NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 3
LCDT 018/13

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of **HEVAL HYLAN**
Lawyer, of Auckland

CHAIR
Mr D Mackenzie

MEMBERS OF TRIBUNAL
Mr A Lamont
Mr C Rickit
Mr P Shaw
Mr S Walker

HEARING at Auckland on 11 December 2013

APPEARANCES
Mr C Morris and Ms Chandra for the Standards Committee
Mr C Henry for Mr Hylan

RESERVED DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] Mr Hylan faced a charge of misconduct laid by Auckland Standards Committee No. 5 ("the SC") in July 2013. In the alternative Mr Hylan was charged with unsatisfactory conduct, or negligence or incompetence of such a degree as to reflect on his fitness to practise or as to bring his profession into disrepute.

[2] The charge arose from Mr Hylan's conduct regarding a client, Mrs S. It was alleged that Mr Hylan had been asked by Mrs S to certify a document, entitled "*Separation, Parenting, and Maintenance Agreement"* ("the Agreement"). The Agreement did not accurately portray the position regarding Mrs S's matrimonial affairs. Mr Hylan was said to have certified the Agreement as requested, knowing that it did not accurately reflect the true position of the parties to the Agreement.

[3] The misconduct charge arose from the allegation made against Mr Hylan that at the time he certified the Agreement he knew:

(a) the contents of the Agreement were false, in that contrary to what the Agreement said the parties (Mrs S and her husband) were not separated and were jointly caring for their children;

(b) Mrs S was being forced to sign the Agreement by Mr S; and,

(c) the Agreement was needed in order to support a visa application to Immigration New Zealand ("INZ") for a person said to be Mr S's "girlfriend".

[4] The first alternative charge, of unsatisfactory conduct, alleged that Mr Hylan certified the Agreement when he was aware Mrs S was under duress and was being coerced by her husband to sign. The SC position was that Mr Hylan had a duty to

refuse to certify the Agreement in those circumstances, and his failure to do so constituted unsatisfactory conduct.

[5] The second alternative charge, of negligence or incompetence, relied on the same allegations as in the first alternative charge, but added a further element, relating to Mr Hylan's failure to satisfy himself as to the truth of the matters covered by his certificate.

[6] In his required regulatory response[1] Mr Hylan denied the charge of misconduct. He also denied the second alternative charge, negligence or incompetence, but admitted the first alternative charge of unsatisfactory conduct.

[7] Mr Hylan said in that response that he had not been asked by Mrs S to "*certify a document*". He said he had been asked to "*certify that he had provided her with independent legal advice about the document and its implications."*

[8] He also said he had not "*certified the agreement by signing the same",* but had "*signed the document to confirm that he had provided to* (Mrs S) *independent legal advice about it and its implications*."

Amendment of Charge

[9] By an application dated 25 October 2013, the SC sought leave to amend the misconduct charge, and the first and second alternative charges.[2] This application was heard and determined by the Tribunal at the commencement of the substantive hearing of the charge on 11 December 2013.

[10] No amendment was sought regarding the form of the misconduct charge itself, but some of the particulars supporting the charge were to be varied.

[11] An amendment was sought to the particulars of the misconduct charge to address the claim by Mr Hylan to the effect that he had not certified the Agreement

[1] Regulation 7 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008.
[2] The specific detail of the amendments is set out in the revised charge document dated 25 October 2013 filed with the Tribunal.

by signing it, but had signed the Agreement to confirm that he had provided independent legal advice about the Agreement and its implications.

[12] The original misconduct charge had noted in the particulars that "*Mr Hylan certified the agreement by signing the same*".

[13] The amendment proposed by the SC regarding this particular was to the effect that:

(a) the Agreement provided an attestation clause for a solicitor to witness execution of the Agreement and a provision for the solicitor to certify that independent advice as to the Agreement and the effect and implications of the Agreement had been given; and

(b) Mr Hylan witnessed Mrs S's signature to the Agreement and completed the associated certification.

[14] As a further amendment in respect of the particulars of the misconduct, the SC proposed the addition of excerpts from a letter dated 23 January 2013 from Mr Hylan to the New Zealand Law Society.[3]

[15] These excerpts related to Mr Hylan confirming he had been told by Mrs S at the time he signed the Agreement that Mr S wanted her help to "…*bring his new girlfriend to NZ…"*;[4] that Mrs S and her husband were not separated, were living together, and were caring for their children together;[5] that he had advised Mrs S not to sign the Agreement as it would mislead INZ;[6] and that Mrs S was being coerced into signing the Agreement.[7]

[3] Exhibit CLP 7 to the affidavit of Chloe Longdin-Prisk dated 16 July 2013 at pages 023 – 028 of the Charge Bundle.
[4] Ibid at paragraph 4 of the letter.
[5] Ibid at paragraph 5 of the letter.
[6] Ibid at paragraph 11 of the letter.
[7] Ibid at paragraphs 3 and 7 of the letter.

[16] The other amendment proposed to the particulars of the misconduct charge related to the use of the Agreement. The original particulars of this charge referred to Mr Hylan's alleged knowledge that:

(a) the Agreement falsely represented Mr and Mrs S's matrimonial status and arrangements;

(b) Mrs S had been forced to sign the Agreement by Mr S; and,

(c) that the Agreement was needed to support Mr S's girlfriend's visa application to INZ.

[17] The SC wished to add to the last particular, (c), that such use of the Agreement to support the visa application to INZ "*would result in misleading* (INZ)".

[18] So far as the amendments relating to the execution of the Agreement were concerned, the amendment simply added particulars which were drawn from Mr Hylan's statements contained in his regulatory response the SC said. Mr Hylan had raised an issue regarding the Agreement being signed by him, saying he did not certify the Agreement as alleged, but witnessed Mrs S's signature and gave a certificate as to independent advice. His position was that he had not certified the Agreement as had been noted in the original particulars. The amended particulars were to clarify the issue. The amendment alleged that Mr Hylan witnessed the Agreement and provided a certificate as to independent advice, rather than that he certified the Agreement by signing it. There was nothing of substance in the issue the SC submitted.

[19] In respect of the excerpts from Mr Hylan's letter to the Law Society of 23 January 2013, the SC noted that all these added were commentary previously provided by Mr Hylan about some factual matters and they reflected the allegations contained in the original particulars.

[20] So far as the addition of a reference to misleading INZ was concerned, the SC said that the misconduct charge as originally filed was based on particulars which

alleged Mr Hylan knew at the relevant time that the Agreement was false and that it was to be submitted to INZ. The SC submitted including in the particulars that this would result in misleading to INZ did not raise a new element.

[21] The SC also made the point that the fact of the Agreement being likely to mislead INZ had been noted by Mr Hylan in his advice to Mrs S at the time the Agreement was signed, as noted above regarding his letter to the Law Society of 23 January 2013.[8]

[22] The SC submitted that the amendments were inconsequential, did not add any new element, and largely reflected Mr Hylan's own views as recorded by him in his statutory response and in his letter to the Law Society.

[23] In respect of the first alternative charge, unsatisfactory conduct, the SC wished to add reference in the charge to the section of the Lawyers and Conveyancers Act 2006 it said was applicable (s 12(a)), and it also wished to specify the rule in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 it said the conduct had breached (r 2).

[24] The same matters as the SC proposed to add to the particulars of the misconduct charge regarding the issue of witnessing Mrs S's signature to the Agreement and completing a certificate regarding independent advice, as distinct from certifying the Agreement by signing it, were proposed to be added to the particulars of the first alternative charge.

[25] To reflect this the duty Mr Hylan was alleged to have breached was proposed to be varied from "*a duty as a practitioner to refuse to certify the agreement",* as set out in the original particulars, to "*a duty as a practitioner to refuse to complete the agreement by witnessing Mrs S's signature, and certifying matters as he did certify."*

[26] The SC also proposed that the particulars of this alternative charge be amended to allege that Mr Hylan ought to have known that the Agreement was to be used to mislead INZ. Excerpts from Mr Hylan's letter of 23 January 2013 were

[8] Above, n 6.

proposed to be added to the particulars as part of this amendment. Those excerpts to be added noted that:

(a) Mr S had threatened Mrs S and forced her to sign the Agreement because he needed it to help bring his *"second wife to New Zealand"*;[9]

(b) it was clear to Mr Hylan at the time that Mrs S was signing under duress, and "…*was very much under the control of her husband*…";[10] and,

(c) Mr Hylan had advised her not to sign the Agreement as *"this will mislead INZ authorities"*, but Mrs S had insisted she sign even though acknowledging to Mr Hylan, regarding her matrimonial status, that "*It is true. We are not separated."*[11]

[27] In respect of the second alternative charge, of negligence or incompetence, the SC proposed that the reference to the relevant section of the Lawyers and Conveyancers Act 2006 which dealt with the negligence or incompetence alleged be noted. Accordingly it wished to add "(*Section 241(c) of the Act*)" to the end of the recital of the charge.

[28] The SC also proposed similar amendments as recited above in respect of expanding the particulars of the first alternative charge of unsatisfactory conduct relating to the issue of witnessing execution of the Agreement and certifying independent advice rather than certifying the Agreement. It also proposed the addition of the same excerpts from Mr Hylan's letter to the Law Society as were noted in paragraph [26] above.

[29] The SC proposed a consequential amendment regarding the duty Mr Hylan was alleged to have breached, which was said in the original second alternative charge to be a duty to refuse to certify the Agreement. It proposed to amend that to

[9] Exhibit CLP 7 supra, at page 23 Charge Bundle, paragraph 3 of that letter.
[10] Ibid at paragraph 7 of the letter.
[11] Ibid at paragraph 11 of the letter.

a duty to refuse to witness the Agreement and to complete certification.[12] An additional duty previously alleged to have been breached[13] was to be removed by the proposed amendment.

[30] For the SC it was said that the all the amendments were of insignificant moment. The amendments were noted as being based on matters asserted by Mr Hylan in his own letter of 23 January 2013 to the Law Society relating to the circumstances of execution of the Agreement, or in statements he had made in his regulatory response about whether he had witnessed or certified the Agreement.

[31] There was nothing new in the amendments the SC said, and no prejudice and no surprise. It also noted that the special jurisdiction of professional discipline meant that the strict approach to amendment applications sometimes seen in the criminal jurisdiction should not occur here, particularly where the amendments were insignificant in any event.

[32] For Mr Hylan, the amendment application was opposed. The basis of that opposition was that the amendments were not minor, but introduced a new element, that of being a party to the wilful attempt to mislead INZ.

[33] Mr Hylan had responded to the charge as originally laid, and it was said to be unfair to Mr Hylan to require him to now face a differently constituted charge.

[34] The Tribunal allowed each of the amendments on the basis that they were inconsequential, reflecting the same issues and matters as the original charges, contained nothing of any substance that was new, and there was no unfairness as a consequence. It indicated at the hearing that it would give its full reasons in due course, and these are now set out.

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[12] Again, this amendment is related to the issue of any difference between witnessing a signature to the Agreement and certifying regarding independent advice, and certifying the Agreement by signing it.

[13] A duty of having to satisfy himself as to the truth of the contents of the Agreement was no longer alleged to be a duty which Mr Hylan had ignored.

Reasons for allowing the Amendment

[35] In respect of the amendments to the misconduct charge, no change was proposed to the formal charge itself, it remained misconduct under s 7(1)(a)(i) Lawyers and Conveyancers Act 2006.

[36] The particulars were to be varied in a minor way, by referring to Mr Hylan witnessing Mrs S's signature and completing a certificate regarding advice about the Agreement. Previously the particulars had referred to Mr Hylan certifying the Agreement by signing it. In the Tribunal's view this amendment was of no consequence, it made no effective change to the conduct the subject of the charge, and was immaterial to the way Mr Hylan might defend the charge. These changes also reflected Mr Hylan's own position set out in his regulatory response.

[37] The particulars of the misconduct were also to be varied by the addition of a reference to INZ being misled by the Agreement and some paragraphs contained in a letter Mr Hylan had written to the Law Society. That letter had been written by Mr Hylan in response to Law Society enquiries after a complaint had been made about his conduct in respect of the Agreement.

[38] The Tribunal considered that the addition of excerpts from Mr Hylan's letter did not enlarge the scope of the charge, and noted that they were in the evidence filed and available to the Tribunal in any event.

[39] The original misconduct charge alleged that when Mr Hylan had signed the Agreement he knew it to be false and that it was needed in order to be submitted to INZ to support a visa application. There is a clear implication that as a result INZ would have been misled by the Agreement if it was false as alleged and given to INZ to show a position that was not true.

[40] The Tribunal formed the view that adding a particular, which referred to the false agreement misleading INZ, was not creating a new element to the allegations that would require any different approach by Mr Hylan in his defence. Such an outcome was a natural consequence of Mr Hylan's alleged conduct in signing the

Agreement knowing it to be false and that it was to be used to assist with a visa application to INZ, an application in respect of which Mr S's marital status had some importance.

[41] The Tribunal also noted that the issue of the Agreement misleading INZ was a matter raised by Mr Hylan himself in his letter of 23 January 2013, confirming that the question of INZ being misled was an issue about which he was aware. It was a matter Mr Hylan had raised and about which he had said he had warned Mrs S before she signed the Agreement.

[42] The amendment to the misconduct charge was allowed. The Tribunal considered in the circumstances there was nothing prejudicial or unfair in the amendment, which involved largely inconsequential changes, for the reasons noted.

[43] In respect of the amendment to the first alternative charge, the addition of the applicable section reference, and its description of conduct comprising unsatisfactory conduct under the Lawyers and Conveyancers Act 2006, was not a material change.

[44] The addition of a reference to the actual Rule in the Conduct and Client Care Rules said to have been breached by Mr Hylan's conduct was new, but the Tribunal did not consider it constituted a change of such a nature as to cause any prejudice to Mr Hylan. The nature of his alleged conduct was unchanged.

[45] The addition to this first alternative charge of references to relevant sections and rules did not prejudice Mr Hylan. While it would have been preferable to have spelt out the applicable sections and rules from the outset, their inclusion as part of the amendment to this charge did not prejudice Mr Hylan. There was no substantive change to the allegations and he was not caught by surprise.

[46] The conduct described by the amendment proposed to the particulars regarding execution of the Agreement was effectively the same as set out in the original charge so far as the issue of "certifying", as distinct from "witnessing and providing a certificate" were concerned.

[47] In its original form, the first alternative charge specified as a particular that there was a failure by Mr Hylan to observe a duty to refuse to certify the Agreement when it had been signed under duress. The amended charge specified as a particular that there was a failure by Mr Hylan to observe a duty to refuse to witness execution of the agreement and provide a certificate when the Agreement was signed under duress. This amendment relates to the same issue we noted above regarding the amendment of the misconduct charge. The issue of whether Mr Hylan witnessed a signature and certified independent advice, or certified the Agreement by signing it, is a matter of no consequence in the circumstances of the charge, the examination required of Mr Hylan's conduct, or the conduct of Mr Hylan's defence.

[48] Factors relating to the insertion of parts of Mr Hylan's letter of 23 January 2013 were noted above in respect of the amendment of the misconduct charge, and apply similarly in respect of this part of the amendment proposed to the first alternative charge. The inclusion of excerpts from Mr Hylan's own letter did nothing more than record Mr Hylan's acknowledgment to the Law Society of the fact he was aware of the duress and the use to be made of the Agreement to support a visa application.

[49] The amended particulars note that as a result of the duress, Mr Hylan should have recognised that if the Agreement was signed by him, use of the Agreement in support of a planned visa application would be misleading for INZ. That is what he himself had said in his letter of 23 January 2013. The amendment did not introduce new matters of a nature that could reasonably be said to prejudice Mr Hylan.

[50] As the Tribunal did not identify, for the reasons noted, that there was anything prejudicial or unfair to Mr Hylan in the amendment of the first alternative charge as proposed, the amendment to the first alternative charge was also allowed.

[51] In respect of the amendment proposed to the second alternative charge, negligence or incompetence, the same issues are present. The amendment describes witnessing a signature and providing a certificate, rather than certifying the agreement by signing it. There is nothing of substance in that change.

[52] Again, excerpts from Mr Hylan's own letter of 23 January 2013 were proposed to be included by the amendment, reciting his knowledge of facts and circumstances which were alleged to show that Mr Hylan should have been aware that the Agreement falsely represented the true nature of Mr and Mrs S's matrimonial status and arrangements and the likely affect it would have if submitted to INZ.

[53] The second alternative charge in its original form referred to Mr Hylan breaching his duty as a solicitor because he did not refuse to certify the Agreement where it had been signed under duress. He also was alleged to have failed in his duty to satisfy himself that the Agreement reflected the truth, given the background factors of which he was aware, in the original form of the second alternative charge laid.

[54] The amendment proposed to remove the second part of the allegation regarding breach of duty, involving Mr Hylan's failure to observe his duty to satisfy himself as to the truth of matters set out in the Agreement. The charge as amended proposed only to rely on his failure to observe a duty to refuse to witness execution of the Agreement and provide a certificate regarding independent advice on the Agreement.

[55] For the reason noted, the amendment to the second alternative charge was allowed because of the inconsequential nature of the amendments and lack of any prejudice to Mr Hylan.

[56] In summary, the amendments proposed in respect of each of the charges brought nothing new into the substance of the allegations that Mr Hylan's conduct supported a charge that he was guilty of misconduct, or in the alternative, unsatisfactory conduct, or negligence or incompetence.

[57] Each charge is the same (accepting there is more definition arising from the amendment to the first alternative charge, but it is inconsequential), and the particulars are expanded in a way that is not material. Matters to be included in the amendments were already issues substantively before the Tribunal as a consequence of the scope and content of each original charge. Much of the new

material represented Mr Hylan's own response to the Law Society on the issues as part of the proceedings at the investigatory stage.

[58] There is no unfairness, and no prejudice arose from the amendments. Mr Hylan was not taken by surprise as the amendments were well signalled some time prior to the hearing.

[59] The difference between Mr Hylan witnessing a signature to the Agreement and providing a certificate about independent advice on the Agreement is little different from Mr Hylan certifying the Agreement, as alleged in the original charge and its alternatives. This issue is a matter of no consequence in evaluating Mr Hylan's conduct.

[60] Much of the content of the amendments related to facts on which Mr Hylan had represented his own views when making submissions to the Law Society. That included his view that INZ would be misled, a particular proposed to be added by the amendment. This amendment was made in the context of the original particulars which specified Mr Hylan's knowledge that the Agreement was false, the circumstances of its execution, and that it was relevant to a visa application to be made to INZ. Noting in the amended particulars that INZ would be misled by that false document is not a new issue in those circumstances.

Adjournment Application

[61] No adjournment was granted pursuant to reg 24 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008.

[62] The application for leave to make the amendments had been filed some six weeks prior to the hearing, so Mr Hylan was well aware that it would be dealt with at the commencement of the hearing.

[63] Mr Hylan acknowledged that he had not been taken by surprise, but said that he was prejudiced by the amendments. He claimed that a new element, that of being a party to a wilful attempt to mislead INZ, had been introduced and that made it

difficult to prepare his defence as he did not know what he would face until the amendment application had been decided

[64] The Tribunal took the view that, when analysed, the amendments were not of a nature whereby Mr Hylan could reasonably say that there was any unfairness or that his ability to defend himself had been prejudiced. There was no new matter alleged regarding Mr Hylan's conduct that materially affected him. The scope of what Mr Hylan faced in respect of the charge and its alternatives as originally laid was not enlarged by the amendments.

[65] The likelihood of INZ being misled by the Agreement was not a new issue. It was an issue well signalled by the original Notice of Determination issued by the SC,[14] and the terms of the original charge.[15] Mr Hylan had himself commented on his advice to Mrs S regarding the Agreement's use with INZ and the risk of misleading INZ in his letter to the Law Society. No different approach was required by Mr Hylan if the amendment was granted as compared to what he would face if not granted.

[66] For these reasons, as well as the reasons we have traversed in more detail above regarding our rationale for allowing the amendments, the Tribunal did not consider that allowing the amendments required an adjournment to avoid any prejudice. Mr Hylan was unable to show that there was any realistic possibility of prejudice.

The Charge

[67] Details of the charge, and its alternatives, have been referred to in the course of discussion regarding the amendments sought and granted at the commencement of the hearing.

[14] Affidavit of Chloe Longdin-Prisk dated 16 July 2013, Exhibit CLP 26 at page 093 of the Charge Bundle paragraph 24.
[15] The original charge alleged knowledge that the Agreement was signed under duress, that the Agreement falsely represented the true situation, and that it was to be used to support a visa application to INZ.

[68] The nub of the misconduct charge is that Mr Hylan knew the Agreement falsely represented the true situation regarding Mr and Mrs S's marital status, and that Mrs S was to sign it because of coercion by her husband. The Agreement did not represent a true state of affairs and Mr Hylan knew that its use would mislead anyone relying on it.

[69] Notwithstanding his knowledge, Mr Hylan had witnessed Mrs S's signature and certified that he had given her independent advice as to the Agreement and had explained to her the effect and implications of the Agreement. His signature allowed the Agreement he knew to be false to be used as if it was true and accurate.

The SC's position

[70] The SC made the point that the Agreement stated that Mr and Mrs S were married, had two children, and that they wished "…*to record in writing their separation, arrangements for the parenting and maintenance of the children".*[16]

[71] It went on to state that the parties were living apart and that they would "…*continue to live separate and apart and neither will disturb the other's life in any way.*"[17]

[72] The Agreement then dealt with matters relating to custody and care of the children, as well as their parenting, care, welfare and maintenance, noting that the arrangements would involve sharing and agreement, "…*despite the fact that the children live on a day to day basis with* (Mrs S)".[18]

[73] The Agreement detailed a range of matters, including an acknowledgment by Mrs S that "…*since the parties have separated* (Mr S) *has been solely responsible for meeting the financial needs of the children.*"[19]

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[16] Charge Bundle page 15, at Recital C.
[17] Ibid, page 15, at paragraph 1.
[18] Ibid, page 16, at paragraph 2.4.
[19] Ibid, page 16, at paragraph 3.2.

[74] The SC said that Mr Hylan was guilty of misconduct because he knew, at the time he signed the Agreement, that it presented a false arrangement, that Mrs S was being forced to sign it, and that he also knew the purpose for which it was being sought, submission to INZ, which would be misled by a false document.

[75] The SC said that the evidence showed that Mr and Mrs S were living together and were not separated at the time, and that they were jointly caring for the children. The Agreement did not accurately represent the true situation it said.

[76] Mr Hylan had confirmed that he knew that Mrs S was being coerced into signing the agreement by Mr S, who wanted the agreement to assist with the visa application to INZ, the SC submitted.

[77] The position of the SC in respect of the misconduct charge was that My Hylan was aware, based on his attendance on Mrs S, that the Agreement was a sham. It was a document created to provide to INZ, to facilitate Mr S acting as sponsor for a person making a visa application to enter New Zealand, and in respect of which application Mr S's marital status was relevant.

[78] The SC said that Mr Hylan should not have acted in a way that facilitated the use of the Agreement which presented a situation that was untrue. He knew it was to be used to support the visa application. He also knew that using a false document would naturally mislead anyone relying on it, in this case INZ. It said that in those circumstances Mr Hylan was under a duty, and an obligation, to refuse to become involved and that he should have declined to involve himself with the Agreement.

Mr Hylan's position

[79] In an affidavit filed in this matter, dated 13 May 2013,[20] Mr Hylan said that at the time he signed the Agreement in May 2012 he believed that Mrs S's marriage was at an end and that she wanted to proceed with a separation. He thought that the

[20] Exhibit "CLP 19" to the affidavit of Chloe Longdin-Prisk dated 16 July 2013 at page 59 of the Charge Bundle.

Agreement was a true representation of matters, and he had "*no idea*" that the Agreement was to be used to support a visa application by Mr S.[21]

[80] In that same affidavit Mr Hylan also said that he did not know that Mrs S had been coerced into signing the Agreement until she visited him in December 2012 and told him she had been forced to sign the Agreement in May that year. At that visit Mrs S had asked Mr Hylan to write to INZ to advise that she had been forced to sign the Agreement against her will and that she and Mr S were still cohabitating. Mr Hylan said in this affidavit that Mrs S told him at that time that despite signing the Agreement in May 2012, she and her husband had continued to live together as a family.[22]

[81] In his affidavit of 9 December 2013, Mr Hylan said that he thought the Agreement accurately represented what Mr and Mrs S planned to do in the future. He said that because the Agreement related to future intentions, not past action, he had no way of knowing whether the Agreement was a sham or not.[23]

[82] The submission for Mr Hylan was that he did not know whether Mr and Mrs S were living apart or not, because the Agreement recorded an intended state of affairs and did not record an existing position. In those circumstances, it was said, Mr Hylan could not have known that the prospective situation of the parties described in the Agreement may not eventuate, and he had no reason to believe at the time that the situation proposed to occur would not eventuate.

[83] So far as his comments in his letter of 23 January 2013 to the Law Society about the Agreement being misleading were concerned, this was said to be based on Mr Hylan's ex post facto knowledge of matters, and not to relate to his knowledge at the time the Agreement was executed.

[84] Mr Hylan said at the hearing that when he signed the Agreement in May 2012, he was not aware that it was not true and accurate or that it was to be sent to INZ.

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[21] Above, n 20, at paragraph 14 (Charge Bundle p 63).
[22] Ibid at paragraph 16 (Charge Bundle p 64).
[23] Affidavit of Heval Hylan dated 9 December 2013 at paragraph 3.

He said he was not aware of these matters until December 2012, when told at that time by Mrs S.

[85] In his affidavit dated 4 October 2013 filed in this matter Mr Hylan said, inter alia:

(a) Mrs S brought the Agreement to his office on or about 18 May 2012 and asked him to "*witness her signature on the Agreement, after advising her of the import and effect of its contents*;"[24]

(b) Mrs S was "*not happy*" about signing the Agreement but was going to do so because her husband wanted the agreement in place between them;[25]

(c) Mr Hylan considered the Agreement had "*prospective effect*" and that as a consequence there was "*no need for me to ascertain whether or not its contents were true";*[26]

(d) While the Agreement noted that Mr and Mrs S were living apart, he thought that they were living "apart" at the same residence;[27]

(e) He advised Mrs S on the effect of entering into a separation agreement, and, that she did not have to sign the Agreement if she disagreed with its contents;[28]

(f) He was not certain if the Agreement was to be submitted to INZ, noting his client, Mrs S, "*had no need of such a document for immigration purpose"* and that Mrs S may have mentioned "*while she was in my office ……her husband's desire to satisfy* (INZ) *that he was separated from her, but I do not act, and I have never acted for her husband, so I*

[24] Affidavit of Heval Hylan dated 4 October 2013 at paragraph 5.
[25] Ibid paragraph 6.
[26] Ibid paragraph 7.
[27] Ibid paragraph 8.
[28] Ibid paragraph 9.

cannot say whether or not he had any need for such a document as the Agreement, for immigration purposes."[29]

(g) Mrs S signed the agreement and Mr Hylan witnessed her signature, certifying that he had given her independent advice as to its contents and effect.[30]

[86] Mr Hylan submitted the evidence showed he had no reason to believe that Mr and Mrs S were not separated or that the Agreement represented a false state of affairs at the time it was signed.

Discussion

[87] Mr Hylan's evidence conflicted with what Mr Hylan had said about matters in his letter of 23 January 2013 to the Law Society when responding to its initial enquiries.[31]

[88] Mr Hylan's letter indicated he knew at the relevant time, May 2012, that the Agreement had been signed by Mrs S under duress. He said in his letter that he was advised of the duress by Ms S at the time the Agreement was signed, and that there was in fact no separation and Mr and Mrs S were jointly caring for their children. He was also told the reason the Agreement was being sought, to assist with the INZ visa application.

[89] Mr Hylan's later evidence was that he knew nothing about these things at the time the Agreement was signed in May 2012, first becoming aware when told by Mrs S in December 2012, some seven months after the Agreement had been signed by Mrs S.

[90] The key issue in considering the charge is Mr Hylan's state of knowledge at the time he executed the Agreement.

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[29] Above, n 24 at paragraphs 10 and 11.
[30] Ibid at paragraph 9.
[31] Above, n 3.

[91] If Mr Hylan witnessed Mrs S's signature when he knew the Agreement to be untrue and signed under duress that is conduct well below the acceptable standard required of a barrister and solicitor. Knowing the purpose of the false document was to assist with the visa application to INZ compounds the matter, as the natural consequence of a false document being provided for such a purpose would be to mislead. Similarly, Mr Hylan could not have properly given independent legal advice on the content and implications of the Agreement when he knew it to be false. He gave a certificate that he had given such advice, and confirmed that in his evidence.

[92] Mr Hylan endeavoured to get around the issue of whether the Agreement represented the true matrimonial situation of Mr and Mrs S accurately, by suggesting the Agreement was prospective, that is, it was a record of a proposed situation. He said it was not a record of a current situation that may or may not have been untrue at the time of execution. That meant that not only could he not judge whether what was planned would occur or not, so there was no fault in him executing the Agreement as a prospective arrangement, but it was also possible for him to give advice on what the Agreement meant and its implications, as he had certified.

[93] Mr Hylan's letter of 23 January 2013 to the Law Society in response to its investigation of this matter clearly records his state of knowledge at the time the Agreement was executed in May 2012.

[94] According to that letter, Mr Hylan was aware of coercion by Mrs S's husband for her to sign the Agreement, he says that Mrs S advised him that day that she was not in fact separated, that he was aware that the Agreement was to be used to help with the visa application to INZ the outcome of which would be affected by Mr S's marital status, and he noted that he had advised Mrs S before she signed it that the Agreement would mislead INZ.

[95] Mr Hylan endeavoured to address these statements and their effect so far as a finding as to his knowledge at the time he attended on execution of the Agreement was concerned, by saying that he had been mistaken in the timing of those conversations with Mrs S. He said that in fact the information he referred to became known to him only after Mrs S visited him in December 2012, and that he had written

to the Law Society about this mistake in May 2013.[32] He said he had not known of these matters at the time he witnessed Mrs S signing the Agreement and advised her on its legal implications in May 2012.

[96] Having seen Mr Hylan give his evidence and respond to cross-examination the Tribunal does have serious reservations about the accuracy of Mr Hylan's recollection in this matter. In particular the information he had regarding the true state of affairs as between Mr and Mrs S and the use to be made of the Agreement at the time the Agreement was signed. The Tribunal notes that it felt it necessary to remind Mr Hylan when he was giving his evidence and responding to cross-examination that he was on oath.

[97] As Mr Hylan would have it, there were no conversations with or advice from Mrs S at the time of execution of the Agreement in May 2012 that indicated that the Agreement was untrue, that it was being signed under duress, or that it was to be used to support a visa application to INZ, with the consequent risk of INZ being misled.

[98] Mr Hylan claimed that his 23 January 2013 letter, in which he had said he was aware that the Agreement was untrue and had been signed under duress, and was to be used to support a visa application to INZ, was an ex post facto relaying of matters of which he had only became aware some time after the Agreement had been signed. He said that his letter was not a record of the position as he knew it at the time of execution of the Agreement.

[99] If that is correct, the Tribunal questions why Mr Hylan would have described in his letter of 23 January 2013 his warning to Mrs S, in May 2012 when she signed the Agreement, in terms referring to matters that might arise if he witnessed her signature to the Agreement (ie that it would mislead INZ authorities). That is a warning described in the context of it being given prior to execution, so it is an unusual description to apply in respect of information said to have been provided

[32] See Exhibit CLP 21 at page 075 of the Charge Bundle. The dates referred to in this letter were corrected by Mr Hylan at the hearing – "2012" in the first line should have been "2013", and "18 January " in the third line should have been "23 January". The corrections were noted.

seven months after execution. Mr Hylan said he did not know the Agreement was inaccurate until December 2012, when he says he was first told of that by Mrs S.

[100] Similarly, if as Mr Hylan claims, he did not know about the Agreement falsely representing the true situation or its potential use for INZ purposes until December 2012, the Tribunal would not have expected his letter containing his "ex post facto" recollection to quote Mrs S as saying she wanted to sign and that she risked verbal and physical violence if she did not sign. Those factors present as matters which must have occurred prior to Mrs S signing in May 2012.

[101] It is difficult to reconcile Mr Hylan's later explanation that these matters arose from information said to have been provided seven months after the Agreement was signed, when they were expressed by him originally to be matters occurring pre-execution.

[102] The described circumstances and imperatives for the advice referred to by Mr Hylan in his letter of 23 January 2013 do not fit his later claim that they were not matters raised by him prior to Mrs S's execution of the Agreement in May 2012. His later claim, that in his letter he was referring to matters of which he became aware of in December 2012 does not sit well with that submission.

[103] Similarly, Mr Hylan said he did not know of any coercion of Mrs S to sign a false agreement until December 2012. The detail he gave in his letter of 23 January 2013 of pressure on Mrs S to sign from Mr S, involving two phone calls to Mrs S from her husband while she was in Mr Hylan's office in May 2012 to sign the Agreement, does not fit that explanation. Mr Hylan's claim that his recollections were "ex post facto" recollections, not matters known to him in May 2012 at the time the Agreement was signed, is not supported by facts he described in his letter of 23 January 2013

[104] As noted above, in his affidavit of 4 October 2013, Mr Hylan stated that he considered the Agreement had prospective effect. He said that because of this there was no need for him to ascertain whether the contents of the Agreement were true.

[105] The Agreement clearly states that Mr and Mrs S are living apart and would continue to do so, and also confirms that "*since the parties have separated* (Mr S) *has been solely responsible for meeting the financial needs of the children."*[33] We question why Mr Hylan says that the matrimonial arrangements were prospective given the clear words in the Agreement.

[106] On the basis of particular clauses, as well as the tenor of the Agreement when taken as a whole, the Tribunal does not accept that a reasonable interpretation is that this is a prospective arrangement. It is what it says, a Separation, Parenting and Maintenance Agreement containing provisions which would be taken by a reader as evidencing the existing matrimonial arrangements in place between two separated spouses.

[107] Mr Hylan claimed that as the Agreement reflected prospective arrangements, not current arrangements, the issue of truth and accuracy of current arrangements did not arise, as he could not anticipate non performance of the arrangements in future. Even if it could be accepted that the Agreement was a document that dealt with only prospective matters, it is not clear to the Tribunal why this claimed prospective effect should mean that Mr Hylan did not have to be concerned as to whether the arrangements were true or untrue.

[108] Mr Hylan confirmed that he had given advice on the content and effect of the arrangements set out in the Agreement to Mrs S before she signed it. In the course of giving that advice there would have to be discussion on the arrangements that had been agreed, so we are unsure why Mr Hylan should say that he could not or need not ascertain if the contents of the Agreement on which he was giving advice were true or untrue.

[109] Apart from the fact that the suggestion that the Agreement was prospective does not fit what the Agreement says, the claim that truth and accuracy were not relevant considerations because it was referring to prospective arrangements is completely without merit in the Tribunal's view. It is an implausible basis to adopt to suggest lack of responsibility on Mr Hylan to ensure the integrity of the Agreement.

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[33]Charge Bundle p16 at paragraph 3.2.

[110] In his affidavit of 4 October 2013, Mr Hylan said that he did not know with any certainty the Agreement was to be submitted to INZ. He accepted Mrs S "*may have mentioned her husband's desire to satisfy* (INZ) *that he was separated from her"* but noted that he had never acted for Mr S so could not say whether Mr S has a need for such a document.[34]

[111] We contrast that position with Mr Hylan's evidence that he was well aware of Mr S previously seeking to have a separation agreement that would allow Mr S to signal a marital status to INZ that in turn would assist with a visa application for his girlfriend.[35]

[112] All of these factors indicate to the Tribunal that what Mr Hylan said in his letter of 23 January 2013 was accurate, and reflected his understanding of matters and actions he took at the time the Agreement was executed in May 2012. His various explanations and claims are implausible, and do not fit the proven facts.

Determination

[113] The standard of conduct exhibited in attending on execution and certification of an Agreement which was known to falsely represent the true situation, particularly given Mr Hylan's knowledge of the use to which it would be put with INZ, is conduct that falls a long way below an acceptable standard of conduct. It is clearly misconduct as charged.

[114] Misconduct under s. 7(1)(a)(i) Lawyers and Conveyancers Act 2006 refers to conduct which:

> "… would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable."

[115] Such conduct has been described by the Courts as involving conduct which represents a deliberate departure from accepted standards, or such serious

[34] At paragraph 11 of that affidavit.
[35] Affidavit of Heval Hylan dated 13 May 2013 at paragraphs 7 and 8 (Charge Bundle p 61).

negligence as, although not deliberate, to portray indifference to and an abuse of professional privileges.[36]

[116] In our view, Mr Hylan's conduct has been unacceptable for a barrister and solicitor, involving a significant departure from accepted standards. We find that on the balance of probabilities[37] Mr Hylan was aware that the Agreement he was signing was false, the facts represented as true were not true, Mrs S was signing under duress, and use of the Agreement would mislead a person relying on it as accurately representing the true situation. We find that he knew also that it was to be used to support the visa application to INZ.

[117] The charge of misconduct is proven against Mr Hylan, and we formally record that finding. We should also signal that the Tribunal considers the manner in which the charge has been defended, with implausible claims and, at best, significantly faulty recall, is a matter which does not reflect well on Mr Hylan, and compounds the issue of his lack of probity and integrity demonstrated by his conduct in signing the Agreement.

Directions

[118] The Case Manager is to liaise with counsel with a view to establishing a suitable date for a penalty hearing, at some date within the next two months. Once a date has been established the SC is to file and serve its submissions on penalty and costs not less than 21 days before the hearing, and Mr Hylan is to file and serve his submissions not less than 7 days before the hearing.

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[36] *Re A (Barrister and Solicitor of Auckland)* [2002] NZAR 452 approving *Pillai v Messiter (No.2)* (1989) 16 NSWLR 197. See also *Complaints Committee No.1 of the Auckland District Law Society v C* [2008] 3 NZLR 105.

[37] The test the Tribunal is required to apply – s 241 Lawyers and Conveyancers Act 2006 and see also *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

Costs

[119] As at the date of this determination, costs under s 257 Lawyers and Conveyancers Act 2006 are $10,400. A final amount will be certified at the hearing.

DATED at AUCKLAND this 31st day of January 2014

DJ Mackenzie
Chair