NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 25
LCDT 044/14

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WELLINGTON STANDARDS COMMITTEE 2** Applicant
AND	**PAPALI'I TOTI LAGOLAGO** of Wellington, Solicitor

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr M Gough
Mr G McKenzie
Mr K Raureti
Mr B Stanaway

HEARING 22 & 23 June 2015

HELD AT Wellington District Court

DATE OF DECISION 13 August 2015

COUNSEL
Ms K Feltham for the Standards Committee
Mr A Beck for the Practitioner

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Overview

[1] Ms Lagolago faces disciplinary charges brought by the Standards Committee arising from her representation of Mr and Mrs F in relation to a debt to a finance company.

[2] The charges relate, inter alia, to the standard of her advice to the client on settlement proposals offered, the likelihood of success and risks in litigation with the finance company and her conduct of the resulting case in the District Court before Judge Tuohy, who was strongly critical of Ms Lagolago's representation and conduct in both his decisions on the merits and a later costs application.

[3] The outcome for Mr and Mrs F was that a debt not exceeding $12,000, capable of being resolved in the Disputes Tribunal without legal fees was escalated into a two-day hearing in the District Court where the outcome was judgment for the balance of the loan contract and interest and where costs were awarded against them exceeding $45,000 (of a total of $75,000 actually incurred by the plaintiffs).

[4] The Standards Committee presented three alternative levels of charge to the Tribunal for consideration:

1. Misconduct pursuant to s 7(1)(a)(i) Lawyers and Conveyancers Act 2006 ("LCA").

2. Negligence or incompetence to such a degree as to reflect on her fitness to practice or to bring the profession into disrepute.[1]

3. Unsatisfactory conduct that is not so gross, wilful or reckless as to amount to misconduct pursuant to s 241(b) but that was conduct that fell short of the

[1] Section 241(c).

standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[2]

[5] They allege two areas of failing on Ms Lagolago's part:

1. Inadequate advice as to "… prospects of success, the risk of the litigation and the potential value in settling the claim out of Court";

2. That her conduct of the Court case itself was "below an acceptable standard".

[6] In bringing the charges the Standards Committee acknowledged that no one failing alleged would necessarily invoke a disciplinary response. It is the cumulative effect of a number of errors which does so, in their submission.

[7] The Standards Committee frankly acknowledged the degree of latitude which must, of necessity, be extended to litigation practice. It was contended that the overall conduct of the practitioner (with no suggestion of ill-intent) still went beyond any proper degree of such tolerance.

Issues

[8] The issues to be determined are:

1. Have the Standards Committee proved any or all of the 35 particulars to the relevant standard, that is, on the balance of probabilities? The charges and particulars are Appendix I of this decision.

2. If so, is the conduct such as "… would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable" pursuant to s 7(1)a)(i) as pleaded by the Standards Committee?

3. If not, is there negligence in Ms Lagolago's professional capacity "… of such a degree … as to reflect on (her) fitness to practice or as to bring (her) profession into disrepute"?

[2] Section 12(a).

4. If not, does the conduct either:

   (a) Fall "… short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer"[3]; or

   (b) Represent "conduct consisting of a contravention of …" the LCA Regulations or Rules, but short of that which reaches the level of misconduct.[4]

Nature of the Evidence

[9] Evidence for the Standards Committee was given by the complainant Mrs F.

[10] No expert evidence was called as to the appropriate standard required of a practitioner in the two categories where it is alleged she failed her client. The Standards Committee submitted that it was for the Tribunal to set such standards, relying on its own expertise as a Specialist Tribunal.

[11] We have dealt with the matter on that basis, although comment that this is a case where some clear boundaries of acceptable and totally unacceptable advice and conduct could well have assisted the Tribunal, even having regard to the latitude to be extended to litigators, which will be more fully discussed later in this decision.

[12] As to the complainant, unfortunately we did not consider her to be an entirely helpful witness. The consequences for her and her family of the outcome of the proceedings taken by the practitioner on her behalf were obviously devastating. However, we consider that the complainant has failed to accept any responsibility whatsoever on her part, for her insistence that the practitioner pursue the matter through litigation, rather than seriously considering the settlement offer made in June 2009.

[13] We accept the practitioner's evidence, supported by evidence of the other practitioner who had represented the F's, Ms Lester, that Mrs F was utterly determined to have her day in Court.

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[3] Section 12(a).
[4] Section 12(c).

[14] On occasions, Mrs F denied receiving material which it became apparent subsequently she had received. She also denied sending a crucial email which recorded that the practitioner had advised her about the risks of costs should the litigation fail.[5] After allowing her time to read the email over an adjournment she changed her evidence to agree she had written: "We understand that if we lose we may have to pay $50K".

[15] Mrs F also admitted lying to the Judge at the hearing about the preparation of affidavits.[6] Her explanation for this was not persuasive.

[16] When material was put to her which did not support the view that she was advancing, about the practitioner's lack of advice or communication with her, she repeatedly protested that there had been "so many letters", that she was busy at work, stressed at home, that her "children were starving" and that she did not understand legal language. This included a letter early on in her resumed relationship with the practitioner, in October 2009 advising of the desirability of pursuing the matter through the Disputes Tribunal.

[17] On another occasion she referred to the "letter of confirmation of instructions" which the practitioner had requested, as being signed under some pressure, saying that "the proceedings were underway". In fact this letter was sent before the proceedings were filed.

[18] She also appeared to assert that the practitioner had somehow deliberately issued proceedings which were doomed to failure, in the knowledge that her claim was unsustainable. In other words she appeared to be alleging a deliberate error on the part of Ms Lagolago.

[19] It was clear from a spreadsheet Mrs F prepared in relation to payments and insurance rebates, that the witness was far more knowledgeable about financial transactions (having previously been employed as a head teller at a bank) than she was prepared to acknowledge. This appeared to be part of the pattern of shifting the entire responsibility for the disastrous outcome to the practitioner alone.

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[5] NOE p 11.
[6] NOE p 14.

[20] For her part, Ms Lagolago appeared to be somewhat confused about her role during the first few months of her engagement. In her affidavit responding to charges she "partly denies" having been instructed by the F's on 12 March 2009.[7] She confirms the letter of engagement was signed on 23 March but says:

> "The agreement was that I was to proceed to file proceedings as soon as a substantial retainer of $3K to $4K was accumulated in the trust account for fees excluding disbursements such as for filing fees and hearing costs which they were to pay separately when required. I was to begin to review the file as soon as a substantial retainer of $1K was accumulated in the trust account paid at $200/wk in about a month's time. However Mr and Mrs F took more than 5 months to accumulate the first $1K, deliberately stalling (as Mrs F admitted in her voice message on 9 and 13 October 2009) and not before SRL filed Dispute Tribunal proceedings."

[21] In her evidence she prevaricated in answering and appeared genuinely vague and confused about her obligations in June 2009 when the F's received a settlement offer. This offer, to settle for a total payment of $6,678.13 in full and final settlement, was, objectively, the best possible route out of the F's situation. The practitioner's conduct around this offer is the focus of the first limb of the conduct under scrutiny.

[22] Ms Lagolago says that she advised the clients to accept or seriously consider this offer. However she allowed herself to be deterred in the strength of her advice by their protestations of inability to pay.[8] She was also obviously concerned as to how involved or proactive she should be, given that the clients had not reached the retainer level she had set before she would issue proceedings as instructed.[9]

[23] After cross-examination we were struck by the apparent mismatch between the practitioner's evidence and her written advice to the client.

[24] She appears to have been diligent in providing written summaries of her reported conversations with her clients. In many instances, despite the client's denial of knowledge or understanding, these letters contained clear advice to them about costs faced and some of the risks entailed, although there were also some more confusing communications.

[25] By contrast, and even allowing for the nervousness undoubtedly experienced by Ms Lagolago in giving evidence, her presentation as a witness was of some concern

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[7] Respondent's bundle page 772.
[8] Practitioner's evidence bundle at p 773.
[9] Practitioner's evidence (NOE at p 48).

to the Tribunal. She still appeared to misunderstand some of the legal issues, on which the Court had made clear decisions. She did not appear to understand the nature of her role, particularly in initial stages, with her clients, and her obligation to be clear and firm and provide unemotional, objective advice to them. She was frequently tangential and unclear in her response to questions.

[26] Her affidavit spanned 168 paragraphs over 94 pages. It was rambling, lacked focus, and was at times difficult to follow.

[27] Overall, we were concerned that, even after the very clear and strong comments made by the District Court Judge about the F litigation, the practitioner did not have a high level of insight into her failings.

Practitioner's Position

[28] Mr Beck's submissions for the practitioner directed the Tribunal's attention to the "extensive advice" provided to Mr and Mrs F. He pointed out that it was the clients' choice to proceed with the litigation.

[29] Mr Beck emphasised the burden of proof and submitted that, given the necessary latitude to be accorded to litigators, the failures alleged, even if established, were not such as to justify disciplinary action. In closing Mr Beck conceded the proceedings "could have been done better" and "objectively it was almost certainly not going to succeed".

Admissibility of Decision of Judge Tuohy and Weight to be given to Comments in that Decision

[30] Two decisions were delivered by His Honour Judge Tuohy, first as to liability and subsequently as to costs. Both of these decisions, but particularly the latter were extremely critical of Ms Lagolago. For example:

> "[36]… virtually no evidential foundation for the application to re-open all seven contracts on the basis they were oppressive at the time they were made. … To have any hope of success, it would have been necessary for the F's to call evidence that those aspects of the loan contracts were not in accordance with reasonable commercial standards at the time. No such evidence was called by them. Indeed, in her submissions on costs, counsel for the F's has even

> criticised FNL for its entirely sensible and necessary decision to call such evidence in its defence."

And:

> "[38] As to the claim for harassment, there seems to have been little or no consideration given to the legal basis for it, either before it was made or at any time up until the hearing, despite what I am satisfied were several prior challenges by the defendants …"

And:

> [40] The whole conduct of the litigation on behalf of the F's has been seriously ill-judged, lacking in proper legal analysis and commercial commonsense. It is disturbing that what should have been a dispute about the amount owing under a loan contract (not exceeding $12,000), which could have been satisfactorily resolved in the Disputes Tribunal without legal fees, has been escalated into a two day hearing in the District Court, necessitating a 107 paragraph judgment which has cost the successful parties a total of over $75,000 in legal fees and disbursements and leaves the F's now facing judgment, not just for the balance of the loan contract, but for far greater sums in costs, apart altogether from their own legal costs – all this despite some clear warnings from the defendants.

And:

> "[41] … I am satisfied, despite the criticisms I have made, that they and their counsel were acting in good faith …"

[31] Mr Beck submitted, for the practitioner, that s 50 "precluded" the Judge's remarks "from being adduced in evidence". He relied on the decision in *Dorbu*. Mr Beck accepted that Judge Tuohy's decision could be referred to but submitted the comments did not constitute a rebuttable presumption.

[32] The admissibility of civil judgments containing comments made about practitioners has been the subject of somewhat divergent decisions of the High Court. The relevant sections discussed are s 239 of the LCA and s 50 of the Evidence Act:

> **239 Evidence**
>
> (1) Subject to section 236, the Disciplinary Tribunal may receive as evidence any statement, document, information, or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law.
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> (2) The Disciplinary Tribunal may take evidence on oath, and, for that purpose, any member of the Disciplinary Tribunal may administer an oath.

(3) The Disciplinary Tribunal may permit a person appearing as a witness before it to give evidence by tendering a written statement and verifying that statement by oath.

(4) Subject to subsections (1) to (3), the [Evidence Act 2006] applies to the Disciplinary Tribunal in the same manner as if the Disciplinary Tribunal were a Court within the meaning of that Act.

(5) A hearing before the Disciplinary Tribunal is a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury).

50 Civil judgment as evidence in civil or criminal proceedings

(1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.

(2) This section does not affect the operation of—

(a) a judgment *in rem*; or

(b) the law relating to *res judicata* or issue estoppel; or

(c) the law relating to an action on, or the enforcement of, a judgment.

[33] It has been accepted, in the recent decision of the full Court in *Orlov*[10] that the Tribunal could accept adverse judicial comments contained in a judgment pursuant to its discretion under s 239.[11] Referring to that section Their Honours held:

> [80] We consider subs (1) (*of s* 239) governs s 50 of the Evidence Act 2006. The judgments may be accepted by the Disciplinary Tribunal as evidence. It then simply becomes a question of weight to be given to the conclusions contained therein. This assessment will inevitably be case specific and turn very much on the particular proposition for which the judgment is being relied on. We therefore reject this challenge to the extent it is an admissibility challenge. Whether the Disciplinary Tribunal has accorded the wrong weight to any conclusions contained in any judgments is a matter able to be addressed when the appeal is considered, although we do not find it necessary to do so in this case.

[34] This decision was followed by Her Honour Thomas J in *Deliu.*[12]

[35] It is a matter for the Tribunal as to what weight it accords the judicial comment having regard to that evidence, considered with all other evidence, including explanations by the practitioner.

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[10] *Orlov v NZ Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606 at para 80; (reference to s 239 inserted).

[11] Section 239 LCA (1) subject to s 236, the Disciplinary Tribunal may receive as evidence any statement, document, information, or matter that may, in its opinion deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a Court of Law.

[12] *Deliu v National Standards Committee* [2014] NZHC 2739 at [87-89].

[36] The remarks quoted above of His Honour are clearly relevant to the issues to be determined. As comments made by an experienced Judge, having conducted a two-day hearing, we consider they should be accorded considerable weight, taking account of the practitioner's explanations.

General Advice to the Client, in Particular Concerning Settlement

[37] Particulars 1-4, 6, 8, 9, 12-16, 18-20, 22-27 and 29 are admitted by the practitioner.

[38] Particulars 5 and 7 precede the relevant period under consideration, because they occurred before the LCA came into force.

[39] Particulars 10 and 11 relate to the dispute (and confusion) as to the practitioner's role and her conduct referred to in paragraphs [3]-[5] of this decision. We record Ms Lagolago's evidence on this topic as follows:[13]

> "Q: When the settlement offer was made by SRL in June 2009, did you consider that you were acting for the F's?
> A: I considered I wasn't doing any work. I was conscious that she didn't want to spend money. Didn't want me to do work that she had asked me to do and just conscious that she, yeah, she wanted proceedings and that if I was to do work other than proceedings then that was not something she had wanted to pay money towards, so I was conscious of that.
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> **The Court: Mr McKenzie**
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> Q: I don't quite understand. You're not acting for her in relation to the $6000 offer but you are in relation to proceedings, or have I got that wrong?
> A: The engagement was to take proceedings. That's what my understanding of the engagement was and that was my understanding of why she was paying money. When the offer came in it was a correspondence that I said I would charge her for so it was – I was there and available to give advice but I wasn't doing any work for the proceedings.
> Q: But were you acting for her or not? I'm just trying to understand it.
> A: In a sense, I was acting, I was instructed by her because I think the engagement in all related work so that would include correspondence but it wouldn't be – yeah, so there were certain things to be done before I did certain work so there was no obstacle to me giving advice or answering the phone and talking to her and giving her some advice or sending correspondence to the car company to assist her for buying a car, by pulling correspondence from the file … "
>
> And at page 49
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> **The Court: Judge Clarkson**
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> Q: Now do you not see that offer as part of the proceedings?
> A: Oh not that was, that was totally – yeah that was part of –

[13] NOE p 48.

Q: Okay.
A: There were no proceedings but it was, I guess it was, it was something there to resolve it.
Q: In terms of preliminaries to litigation –
A: Yep.
Q: – did you not see that settlement offer as something that fell under that head? You referred to it as correspondence.
A: Yes, yes I do –
Q: – as opposed to a settlement offer.
A: I fully did see that as, I think what it is, is probably, trying to understand why I said I wasn't instructed by her, fully instructed by her. I wasn't instructed, fully instructed according to, I mean, when she came to me it wasn't to discuss any offers.
Q: She came to you to resolve a dispute. You said yes to that.
A: Um, she came to me –
Q: How can that settlement offer not be part of the resolution of that dispute?:
A: My instructions were not to resolve the dispute by settle, accepting any offers, because I realised, when she rang me, when she was with Ms Lester, she told me she was not accepting any offers Ms Lester was making. She's not, she was not interested, and Ms Lester had written a letter saying that was her position and she was still stating that when she, when she instructed me to take proceedings. So my understanding was, that was, oh she came to me for, not to accept any offers because there was not any, no point in me, um …
Q: Did you not see that you had an obligation to at least discuss the merits of the offer with her?
A: I did discuss the merits of the offer with her, I did – I mean I. –
Q: Now I'm confused because a minute ago you were talking about it as being correspondence which was sort of separately charged for and not part of your overall brief. …"

[40] We also note that Chapter 13 of the Conduct and Client Care Rules[14] dealing with lawyers as Officers of the Court addresses this issue also.

"**Alternatives to litigation**

13.4 A lawyer assisting a client with the resolution of a dispute must keep the client advised of alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client already has an understanding of those alternatives) to enable the client to make informed decisions regarding the resolution of the dispute."

[41] We do not consider that the lawyer herself had a clear enough understanding of the risks associated with the proposed litigation to assist her clients to make "informed decisions" regarding the settlement offer.

[42] We consider the practitioner's obligations towards Mr and Mrs F began on 12 March 2009 when they approached her and she agreed to act for them. We find Particular 10 proved to the relevant standard.

[14] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[43] As to Particular 11, it is common ground that the offer was not accepted. The issue was whether the Standards Committee has established that "Ms Lagolago did not discuss the settlement offer fully with Mr and Mrs F."

[44] We consider that not just the evidence of Mrs F but also of the practitioner herself establishes this Particular also. Around the time when the offer was received Ms Lagolago, as previously discussed, appeared confused about her role and the extent to which she should be active in the process. Given the level of the offer (that is, how advantageous it seemed) it was her obligation to thoroughly assess at that stage the merits of alternative action, namely the litigation which was being urged by her client. Instead, she appears to have accepted her client's somewhat paranoid view that because the offer was so low that they ought to be suspicious of it and that in any event they wished to proceed to claim for harassment.

[45] It is clear that at this stage the practitioner had not researched whether any such harassment claim was, objectively, a sound one. Furthermore, it would seem that she did not get her clients in to see her together and thoroughly canvass the merits of proceeding or otherwise. At later stages she appears to have provided fuller advice about the merits of proceeding, and recommended Disputes Tribunal as an alternative. By this time the opportunity to accept the settlement offer had passed.

[46] It is most important that practitioners objectively assess the merits of settlement offers and advise their clients dispassionately, removed from the type of emotional interpretations which clients may adopt. That is the very reason for proper independent legal advice. It is our view that the practitioner failed in her obligations in this regard.

[47] As to the level of failure, this needs to be assessed once the second plank of the Standards Committee's case is considered and if the further Particulars are determined, which relate to her conduct of the court proceedings.

Conduct of Court Proceedings

[48] The first disputed Particular under this head is Particular 21 relating to the Court's rejection to the claim of harassment. This is "partly denied", however the

dispute in this matter would tend to be a technical one relating to the specific wording of His Honour's judgment.

[49] The next disputed Particular is 28, however this aspect of the charge has been withdrawn (in relation to fees charged) and therefore we do not address it.

[50] Particular 31, the next with which the practitioner takes issue, alleges that Ms Lagolago failed to properly advise Mr and Mrs F about the merits of commencing the District Court proceedings including the likelihood of the claim succeeding. It also alleges she failed to properly advise them that their concerns in relation to the contracts could be adequately dealt with in the Disputes Tribunal.

[51] In the letter to the clients of 12 October 2009 Ms Lagolago records that the clients had been advised by their two previous lawyers and herself that the "Disputes Tribunal may be the best option to deal with your dispute, at less cost to you". It records that the creditor had taken that option but that:

> "… you want to lodge proceedings in the District Court to claim compensation, so that the hearing can be transferred from the Disputes Tribunal to the District Court. You were advised that the Court can compensate you for loss that you can show …
>
> Another reason you want to lodge District Court proceedings even (sic) is to threaten [SR] as they have done to you."

[52] She then recorded the previous settlement offers made by the creditor and that:

> "…you have refused to pay anything further on the account, and have been deciding for a while now whether to go to the Disputes Tribunal or the District Court, and whether to complete the legal aid application or not."

[53] In an email to the lawyer, in December 2009, Mrs F recorded her lack of confidence in the Disputes Tribunal:

> "… Belive (sic) they (*creditor*) went to the disputes tribunals to get away from their responsibility of resloving (sic) issue. They must know that the Dispute Tribunal are not lawyers and would rule in favour of them. The amount filed in the Dispute Tribunal was also **inaccurate**…the value of $18,000 when clearly the balance owed to them before we stopped paying was was (sic) less than $11K. Their dishonesty is truly apparent!
>
> Our claim of $100,000 still stands!"

[54] In her evidence Mrs F repeated her lack of confidence in the Disputes Tribunal process. It is of some concern that her misapprehensions were not, apparently, corrected by the practitioner. However, other than in this regard we do not think that the second part of Particular 31 has been established against the practitioner in that she did repeat oral advice, in writing, that the Disputes Tribunal was a preferable course.

[55] We consider in other respects, this particular is established on the balance of probabilities. While Ms Lagolago's file notes record numerous conversations with Mrs F, in which the client appeared determined to pursue the matter in the District Court, much of these discussions centred on fees to cover the lawyer's work, rather than actual discussions about the nature of the claim to be made and a clear elucidation of the likely prospects of success.

[56] In July of 2010 the practitioner clarified her advice concerning the proposed claims and what losses could be sought. In particular she referred to the claim for compensation for harassment which the client's were keen on pursuing. It is clear by this stage the practitioner had done some research in this area but her explanation to the client is somewhat confusing. She says that she has not *"… come across a precedent to advise what amount if any the Court will grant you for damages where the amount of the loss is not monetary."* She refers to the risk of losing and of paying Court and the solicitor's costs for the opposition lawyers. She recommends that a further attempt at settlement be made but points out that the clients may well have turned down the best offers to settle already.

[57] The advice while fairly wide-ranging is somewhat confusing and because the practitioner had misconceived a claim under the Harassment Act, we are not able to say that she fully advised them as to the merits of commencing the proceedings.

[58] Particular 32 alleges a failure to "fully and properly advise Mr and Mrs F as to the risk involved in the proceedings and the potential financial consequences to them, including an accurate assessment of the likely costs if their claim was unsuccessful." We consider that the series of letters from the practitioner to her client beginning 1 August 2010 through to 29 November 2010 did fairly advise the client of the financial risks pursuing this litigation. In the final letter of 20 September 2010 the

practitioner amends upwards her earlier estimate of costs saying that "… FNs legal costs would be $50,000 and the legal costs for SR could be the same …".

[59] Furthermore in her email of 24 November 2010, (the email that was initially denied but later acknowledged by Mrs F in evidence), she states "we understand that if we lose we may have to pay $50K …"

[60] Thus we do not find this Particular to have been established on the balance of probabilities.

[61] Particular 33 is a repeat of Particular 11 and we refer to our findings on that Particular.

[62] Particular 34 deals with the pleadings and submissions filed by the practitioner. Eight specific examples are given about defects in the practitioner's documentation and presentation of the case. We propose to deal with these broadly rather than individually.

[63] Before doing so, we also note that a further concern which was raised in the evidence, was that these proceedings were pressed on with, in the face of considerable criticism, indeed dismay, expressed by counsel for opposing parties.

[64] It would appear that letters from counsel pointing out the flaws in the proceedings were simply forwarded on to the client without any elaboration or explanation to them. Unsurprisingly the F's simply rejected the criticisms in an uninformed way and restated to Ms Lagolago their wish to pursue their claim which they regarded as valid.

[65] Whilst in litigation it is an obvious feature that different views will be taken, we consider that in this instance, where opposing counsel were pointing out what appeared to be very major flaws and following that with warnings of seeking indemnity costs should the matter proceed, that the practitioner, who was very inexperienced in civil litigation at the time, ought to have paid more attention. Her failure to do so and to seek advice from more experienced counsel was ultimately very costly for her clients. The challenges, which she appears to have given little weight, were ultimately upheld by the Judge.

[66] Failure to call proper evidence is a further failing noted in the conduct of these proceedings. Although alleging that the credit contract under consideration was "oppressive" Ms Lagolago failed to call any expert evidence in this regard. Thus His Honour found:[15]

> "The F's failed to prove that it was not in accord with reasonable standards of commercial practice and in the absence of such proof, I am not satisfied the fee is "*oppressive*" in terms of s 9."

[67] And in relation to the F's major claim of $100,000 for "harassment" His Honour stated:[16]

> "There is no suggestion of any psychiatric injury having been caused in this case. Indeed, there was virtually no specific evidence from the F's of having suffered emotional distress or anxiety by reason of the conduct complained of."

[68] As to the claim itself, His Honour[17] said:

> "The legal foundation for this claim was never made clear in either the notice of claim or the plaintiff's information capsule.

[69] His Honour confirms that the synopsis of argument had simply stated:[18]

> "Harassment is a tort and common law damages is (sic) available as a remedy in respect of harassment."

[70] His Honour points out no authority was cited for the proposition although an attempt to rely on an English authority and oral argument was commented on as follows:[19]

> "… but no attempt was made to analyse that case and apply its principles to this case or to discuss its subsequent history."

[71] His Honour found:[20]

> "The true position is that there is no tort of harassment recognised in New Zealand."

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[15] TF & LF, plaintiffs and Finance Now Limited, first defendant and Southern Receivables, second defendant and *Southern Receivables Limited v TF & LF*, decision Judge C N Tuohy, 7 March 2012, CIV-2009-091-000639, at para 35.
[16] See footnote 17 at para 65.
[17] At para 61.
[18] At para 62.
[19] At para 62.
[20] At para 63.

[72] Despite the lack of foundation for this claim the Judge was prepared to examine whether the behaviour of the respondent's could have amounted to harassment in terms of s 23 of the Fair Trading Act. He found that no criticisms could be levelled at the respondents for the manner in which they simply went about attempting to collect their debt from Mr and Mrs F who had stopped paying and had not responded to attempts to settle the matter.

[73] The Judge was also clearly critical of counsel for suggesting that the actions of the respondents "amounted to extortion or blackmail under s 237 of the Crimes Act and that reparation is available to the F's." His Honour pointed out that a sentence which could be imposed on conviction of a criminal offence, was not a remedy available in civil proceedings. Ms Lagolago indicates that the Judge had misunderstood her and that she had merely referred to extortion or blackmail by way of analogy. Even that explanation indicates the lack of clarity in the practitioner's analysis.

[74] A further difficulty with the claim was that the practitioner raised an argument under the Fair Trading Act. As pointed out by opposing counsel and ultimately accepted by the Judge, any claim under the Fair Trading Act was out of time and therefore doomed to fail. In any event, the Fair Trading Act was not pleaded in the original notice of claim by the practitioner.

[75] The purported cancellation of the contract in question on behalf of the F's was also the subject of adverse comment in the District Court decision.[21] This part of the case was held to be "… without either legal or substantive merit".

[76] The practitioner's submissions as to costs following what she clearly did not recognise as an almost total failure of her claim, were also of concern to the District Court Judge and indeed to the Tribunal. The practitioner quite unrealistically sought that no order for costs be awarded against her clients. We have already quoted three examples of His Honours criticisms at paragraph [30] of this decision. We do not propose to repeat the criticisms, except to endorse His Honour's comments.

[77] What is even more concerning is that as recently as the disciplinary hearing, she attempted to defend the overall result on the basis that there had been a minor

[21] Paragraphs [44]-[51].

adjustment in favour of her clients of approximately $700. In the face of a judgment against them of $11,550 together with the costs of $46,150 (having cost Mr and Mrs F $28,800 themselves in fees), the characterisation by the practitioner as somewhat successful, was astounding.

[78] We find that the Standards Committee has established the conduct set out in Particular 34 in all of the alleged instances.

Level of seriousness of the conduct

Issue 1

[79] The answer to issue 1 then is that, with the exception of Particular 32 relating to advice to proceed through the Disputes Tribunal, we find all of the particulars proved on the balance of probabilities.

Issue 2

[80] The most serious level pleaded in the charges is that of misconduct and it is based on s 7(1)(a)(i) which reads:

> "(1) ... misconduct in relation to a lawyer … -
>
> (a) means conduct of the lawyer … that occurs at a time when he or she … is providing regulated services and is conduct –
>
> (i) that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable."

The statutory test is clarified by a number of decisions, albeit many under the previous legislation. Mr Beck referred us to the dicta in *Auckland Standards Committee 3 v W*[22] which in turn referred to the well known decision of *Pillai v Messiter*[23]. In that decision it was said that gross negligence could amount to misconduct "...*particularly if accompanied by indifference to, or lack of concern for, the welfare of the patient…"*

And later that:

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[22] Auckland Standards Committee 3 of NZLS v W [2011] 3 NZLR 117 at [34].
[23] Pillai v Messiter (no 2)(1989)16 NSWLR 197, per Kirby P.

"…*But the statutory test* is *not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration…"*

[81] We do not consider the conduct proved reaches this level. This was a well motivated and diligent practitioner attempting to do the best job she could for her clients, albeit in a less than competent manner. There was no wilful or reckless abandonment of her responsibilities, rather a failure to perceive her own inadequacies and seek assistance.

Issue 3

[82] The leading authority on negligence or incompetence pursuant to s 241(c) is the decision of the Court of Appeal in *W.*[24] Although distinguishable, in the sense that it involved the breach of an undertaking as opposed to the context of litigation, the test was set for assessment of the second limb of s 241(c) namely the tendency to bring the profession into disrepute as a result of the practitioner's negligence. The *W* decision dealt with the preceding provision in the Law Practitioner's Act 1982.[25] We consider it equally applicable to s 241(c) because the wording is almost identical with this provision.

[83] The particulars having been proved, we certainly find there is a level of negligence which is of some concern and which might lead to a reflection on the practitioner's fitness to practice in this area of legal work. It does not reflect on her overall fitness which is why we moved to consider the second limb of the s 241(c) test.

[84] *W* held that the test was "… whether reasonable members of the public, informed of all relevant circumstances, would view (*W's*) conduct as tending to bring the profession into disrepute … the issue is to be approached objectively, taking into account the context of which the relevant conduct occurred …".

[24] *W v Auckland Standards Committee 3 of New Zealand Law Society* [2012] NZCA 401.
[25] Namely s 112(1)(c).

[85] We wish to be clear that it will be relatively rare for the Tribunal to find that counsel involved in contested litigation has met the negligence and competence criteria in preparing and filing pleadings and appearing at a subsequent hearing.

[86] We recognise that counsel must be given latitude arising from the possible range of views about the viability of the cause of action and the likelihood of success. If there were not such variations there would, of course, be no litigation.

[87] However there will be instances where the pleadings and conduct of the case are objectively so flawed and unlikely to succeed that disciplinary intervention is warranted.

[88] We have reached the view that this is one of those cases having regard to the cumulative effect of the evidence we have found to be proven.

[89] We have taken into account and have considerable sympathy for, the difficulty of a practitioner faced with a client who is set in a particular view.

[90] We have had regard to Rule 13.3 of the Conduct and Client Care Rules:

> **"Informed Instructions**
>
> 13.3 Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them."

[91] We have already stated that we considered the clients in this case were not properly informed of the objective merits of their case so as to fully understand the risks of proceeding. Despite providing a lot of material to the clients, the practitioner's lack of analysis and clear application of research to these facts meant that the clients were failed by her.

[92] We consider that on an objective assessment of how the public would view the practitioner's conduct of these proceedings and her significant failure to fully advise the clients in respect of the early settlement offer, the profession would be brought into disrepute. Thus we find the charge proved at the legal level of negligence pursuant to s 241(c).

[93] That being the case Issue 4 does not fall for consideration. However if we are wrong in our analysis of the practitioner's negligence, having regard to the latitude which needs to be granted to litigators, then we consider that her conduct would certainly "fall short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer". Thus there would be a finding of "unsatisfactory conduct".

Directions

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

2. Counsel for the respondent is to have a further 14 days to file submissions in answer on the question of penalty.

3. The case officer is to allocate penalty hearing of half a day.

DATED at AUCKLAND this 13th day of August 2015

Judge D F Clarkson
Chair

Appendix I

CHARGES

The Wellington Standards Committee 2 of the New Zealand Law Society charges **Papali'i Toti Lagolago** of Wellington, Barrister & Solicitor, as follows:

The advice and representation provided by Ms Lagolago to T. & L. F. relating to the District Court civil proceedings commenced against Finance Now Limited and Southern Receivables Limited constituted:

(i) Misconduct; or

(ii) In the alternative, unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct; or

(iii) In the alternative, negligence or incompetence in her professional capacity, and of such a degree as to reflect on her fitness to practise or as to bring the profession into disrepute.

The facts and matters relied upon and the particulars of the charges, are set out below.

Reliance is also placed on the affidavits of T. F. and L. F.

FACTS AND MATTERS RELIED UPON

The Practitioner

1. Ms Lagolago was admitted as a Barrister & Solicitor of the High Court of New Zealand on 18 December 2001.

2. At all material times, Ms Lagolago held a practicing certificate as a barrister and solicitor under the Lawyers & Conveyancers Act 2006 (**the Act**).

3. On 2 July 2008 Ms Lagolago became a sole practitioner. Prior to this she was employed as a solicitor at the Whiteria Community Law Centre.

L. and T. F.

4. T. and L. F. entered into seven successive loan contracts with Finance Now Ltd (**FNL**). The final credit contract entered into on 18 December 2003 was for an advance of $18,639.91. $17,639.91 was to be applied to settle the existing contract, with the balance of $1,000 being advanced in cash to Mr and Mrs F. Upfront interest charges, payment protection insurance and administration costs brought the total sum loaned to $34,563.09.

5. Mr and Mrs F made regular loan repayments until 6 June 2007, when they verbally advised FNL that they were ceasing the repayments. They did this after receiving advice from Ms Lagolago at the Whiteria Community Law Centre about the loan.

6. On 19 June 2007 Ms Lagolago confirmed in writing to FNL that Mr and Mrs F would not be continuing their loan repayments on the basis that they "considered that the contract was unduly burdensome under the Credit Contracts Act 1981, because of the unreasonable charges on the cost of credit".

7. FNL made a number of unsuccessful efforts to recover the amount outstanding, before assigning its interest in the loan to Southern Receivables Limited (**SRL**) on 8 February 2008.

8. Over the following 18 months SRL also made numerous attempts to obtain settlement of the loan. This included sending letters and making telephone calls to Mr and Mrs F.

9. In early 2008, Mr and Mrs F consulted another lawyer about the loan. Efforts to resolve the matter failed.

10. On 12 March 2009 Mr and Mrs F instructed Ms Lagolago to act for them. At this time she was in sole practice as a barrister and solicitor in Porirua.

11. In June 2009 SRL offered to accept $6,678.13 as full and final settlement of the amount outstanding. Ms Lagolago did not discuss this settlement offer fully with Mr and Mrs F. The offer was not accepted.

Court Proceedings

12. On 21 August 2009 SRL filed proceedings in the Disputes Tribunal against Mr and Mrs F for the balance of the loan.

13. On 2 November 2009 Ms Lagolago filed a notice of claim in the District Court on behalf of the F's against FNL and SRL seeking that there be no further enforcement of the loan contract. Damages of $100,000 for emotional stress and anxiety were also claimed.

14. On 2 March 2010 Ms Lagolago wrote to SRL purporting to cancel the final loan contract and all preceding contracts.

15. The Disputes Tribunal claim filed by SRL was subsequently transferred into the District Court and consolidated with the F's claim.

16. The matter proceeded to a defended hearing in the Porirua District Court before Judge Tuohy on 5 and 6 October 2011.

District Court judgment

17. In a reserved judgment delivered on 7 March 2012, the claims made by the F's in their notice of claim and counter claim were dismissed, judgment for the balance payable on the loan (subject to some minor recalculation) was awarded in favour of SRL and counsel were requested to file memoranda as to costs.

18. In the course of the judgment his Honour noted that the F's claim:

> [9] … was commenced by a Notice of Claim under the 2009 Rules. Unfortunately its legal foundation is unclear. This is a case which would have been assisted by directing a statement of claim under R 2.48(3)(c) in order to clearly identify the causes of action and remedies sought. In its absence, I have sought to identify them from the notice of claim, the plaintiffs' information capsule and their counsel's synopsis of argument. It is helpful that counsel for both defendants have also sought to meet the claim on a broad basis without

seeking to take advantage of deficiencies in the way it has been framed. That is in the spirit of the objective of the Rules as set out in R 1.3.

[10] The remedies which the F's seek are:

- An order that the final contract and all preceding contracts be re-opened and recalculated on the grounds that the contracts were unjustly burdensome.
- An order declaring that the final contract has been validly cancelled and that all monies paid under it be refunded to the F's.
- Damages for emotional stress and anxiety caused by harassment by FNL and SRL.
- Costs

[11] There is also an allegation that a false misrepresentation was made by an FNL employee to Mrs F about the final balance repayable at the time the final contract was entered into although it is unclear what remedy is sought in respect of that.

19. In relation to the application to reopen the credit contracts, his Honour found that there was an omission to rebate payment protection insurance in contract 3, amounting to $317 and that there was a possible miscalculation of rebates due to the method of calculation used by FNL, but that otherwise Mr and Mrs F had not proven that the terms of the contracts were in contravention of reasonable standards of commercial practice at the time and accordingly were not oppressive in terms of section 9 of the Credit Contracts Act 1981.

20. The claim by the F's that the final contract had been validly cancelled was found to be without either legal or substantive merit. It was noted that the claim for false representation under the Fair Trading Act was not mentioned in the notice of claim or the statements of defence or counterclaim filed by the F's, but in any event was held to be out of time and not made out on the facts.

21. The claim for harassment in the sum of $100,000 was rejected with his Honour noting that there was no tort of harassment recognised in New Zealand and regardless, there was virtually no specific evidence of Mr and Mrs F having suffered emotional distress or anxiety by reason of the conduct of FNL or SRL. The claim for harassment pursuant to the Fair Trading Act was clearly disposed of on the facts, His Honour noting that FNL's determination to pursue the debt could have been greater while SRL's behaviour was not viewed as objectionable given the debt position. Ms Lagolago's suggestion that the actions of FNL or SRL amounted to extortion or blackmail under the Crimes Act and that reparation was available to them was noted to be completely untenable, while reparation was not a remedy available in civil proceedings.

22. Counsel for FNL and SRL then filed memoranda seeking indemnity costs against the F's. Ms Lagolago filed a memorandum in response submitting that no costs should be awarded.

Costs decision

23. On 7 September 2012, Judge Tuohy issued a decision as to quantum of judgment and costs. His Honour ruled that the effect of the omission to rebate payment protection insurance in contract 3 reduced the debt by $694.67 while any possible miscalculation of rebates may have led to a small disadvantage to Mr and Mrs F and a further discount of $8.62 was given, resulting in a final quantum of $11,550.

24. As to costs, His Honour rejected Ms Lagolago's submission that Mr and Mrs F should not be required to pay any costs noting:

> [29] … to put it in the simplest terms, the F's failed to make the payments on a loan they had taken out; they resisted a claim for the balance owing on numerous grounds, none of which were made out except in one or two trivial respects; they made a counterclaim for a totally unrealistic amount which completely failed. Neither of the defendants were found to have done anything significantly wrong in the events which led up to the litigation. To suggest that they should not have costs shows a blindness to the reality of the Court's judgment. Nevertheless the submission, however unrealistic, had to be answered by the defendants and addressed by the Court, mirroring the pattern of the substantive proceeding.

25. Despite the low value of the claim, His Honour found that it was both legally and evidentially complex, classifying it as a category 3 band B proceeding. The claim by both FNL and SRL for indemnity costs was declined as Mr and Mrs F had not acted vexatiously, frivolously or improperly in commencing or continuing the proceedings, but increased costs were justified as they had not acted reasonably in the conduct of the litigation. His Honour noted:

> [36] In particular, there was virtually no evidential foundation for the application to re-open all seven contracts on the basis they were oppressive at the time they were made. The relevant complaints were that interest was charged up-front and that various fees and premiums were excessive or should not have been charged. To have any hope of success, it would have been necessary for the F's to call evidence that those aspects of the loan contracts were not in accordance with reasonable commercial standards at the time. No such evidence was called by them. Indeed, in her submissions on costs, counsel for the F's has even criticised FNL for its entirely sensible and necessary decision to call such evidence in its defence.
>
> [37] As to the other complaints about the loan contracts (rebates for early settlement not correctly calculated and applied, advances not immediately applied), these could have been raised as defences to SRL's Disputes Tribunal claim and the minimal adjustments obtained established in that forum.
>
> [38] As to the claim for harassment, there seems to have been little or no consideration given to the legal basis for it, either before it was made or at any time up

> until the hearing, despite what I am satisfied were several prior challenges by the defendants…
>
> [39] As well as these primary claims, the issues of cancellation of the contract, false representation under the Fair Trading Act and reparation for blackmail were raised in one way or another by counsel for the F's and had to be met by the defendants. The first had no legal or substantive merit. It was unclear that the second was ever properly raised and, in any event, it was out of time and failed on the facts. The third was also completely without merit.
>
> [40] The whole conduct of the litigation on behalf of the F's has been seriously ill-judged, lacking in proper legal analysis and commercial commonsense. It is disturbing that what should have been a dispute about the amount owing under a loan contract (not exceeding $12,000), which could have been satisfactorily resolved in the Disputes Tribunal without legal fees, has been escalated into a two day hearing in the District Court, necessitating a 107 paragraph judgment which has cost the successful parties a total of over $75,000 in legal fees and disbursements and leaves the F's now facing judgment, not just for the balance of the loan contract, but for far greater sums in costs, apart altogether from their own legal costs – all this despite some clear warnings from the defendants.

26. While noting the F's lack of financial resources to meet a costs award, His Honour stated:

> [49] … I have great sympathy for them because I do not think they ever understood the legal weakness of their case or the great financial risk to them in taking the matter to trial.

27. Increased costs against the F's were awarded in the sum of $23,000 in favour of FNL and in the sum of $18,000 in favour of SRL, together with disbursements.

28. Ms Lagolago charged Mr and Mrs F a total of $28,832.13 in relation to her conduct of these proceedings. Approximately half this amount has been paid, with a balance of $14,425.76 outstanding.

29. On 6 June 2013 Ms Lagolago filed proceedings in the Porirua District Court for the balance of her fees. At the request of Mr and Mrs F, the proceedings were transferred to the Disputes Tribunal.

PARTICULARS OF CHARGE

30. The facts, matters and particulars set out in paragraphs 1 to 29 are repeated.

31. Ms Lagolago failed to properly advise Mr and Mrs F in relation to the merits of commencing the District Court proceedings, including the likelihood of the claim succeeding. She also failed to properly advise them that their concerns

in relation to the contracts could be adequately dealt with in the Disputes Tribunal.

32. Ms Lagolago failed to fully and properly advise Mr and Mrs F as to the risks involved in the proceedings and the potential financial consequences to them, including an accurate estimation of the likely costs if their claim was unsuccessful.

33. A reasonable settlement offer to accept $6,678.13 as full and final settlement was advanced by SRL in June 2009, which Ms Lagolago failed to fully consider or advise Mr and Mrs F about.

34. The pleadings and submissions prepared by Ms Lagolago contained significant errors and/or were seriously misconceived, in particular:

(a) The initial Notice of Claim referred to both the Credit Contracts Act 1981 and the Credit Contract and Consumer Finance Act 2003, when only the Credit Contracts Act applied, given the dates the loans were taken out.

(b) There was no evidence provided to show that the contracts were not in accordance with reasonable commercial standards at the time and were therefore oppressive pursuant to s 9 of the Credit Contracts Act 1981.

(c) There was a purported cancellation of each of the loan contracts without proper grounds existing for such cancellation.

(d) The claim of false representation under the Fair Trading Act 1986 was not pleaded and was well out of time, but was set out in Ms Lagolago's Synopsis of Argument for Plaintiffs dated 5 October 2011 at 3.2, 4.14, 4.21, 4.22 and 5.6.

(e) There was no legal basis for the claim of harassment and no basis on which the court could award damages, much less the exceptional sum of $100,000.

(f) Reparation was sought for extortion or blackmail, in particular in Ms Lagolago's 5 October 2011 Synopsis of Argument for Plaintiffs at 4.39, pursuant to s 237 of the Crimes Act 1961 in the context of civil proceedings.

(g) In the costs submissions, in particular at paragraphs [27] to [32] there was an attempt to litigate matters not put in issue in the substantive hearing.

(h) It was submitted that Mr and Mrs F should not have to pay any costs, despite their very limited success in the substantive proceedings.

35. This conduct as particularised in paragraphs 1-36 above either separately or cumulatively constituted:

(a) Misconduct pursuant to section 241(a) of the Act in that it was conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable: section 7(1)(a)(i); or in the alternative

(b) Unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct pursuant to section 241(b) of the 2006 Act, in that it was conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer: section 12(a); or in the alternative

(c) Negligence or incompetence in her professional capacity, and the negligence or incompetence has been of such a degree as to reflect on her fitness to practice or as to bring her profession into disrepute pursuant to section 241(c) of the 2006 Act.