know LC. I did ring her from time to time. I may have telephoned her around that time, but certainly not on behalf of Ian Hay. I hadn’t spoken with Mr Hay for a number of years. Mr Hay never asked me to pass any such message to LC. I would have remembered if he had, because it would have been such an unusual message to pass on.”

[49] Mrs Skinner was required for cross-examination but did not appear on the November date scheduled. Inquiries were made and she was unable to be located in time for the hearing to be completed.

[50] Further, on the evening of the first day of the hearing Mrs Skinner contacted Ms C, via Facebook, to wish her luck for the following day and to ask her to call her. Ms C called Mrs Skinner and told her she had already been to the hearing, to which Mrs Skinner responded that she felt terrible about her involvement and would not be attending the hearing the following day. She said she did not want to be involved with helping Mr Hay as it felt wrong. Mrs Skinner told Ms C that she had been contacted by Ian Hay to write the affidavit and that he had told her that Ms C had said that “*Ian had contacted her and told her to ring me and drop the complaint against him*”.

Mrs Skinner explained that she wrote the affidavit because she had never been in contact with Ian Hay (directly) so what she said was correct. Ms C reassured her that she knew that Mrs Skinner had not had direct contact with Ian Hay and that was not what she had said. Ms C informed Mrs Skinner that she had said that the message had been passed through Barrie who was passing a message on from Ian.

[51] Mrs Skinner told Ms C that was not what Mr Hay had told her when he asked her to write the affidavit. She was upset and did not want to take part in the hearing. Ms C expressed, in an email to Ms Carter (counsel for the Standards Committee) that she was aware that if Mrs Skinner did appear it would probably assist the complainant's case rather than Mr Hay's, however she was concerned for her friend and did not wish to harm her. Ms Carter advised Ms C that she would need to make the Tribunal and Mr Hay's counsel aware of this communication and this duly occurred.

[52] The status of the email then became the subject of some debate, because Mr Upton QC submitted it was "gravely prejudicial" to his client and as such ought not to be accepted by the Tribunal if the witness was not available. It was agreed that a two-stage process be embarked upon whereby the Chair would examine the document, and if it was considered as appropriately admitted then Mr Upton would be able to address the Tribunal as a whole further. That process was completed and the Chair indicated that the document ought to be admitted despite its hearsay content, under the provisions of s 239, which could partially be cured by giving Mr Hay the opportunity of providing rebuttal evidence and by securing the attendance of the witness.

[53] After the Tribunal had heard evidence from Barrie Skinner by Video Conference Link with the prison, the issue of Mrs Skinner's non-appearance was addressed. Mr Upton on behalf of Mr Hay sought an adjournment in order that he could request a summons to be issued against Mrs Skinner to compel her attendance. This application was granted, since in fairness to Mr Hay it was important that this issue be resolved, preferably by hearing from Mrs Skinner directly.

[54] Mrs Skinner was served with a summons and appeared at the resumed hearing on 8 December. Mr Hay also had the opportunity of providing rebuttal evidence following her evidence.

[55] Mrs Skinner was questioned by Mr Upton. She confirmed that she and Ms C had been friends but had not had contact directly since the events in question. She was asked about the phone call around 28 November 2014 and confirmed that her ex-husband had phoned from prison early in the morning and asked her to pass a message on to Ms C on behalf of Mr Hay, that he would pay the amount owed but he would not be able to do that if he was disbarred.

[56] Mrs Skinner clarified, as stated in her affidavit, that she wanted to be clear that she had not made the phone call directly on behalf of Mr Hay but at the request of her ex-husband “who was talking on behalf of Mr Hay”.⁵

[57] She explained that she had been approached by Mr Hay to swear an affidavit and that they had met at a café at which time Mr Hay had explained the nature of the complaint against him. She confirmed Mr Hay had requested her to swear an affidavit to confirm that she had not had a conversation with him about approaching Ms C. She confirmed that she was prepared to do so because that was true.

[58] Mrs Skinner clarified as follows:

“I agreed to sign an affidavit because Mr Ian Hay said to me that L had written an affidavit stating that I had had a conversation with him about the matter. That is why, and I said to him I have never had a conversation with you about it. I have had conversations with Mr Skinner. So I agreed to do that, to sign this, because I was under the understanding that L, Ms C, had signed an affidavit stating that – something different, yep. Yep, that is the reason why, because I thought why would she be saying something that is not true, that is why I signed that affidavit.”⁶

[59] Mrs Skinner explained that, having spoken to Ms C on the evening of the first day of hearing, and discovering that Ms C had not put her affidavit in the terms that had been described, she felt disappointed and did not believe she could add anything to the case and that she “... freaked out and didn’t come”.⁷ Mrs Skinner confirmed that she had not seen Ms C for three years.

[60] Mrs Skinner confirmed that the paragraph [98] in the charge was “possibly ambiguous” but that Mr Hay had clarified that Ms C was saying that Mrs Skinner had spoken to Mr Hay directly and that this was not the case.

⁵ NOE 8 December 2017, page 6.

⁶ NOE 8 December 2017, page 9.

⁷ NOE 8 December 2017, page 10.

[61] Following questions from the Tribunal it transpired that Mrs Skinner had never been shown paragraph [36] of Ms C's affidavit. It seems that when Mr Hay provided her response to that affidavit it was not a proper or fully informed response that was presented to the Tribunal.

[62] This was confirmed by Mr Hay in rebuttal evidence, namely that the only document shown to Mrs Skinner in order to obtain her reply affidavit was the charge document. However, Mr Hay disputed Mrs Skinner's evidence that they had not had a conversation that had clarified that it was in fact Mr Skinner who had made the call to her. He denied there was any ambiguity at all "*... she was absolutely clear about what the conversation was and what the involvement of the parties was*".⁸

[63] Mr Hay had no satisfactory explanation as to why he had not shown Mrs Skinner Ms C's actual affidavit, other than that he expected that any details could be clarified at the hearing and not everything needed to be included in the affidavit.

[64] When pressed, Mr Hay accepted that his normal practice in having a witness answer an affidavit would be to show them the actual documentation that they were answering. He was unable to explain why he departed from his usual practice in this instance.

[65] In the statement of affairs filed with the Official Assignee following his bankruptcy adjudication (on the application of the BNZ) Mr Hay did not include the judgment debt to C Limited. Further, it is recorded in notes of a meeting with the Official Assignee on 17 September 2014 that, when it was put to him that there was High Court judgment debt in the range of \$100,000 to \$200,000 he could not recall it. Even when Ms C's name was mentioned as the director of the company concerned, the interviewer noted that "*it seemed peculiar that he couldn't remember a court case about such a significant amount*".

[66] In cross-examination Mr Hay said this referred to the fact that he could not recall the detail of the judgment debt, but he did not fully explain why he had not included it in his statement of affairs. His subsequent representation to the Official Assignee was that "*it went into property in Queenstown that failed.*" He noted "*a deposit was paid but the deal fell through.*"

⁸ NOE 8 December 2017, page 20.

[67] The Standards Committee suggest that these statements show a less than open and straightforward disclosure to the Official Assignee.

Issue 1 – Throughout this transaction was Mr Hay acting in a personal or professional capacity?

[68] We begin with the proposition, clearly stated in *Orlov*⁹ that ss 7(a) and 7(b)(ii) must, together, cover all conduct, and that a broad scope to ‘professional misconduct’ ought to be given. The Court saw this as having a consequential limiting of personal misconduct to situations clearly outside the work environment.¹⁰

[69] It is conceded by the Standards Committee that Ms C was not Mr Hay’s client, although it appears she saw herself as such.

[70] What is clear, however, is that Mr Hay was providing legal services to his trustee company, and conclusively so, if we find that it was he that prepared the loan agreement.

[71] Indeed, Mr Hay admits he undertook the preparation of the personal guarantee document, this is sufficient, in our view, to fall within the definition of “provision of regulated services”, and thus characterise the conduct as professional not personal.

[72] Following the *Orlov*¹¹ decision, the more recent decision of *Deliu*¹² further discussed s 7(1)(a), drawing attention to the wider reading supported by the use of the words “conduct ... **at a time** when he or she or it is providing regulated services ...”.

[73] There can be no doubt Mr Hay was representing his trustee company, which is another identifiable entity, in respect of the loan advance from Ms C, coming within the definition of “regulated services”.

[74] In his submissions Mr Upton contends for the view that the charge should be dismissed because Mr Hay was not providing regulated services and Ms C was not his client. The latter is not in dispute, however what is in dispute is who drafted the loan agreement.

⁹ *Orlov v NZLCDT* [2015] 2 NZLR 606.

¹⁰ At [107].

¹¹ See above n 9.

¹² *Deliu v National Standards Committee and Auckland Standards Committee 1 of the New Zealand Law Society* [2017] NZHC 2318.

[75] Barrie Skinner did not recall drafting the agreement although did not dismiss the possibility that it might have been done “within his office”. However, he indicated that would have required information to have been provided by Mr Hay and Mr Hay did not give evidence to this effect. It was Mr Skinner’s office which sent the loan agreement to Ms C.

[76] The strongest point advanced by Mr Hay to suggest that he had not drafted the agreement was the incorrect naming of his trustee company. We note also that his name was omitted from the guarantee clause in the agreement, although this was remedied by the separate guarantee prepared by Mr Hay later.

[77] In relation to the form of the loan agreement Mr Hay conceded that it was surprising that although there is reference to a guarantee in the loan agreement there did not appear to be provision for that guarantor’s signature.

[78] The Standards Committee contend that a number of factors point to Mr Hay having drafted the loan agreement. First, and significantly, when Mr Hay first responded to the complaint, he confirmed that he **had** prepared the loan agreement. He later withdrew this, saying neither he nor a technician had been able to find it on his computer records, so now asserts that he was not responsible for its drafting.

[79] Secondly, it is submitted that the drafting of the agreement strongly suggests it is based on a precedent and therefore was prepared at least with the assistance of a lawyer.

[80] Mr Hay and Mr Skinner had a close professional relationship at this time and indeed Mr Hay was on the record for Mr Skinner in relation to the criminal proceedings faced by him. The typeface and font of the loan agreement is the same as the guarantee document which Mr Hay has confirmed he prepared. While this is a fairly common font, it is one further factor pointing towards its origin. Mr Hay provided no other evidence about an alternate origin of the loan agreement, for example, correspondence with another solicitor.

[81] In the guarantee document the loan agreement is referred to, however Mr Hay states he had not seen the loan document before Ms C had signed it. He confirmed in evidence that he received the funds before he as borrower had signed the agreement and agreed that this was contrary to normal practice.

[82] The Standards Committee submit that it is “not credible that Mr Hay has no idea who drafted, commissioned and orchestrated the loan document”.

[83] Finally, Mr Hay has provided no explanation for failing to correct the name of his trustee company on the loan agreement. This also is significant when put with the number of other misapprehensions which Mr Hay failed to correct for Ms C.

[84] While Mr Hay did sign the personal guarantee, it is apparent that this is because Ms C would not advance the funds until she had received such a written guarantee.

[85] We find, on the balance of probabilities, that Mr Hay is more likely than not to have prepared the loan agreement and thus provided regulated services and acted in a professional capacity.

[86] If we are incorrect about the loan agreement, then we point to the fact that he prepared the personal guarantee which is a document purporting to have legal effect and indeed which supported the judgment entered against him in the High Court. Again it would appear that in providing the guarantee for an advance to his trustee company through which the loan advance was channelled, he was providing regulated services.

[87] The non-personal nature of the transaction is also strengthened by the evidence that Ms C, who we found to be a thoroughly reliable and credible witness, relied on Mr Hay’s status as a lawyer in making her decision to advance the funds.

Issue 2(a) – Client Status

[88] As already stated we accept that despite Ms C’s misapprehension about her relationship with Mr Hay, namely that any legal advice that she needed was provided by him and his status as a lawyer, we accept that Ms C was not Mr Hay’s client.

Issue 2(b) – Other Professional Obligations

[89] We accept the submission by the Standards Committee that Rule 5.10¹³ imposes obligations on Mr Hay in relation to this transaction even for a non-client.

¹³ A lawyer must not draft or assist in drafting a provision of a will or other instrument under which the lawyer may take a benefit other than a benefit normally attached to acting in a professional capacity in respect of the will or instrument unless, before the execution of the will or instrument, the person concerned has taken independent advice.

That Rule provides that a lawyer is not to draft or assist in drafting a provision of a will or other instrument under which the lawyer may take a benefit other than a benefit normally attached to acting in a professional capacity in respect of the will or instrument unless, before the execution of the will or instrument, the person concerned has taken independent advice.

[90] In addition to this specific obligation, Mr Hay must also be held to the high standards of conduct when acting as a lawyer so as not to be regarded as having behaved in a disgraceful or dishonourable manner.

Issue 2(c) – Were the Obligations fulfilled by Mr Hay?

[91] Throughout his evidence Mr Hay has accepted that Ms C required independent legal advice. He relied however on the email trail, in which Ms C confirmed to her banker that she had received independent advice.

[92] That email trail was an exchange of emails between Ms C and her personal banker in the context of Ms C's unwaivering belief that she had had legal advice from Mr Hay. Mr Hay takes that email exchange out of context and uses it *ex post facto* to support his contention that he had advised Ms C to take independent legal advice.

[93] It is common ground that the only time Mr Hay spoke to Ms C was at the airport meeting. It is common ground that the only people present at that meeting were Ms C, Mr Hay and Mr Barrie Skinner. Most of the talking was done by Barrie Skinner rather in the nature of an introduction and a grooming of Ms C. The actual proposal was mentioned only briefly at the end of that meeting with little time to raise matters such as independent legal advice.

[94] Mr Barrie Skinner says in his Affidavit of 12 October 2017 “*As a result of our brief meeting at the airport, matters were left on the basis that L [Ms C] would go away and think about what she wanted to do. Obviously, I told her to get independent legal advice on whatever she wanted to do. I gave her similar advice.*” This aspect was not tested on cross-examination but the Tribunal places no weight on Barrie Skinner's evidence. In general his evidence in writing and orally is so inconsistent and contradictory that the Tribunal formed the view that it would be proper to accord his evidence little or no weight.

[95] We are left therefore with Ms C's unwaivering evidence that Mr Hay did not tell her to get independent legal advice and Mr Hay's evidence that he did. For reasons expanded upon later we prefer Ms C's evidence. We find that Mr Hay did not tell Ms C to get independent legal advice.

[96] No lawyer contacted Mr Hay about the loan advance. Given the lack of specificity, in the loan agreement, as to the use to which the funds were to be put, and lack of security, it is not credible that any independent lawyer would not have contacted Mr Hay for more details.

[97] Mr Hay himself expressed surprise he had not been contacted by the independent lawyer he thought had seen Ms C. She had been provided absolutely no details about the purported property development, nor about Mr Hay's own personal capacity to meet his obligations under the guarantee signed by him. She was not provided with any description of proposed buildings, a timeline or any cashflow projections. She was providing an unsecured loan for 10% to someone who, although recommended to her by her accountant, was a complete stranger. All of these matters would have been of considerable concern to any lawyer she might have consulted. The absence of a single query from another lawyer ought to have rung the "alarm bells" referred to by Ms Carter when she cross-examined Mr Hay on this topic.

[98] We consider that the reliance on the email trail is a convenient ex post facto justification for Mr Hay's failure to ensure that this woman, who was unversed in business transactions, was properly and independently advised. Ms C is a nurse and had received the funds she proposed to invest from a relationship property settlement shortly before. This was a fact which Mr Hay conceded he had been told by Mr Skinner before the investment was proposed to Ms C. Ms C was in a particularly vulnerable position faced with two professional men, and at least one of them (Mr Skinner) was strongly urging this investment upon her. She had never had such a large sum of money to invest before.

[99] Mr Hay made no file note of the meeting at the airport, which might have supported his evidence that he told her to get independent advice. We prefer Ms C's evidence that no such suggestion was made to her.

[100] Compounding the omission, was also Mr Hay's and Mr Skinner's omission to tell Ms C that at this very time when she was proposing to advance the funds that

Mr Skinner, on whom she relied for business advice, was facing serious criminal fraud charges. She was not aware of that fact until well after the advance was made.

[101] We also consider that Mr Hay had obligations of an ethical nature to be much more forthcoming and honest with Ms C at the later times in the transaction when she was seeking late interest payments and ultimately repayment of the loan. We detail those more specifically under the next issue. In summary to say the answer to the question posed by this issue is no, that Mr Hay did not meet the professional obligations upon him in relation to this transaction.

Issue 3 – Does this Meet the Standards of Misconduct?

[102] Misconduct is established if the Standards Committee demonstrates a wilful or reckless breach of the Rules or that the conduct was disgraceful or dishonourable, as judged by lawyers of good standing. We propose to look at Mr Hay's conduct throughout this matter at four separate stages.

(a) Conduct Leading up to the Advance

1. There was a brief casual discussion in an airport bar, in relation to a large advance of money (\$200,000).
2. No file notes were kept by Mr Hay.
3. No information was provided to Ms C about the investment, on which she could then be advised.
4. There was no written confirmation following the airport meeting of the points which had been covered at the meeting.
5. There was no written advice to Ms C to seek independent advice.
6. Mr Hay provided no profiling of himself in relation to his expertise and ability to fulfil the task of the property development which was proposed.
7. There was no specific negotiation of terms.

8. Mr Hay did not sign the agreement before receiving funds from an inexperienced lender.¹⁴
9. Mr Hay did not provide Ms C with any information about Barrie Skinner facing serious criminal fraud charges. Given Ms C's clear reliance on Barrie Skinner's advice Mr Hay should have ensured she knew the person who was introducing him and obviously endorsing him was facing serious criminal fraud charges. Ms C's evidence was that she was told he was just being investigated by the IRD and that it was "all in hand".
10. The nature of the loan agreement itself is of concern. There are errors, it lacks specificity and one of the parties was incorrectly described/non-existent. Even if we are wrong in our finding that Mr Hay prepared this agreement then he must be held to account for his conduct in not correcting the errors when he saw them.

(b) Conduct After the Advance

[103] We are satisfied that immediately on receipt of these funds they were misused by Mr Hay.

1. They were applied to purposes which would never have been anticipated by Ms C in making the advance. She did not expect them to go towards the Empire Cinema or related entities.
2. Nor did she expect the funds to be used to pay entities associated with Mr Skinner's brother or to make their way into Mr Hay's personal or office accounts.
3. Interest was consistently paid late and required constant follow up by Ms C.
4. The omission of information and failure to correct misapprehensions when sought by Ms C is of serious concern.
5. Nor do the delaying tactics do Mr Hay any credit. Excuses such as bank errors, wrong account payments, Ramadan and awaiting creditors were repeatedly employed.

¹⁴ It is clear Ms C placed weight on Barrie Skinner's assurance that "he's a lawyer, he is good, he's safe". Mr Hay had done investments with Mr Skinner before and he had always received 10% return.

(c) *Conduct when the Repayment was Due*

1. Mr Hay has himself conceded poor communication and failing to keep Ms C updated as an error on his part. However it was much more serious than that. Allowing her to think that there were delays in buildings and to make inquiries about sales of houses when the land had not even been purchased was an outrageous omission.
2. Mr Hay's attempt to query the repayment date as being 18 months not 12 months was a blatant obfuscation and delaying tactic. It does Mr Hay no credit.
3. The pressure that was then exerted on Ms C via Mr Skinner was also disgraceful. Despite considerable scepticism as to Mr Skinner's own credibility, it has to be said that he had no source of information about the Queenstown development other than from Mr Hay and thus his perpetuating of the myth of the "90-day delay in the development project" we consider is likely to have arisen from either misinformation from Mr Hay or their collusion in misleading Ms C further.
4. Mr Hay's failure to repay any part of the capital before his bankruptcy even after judgment had been entered against him was a serious matter also.

(d) *Ancillary Conduct*

[104] We accept the evidence of Ms C and the clarified evidence of Mrs Skinner that Ian Hay asked Barrie Skinner to have his wife approach Ms C to drop the complaint.

- a. We reject Mr Hay's evidence in this regard.
- b. We consider Mr Hay misled the witness, Mrs Skinner, into swearing an affidavit which was itself misleading to the Tribunal. While we accept this is not the subject of the charge itself it is aggravating conduct in the extreme.
- c. The omissions to the Official Assignee and obfuscation concerning the judgment debt owed to Ms C's company are also established on the evidence, and fall well below the conduct expected of a lawyer.

Credibility

[105] As will be apparent, we have found the complainant to be a credible witness. We cannot say the same of Mr Hay. He was evasive at times, for example in relation to his misleading conduct as to the progress of the Queenstown project. We found him to be lacking in credibility concerning the preparation of the loan agreement and the ex post facto justification of the misapplication of the funds by him by trying to incorporate the wall panel business into a purpose for which the funds were advanced by Ms C.

[106] Our concerns as to his credibility were only heightened after the incidents around the obtaining of Mrs Skinner's affidavit were revealed. His failure to show her the affidavit of Ms C, to which she was purporting to respond, and instead showing her a somewhat ambiguous statement in the charge was reprehensible. It resulted in the witness feeling compromised and initially providing the Tribunal with misleading evidence which contradicted that of the complainant, but which after clarification and oral evidence confirmed the complainant's evidence, that Mr Hay had indirectly sought to influence the complaints process. This is an extremely serious matter.

Evidence of Adrian Skinner

[107] Mr Skinner filed an affidavit seeking to justify the payments made to him by Mr Hay from the borrowed funds. He was not available for cross examination. He was the recipient of large sums of money from the advance and is Mr Barrie Skinner's brother. Adrian Skinner's affidavit was not obviously credible on its face and required testing. In view of his unavailability for cross-examination, we attribute little or no weight to his evidence.

Nature of the Rule Breach

[108] We consider that the lack of regard shown by Mr Hay as to an inexperienced investor's need for independent advice was at the very least a reckless breach of Rule 5.10 and thus constitutes misconduct.

[109] In addition we find that his overall conduct in relation to this transaction, as detailed above, and when viewed as a whole, would be regarded by lawyers of good standing as disgraceful and dishonourable. Once again this constitutes a finding of misconduct.

Issue 4

[110] Should we be wrong in determining Mr Hay was acting in a professional capacity and rather that he should be considered under s 7(1)(b)(ii), we move to consider whether his conduct would justify a finding that he is not a fit and proper person or as “otherwise unsuited” to practice as a lawyer.

[111] Viewed overall, we consider that Mr Hay’s conduct certainly meets that higher threshold. In summary, we consider that a lawyer who preys upon an inexperienced investor, applies her funds to repay his own debts and for purposes unknown and unintended by the investor, prevaricates and delays interest payments then fails to repay the loan, and misleading her by omission, is not a fit and proper person to have the charge of clients’ affairs and funds. This is exacerbated by the conduct following these events and his attempts to interfere with the complaints and disciplinary processes.

Issues 5 and 6

[112] It will be plain that we have answered both of these questions in the affirmative and that we consider this to be extremely serious misconduct. However, the question posed under Issue 6 will be viewed as aggravating conduct rather than part of the culpability for the matters charged, since it was not pleaded as part of the charge and concerns the practitioner’s manner of conducting the proceedings, which is a matter for consideration at the penalty stage.

Directions

[113] Counsel for the Standards Committee are to file submissions on penalty within 14 days of the release of this decision.

[114] Counsel for the practitioner is to file penalty submissions within a further 14 days.

[115] A penalty hearing of half a day is to be allocated forthwith.

DATED at AUCKLAND this 19th day of January 2018

Judge D F Clarkson
Chair