THE INTERIM ORDERS FOR NON-PUBLICATION OF THE NAME OF THE FIRM WHO EMPLOY MR U AND ALL COMPLAINANT NAMES ARE MADE PERMANENT ORDERS. THERE ARE FURTHER PERMANENT ORDERS FOR NON-PUBLICATION OF THE NAME OF MR U, HIS CHILDREN AND FORMER WIFE. THESE ORDERS MADE PURSUANT TO S 240 LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2024] NZLCDT 4

LCDT 018/23

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **CANTERBURY WESTLAND STANDARDS COMMITTEE 2**
Applicant

AND **Mr U**
Respondent

CHAIR
Ms D Clarkson

MEMBERS OF TRIBUNAL
Mr I Hunt
Mr T Mackenzie
Prof D Scott
Dr D Tulloch

DATE OF HEARING 22 November 2023

HELD AT Christchurch District Court

DATE OF DECISION 9 February 2023

COUNSEL
Mr A Harvey and Ms N Town for the Standards Committee
Mr U the Respondent Practitioner

DECISION OF THE TRIBUNAL ON LIABILITY

[1] During a time of extreme personal stress, Mr U behaved in a manner which he admits was "rude, distasteful, disrespectful and regrettable". This occurred in the context of his personal Family Court proceedings concerning the care of his children[1] and their occupation of the former family home. In those proceedings Mr U represented himself.

[2] Should a lawyer, conducting litigation in the most personal of circumstances, and in a private court setting (as opposed to most courts being open), be held to the same level of professional conduct as if he had been representing a client, just because he is otherwise a lawyer?

[3] As always, we must be guided not only by our own assessment of the practitioner and the context around the conduct, but also about how previous decisions have viewed similar conduct.

[4] We discuss how these decisions might apply in these somewhat unusual circumstances.

Issues to be determined

1. When Mr U made the statements under consideration, was he acting in his personal or professional capacity?

2. If it is professional misconduct, do we consider it to be either disgraceful and dishonourable, or alternatively a wilful or reckless breach of the Rules or of s 4 of the Act?[2]

[1] Who were in his primary care.
[2] Lawyers and Conveyancers Act 2006 (LCA) and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

3. If we regard this as personal conduct, does it meet the threshold of signalling that Mr U was not, at the time, a fit and proper person to be a lawyer?

Context

[5] In order to understand how the conduct came about, a brief background is required. Mr U studied law as a mature student and was admitted to the bar in 2019. Subsequently he was employed in a law firm as a solicitor. In 2020, Mr U separated from his wife and proceedings began in the Family Court concerning, among other things, the care of the children of the family and the occupation of the former family home.

[6] Mr U says that the proceedings encountered significant delays. We are not in a position to form a view on that, nor do we need to – as even a significant delay would not justify what was to occur. We can accept however at a general level that an acrimonious set of proceedings in the Family Court can take some time to resolve and that participants are often upset by this. In addition to the delays, there were a number of sources of frustration for Mr U. He did not consider that his former wife ought to be in receipt of legal aid, and he blamed not only her but the firm representing her for allowing this to continue. It was his view that his former wife had sworn affidavits which were untrue and he alleged that her representatives must have known this to have been the case.

[7] Mr U says that although he had been awarded the primary care of the children, his former wife continued to occupy the family home for some 18 months post separation, with Mr U being expected to pay the outgoings on that home. We pause to note here that we are summarising the position as Mr U saw it and have not reviewed the Family Court proceedings and decisions. As a result, he and the children were obliged to live in rundown warehouse premises, which he considered unsuitable. He considered the arrangement to be extremely unfair. He says that despite his having the primary care of the children, his former wife was receiving the solo parent's benefit.

[8] Mr U reached the view that he was the victim of bias within the system. On 19 November 2021, this frustration bubbled over into an appalling memorandum that he filed with the Family Court (and of course served on the representatives for his former

wife). In that memorandum Mr U referred to the Family Court as a "rotten jurisdiction" and the Family Court bench as "disgracefully inept". There were further derogatory and insulting remarks about a Family Court Judge. These remarks were made even worse by Mr U accusing the Judge of omitting damning statements concerning his former wife from a decision.

[9] Mr U reached a crescendo in that memorandum. He referred to the Family Court as the "vagina court" and stated, "if you have a penis, then you will lose. The law … well that doesn't apply in the family court!" He continued:

> … The law is secondary to the vaginal operational protocol of the family court and all practitioners associated with such appalling orders should hand in their practising certificates, as they do not stand for the law, rather, they stand for gaming the system which is not justice.

[10] He went on to accuse his opposing counsel and the firm of "unscrupulous and unethical conduct". He then referred to what he regarded as a factual error in the hearing, referring to the Judge and to Ms H, who was his opposing counsel, in the following terms: "An understandable mistake that an ignorant woman would make!"

[11] Mr U then turned to criticise Counsel to Assist, referring to him as "counsel to frustrate". Despite the fact that there is a statutory obligation, where a litigant in person is involved in family violence proceedings for Counsel to Assist to undertake the cross-examination of the other party, Mr U stated that he had "…been denied my natural justice rights by being unable to cross-examine the respondent. I submit that all orders are accordingly unsafe". He categorised the situation as an opportunity for lawyers to "milk a disgraceful amount of fees from this process". Finally, he summed up by suggesting that the Ministry could solve a lot of issues by simply putting on the front page of their website: "Vagina = win – Penis = lose".

[12] Shortly following the filing of this memorandum in Court, the firm representing Mr U's ex-wife (X firm) referred the memorandum to the New Zealand Law Society Lawyers Complaints Service (Complaints Service).

[13] The Complaints Service responded most constructively, which was very fortunate for Mr U. In mid-January 2022, rather than commencing an own motion investigation (which was obviously open to it at this point), the Standards Committee instead arranged for Mr U to be invited to discuss the matter and be offered a number

of sources of support for him. A Senior Professional Standards Officer, Mr Ellis, discussed with him the letter from X firm which had attached the memorandum Mr U had filed in the Family Court. It was recommended to Mr U that he apologise to the Court and to his colleagues and seek to withdraw the memorandum. Of the five support resources suggested to him, Mr U apparently contacted a member of the Panel of Friends, a service offered by the profession whereby senior members of the profession are available to assist lawyers with problems, either of a legal or personal nature.

[14] Mr U, aware that he had "lost the plot", took the course suggested by Mr Ellis and apologised to those concerned. As a consequence in March he was advised that the own motion investigation would not be commenced.

[15] Regrettably this was not the end of these events. By early May Mr U's frustration levels had bubbled over again, for much the same reasons. He sent an email to Mr K, the managing partner at X firm. In that email he verbally attacked two lawyers in the firm, counsel representing Mr U's former wife, and her supervising partner, Mr J, accusing them of "suborning perjury". He referred to the firm as having "…femanist (sic) staff (who have a bone to pick with men)…" and made appalling statements about Mr J, Mr U's former wife and the staff of X firm. Mr U later acknowledged that he had made the statements about Mr J deliberately to provoke him.

[16] Mr U concluded the email by suggesting that the firm ought to notify their insurers, but also added that he was open to "settlement". This added a threatening tone to the insulting and disrespectful communication.

[17] Three days later, Mr U sent a further email apologising for the email and retracting it. Whilst he said that he "unreservedly apologise[d]", the apology devolved from there. Mr U said that he had been pushed "…to the point of lashing out…". He retracted the email but went on to say that he wished his concerns about the actions taken by X firm, which he saw as having "…an enormous and detrimental impact on [his] life (and that of [his] children)…". He referred to the fact that he had asked Mr K to follow up complaints earlier in the piece and that he had refrained from lodging complaints with the Law Society about the practitioners in X firm.

[18] X firm complained again to the Complaints Service towards the end of May.

[19] Again, matters did not end there. Mr U filed a further memorandum in the Family Court on 3 June 2022, and this time also launched an attack on the police. He referred to "the utterly useless dumb f___ Police did not give a flying f___! …". He referred to X firm as having invaded and destroyed his life. He went on to refer to the policeman who attended a burglary which had occurred at his premises as "an ignorant and oafish forensic Policeman…". In the course of the memorandum, he made further complaints about the lack of responsiveness by X firm and referred to failures to respond as a "common tactic of Mr J". He accused the X firm of misleading the Court, and later called them "morally bankrupt". He went on to state, "I accept I've lost all perspective in these matters".

[20] The fourth and final incident of concern was the third memorandum filed by Mr U in the Family Court. Even after Mr U had acknowledged and apologised for the improper comments concerning colleagues on earlier occasions, he once again informed the Court that he was being personally attacked by opposing counsel and that there was a campaign against him by means of complaints to the Law Society. He stated he found every document filed by opposing counsel "to be deeply offensive" and that he found "*most* of the Judgments of this Court, to date, to be deeply offensive".

[21] He went on to refer to psychological and financial abuse being inflicted upon him as a result of his colleagues' conduct. Mr U advised the Court that Ms H and Mr J had "…been aiding and abetting applications for legal aid grants, based on materially incorrect representations, as well as the active misleading of this Court…". He went on to make further inappropriate remarks and refused to apologise for the comments in his 3 June memorandum. Having again accused the X firm of dishonest and unethical behaviour, he complained that he was not treated by them with the respect befitting a barrister and solicitor of the High Court.

Preliminary admissibility ruling

[22] Before turning to the core issues, a preliminary evidence matter needs to be determined. At the commencement of the hearing Mr U stated that he was seeking a "strike out" of the charges. The argument as we understood it went as follows:

1. The production in this proceeding by the Standards Committee of the offending memoranda was in breach of s 11B Family Court Act 1980 (see below).

2. The Tribunal should not admit evidence produced in breach of an enactment.

3. The evidence should therefore not be admitted – all of it.

4. As the Tribunal has seen the evidence already, it cannot un-see it and now cannot hear the case (putting aside that there would be no case to hear without the evidence).

5. The charges should be dismissed or struck out.

[23] The Tribunal indicated to Mr U that it considered what he was advancing was really twofold. First, an admissibility challenge. Second (depending on the result of the first) was an application for a dismissal of the charge. The Tribunal considered the matter at the hearing and indicated that it would admit the evidence, with reasons to follow later. These are our reasons.

[24] Dealing with the admissibility issue first. This Tribunal may accept as evidence any statement, document, information, or matter that may assist it to deal effectively with a matter before it, whether or not admissible in a court of law.[3] With an overarching protective purpose, a specialist disciplinary tribunal will usually be reluctant to fetter what (otherwise relevant) conduct evidence comes before it.

[3] Section 239 (1) LCA.

[25] Section 11B Family Court Act 1980 provides as follows:

> **11B Publication of reports of proceedings**
>
> (1) Any person may publish a report of proceedings in the Family Court.
>
> (2) Subsection (1) is subject to subsection (3).
>
> (3) A person may not, without the leave of the court, publish a report of proceedings in the Family Court that includes identifying information where—
>
> (a) a person under the age of 18 years—
>
> (i) is the subject of the proceedings; or
>
> (ii) is a party to the proceedings; or
>
> (iii) is an applicant in the proceedings; or
>
> (iv) is referred to in the proceedings; or
>
> (b) a vulnerable person—
>
> (i) is the subject of the proceedings; or
>
> (ii) is a party to the proceedings; or
>
> (iii) is an applicant in the proceedings.

[26] Mr U is correct that some of the memoranda placed before us do contain children's names, which may technically trigger the requirements above.[4] Or on a wide view simply the presence of Mr U's name and references to (unnamed) children might also be "identifying information". And as to what a "publication" is, it would appear that provision of the material to another judicial proceeding can be sufficient at law for a publication to occur.[5]

[27] However, it is not our role to determine whether the provision above has or has not been breached. The issue for this Tribunal is whether the evidence is properly admitted. We consider it should be regardless of the breach issue raised. The evidence is highly relevant. Indeed it is the entire case. This Tribunal would be very slow to not allow the admission of documents containing the material that these documents contain. To do so would create an unpalatable situation where a

[4] Unfortunately, whilst some of the memoranda redacted those names, later ones didn't.
[5] See *Poynter v Bastion* [2013] NZFC 3448 where a party applied for use of various proceedings documents to be utilised in a related criminal prosecution.

practitioner might feel some level of immunity to act out within the confines of seemingly protected documents in the Family Court.[6]

[28] We also take two further points into account. First, we consider that if leave had been needed and was sought, it would most likely have been obtained (indeed we note that initially X Firm sought leave of the Family Court to provide one of the offending memoranda to the Lawyers Complaints Service, which was granted). Second, the requirements of privacy reflected in the provisions above are maintained in this proceeding through the wide non-publication orders we have made. That is, the sensitive material is not being "published" at a practical level.

[29] For all of those reasons we admit the evidence. That being the case we need not determine any consequences of non-admission.

Personal or professional conduct?

[30] The relevant statutory provisions as to misconduct in different roles are contained within s 7(1)(a) and (b) of the LCA:

> **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 the 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; or
>
> (ii) that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or
>
> (iii) that consists of a wilful or reckless failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a

[6] Even if the evidence was otherwise inadmissible, the Tribunal may exercise its discretion to admit such evidence under s 239 of the Act in the interests of justice. As noted by the Court of Appeal in *Deliu v National Standards Committee of the New Zealand Law Society* [2015] NZCA 399 (at n 31) "The centrality of the evidence to the case and the effects of an inability to cross-examine may be material considerations in its assessment (footnotes omitted)".

condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject; or

(iv) that consists of the charging of grossly excessive costs for legal work carried out by the lawyer or incorporated law firm; and

(b) includes—

(i) conduct of the lawyer or incorporated law firm that is misconduct under subsection (2) or subsection (3); and

(ii) conduct of the 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.

[31] Also of relevance in interpreting these sections are the purposes of the Act contained in s 3:

3 Purposes

(1) The purposes of this Act are—

(a) to maintain public confidence in the provision of legal services and conveyancing services:

(b) to protect the consumers of legal services and conveyancing services:

(c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

(2) To achieve those purposes, this Act, among other things,—

(a) reforms the law relating to lawyers:

(b) provides for a more responsive regulatory regime in relation to lawyers and conveyancers:

(c) enables conveyancing to be carried out both—

(i) by lawyers; and

(ii) by conveyancing practitioners:

(d) states the fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services:

(e) repeals the Law Practitioners Act 1982.

[32] In addition, the interpretation section is important, specifically, s 6, which defines “legal services”, “legal work” and “reserved areas of work”:

legal services means services that a person provides by carrying out legal work for any other person

legal work includes—

(a) the reserved areas of work:

(b) advice in relation to any legal or equitable rights or obligations:

(c) the preparation or review of any document that—

(i) creates, or provides evidence of, legal or equitable rights or obligations; or

(ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property:

(d) mediation, conciliation, or arbitration services:

(e) any work that is incidental to any of the work described in paragraphs (a) to (d)

reserved areas of work means the work carried out by a person—

(a) in giving legal advice to any other person in relation to the direction or management of—

(i) any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or

(ii) any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party; or

(b) in appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal; or

(c) in representing any other person involved in any proceedings before any New Zealand court or New Zealand tribunal; or

(d) in giving legal advice or in carrying out any other action that, by section 21F of the Property (Relationships) Act 1976 or by any provision of any other enactment, is required to be carried out by a lawyer

[33] The Standards Committee contends primarily for a finding that the conduct fell within Mr U's professional life and conduct rather than personal. The conduct would then fall for consideration under s 7(1)(a).

[34] For his part, Mr U contends that his conduct was of a personal nature and that it did not reach the threshold for personal misconduct.

[35] It is well established that Parliament has set a deliberately higher threshold for conduct in a personal capacity to be considered misconduct. This recognises human frailties and the range of conduct which might fall for consideration. It would be unduly

oppressive for a lawyer in his or her personal life to have to maintain the sort of standards that are, at all times, expected of him or her when acting professionally. It has been described as conduct which:[7]

> … involves moral obloquy. It is conduct unconnected to being a lawyer which nevertheless by its nature, despite being unrelated to the practitioner's job, is so inconsistent with the standards required of membership of the profession that it requires a conclusion that the practitioner is no longer a fit and proper person to practice law.

[36] A discussion of the current state of the law begins with the *Orlov* decision in which the High Court was the first to discuss where a practitioner's conduct fell in terms of the professional/personal divide. The Full Court held that the conduct need not be bound up in the actual provision of regulated services. Conduct which was "connected to" the regulated services also fell within the professional role, because a wide interpretation of the definition was justified, having regard to the protective purposes of the legislation.

[37] *Orlov* is also authority for the proposition that Parliament intended that there be no gap between the two roles of personal and professional through which a practitioner could escape.

[38] Next, in the *Deliu* decision,[8] her Honour Hinton J approached the analysis slightly differently, but widened the net further. Her Honour considered there needed to be a client in the picture because of the definition of "providing regulated services" which includes the words "to another person". Her Honour held that the definition could be met if the conduct occurred "at a time when the lawyer was providing regulated services".

> [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 any other 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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[7] *Orlov v NZLCDT and National Standards Committee No 1* [2014] NZHC 1987 at [106].
[8] *Deliu v National Standards Committee* [2017] NZHC 2318.

> [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, i.e. 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, i.e. incidental to giving legal advice to his clients generally, regarding appearing as an advocate for them. Either way, the relevant conduct was "regulated services".
>
> [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".
>
> [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".

[39] The wider reading of "at a time" is still limited by the definition of "legal services", that is "services a person provides by carrying out legal work for any other person".

[40] Her Honour considered the definition could be met if the conduct occurred "at a time when the lawyer was providing regulated services". However, the presence of another person (client), or clients generally (as was the case in *Deliu*) was required.

[41] The broadest view of the professional conduct definition was expressed by his Honour Whata J in the *Young* decision,[9] which is relied on by the Standards Committee. Mr Young had been charged with conduct which occurred in the context of litigation in which Mr Young represented himself and his wife's company. Mr Young had failed to disclose relevant documents as part of the discovery process.

[42] After analysing the relevant definitions of legal services, his Honour noted:[10]

> Given the express reference to "any other person" in the definition of "legal services", s 7(1)(a) literally refers, in the present context, to conduct by a lawyer "at a time" when he or she is providing "legal work" for "any other person".

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[9] *Young v National Standards Committee* [2019] NZHC 2268.

[10] See above n 9 at [52]. However, it could be said that in acting for his wife's company, Mr Young was in fact representing another "person".

> Based on this literal construction, Mr Young is not caught by s 7(1)(a) because he was not providing legal work for "any other person".

[43] Faced with the obstacle posed by the literal construction, his Honour moved to consider the protective purposes of the LCA, which he held required an interpretation of the definition which captured any legal work, regardless of whether there was a client.

[44] This reasoning is explained at paragraph [58], where his Honour was concerned about the incompetence involved in the matter before him. He noted:

> However, context is important here. Incompetent lawyers acting for themselves one day are not transformed into competent lawyers the next day because they are acting for a client. An Act directed at maintaining public confidence, consumer protection and recognising the standing of the profession should be construed in a way that is consistent with that direction. This supports the broader construction of s 7(1)(a) favoured by Hinton J, one that is addressed to lawyers (and practitioners) who are incompetently performing legal work for themselves or others, "at a time" when they are providing legal services. Conversely, an interpretation of s 7(1)(a) that allows incompetent legal work to go unchecked, is discordant with that direction. I therefore prefer and adopt Hinton J's approach to s 7(1)(a).

[45] Counsel for the Standards Committee submitted, relying on the above decisions, that "the misconduct, in this case, occurred while Mr U was providing regulated services to clients while working as an employed lawyer". Counsel then went on to point out that in acting for himself, Mr U was drawing on his skills and experience as a practicing lawyer.

[46] We have some concerns about the application of that approach to this case, along the lines submitted by Mr U, as follows:

> Put another way, the applicant's submission is that – given lawyers inevitably will have clients in their day to day work – simply being a lawyer is sufficient nexus to bring all actions, private or personal, that might occur in a legal context, to be scrutinized under a professional conduct lens.

[47] Mr U went on to submit that that was a "concerningly oppressive prospect for any lawyer". We agree that would be so. In fact, were it to be the case that provided a lawyer had clients at all, she or he would inevitably be caught by s 7(1)(a), this would render s 7(1)(b) redundant in all but a handful of cases.

[48] Despite these reservations, we are of course bound by the *Young* decision unless we are able to discern distinguishing factors between that and the present case. We now turn to consider those.

[49] In *Young* (and the other cases relied on by the Standards Committee), the conduct occurred in the context of civil proceedings involving the recovery of monies or (in the case of *Orlov* and *Deliu*) an attempt to gain an advantage for clients in civil proceedings. In the present case, Mr U was conducting his own case in relation to very private and intimate matters conducted within the forum of the Family Court which is a closed (that is, not public) forum. We regard the private nature of the proceedings as a significant factor because it relates to the risk of damage to the reputation of the profession by Mr U's disgraceful comments, where there is no mechanism for these to reach the ears of the public. In that sense there is no public protective purpose.

[50] Secondly, whereas the *Young* matter was concerned with incompetence and the risk that that might translate to incompetent practice for members of the public as clients, the present matter had no such component.

[51] Mr U accurately points out that at no time did he attempt to vent his frustration on social media or in any other public forum or media. He confined his (outrageous) communications to the Court and the opposing legal representatives.

[52] We consider these factors to be sufficient to distinguish the present case from the *Young* authority.

[53] Mr U was acting as a self-represented party in highly contentious and protracted Family Court proceedings. He was a recently admitted practitioner who had not previously practised in the Family Court.

[54] In assessing which side of the division of professional and personal conduct encompassed by the legislation the matter falls, the individual case context will always be very important.

[55] We consider Mr U was predominantly acting in the role of ex-partner and father, rather than lawyer, in conducting his proceedings. Indeed, the very personal nature of his enmeshment in the various relationships and his inability to step aside supports

that view. Mr U himself acknowledged in his final piece of correspondence that he had lost perspective on the matter and ought to instruct independent counsel.

[56] There is a further authority to be considered and that is the *Hong* decision.[11] In that case correspondence between the practitioner and other lawyers was held to be "...(not) unconnected with the provision of legal services". However, Mr Hong himself said that he was acting personally but also on behalf of clients. That situation does not exist here, therefore we distinguish the *Hong* decision.

[57] We find that Mr U's conduct falls to be considered under s 7(1)(b)(ii). If we are wrong in this conclusion, we would certainly find that either limb of s 7(1)(a) would be met, as "disgraceful or dishonourable" conduct, or a reckless breach of the conduct rules.

[58] We now turn to consider whether the conduct reaches the threshold such that Mr U could be seen as not a fit and proper person to be a lawyer at the time the conduct occurred.

Does this conduct reach the Threshold for Personal Misconduct?

[59] To answer this question we must consider the limits to be placed on the freedom of speech of a lawyer, such being accorded to any individual under the Bill of Rights Act 1990, s 14.

[60] Mr U relies on the comments in *Orlov*[12] that:

> We accept that the value to be accorded to free speech means that one cannot be unduly precious when faced with robust or extravagant comment. If it is said that language is having the effect of undermining the dignity of the judiciary, regard needs to be had to where it was said and what was said, all against a background of not lightly restricting the right to make comment, even if ill-informed and extravagant.

In considering whether the comments could be said to undermine the institutions of justice, the Full Court referred to the Canadian decision of *Doré*:[13]

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[11] *Hong v Legal Complaints Review Officer* [2016] NZHC 184.
[12] See above n 6, at [84].
[13] *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SLR 395.

> We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

[61] Mr U accepts that his comments "…caused offence, they were rude, distasteful, disrespectful and regrettable", but denies that these reached the level of "reprehensible" or signified that he was, at the time of making them, unfit to practice as a lawyer.

[62] In *Doré* the following comment is relevant:

> [68] Lawyers potentially face criticism and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

[63] It must be borne in mind that these comments refer to a lawyer in his or her professional role. However, the fact that personal conduct is provided for in the LCA reminds us that having the privilege of membership of the legal profession carries with it the responsibility of maintaining certain levels of (dignified) conduct and certainly not behaving in a manner which breaches his or her obligation to uphold the rule of law and facilitate the administration of justice.[14] We referred to this in our decision in *Grey*,[15] where we referred to the Basic principles on the role of lawyers UNHR,[16] adopted in 1990:

> Article 23
>
> Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, lawyers shall always conduct

[14] Section 4 LCA.
[15] *Nelson Standards Committee v Grey* [2023] NZLCDT 33.
[16] United Nations Human Rights.

> themselves in accordance with the law and the recognised standards and ethics of the legal profession.

[64] Mr U stated that his experiences in the Family Court are his "lived experiences" and that he was entitled to hold and express his views and opinions. He acknowledges and apologises for the distasteful and gendered language used. Even accepting Mr U's "lived experiences" were frustrating, this does not provide him with free rein to vent in the manner he did.

[65] In his submissions Mr U has minimised his conduct as "4 communications sent over a 7 month period...". We need to examine the reality of and ramifications of the communications to consider the seriousness of the conduct and whether it reaches the threshold.

[66] Mr U's ugly and disrespectful assertions were directed towards:

- Ms H, counsel for his former wife
- Mr J, Ms H's supervising partner
- Mr K, the managing partner of X firm
- X firm, representing Mr U's former wife, in particular female staff of the firm
- Mr U's former wife herself
- Judge Sommerville
- Judge Lindsay
- The Police
- The Family Court
- Counsel to Assist the Court
- All lawyers who work in the Family Court system

That is a total of eleven people or organisations against whom Mr U "vented his spleen".

[58] The number of instances:

1. Memorandum of 19 November 2021 to Family Court - nine instances of unacceptable language are referred to by the Standards Committee. An apology was filed on 11 February 2022, following Law Society intervention.

2. Email of 8 May 2022 to Mr K of X firm - six instances of insulting comments. An apology was sent voluntarily on 25 May 2022.

3. Second memorandum to Family Court 3 June 2022 - six further insulting and accusatory statements made.

4. Third memorandum to Family Court of 29 June 2022 - in which at least eight further instances of insults, slurs and insulting comments are found. In this memorandum Mr U referred to the 3 June memorandum as "cathartic" and stated that nothing in that earlier memorandum required an apology.

[59] The sheer quantity and breadth of the outrageous and insulting communications, even though confined to the context of private Family Court proceedings, lead us to the view that this is very serious misconduct. Mr U himself referred to one of the memoranda to the court as "stream of consciousness", and to the fact that he was unable to be objective and required independent counsel.

Decision

[60] All of these factors and the very nature of the ugly and discriminatory comments themselves satisfy the Tribunal that at the time they were made by Mr U, he was not a fit and proper person to be a lawyer. Thus, the threshold for personal misconduct is met.

Suppression

[61] At the time of the hearing we made interim non-publication orders for the firm who employ Mr U, and for all of the complainants in the charges. We accept that in order to respect and adhere to the privacy provisions of the Family Court proceedings, and to avoid harm to Mr U's children and former wife, that these orders must be made final. Mr U's name and that of his former wife and children are also suppressed, in line with the provisions of s 11B Family Court Act. These orders are made pursuant to s 240 LCA.

Directions

1. Counsel for the Standards Committee are to file submissions on penalty within 14 days of the date of this decision.

2. The Respondent may file his penalty submissions within a further 14 days.

3. Counsel are to confer with the Case Manager to arrange a 2-3 hour penalty hearing.

DATED at AUCKLAND this 9th day of February 2024

DF Clarkson
Chairperson