NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 27

LCDT 025/12

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**LEGAL COMPLAINTS REVIEW OFFICER** Applicant
AND	**BOON GUNN HONG** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr G McKenzie

Mr K Raureti

Ms C Rowe

Mr I Williams

HEARING 15 June 2015

HELD AT Auckland

DATE OF DECISION 19 August 2015

COUNSEL

Mr P Collins for the Legal Complaints Review Officer

Mr B Hong, respondent in person

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Charge

[1] Mr Hong faces one charge laid with two alternatives namely:

(a) Misconduct pursuant to s 7(1)(a)(i) and (ii);

Or in the alternative

(b) Unsatisfactory conduct pursuant to s 12(b) and (c) of the Lawyers and Conveyancers Act 2006 ("LCA").

[2] The particulars relied on are set out in Appendix I to this decision.[1]

Background and Procedural History

[3] This case has a lengthy background and procedural history, which can be summarised as follows: In May 2010 Mr Deliu complained to the Lawyers Complaints Service ("LCS") about correspondence Mr Hong had sent to two barristers in Mr Deliu's chambers, and to an instructing solicitor. The correspondence arose out of civil proceedings brought by former clients of Mr Hong, and now represented by the two barristers, in which Mr Hong was named as a respondent. Mr Hong considered the claim entirely misconceived and in his correspondence was attempting to have them withdraw it. Given that some time later the claim was struck out, Mr Hong points to the merits of his arguments. However, it is not the merits that we are asked to assess, but the manner of expressing himself – which included a number of threats and insults.

[4] The two practitioners exchanged heated correspondence and subsequently Mr Hong also complained about Mr Deliu.

[1] Appendix I "Amended Disciplinary Charge laid by the Legal Complaints Review Officer".

[5] In correspondence with the LCS Mr Hong made further statements which form part of the current charges.

[6] Meanwhile, the situation escalated between the two barristers. A counterclaim was filed in the civil proceedings. Mr Deliu brought defamation proceedings against Mr Hong seeking an injunction. This later settled on the basis of undertakings and Mr Hong engaged a private investigator to locate clients Mr Deliu had previously represented. In November 2010, having earlier offered mediation which was declined, the Standards Committee to which the cross-complaints had been referred decided to take no further action on either.[2]

[7] The decision relating to Mr Deliu's conduct rested there, but the cross-complaint against Mr Hong was taken on review by Mr Deliu to the Legal Complaints Review Officer ("LCRO"). That review confirmed the decision of the Standards Committee.

[8] Then, in November 2011, Mr Deliu successfully sought judicial review of the LCRO's decision. In her decision of February 2012, to which we shall later refer, one of the reviewable errors found by Her Honour Winkelmann J was that the LCRO had taken account of Mr Deliu's (complainant's) behaviour as relevant to the complaint about Mr Hong.[3]

[9] Significantly, Her Honour found that, viewed as a whole, there was "ample cause for concern" about Mr Hong's conduct. She held:

> "He engaged in offensive and intemperate correspondence. His conduct could not reasonably been described as trivial, nor the complaint frivolous or vexatious. Nor could it properly be characterised as a dispute "personal to the parties", because it drew others into the dispute, including other lawyers and former clients of both Mr Hong and Mr Deliu, and the District Court. It wasted court resources. It had the potential at least to undermine public confidence in the profession."[4]

[10] Her Honour went on to say:

> "The fact that criticism can also be made of the complainant Mr Deliu is, in this context irrelevant. Although provocative conduct by another practitioner, (and Mr Deliu's conduct was undoubtedly provocative) may be relevant context to

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[2] "… On the grounds that the overall subject matter of the complaint was trivial and the complaint was frivolous and vexatious …" as recorded by Winkelmann J in *Deliu v Hong and The Legal Complaints Review Officer* [2012] NZHC 158 at [2].
[3] Her Honour found other reviewable errors which are not relevant to this decision.
[4] See note 2 at [49].

> conduct, no practitioner is justified in responding to the conduct of another in the way that Mr Hong did. If the Standards Committee felt that Mr Deliu's conduct was roughly equivalent to Mr Hong's, then they should have addressed that in the context of the complaint against him."[5]

[11] The review application was remitted to the LCRO for reconsideration. After a hearing in May 2012 which both Mr Hong and Mr Deliu attended, the LCRO determined, in June 2012, to refer the matter to the Tribunal.

[12] The LCRO (as "prosecutor") preferred one charge of misconduct, laid under s 7(1)(b)(ii). This charge was laid prior to the decision of the full Court in *Orlov.*[6] In that case clarification was provided as to the breadth of circumstances in which a connection could be made to the "provision of regulated services", therefore broadening the circumstances under which s 7(1)(a) could be pleaded. At the time of the first Tribunal hearing in February 2013 a more constrained view of the "provision of regulated services" was held and thus the LCRO had laid the charge under s 7(1)(b) as unrelated to the" provision of regulated services". That section has a high threshold because a Tribunal must consider the conduct to be such as to require a finding that *"… the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer".*

[13] The (previously constituted) Tribunal, while noting breaches of the CCCR,[7] did not consider these reached the level which required a finding Mr Hong was not "fit and proper" or was "otherwise unsuited …".[8]

[14] The (previously constituted) Tribunal appears not to have considered the substitution of the lesser charge of unsatisfactory conduct. It dismissed the misconduct charge.

[15] That decision was, in turn, taken on judicial review, not by the LCRO as prosecutor, but by Mr Deliu as complainant.[9] Thus there appears to have been no discussion about the complainant's standing to bring such proceedings, given that he would not have had status as an appellant (s 253 LCA). This review was heard in

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[5] See note 2 at [50].
[6] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606.
[7] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[8] *Legal Complaints Review Officer v Hong* [2013] NZLCDT 9 at [12], [39], [56] and [64].
[9] The Tribunal and Mr Hong took no active part in this hearing.

February 2015. In her decision of March 2015,[10] Her Honour Andrews J upheld the review on the basis of three reviewable errors:

> "(a) The Tribunal proceeded under a mistake of fact, namely that Mr Hong had never before had a client complaint, in his many years of practice.
>
> (b) The Tribunal was in error of law in failing to exercise, or consider the exercise of its power to amend the charge or add a charge.
>
> (c) The Tribunal erred in failing to consider an alternative charge."

[16] The matter was remitted to this Tribunal for reconsideration (for the seventh time).

[17] On the basis of Her Honour's findings, the LCRO had filed an amended charge, firstly to allege the conduct occurred in the course of "provision of regulated services"; and secondly to provide the Tribunal with the option of a lesser charge, in order that the error found in the previous decision would not be repeated.

[18] Mr Hong objected to the amendments, arguing that the LCRO should not be afforded "a second chance at better prosecution". However given the power accorded to the Tribunal to amend,[11] and having regard to the dicta in *Orlov*[12] and the dicta of Andrews J in the (second) judicial review of these proceedings,[13] we allowed the amendments as necessary and inevitable.

Issues

[19] The issues to be determined in the present matter are:

1. As a preliminary question, as to the admissibility of the practitioner's statements to the LCS and LCRO, is there privilege to be attached to afford a protection against self-incrimination?

2. Are the statements in the Particulars relied upon made in the manner which is "connected with the provision of regulated services"?

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[10] *Deliu v Hong and New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] NZHC 492 at [40].
[11] Regulation 24 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008.
[12] See note 6.
[13] See note 10.

3. Do the statements individually or cumulatively amount to misconduct either as (a) "disgraceful or dishonourable",[14] or (b) comprising a "wilful or reckless contravention" of the LCA or its Rules or Regulations made under it?[15]

4. If not, is the conduct unacceptable as (a) "unbecoming … or unprofessional"[16] or does it (b) consist of "a contravention" of the LCA, its Rules or Regulations?[17]

[20] Definitions and statutory provisions relied upon include the following:

> **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 condition or restriction to which a practising certificate held by a 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;
>
> …
>
> (2) A lawyer or an incorporated law firm is guilty of misconduct if, at a time when he or she or it is providing regulated services, and without the consent of the High Court or of the Disciplinary Tribunal, the lawyer or incorporated law firm knowingly employs, or permits to act as a clerk or otherwise, in relation to the provision of regulated services, any person who, to the knowledge of the lawyer or incorporated law firm,–
>
> (a) is under suspension from practice as a barrister or as a solicitor or as a conveyancing practitioner; or
>
> (b) has had his or her name struck off the roll of barristers and solicitors of the High Court; or

[14] Section 7(1)(a)(i).
[15] Section 7(1)(a)(ii).
[16] Section 12(b).
[17] Section 12(b) and (c).

(c) has had his or her registration as a conveyancing practitioner cancelled by an order made under this Act; or

(d) is disqualified, by an order made under section 242(1)(h), from employment in connection with a practitioner's or incorporated firm's practice.

12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms

In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means –

…

(b) conduct of a lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including –

(i) conduct unbecoming a lawyer or an incorporated law firm; or

(ii) unprofessional conduct; or

(c) conduct consisting of a contravention 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 (not being a contravention that amounts to misconduct under section 7);

4 Fundamental obligations of lawyers

Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:

(a) The obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand;

Conduct and Client Care Rules

2 A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.

…

2.2 A lawyer must not attempt to obstruct, prevent, pervert, or defeat the course of justice.

…

2.7 A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.

…

10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

10.1 A lawyer must treat other lawyers with respect and courtesy.

10.2 A lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter except as authorised in this rule.

…

13.2.1 A lawyer must treat others involved in court processes with respect.

Issue 1

Does privilege arise?

[21] The Tribunal sought supplementary submissions from the parties in relation to this issue and has received an extremely helpful summary of the position from Mr Collins. A number of the particulars relied upon by the LCRO had arisen from communications with the Regulatory Services both LCS and the LCRO and the Tribunal raised the question of whether any privilege might attach to communications pursuant to s 186 of the LCA. That section states:

> "**186 Protection and privileges of witnesses**
>
> (1) Every person has the same privileges in relation to—
>
> (a) the giving of information to a Standards Committee; and
>
> (b) the giving of evidence to, or the answering of questions put by, a Standards Committee; and
>
> (c) the production of papers, documents, records, or things to a Standards Committee—
>
> as witnesses have in a court of law.
>
> (2) In this section, **Standards Committee** includes an investigator and any other person acting on behalf of, or as the delegate of, a Standards Committee."

[22] The protection available "in a court of law" is contained in Part 2, Subpart 8 of the Evidence Act 2006. The relevant provision is s 60:

> **"60 Privilege against self-incrimination**
>
> (1) This section applies if—
>
> (a) a person is (apart from this section) required to provide specific information—

(i) in the course of a proceeding; or

(ii) by a person exercising a statutory power or duty; or

(iii) by a Police officer or other person holding a public office in the course of an investigation into a criminal offence or possible criminal offence; and

(b) the information would, if so provided, be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment.

(2) The person—

(a) has a privilege in respect of the information and cannot be required to provide it; and

(b) cannot be prosecuted or penalised for refusing or failing to provide the information, whether or not the person claimed the privilege when the person refused or failed to provide the information.

(3) Subsection (2) has effect—

(a) unless an enactment removes the privilege against self-incrimination either expressly or by necessary implication; and

(b) to the extent that an enactment does not expressly or by necessary implication remove the privilege against self-incrimination.

…"

[23] In turn "self-incrimination" is defined in s 4 of the Evidence Act as "…*the provision by a person of information that could reasonably lead to, or increase the likelihood of, the prosecution of that person for a criminal offence."*

[24] Mr Hong's submissions appeared to suggest he would be immune from any disciplinary charge arising out of communications in this manner. We accept the submission of Mr Collins that the effect of the privilege is an entitlement to refuse to disclose information rather than a cloak of immunity once a disclosure has been made. That is confirmed by s 53(2). In any event however we accept the submission that the privilege cannot apply since it did not render Mr Hong liable to prosecution for a criminal offence.

[25] Mr Collins goes on to point out that there is a further reason why privilege against self-incrimination ought not to apply to a lawyer's correspondence with regulatory bodies, because that would be inconsistent with s 262 which creates an

offence of wilful obstruction, hindering or resisting such regulatory bodies. Mr Collins points out that s 60 of the Evidence Act would be subject to s 262 of the LCA since it is "*an enactment [which] removes the privilege of self-incrimination expressly or by necessary implication*", where this relates to obstruct of communications (s 60(3)(a) Evidence Act).

[26] Mr Hong filed memoranda which were somewhat discursive and at times irrelevant. His second memorandum of 3 July 2015 relates to double jeopardy and judicial fraud. Mr Hong appeared to be under the misconception that facing amended charges at the rehearing of this disciplinary proceeding somehow presented a double jeopardy situation where he could plead *autrefois acquit*. This completely misconceives the situation where the earlier Tribunal ruling has been set aside on judicial review by the High Court and a further hearing ordered.

[27] In summary we consider that Mr Collins' arguments are unassailable and that there is no difficulty with the reliance on the particulars which have been pleaded by the LCRO.

Issue 2

Were the communications in connection with regulated services?

[28] We consider that the statements made by Mr Hong were undoubtedly connected with the provision of Legal Services, that is that they are properly considered within the context of professional rather than personal misconduct pursuant to s 7(1)(a). We refer to the broadening of this particular category by the decision of the Full court in *Orlov.*[18] In that decision the Court affirmed the Tribunal's conclusion that ss 7(1)(a) and (1)(b) must cover all conduct. "*There cannot be a gap*".[19]

[29] At paragraph [107] of the decision Their Honours discuss the structure of the definition and say:

> "We think this structure supports giving a broad scope to professional misconduct with a consequent limiting of personal misconduct to situations clearly outside the work environment."

[18] See note 6.
[19] See note 6 at [102].

[30] In analysing whether the behaviour in the *Orlov* matter fell within the professional environment Their Honours found that the lawyer's behaviour *"… directly stems from litigation and puts what happened in litigation squarely in issue.*"[20]

[31] They further held that the conduct should only be considered under s 7(1)(b)(i) if it is *"… unconnected with the provision of legal services*".[21]

[32] This approach has recently been affirmed in a further High Court decision in *A v Canterbury Westland Standards Committee No. 2 of the New Zealand Law Society*[22]. At paragraph [57] His Honour Venning J held:

> "… I prefer to follow the reasoning of the full court in *Orlov* and consider that it applies in this case to the actions of the appellant. Section 7 of the Act deals with a lawyer's conduct in two aspects, first their professional conduct and second, their personal conduct. All conduct must either be in the course of one or the other. There can be no gap or lacuna."

[33] And at paragraph [60]:

> "There is a further point. While s 7(1)(a) refers to conduct "that occurs at a time when the lawyer is providing regulated services" it does not require there to be a subsisting lawyer/client relationship with a particular client. It could also obviously relate to the practitioner's actions in seeking the recovery of a fee after the services have been terminated."
>
> …
>
> [61] The emphasis in s 7(1)(b)(ii) is on conduct which is unconnected with regulated services. It cannot be said that the appellant's conduct in this case, which was directed at obtaining payment for the legal (and other) work he had done for Mr G and J was unconnected with the provision by him of legal services. Even if the relationship with Mr G and J had been terminated in that the appellant was no longer instructed by them, Ms Davenport submitted the appellant's conduct in this case arose out of the lawyer/client relationship with Mr G and J. Further, he was still engaged in the provision of regulated services to others, even if not to Mr G and J.
>
> [62] I am satisfied that the conduct referred to in the charges before the Tribunal falls to be considered under s 7(1)(a) as connected to, and arising out of the provision of regulated services."

[34] In that matter the conduct complained of was, as in the present matter, comprised of communications with new lawyers for a previous client and with the former client directly.

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[20] See note 6 at [110].
[21] See note 6 at [112].
[22] [2015] NZHC 1896.

[35] Mr Hong's assertions in the correspondence at issue, directly arose out of the services provided by him to his former clients. Indeed the litigation about which he complained alleged negligence in relation to those services. The answer to this Issue must be "Yes".

Issue 3

Do the statements represent disgraceful or dishonourable conduct?

[36] Nine pieces of correspondence are relied on. These are repeated, at least in excerpt form, by the charges and particulars annexed in Appendix 1.

[37] **The letter of 5 May 2010** was to the instructing solicitor (of the complaining barrister, Mr Deliu). We consider that this letter contained inappropriate threats which breached Rule 2.7, Rule 10, and Rule 13.2.1. It is clear that Mr Hong intended to frighten the practitioners into withdrawing the claim against him by the combination of threats, including a threat to complain to the Law Society. In doing so, he breached his obligations to treat fellow practitioners with respect. This is aggravated by the fact that the claim is that of the client, but the threats largely are towards the barristers personally, thus potentially creating a conflict of interest between the barristers and their clients.

[38] **In the email of 13 May 2010** (also to the instructing solicitor) Mr Hong, accused a fellow practitioner of character assassination and made a thinly veiled threat of how he would deal with that later. This correspondence at the very least breached proper standards of courtesy and professionalism.

[39] The **third** correspondence, **a letter dated 13 May 2010** to the instructing solicitor, Mr Hong made allegations of incompetence and made inappropriate comments referring to professional indemnity insurance, which carried a threatening tone. After recording his views of the weakness of the plaintiff's case Mr Hong then made the completely improper comment "*if nothing is rectified and the action took the turn as I intimated it might then at the conclusion thereof, I will approach the clients to further investigate the matter and their possible remedies with them (sic)*."

[40] Of themselves these last two pieces of correspondence might not be seen as "disgraceful" but are certainly below the proper standards of courtesy and professionalism expected, and breach the Rules already cited. Mr Deliu considers this correspondence damaged his ongoing relationship with his instructing solicitor.

[41] The **fourth** communication, **a letter of 23 May 2010** to the LCS, Mr Hong continued his tirade against the barristers who had issued the suit against him. He accused them of blatant errors, incompetence in the field of law, improper motivation in complaining about him, using such derogatory terms as "half fledged lawyers" and "amateurs".

[42] The further serious conduct emerging out of this communication is the practitioner's threat that he would contact his former clients directly to *"advise them of their right to have another senior counsel look into addressing these concerns with the New Zealand Law Society".* A practitioner of Mr Hong's experience must know the impropriety in approaching another lawyer's client, particularly in a situation such as this when the client is suing the practitioner himself. Indeed in the course of this response to the LCS he stated his knowledge of that rule.[23]

[43] Certainly, had the practitioner carried through on this threat, it would itself have been regarded as "disgraceful and dishonourable" conduct. The threat to do so is only marginally less serious. It is also worrying that the practitioner has so little insight into these matters that he would be prepared to make such a suggestion to one of the regulatory bodies of his profession.

[44] The **fifth** correspondence was with the LCS on **25 May 2010** in which Mr Hong proposed an extraordinary arrangement. He suggested the portion of the civil action against him would be "*put on hold*" while he took control of the plaintiff's case, assisting the junior barristers, stating that he would not deal with Mr Deliu, who was "*a pure waste of my time*".

[45] This suggestion also shows a troubling lack of insight into his professional obligations in relation to his former clients who, rightly or wrongly, thought they had a cause of action against him; and in respect of his colleagues who once again he treated with discourtesy and disrespect.

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[23] See bundle of documents, page 49, at [14.4].

[46] Again, while this suggestion might not of itself be seen as "disgraceful or dishonourable", it is highly improper and will need to be viewed along with the other proven particulars.

[47] Rather than calming down and reflecting on his position, Mr Hong's suggestions escalated even further in the **sixth** correspondence, his **email to the LCS of 9 June 2010**. In this email he recorded that he had "*reviewed Mr Deliu's performance in Court pursuant to 57 judgments of (sic) which he acted as Counsel*". He went on to comment "*it is quite clear to me that Mr Deliu never accepts what anyone says, even learned Justices, to the grave detriment of his clients …"*. Mr Hong then went on to propose a wager relating to the civil proceedings involving his former clients:

> "..I will put up this 'put up' or 'shut up' proposal.
>
> I invite Mr Deliu to rise to this case against me as the (plaintiffs) counsel. We both agree to a contingent fee. The one who loses pays that contingent fee to the other party as agreed award of costs. Deliu and his Amicus Chamber counsels (sic) do not charge the (plaintiffs) at all. No costs need be sought. I nominate $30,000 plus GST. I have a counsel in mind already who was admitted in 2003. I am prepared to go as high a contingent fee as Mr Deliu has funds for … this will ensure as to the action against me the (plaintiffs) could not be any worse off and would only be better off, the pit will be between counsels and practitioners and Mr Deliu and his counsels will not be able to feed on such a vexatious claim. He will do so now at his own cost."

[48] Mr Hong submitted that his stated intention was to avoid costs for his former clients and to ensure their interests were protected. We consider it is still a flagrant breach of Rules 10 and 10.1. This very submission was discussed in a decision of the LCRO[24] who stated:

> "Whilst a duty of confidence continues after a retainer has been terminated a lawyer's fiduciary duty to protect his or her clients' interests ceases once a retainer has been terminated, particularly where new counsel have been instructed. Such a perceived duty cannot be used to justify interference in the relationship between the former client and the new lawyer."

[49] Despite Mr Hong's protestations about his concerns for the plaintiffs his 'wager' proposal seemed to focus on the battle between the practitioners rather than the duty to the client to always put their interests first. Indeed having proposed the wager Mr Hong himself said "*this proposal is not ideal as the (plaintiffs) will lose out against the other defendants and bar their remedies, such as restitution*."

[24] LCRO 90/2011 UF v OU at [31].

[50] The Tribunal considers that this piece of communication, of itself, reaches the level of "disgraceful and dishonourable" conduct as "viewed by lawyers of good standing".

[51] The **seventh** piece of correspondence relied upon is the **letter of 17 June 2010** to the LCS lodging a cross-complaint about Mr Deliu. This complaint appears to have been precipitated by a telephone message from Mr Deliu to Mr Hong in which Mr Deliu threatens to sue him and refers to him as "*just another Kiwi lawyer*". He threatens to seek punitive damages. Mr Deliu had made provocative comments,[25] referring to having just won a defamation judgment "*… another Kiwi … Chinese … a wannabe lawyer …*". Mr Deliu had gone on to say that he had:

> "… gone to war with (two of the biggest firms in Auckland) ... with Judges of New Zealand, I am really not afraid of any of you, I can take you all on, because frankly … you are not competent lawyers as a group … eh … so anyway, feel free to make any complaint you want to but first, … eh… know that there will be retaliation for what you do, I am not going to sit idly by and let you do what you've been doing and there will be consequences and you will be sorry for what you've done in the end and I am leaving this personal word on purpose, which you can send Law Society (sic) cause I told them how corrupt they are too".

And

> "… Now it is time to pay and you will see how you will pay".

[52] While, with respect, we agree with Her Honour's assessment of these comments as being provocative and worrying to Mr Hong, we accept the submission of Mr Collins that a lawyer is expected, in the face of such provocation, to act with dignified restraint. In this letter Mr Hong thoroughly demonstrated his discourtesy and disrespect for a fellow practitioner, referring to him as holding racist inclinations, as "*mentally unstable*" and that he "*had shown such thuggery towards others*". Further, Mr Hong went on to make the threatening comment that should Mr Deliu *"… be stupid enough to try, either the defamation action or anything physical, he will surely end up at the sorry end of the stick …".*

[53] While Mr Hong has, in his evidence and submissions, sought to have this term read in a more neutral manner, it is clearly a physical threat and as such, is totally unacceptable on the part of a member of the profession.

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[25] As referred to by Her Honour Winkelmann J in the Judicial Review Proceedings, see note 2.

[54] The **next** correspondence to the **LCS on 15 September 2010** also repeated physical threats. He refers to comments Mr Deliu had made about being fearful of Mr Hong's two dogs in the following manner:

> "Yes, Mr Deliu better be concerned about the safety should be attempt to approach my office or me (having been warned previously not to do so [see below]) but it should not be my two girls that he should be aware of, it should be the "sorry end of my stick"!"

[55] Again Mr Hong referred to Mr Deliu as mentally unstable and having threatened himself and others and went on to say:

> "This warning from me to him is therefore to put it on record that I am very concerned and they strike pre-emptively on his approach to protect myself!
>
> I am certainly not going to let him come close enough to jump me!"

[56] In submissions Mr Collins described this particular communication as the "nadir" of the communications. We accept that submission and consider this behaviour to be seriously reprehensible and again, at the "disgraceful and dishonourable" level.

[57] The **final communication** relied upon is to be found in Mr Hong's submission to the **LCRO on 24 May 2012** in which he purported to describe some of his unorthodox practices to achieve good outcomes for clients. In doing so, he revealed apparently knowingly, but without sensible insight, his own unethical practices on at least the occasion described.

[58] Mr Hong has been at pains to persuade the Tribunal that his motives for acting as he did, in response to the service of civil proceedings upon him, were purely to assist his former clients. Even were we to accept that, notwithstanding the authority referred to in paragraph [48] above, it does not excuse unprofessional conduct of any sort and certainly not at this level.

[59] As to context, and the (serious) provocation provided to Mr Hong by Mr Deliu, that may be more relevant at a penalty stage. Legal practice is stressful and personal attacks are difficult to cope with but cannot justify a practitioner departing so far from the professional standards to which he has agreed and must be held to, as a obligation imposed against the benefits of membership of a professional organisation which carries considerable privileges.

[60] Mr Collins cited to us a number of cases where scurrilous communications have been held to be misconduct, in particular the comments of the Full Court in *Orlov*:[26]

> "Looking at the statements overall, we consider that allegations of ethnic discrimination, of discrimination based on foreign nationality, of acting out of spite and a desire to harm counsel personally, all made without any suggested foundation, would rightly be regarded by lawyers of good standing as dishonourable and disgraceful, and as falling outside the protection of freedom of expression."

And later:[27]

> "… The excessive nature of the statements show that by the time of writing this complaint, Mr Orlov had lost any sense of judgment or perspective."

[61] We were also referred to the *Dorbu*[28] decision. In this matter the Tribunal found that Mr Dorbu's:

> "… Inability to treat fellow practitioners with respect and courtesy is a clear breach of the rules of professional conduct and again demonstrates Mr Dorbu's inability to understand the fundamentals which underpin the operation of the profession and distinguish those who practise in it from other members of the public".

[62] Mr Collins also referred us to the leading text on professional responsibility, *Dal Pont*[29] and in particular the following extract:

> "Any personal dispute or antipathy between the lawyers should not be allowed to effect their relations in their professional work. While lawyers are not expected to behave like "verbal eunuchs" in the words of the Canadian Supreme Court, their profession constrains them to respond to provocation with "dignified restraint".[30]
>
> As members of a profession, lawyers are expected to suppress what may be natural negative human emotions in their professional dealings with other lawyers. This is not necessarily easy, especially as clients may expect lawyers to share the clients' personal acrimony to the opponent that, for them, includes the opponent's lawyer. Clients may be dissatisfied and displeased with anything they perceive as an attitude not unfavourable to the opponent. Yet given the importance of courtesy, honesty and respect in lawyers' professional relations inter se to the proper and efficient administration of justice, client acrimony presents no justification for animosity towards an opposing lawyer …"

[63] We have not been persuaded by any submission made by Mr Hong that there could be any justification for his actions. We consider that he has failed in his professional duty and, when taken cumulatively, there is no doubt that the conduct

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[26] See note 6 at paragraph [157].
[27] At [161].
[28] *New Zealand Law Society v Dorbu* [2011] NZLCDT 24 at [35].
[29] *Lawyers' Professional Responsibility v Dal Pont* 5th ed.
[30] This is a reference to the decision in *Dore v Barreau du Quebec* [2012] SCC 12 at [68] per Abella J.

reaches the standard of misconduct. The correspondence was over a period of time and therefore cannot be excused as a momentary lapse or overreaction. We have also identified the particular pieces of correspondence, which by themselves amount to "disgraceful or dishonourable" conduct. Taken cumulatively the fact that there are nine pieces of what can be described as scurrilous communications, aggravates those individual instances. We find misconduct established, as defined in s 7(1)(a)(i).

[64] Should we be wrong in the assessment of "disgraceful and dishonourable", we consider that the LCRO has established, in the alternative, a "reckless breach" of the regulations cited.

[65] We reiterate the features which elevate this conduct from a mere dispute between practitioners are, as submitted by Mr Collins:

(a) The persistent personal attacks.
(b) The threats of menace.
(c) The allegations of racism and mental illness.
(d) The descent into unprofessionalism in the suggestion of a wager on the plaintiffs case.

[66] We note, with respect, that the view we have reached as to the level of seriousness, accords with the view of Her Honour Winkelmann J, who found:[31]

> "[51] The behaviour which is the subject of the complaint against Mr Hong sheds a troubling light on his conduct and judgment as a practitioner, but neither the Standards Committee nor the Review Officer turned their minds to this. It seems that both the Committee and the Review Officer lost their way in considering this complaint because of the dim view they took of the conduct of Mr Deliu. The disciplinary functions of the Law Society are exercised not just for the benefit of the complainant, but also for the benefit of the public and the wider profession.

And at:

> [52] The Law Society has an important role in setting standards for our profession. Spats between practitioners such as this, which some may see as risible, others as deplorable, reflect not only on the standing of those practitioners, but also upon the standing of the profession in general. In this particular case the administration of justice has been adversely affected through wasted court time. Mr Hong did not limit himself to trading verbal blows, but rather involved the professional body, and the Court. On his own account he has approached others to collect information and evidence against Mr Deliu."

[31] See note 2.

Issue 4

[67] For the reasons stated above Issue 4 does not require consideration.

Directions

1. The LCRO is to file submissions on penalty within 21 days of the release of this decision.

2. The practitioner is to file submissions on penalty within a further 21 days.

3. The Tribunal Case Officer is to fix a date for a half day penalty hearing after 30 September 2015.

DATED at AUCKLAND this 19th day of August 2015

Judge D F Clarkson
Chair

Appendix I

Amended Disciplinary Charge laid by the Legal Complaints Review Officer

The Legal Complaints Review Officer charges **Boon Gunn Hong** of Auckland, ("the Practitioner") with misconduct under s.7(1)(a)(i)&(ii) and 241(a) of the Lawyers and Conveyancers Act 2006 ("the Act").

In the alternative:

The Legal Complaints Review Officer charges the Practitioner with unsatisfactory conduct under s.12(b) & (c) and 241(b) of the Act.

1. **Particulars – misconduct or, in the alternative, unsatisfactory conduct**

1.1 In the course of correspondence and in written submissions (specified in Part 2 Particulars below) he made statements and allegations constituting misconduct in the manner asserted or, in the alternative, unsatisfactory conduct.

1.2 The statements and allegations were contrary to provisions of the Act and/or the *Conduct and Client Care Rules*, including:

(a) Section 4(a) of the Act and Rule 2, by failing in his obligation to facilitate the administration of justice;

(b) Rule 2.2, by obstructing, preventing, or defeating the course of justice;

(c) Rule 2.7, by making threats to fellow lawyers that he would make allegations against them, for an improper purpose;

(d) Rules 10 and 10.1, by failing to promote and maintain proper standards of professionalism and by treating fellow lawyers with disrespect and discourtesy;

(e) Threatening to engage in conduct which, if carried out, would have breached Rule 10.2; and

(f) Rule 13.2.1, by failing to treat others in Court processes with respect.

2. **Particulars – correspondence and submissions**

2.1 The correspondence and submissions described in these particulars arose in circumstances where:

(a) The Practitioner was a defendant personally in civil proceedings before the District Court at Auckland ("the proceedings") in which the plaintiffs were his former clients;

(b) The persons with whom he communicated, or about whom he communicated, included the solicitor acting for the plaintiffs in the proceedings ("the Solicitor"), the Barrister instructed to act for the plaintiffs in the proceedings,

Francis Catalin Deliu ("the Barrister"), and certain junior barristers practising at the same chambers as the Barrister ("the Junior Barristers"); and

(c) The Barrister had made a conduct complaint against the Practitioner, to the Lawyers' Complaints Service at Auckland.

2.2 In a letter dated 5 May 2010 to the Solicitor, the Practitioner said:

> "*As I am most concerned with the impact of the action on my good reputation, I am giving you the opportunity to have withdrawn immediately the action against me, failing which I will:-*
>
> *(a) File a strike out action;*
>
> *(b) File a complaint with the NZ Law Society on the ground that you are not competent to undertake this litigation for the client;*
>
> *(c) On the strike out, seek for full costs against you (rather than the clients)*
>
> *(d) File defamatory action and an action in tort against you on the grounds that as the clients' counsels, you ought to be aware such frivolous action against me will cause a loss of my good reputation and name.*"

2.3 In an email dated 13 May 2010 to the Solicitor, he said:

> "*Am glad you adhere to this cordiality among Practitioners. Obviously if none is shown towards me by a Practitioner I will not return that. My guess is one fellow at your end, exercised character assassination of me with my clients when he had an opportunistic meeting with them. At the conclusion of this action, it is my intent to determine whether my guess is correct and to deal with that accordingly.*
> *Note this advice, from a Practitioner with ample of years experience. You better get what you said you could for the clients or they will surely turn on you.*"

2.4 In a letter dated 13 May 2010 to the Solicitor he made allegations of incompetence against the Barrister and against the Junior Barristers, saying:

> "*I hope that you have checked that the barristers you engaged carry sufficient PI insurance.*
>
> *Do not for a moment think that we could just take on anything, collect the fees and if anything goes wrong, that we can rely on PI insurance.*
>
> *Once a claim is made and paid out, you will actually be bearing the brunt of it by way of much higher premiums.*
>
> *Do not also think also that by trading through a limited liability company (and if without insurance) that one can avoid paying up, by winding up the company.*"

2.5 In a letter dated 23 May 2010 to the Lawyers' Complaints Service at Auckland, he expressed himself in abusive and unprofessional terms concerning the Barrister and the Junior Barristers, saying that:

(a) The drafting of pleadings by the Barrister and the Junior Barristers was characterised by "*…**blatant** mistakes in material facts…which in my view was*

due to lack of due care and skill and their lack of courtesy to a fellow Practitioner";

(b) The Barrister and the Junior Barristers "*...are not competent in the areas and fields of the law that have an impact on the issues as raised in this action*";

(c) The Barrister was improperly motivated in complaining to the Lawyers' Complaints Service because the complaint was "*An attempt to silence me*" and "*An attempt to prevent me from communicating with* [the Junior Barristers, and their instructing solicitor]*...*";

(d) The Junior Barristers may be treated as "*half fledged lawyers*";

(e) The Barrister and the Junior Barristers lacked "*in-depth knowledge of conveyancing matters and legal precedents*" and were acting outside their competency;

(f) The Barrister and the Junior Barristers had inadvertently and incompetently breached their clients' privileges;

(g) The Barrister and the Junior Barristers "*...have no idea what a fiduciary duty is*";

(h) Referring to pleadings prepared by the Barrister and the Junior Barristers, "*...the general consensus will be that they have been done by amateurs*";

(i) The Barrister and the Junior Barristers had not complied with the intervention rule and were failing in their professional responsibilities because they "*...wanted to run this litigation free of any scrutiny* [by the instructing solicitor]"; and

(j) He [the Practitioner] would contact the plaintiffs directly, being the clients of the Solicitor, "*...if these Counsels proceed with the action in its present form for the* [plaintiffs] *and disaster struck, I intend to seek out the* [plaintiffs] *and advise them of their right to have another senior Counsel look into addressing these concerns with the NZ Law Society*".

2.6 In an email to the Lawyers' Complaints Service at Auckland on 25 May 2010 he proposed an arrangement in which the complaint would be "*put on hold*", while he took control of the plaintiffs' case in the proceeding (after the claim against him had been put on hold), that he would work "*behind the scenes*", that the Junior Barristers would consult with him, and that he would not communicate with the Barrister "*...whom in my view is a pure waste of my time*".

2.7 In an email to the Lawyers' Complaints Service at Auckland on 9 June 2010 he made comments disparaging of the Barrister and proposed the resolution of a conduct complaint by engaging in a form of wager with the Barrister:

> "*a. I have reviewed* [Barrister's] *performance in Court pursuant to 57 judgments of which he acted as Counsel.*

b. *It is quite clear to me* [Barrister] *never accepts what anyone says, even learned Justices, to grave detriment of his clients. …*

h. *I invite* [Barrister] *to ride this case against me as the* [plaintiffs'] *counsel. We both agree to a contingent fee. The one who loses pays that contingent fee to the other party as agreed award of costs.* [Barrister] *and his…Chamber counsels do not charge the* [plaintiffs] *at all. No costs need to be sought. I nominate $30,000.00 plus GST. I have a counsel in mind already who was admitted in 2003. I am prepared to go as high a contingent fee as* [Barrister] *has funds for.*

i. *This will ensure as to the action against me the* [plaintiffs] *could not be any worse off and would only be better off, the pit will be between counsels and Practitioners and* [Barrister] *and his counsels will not be able to feed on such a vexatious claim. He will do so now at his own cost*".

2.8 In a letter dated 17 June 2010 to the Lawyers' Complaints Service at Auckland he made allegations about the Barrister, namely that he (the Barrister):

(a) "*Holds utter contempt for our Judges*";

(b) "*Holds utter contempt for our Law Society*";

(c) "*Holds utter contempt for the rest of us, his fellow Kiwi colleagues as he reckoned he is the best and the rest of us incompetent*";

(d) "*Has no respect of any of us, legal Practitioners and showed us no courtesy whatsoever (which makes his complaint of my being disrespectful and discourteous ludicrous and farcical)*";

(e) "*By reference to Kiwis and Chinese, holds racists inclinations*";

(f) "*…had shown such thuggery towards others*";

(g) Is "*mentally unstable*";

(h) "*…should* [Barrister] *be stupid enough to try, either the defamation action or anything physical, he will surely end up at the sorry end of the stick…*";

(i) Routinely breached fiduciary duties to his clients and that he "*…instigated actions that were clearly not in the interest of his clients*";

(j) Routinely breached his duties to the Court and intentionally misled the Court; and

(k) Routinely breached the intervention rule.

2.9 In a letter to the Lawyers' Complaints Service at Auckland on 15 September 2010 he made threats of menace and physical violence concerning the Barrister:

"*As to* [Barrister's] *comments on my two Rottweilers and* [Barrister's] *worry of his and his staff's safety, I have to add these:-*

One is a Border Collie and the other is a Boxer (my loyal gals).

Yes, [Barrister] *better be concerned about this safety should he attempt to approach my office or me (having been warned previously not to do so…but it should not be my two gals that he should be beware off, it should be the 'sorry end of my stick'!*

I am reminded that [Barrister] *had previously made a veiled physical threat against me and I have concluded that he is mentally unstable by that threat he made against me and by the intimidating behaviour against others in a Law Society meeting as reported of him in the news.*

This warning from me to him is therefore to put it on record that I am very concerned and may strike pre-emptively on his approach to protect myself!

I certainly am not going to let him come close enough to jump me!"

2.10 In written submissions to the Legal Complaints Review Officer, for the purpose of a review hearing on 24 May 2012, he acknowledged his own unethical practises, purportedly justified by achieving results for his clients:

"*I **attach**…a most **unorthodox** memorandum I filed with the Tribunal and yes I decided to take some risks on this case too (1) continuing to act for the 5 client Practitioners despite objections from opposition counsels and (2) stated in my view these counsels acted in bad faith, all in the interest of protecting my clients particularly one who is elderly and in ill-health.*

As it turned out all went good, opposition counsels did not file complaints against me [I had perceived the risks they might] and I finally managed to have this leaky claim action against these five client Practitioners discontinued."