NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 45

LCDT 002/11

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE** Applicant
AND	**EVGENY ORLOV** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr J Clarke

Mr S Maling

Ms C Rowe

HEARING at Auckland District Court

DATE OF HEARING 2, 3, 4, 5, 6 September 2013

APPEARANCES

Mr W Pyke and Ms Z Johnston for the National Standards Committee

Practitioner in Person

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL
(As to Amended Disciplinary Charges)

Table of Contents

Introduction

[1] The practitioner faces eight amended charges, three of which are pleaded in the alternative. The procedural history of the charges has been complex and the conduct of the hearing also was somewhat unusual and therefore the procedural history and conduct of the hearing is set out below. The amended charges and supporting particulars are annexed as Schedule 1 of this decision.

Procedural History

[2] Because the practitioner also faces other charges laid by the Auckland Standards Committee No. 1 there has been some cross over in respect of interlocutory applications. However this decision records or attempts to keep separate the current charges faced by the practitioner.

[3] Following service of the charges on him in May 2011, Mr Orlov had filed a Protest as to Jurisdiction and declined to file a "Response to Charge" in the proper form. This response is required to be filed within 10 working days of service pursuant to Regulation 7. Mr Orlov ultimately filed this document, after a final direction from the Tribunal, in February 2013. The response repeated the Protest to Jurisdiction. It referred to the charges as "an abuse of process" and breach of the Bill of Rights Act. Instead of responding to each particular and charge as required, Mr Orlov stated: "I put the Society to proof of every fact and every allegation in the charges".

[4] There have been a number of contested applications prior to the commencement of the hearing of the charges proper. Firstly, Mr Orlov had made an application to the High Court for judicial review in respect of the Standards Committee decision to put all of the charges to the Tribunal. Following a defended hearing in April 2011 the Tribunal granted an extended adjournment while that review was determined. Although the current charges were not filed and served until the month following this adjournment, they were also encompassed in the judicial review application and the current charges were treated as subject to the same adjournment ruling.

[5] Justice Heath's decision in respect of the judicial review, which was delivered on 24 August 2012 was then appealed by Mr Orlov to the Court of Appeal. The Standards Committee cross-appealed.

[6] The decision of the Court of Appeal[1] was released in June of this year. In dismissing Mr Orlov's appeal and granting the Standard Committee's appeal the Court make comments, which have been heeded by this Tribunal in progressing the matter to hearing.

> "[165] These and all other charges should now be heard by the Tribunal without delay. On this point we add the following observations. We direct them particularly to Mr Orlov.
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> [166] As a legal practitioner, Mr Orlov is subject to his profession's disciplinary regime. It exists primarily for the benefit of the consumers of legal services. That is, people who include Mr Orlov's own clients. But it exists also for the benefit of all legal practitioners, not least Mr Orlov himself.
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> [167] We mentioned at the outset of this judgment, and we reiterate, that one of the central objectives of the Act is to provide for "a more responsive regulatory regime in relation to lawyers and conveyancers".
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> [168] By raising the numerous procedural objections this judgment considers and rejects, Mr Orlov has thwarted and delayed the disciplinary process. He now complains of these largely self-inflicted delays.
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> [169] The oldest of the complaints dates back to 19 May 2008. It is imperative that the charges against Mr Orlov now be heard by the Tribunal on their merits, and without still further delays.
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> [170] Judicial review exists to ensure a fair process - to ensure "fair play in action". If Mr Orlov considers he has not had a fair process then judicial review remains open to him after the Tribunal has given its decision. Alternatively Mr Orlov will have the appeal rights referred to at [22] above."

[7] Next, an application was brought by Mr Orlov for the Chair and certain members of the Tribunal to recuse themselves. This matter was considered after submissions, on the papers, and is the subject of a decision dated 21 November 2012 declining the application.

[8] Thirdly, two days were occupied between December 2012 and February 2013 in hearing an application brought by Mr Orlov for permanent stay or strike out of all

[1] *E Orlov v New Zealand Law Society* CA [2013] NZCA 230, 14 June 2013.

charges. This was the subject of an oral decision dated 12 February 2013 dismissing those applications. Mr Orlov appealed that decision.

[9] At the conclusion of that interlocutory hearing directions were made to progress the charges to a hearing. At the (sensible) suggestion of Mr Orlov, Charges 1 to 8, brought by the National Standards Committee ("NSC") - "the current charges" were separated out for hearing first. It was Mr Orlov's reasoning that if these charges were established, since he perceived them to be the most serious, then that might obviate the necessity of dealing with the other charges. The remaining charges allege serial negligence and were estimated to require 5-6 weeks to hear. The NSC agreed that the charges be severed, and a hearing of five days was directed.

[10] Fourthly, there was an application brought by Mr Orlov seeking the issue of summonses in respect of two Judicial Conduct Commissioners and Their Honours Justice Randerson and Justice Harrison. In addition the application sought non-party discovery. This application was also the subject of written submissions which were considered on the papers and a decision delivered by the Chair, acting as a District Court Judge in terms of the provisions of Clause 6, Schedule 4 of the Lawyers and Conveyancers Act 2006 ("LCA"), on 4 July 2013. The applications were all declined for the reasons stated in that decision. Counsel for the Judicial Conduct Commissioner cross applied for a ruling under s 69 of the Evidence Act, which was granted.

[11] Finally, an application was filed on 23 August 2013, one week before the hearing, seeking strike out or permanent stay of each charge, on various grounds. It also sought the exclusion of much of the evidence filed for the NSC. The Tribunal was unable to convene to consider these applications in advance of the hearing on 2 September 2013. The evidence applications were dealt with in the course of the hearing and the strike out applications were effectively subsumed into the "no case to answer" submission put by Mr Orlov, at the conclusion of the prosecution case.

[12] Although at various stages Mr Orlov has filed evidence in relation to interlocutory proceedings he did not file his evidence in relation to the substantive charges until three working days prior to the hearing. It was not surprising therefore that the NSC did not provide reply affidavits until the day before the hearing was scheduled to begin. Mr Orlov took strong exception to the receiving of those

affidavits and also protested the consideration by the Tribunal of any evidence filed by him.

Conduct of the Hearing

[13] The charges had been set down for a five-day hearing. Following the Opening by counsel for the NSC, the process witness for the Committee, Ms Ollivier, was cross examined by Mr Orlov for over a day. From late in the second day until 4.00 pm on the third day we were then addressed by Mr Orlov in support of a No Case to Answer submission. We were also provided with written submissions by Mr Orlov and considered those, as well as Mr Pyke's written submissions and oral submissions, which absorbed the remaining (1¾ hours) of the third day. Mr Orlov had also spent some time addressing the Tribunal on the admissibility of evidence of the NSC.

[14] Having deliberated on those submissions overnight the Tribunal, at the beginning of day four ruled on the admissibility issues and rejected the No Case to Answer submission.

[15] At this point Mr Orlov addressed the Tribunal to the effect that he intended to withdraw from the hearing because he perceived he could not, for a number of reasons he outlined, receive a fair hearing. He announced that he would not present a defence and the matter could proceed effectively by way of formal proof. He also renewed his recusal application which was refused.

[16] Mr Pyke indicated that he required Mr Orlov for cross-examination.

[17] In a Minute issued on 23 August 2013, the Tribunal had already directed that Mr Orlov be available for cross-examination. This requirement, pursuant to Regulation 25, was repeated at this point of the hearing. Mr Orlov refused to make himself available for cross-examination. Mr Pyke was thus deprived of the opportunity to challenge this evidence before the merits of the charges were considered.

[18] Having retired to consider the procedure to be adopted, given this unusual turn of events, the Tribunal invited Mr Pyke to present his closing submissions.

[19] At this point, Mr Orlov resiled from his earlier abandonment of the proceedings, and said he wished to present Reply submissions. Both counsel were heard over the remaining two days as to their submissions on the merits.

[20] Some further comment is required on the evidence for Mr Orlov. Dr F. Deliu provided an affidavit in support of Mr Orlov, somewhat unusually, this was filed by him directly, rather than by Mr Orlov. He was not made available for cross-examination. His affidavit is largely a hearsay account of what he has been told by Mr Orlov of the latter's interactions with Harrison J. It would seem that he was not present on these occasions. The remainder of the affidavit is irrelevant in that it does not relate to the charges before us, but refers to Dr Deliu's own experiences, in other situations. We place little if any weight on this affidavit.

[21] Three further affidavits were filed by Mr Orlov in the last few days leading up to the hearing. They were from Vincent Siemer, John Slavich and Charl Hirschfeld. None of these witnesses was made available by Mr Orlov for cross-examination. Furthermore, we find that none of these affidavits has content which meets the test of relevance to these charges, and we do not intend to take them into account. It is noted that one deponent has recently been imprisoned for contempt of court, and another has been declared a vexatious litigant.

Background

[22] We were provided with a summary of proceedings and background as to Mr Orlov's involvement and interactions with the Honourable Justice Harrison as a schedule to both the opening and closing submissions filed by Mr Pyke on behalf of NSC.

[23] We consider this account to be a neutral and fair record of the background and as such adopt it, with some small alterations.

Summary of proceedings

C v R

Mr Orlov's first contact with Justice Harrison appears not to have been in his capacity as counsel but in connection with an application for Habeas Corpus

made on behalf of Mr C, at the High Court at Auckland on 22 August 2005. An order was sought to secure compliance by Ms R with Orders of the Family Court relating to the shared custody of a child. The application for Habeas Corpus sought to have the child delivered to the High Court at Auckland. Orders had previously been made by consent for shared custody. Ms R was refusing to comply. Mr Orlov had appeared before Judge Smith in the Family Court at Tauranga on 28 July 2005 resulting in a judgment dated 29 July 2005 in which the Judge directed Child Youth & Family to uplift the child from Ms R and return him to Mr C's care, on directions that Mr C lived with such persons as directed, as a protective measure for the child, but maintaining that Ms R could have shared custody. Justice Harrison on 29 August 2005 granted orders by way of Habeas Corpus to the effect that the child be delivered to Child Youth & Family Services.

Mr Orlov had previously applied (ex parte) to the High Court for interim relief, which had been refused by Ellen France J. When Mr Orlov appeared in Justice Harrison's Court on the Habeas Corpus matter it was in result of being served with that application - in response he filed a memorandum informing the Court that he was not acting for Ms R in the Habeas Corpus matter. Mr Orlov says that Harrison J became furious and that he threatened to imprison him for contempt unless he advised Ms R to appear in Court. Mr Orlov contacted Dr Rodney Harrison QC who appeared in Court at short notice. Mr Orlov undertook to inform his client of the Habeas Corpus writ.

When the case was before Harrison J no finding had been made against the father – but allegations of abuse had emerged. A finding was made by Judge Sommerville in December 2005 that the father had abused two other children, although the police had declined to charge him. The Judge could not decide if he had abused the child in question. Mr C appealed but it was dismissed; there was a cross-appeal brought, in which Mr Orlov acted, and which ranged widely and was trenchantly critical of the Family Court and the Child Youth & Family Services. Later, there was the sequel before Judge Sommerville in the declaration proceedings.

The statement of Rodney Harrison QC says that Harrison J either indicated (or Dr Harrison QC formed the impression) that Harrison J had "had a re-think" and

did not pursue the issue of contempt further (p2 statement). The Committee also refers to the reply affidavit of Simon Jefferson QC who recalls Harrison J responding "firmly" to Mr Orlov and did not recall any "unjudicial or excessive" actions of Harrison J.

G

It appears that the next occasion on which Mr Orlov appeared before Justice Harrison was in the proceeding G v Chief Executive Office of the Department of Child Youth & Family Services and Barnardos New Zealand.[2] *This proceeding involved an appeal against orders made by the Family Court. In the Family Court Ms G had been represented by another lawyer. The hearing of the appeal was allocated for 14 November but on 28 October Mr Orlov filed a memorandum saying that he was not "on the record". But in an affidavit sworn in support of his application for adjournment Ms G advised that she had raised funds and that Mr Orlov was in receipt of instructions. Another adjournment was sought on 9 November 2005 which was dismissed by Justice Cooper, in the absence of a formal signed document and affidavit in support. Mr Orlov appeared at a hearing on 14 November before Justice Harrison and renewed his application for adjournment. Numerous grounds were offered by Mr Orlov for the adjournment, which are set out at paragraphs 11 to 24 of the judgment leading to dismissal of the application for adjournment.*

During the course of argument before Harrison J the Judge formed the opinion that the appeal was misconceived and that this was as a result of Mr Orlov's lack of competence. The appeal was against the exercise of a statutory discretion. The disposition of the lower court proceeding and the appeal turned on the first and paramount consideration of the child's welfare and interest.

The Judge was critical of Mr Orlov's lack of legal analysis and misconceived arguments, in particular the arguments relating to the lack of investigation into a medical condition of Mr Orlov's client, which he rejected, along with other arguments, particularly rights based arguments that had no foundation.

[2] High Court Auckland CIV 2005-404-424, judgments dated 14 November 2005 and 24 November 2005, at 1/178-1/109.

The appeal was dismissed (1/187). The Judge put Mr Orlov on notice that he may be exposed to costs. This judgment was upheld on appeal.

Mr Orlov and his client Ms G (at 1/199 to 1/208) recorded their dissatisfaction with the treatment of Mr Orlov by the Judge describing that treatment variously as discourteous, inhumane, careless, obnoxious, arrogant, and rude. Mr Orlov felt aggrieved by the Judge pointing out his lack of knowledge of the applicable legal principles which Mr Orlov interpreted along with interruptions made during submissions to be undermining of him in the eyes of his client and aggressive. Connected proceedings were heard by other High Court Judges. The Court of Appeal judgment in G upheld Harrison J's reasoning.

The Committee referred to the evidence of Ms Jennifer Irving, counsel for child in this matter, as to her recollection of the hearing before Harrison J. She does not recall discourtesy to Ms G on the part of Harrison J, nor any screaming by the Judge. She does recall Harrison J enquiring into Mr Orlov's qualification following discussion "including the issues of Mr Orlov's evidence, unfamiliarity with the papers, process or statute".

L

The next proceeding in which Mr Orlov was involved relating to Justice Harrison was on behalf of his clients Mr and Mrs L. This proceeding was an application for judicial review of the Family Court decision relating to interim custody which resulted in the application for review being struck out. The decision to strike out the application review was in some part reversed by the Court of Appeal. Harrison J also ordered costs against Mr Orlov and Mr Deliu and an appeal against that Costs Order succeeded when brought by Mr Deliu, but Mr Orlov settled the question of costs. Despite the successful appeal the proceeding was discontinued by the Ls. What is important to note is that the Court of Appeal recorded that the appellants in that case had been "granted an indulgence" (by Harrison J). The Court confirmed that the statement of claim "contained much that was legally wrong". The application for judicial review was reinstated on terms, with the Court of Appeal holding that neither the High Court nor the respondent should have to deal with "those parts of the existing statement of claim which are legal mumbo-jumbo and which bear no relation to the true

complaint the Ls' made". Earlier in the judgment the Court of Appeal had agreed with most of what Justice Harrison had held holding that Harrison J's description of the statement of claim as "a jungle of conceptional confusion" was a description that was "entirely justified". The original six lines of attack had been reduced to four by virtue of a strike out judgment of Winkelmann J on 4 March 2008, leaving four "supposed causes of action, none of which was coherently pleaded".

In the course of the L proceeding, after Justice Harrison's judgment dated 24 July 2008 dismissing the application for judicial review, Mr Orlov and Mr Deliu applied for Justice Harrison to recuse himself from delivering any further judgments in the case. This coincided with a separate originating application brought by both of them for general recusal. Justice Harrison refused the recusal motion in the L case in His Honour's costs judgment dated 13 October 2008.

The originating application brought by Mr Orlov and Mr Deliu was discontinued and Mr Orlov and Mr Deliu apologised to the Judge by letter dated 4 December 2008. But it was not all over.

Mr Orlov and Mr Deliu appealed against the costs judgment. Records indicate that Mr Orlov abandoned his appeal after the parties reached a settlement. The costs order against Mr Deliu was overturned by the Court of Appeal. The Court of Appeal did however endorse Harrison J's concerns about the conduct of the case.

The record does not provide support for Mr Orlov's submission that Harrison J deliberately made an "illegal" costs order.

H

Mr Orlov next appeared before Justice Harrison in H v T High Court Auckland CIV 208-404-8568. Mr Orlov has referred to this as the 'P I' case because it related to an attempt to bring a derivative action by a director and shareholders in P I, a Company that had been placed in liquidation. Such actions may only be

brought with the leave of the Court, and where the Company is in liquidation the liquidator must be served with the leave application.

The problems Harrison J saw with Mr Orlov's proceeding are outlined in the exchange between the Judge and Mr Orlov that took place on 9 February 2009 for which a transcript is available. This is the only transcript which has been provided to the Tribunal in respect of the four interactions between Mr Orlov and Harrison J.

In short, Mr Orlov had not joined the trustees of the trust shareholder by name (which was then required); had not joined the Company (in liquidation) or it seems served it; failed to address the grounds for leave; failed to recognise the existence of another claim based on the same or similar causes of action, and failed to seek directions under s 284 of the Companies Act (required as P I was in liquidation, so either the liquidator or the court had to approve the contemplated action). There were other procedural problems. Harrison J struck out the proceeding and initiated an inquiry as to who was instructing Mr Orlov or had authorised filing of the claim (as the memorandum failed to show a filing solicitor but instead showed Mr Orlov, then a barrister, as filing the claim, which he was not entitled to do - see old Rule 41); the Judge referred the judgment to the Law Society.

Mr Orlov has criticised Harrison J's questioning of him as to whether he had an instructing solicitor for these proceedings. The Committee submitted that it is clear from the record that Harrison J had a basis for enquiring into this issue.

Framing of Charges in the Alternative and Brief Summary of Charges

[24] Some of the charges have been framed in the alternative. This is because there needs to be a determination of whether or not the practitioner was acting in the "provision of regulated services".

[25] All of the charges allege misconduct in terms of s 7 LCA 2006. This Section draws a distinction between conduct occurring at a time when a practitioner is providing regulated services and conduct unconnected with the provision of these services.

[26] Section 7(1)(a)(i) relates to conduct when a lawyer is providing "regulated services". Those services are defined through the definitions of "legal services", "legal work", and "reserved areas of work" to include:

> "... giving legal advice to any other person in relation to the direction or management of-
>
> (i) any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or ... tribunal ... appearing as an advocate ... before any New Zealand court or ... tribunal ... or ... representing another person in those proceedings ..."

[27] Relevant to the charges in this case, s 7(1)(a) requires proof of conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable[3], or consists of a wilful or reckless contravention of the LCA, or its Rules or Regulations[4].

[28] Section 7(1)(b)(ii) relates to conduct unconnected with the provision of regulated services but which would justify a finding that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer.

[29] Charge 1 relates to a letter sent by Mr Orlov to the Chief High Court Judge, Randerson J, in which he makes a number of serious allegations against His Honour Justice Harrison ("the Judge"). His complaints relate to comments made by the Judge and his conduct towards the practitioner in a series of proceedings in which Mr Orlov was the instructing solicitor, or appearing as Counsel, or attending at the request of the Court. This charge alleges misconduct unconnected to the provisions of regulated services.

[30] Charge 2 is an alternative charge to Charge 1, based on the same facts, but alleging misconduct occurring at the time of providing regulated services.

[31] Charge 3 concerns an Originating Application filed by Mr Orlov's chambers ("Equity Law") and citing Mr Orlov as First Applicant and one Frank Deliu a lawyer in the same chambers as Second Applicant. The Application was filed with the High Court at Auckland in CIV-2008-404-5878 seeking orders directing that the High Court

[3] Section 7(1)(a)(i).
[4] Section 7(1)(a)(ii).

Registry not allocate cases or matters involving the Applicants to the Judge. It is intituled as an “application for permanent judicial recusal”.

[32] Later, on 8 December 2008, those proceedings were discontinued by the Applicants and a letter of apology signed by them on the letterhead of Equity Law, Barristers, was lodged with the Court by their Counsel.

[33] It is the contents of the Originating Application which give rise to the charge. Again it includes a number of serious allegations amounting to judicial misconduct by the Judge.

[34] This charge is brought in terms of s 7(1)(a)(ii) of the LCA 2006 as misconduct occurring in the course of providing regulated services.

[35] Charge 4 is an alternative to Charge 3. It is based on the same facts but alleges misconduct unconnected with the provision of regulated services.

[36] Charge 5 relates to an Application filed with the Supreme Court for Special Leave to Appeal from a decision of the Judge in which he ordered Messrs Orlov and Deliu as Counsel to personally pay the costs of Counsel for the Children in that case on a ‘wasted costs‘ basis. The Application also challenged the refusal of the Judge to recuse himself on that costs order. The Application as filed contained serious allegations against the Judge essentially amounting to judicial misconduct. It is signed by Mr Orlov’s clients in person but filed by Frank Deliu and Evgeny Orlov on their behalf. Its terms seek relief for the lawyers involved rather than their clients. This charge against the practitioner alleges misconduct occurring in the course of providing regulated services. There is no alternate charge.

[37] Charge 6 alleges misconduct in the making of claims and allegations against the Judge in similar vein to those made in the preceding charges, in a letter of claim to the Human Rights Review Tribunal. The matters of complaint relate to the Judge’s comments and actions in various proceedings particularised in the letter. Again this charge alleges misconduct unconnected with regulated services and no charge is laid in the alternative.

[38] Charge 7 alleges misconduct unconnected with regulated services in respect to a number of claims and allegations of judicial misconduct made by Mr Orlov concerning the Judge this time in a letter of complaint to the Judicial Conduct Commissioner.

[39] Charge 8 is laid in the alternative to Charge 7 and relies on the same facts to establish misconduct occurring when providing regulated services.

[40] The facts of the present case show that it is not always straightforward to determine whether the conduct complained of occurs during the provision of regulated services.

[41] In those cases where a practitioner is appearing as Counsel or is the solicitor on the record the matter is reasonably self evident.

[42] But the line becomes more hazy where the lawyer initiates proceedings in his own name or in the name of others but essentially for his own benefit, or takes other unilateral action such as making a complaint. Whilst the genesis of those outcomes can be connected back to the provision of regulated services by that lawyer it is not so obvious to conclude that the conduct occurred at a time when he or she was providing regulated services.

[43] This issue was the subject of consideration by the Legal Complaints Review Officer in a decision *Morpeth v Ramsay* LCRO 110/2009. At paragraphs 15 onwards Dr Webb, LCRO, talks about the relationship of the two subsections relating to undertaking of regulated services or unconnected with the provision of regulated services. At paragraph 15 he has this to say:

> "On the plain English meaning of the words there is some space between conduct of a lawyer which is "unconnected with the provision of regulated services" and conduct "that occurs at a time when [the lawyer] is providing regulated services". However, I consider that those two phrases must be interpreted as covering all possible instances of conduct - there can be no intermediate category of conduct.
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> [16] In undertaking this interpretative task it is proper to look at both the text of the legislation and its purpose (s.5 Interpretation Act 1999). A central purpose of the Lawyers and Conveyancers Act 2006 is to protect the consumers of legal services and conveyancing services (s.3). In seeking to attain that purpose s.3(2) proceeds to state that it intends to provide a more responsive regulatory regime in relation to lawyers and conveyancers. ... One

> of the purposes outlined in s.120(2)(b) is that complaints "may be processed and resolved expeditiously ..." The Act in s.4 also affirms the fundamental obligation of a lawyer to act in accordance with all fiduciary duties and duties of care owed to clients. It is therefore appropriate to interpret the respective provisions in a way which is consistent with the protection of consumers of legal services, and the provision of a responsive and expeditious complaints process."

[44] We would add to that that a further interpretative aid resides in "Fundamental obligations of lawyers" set out in s 4. They must uphold the rule of law and facilitate the administration of justice in New Zealand.

[45] In the above decision Dr Webb was considering "unsatisfactory conduct" (s 12) of the Act but in respect of his comments concerning interpretation we consider that this extends to the definition of s 7 and that the words in paragraph 20 are equally applicable:

> "Conduct of the lawyer or incorporated law firm that occurs at a time when he or she is providing "regulated services" must be construed broadly and consistently with the wider purposes of the legislation to include any conduct which occurs in connection with the practice of law."

[46] For the NSC Mr Pyke submitted that the question was one of fact and that it was for the Tribunal to determine the appropriate head of charge and make its findings accordingly.

[47] We agree but we hesitate to draw firm lines around just when one or other of the relevant subsections is to apply given the protective purpose and the objectives stated under the LCA. In an Australian decision which considered this issue, the Court had this to say:[5]

> "... The dividing line between personal misconduct and professional misconduct is often unclear. Professional misconduct does not simply mean misconduct by a professional person. At the same time, even though conduct is not engaged indirectly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct. Furthermore, even where it does not involve professional misconduct, a person's behaviour may demonstrate qualities of a kind that require a conclusion that a person is not a fit and proper person to practice. ..."

[48] These latter comments reflect the wording of the legislation in s 7(1)(b)(ii).

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[5] *A Solicitor v Counsel of the Law Society of NSW*, High Court Australia [2004] HCA 1, at [20].

Freedom of Expression

[49] Mr Orlov contends that the proceedings against him are an abuse of process because they offend against his rights to freedom of expression under the Bill of Rights Act 1990 ("BORA"). Counsel for the NSC and Mr Orlov both referred us to a decision which considers freedom of expression, particularly in relation to a lawyer in Court, namely *Dore v Barreau du Quebec.*[6] In that matter the lawyer who had been criticised in Court by the Judge, wrote a private letter to him calling the Judge:

> "Loathsome, arrogant and fundamentally unjust, and accusing him of hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his Court to launch ugly, vulgar and mean personal attacks." (at page 3)

[50] Mr Orlov referred to this letter as containing more offensive comments than those made by him.

[51] Mr Dore was reprimanded by his disciplinary body. The issue on appeal was whether that represented *"... a proportionate balancing of the lawyer's expressive rights with its statutory mandate to ensure that the lawyers behave "with objectivity, moderation and dignity" ..."* in accordance with the relevant code of ethics. The Court referred to *"the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and Judges in particular".*[7]

[52] The Court affirmed that *"as with all disciplinary decisions, this balancing is a fact dependant and discretionary exercise*". At page 8 the Court went on to point out that there was not:

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

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[6] *Dore v Barreau du Quebec* [2012] SCC 12.
[7] At page 7.

> A reprimand for a lawyer does not automatically flow from criticising a Judge or the judicial system. Such criticism, even when it is expressed vigorously can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyers professionalism. As the disciplinary counsel found, D's letter was outside those expectations. His displeasure with the Judge was justifiable, but the extent of the response was not."

[53] The Court of Appeal dealt with this central issue in considering Mr Orlov's appeal against Heath J's judicial review decision.[8] At paragraph [77] Their Honours had this to say:

> [a] "It is fundamental to the integrity of our legal system that counsel should be able to advance their client's cause in court fearlessly. However, that is not an absolute right in the sense that counsel do not have carte blanche to behave in any way they please and to make scandalous allegations against others which are without any foundation. Counsel must conduct themselves in court so as to meet their obligations as officers of the court and their ethical obligations under the (LCA) and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. We agree with Heath J that the provisions of the Bill of Rights must be read in light of the duties on counsel that are either articulated in the Act or implicitly recognised. Excessively aggressive or scandalous conduct that breaches those obligations will not qualify for protection under the right to freedom of expression."

[54] And later in that decision, in dealing with the submission that:[9]

> "**The making of a complaint against a judge cannot be the subject of disciplinary action**
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> [120] Mr Orlov submitted that lawyers have the same rights as members of the public to make complaints about judges and that it would be a serious infringement of basic human rights and international law for the making of a complaint to be the subject of disciplinary proceedings.
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> [121] This submission overlooks the point that it is not the making of the complaint which is the concern but the allegedly intemperate and persistent manner in which the complaints have been made.
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> [122] As noted by Heath J, while complaints may be made against judicial officers it is clear that disrespectful or scandalous allegations against a judge exercising judicial authority is an affront to the court and poses a risk to public confidence in the judicial system. Such excessive conduct does not qualify for protection under the right to freedom of expression. To hold otherwise would be to inhibit both the court's own disciplinary jurisdiction over lawyers appearing before it and its content jurisdiction. We agree."

[8] Above, n 1.
[9] Paragraphs 120-122.

[55] Throughout these proceedings we have reminded ourselves of the need to preserve the important right for counsel to properly and responsibly advocate for their clients without fear of repercussions to them personally. Patently this is a freedom with limits arising from the expectation of the public and of the profession as to behaviour of lawyers.

[56] This issue was also discussed in a decision of the New South Wales Administrative Decisions Tribunal.[10] In that case the transcripts revealed behaviour of counsel who was being critical of a Crown prosecutor, in an unrestrained manner, which reflected many of the behaviours which were displayed in front of us by Mr Orlov. Interestingly, that practitioner had also referred to the "political nature of the trial"- an allegation which Mr Orlov has made both in his comments to the Higher Courts and to this Tribunal, throughout the proceedings. That decision dealt with the issue of whether disciplinary proceedings could be brought when contempt powers were available to deal with the same behaviour. In relation to the submission that they could not the Tribunal had this to say:[11]

> "... Contempt powers and disciplinary proceedings each have a role to play in the administration of justice. In our view it is quite possible and appropriate that conduct found to be in contempt could in turn give rise to disciplinary proceedings that might lead to disciplinary penalties being imposed ... we agree with the Tribunal that conduct that does not amount to contempt may still amount to a breach of professional discipline."

[57] As to public expectation of a barrister the Appeal Panel had this to say:[12]

> "... One reasonable expectation of a member of the public is, we consider, that barristers will behave in Court in a way which maintains the public interest in the administration of justice, which includes acting in a way which accords appropriate respect to the Court. Failure to maintain the standard could be seen as involving incompetence on the part of the barrister. Such a view would be consistent with the general object of disciplinary proceedings which is not to punish the practitioner but 'to protect the public and to maintain proper standards in the profession' ..."

[58] At paragraph 54, referring to the approach of the Tribunal, the Appeal Panel had this to say:

> "[54] It is recognised the duty of counsel to their clients to make known their objections. It placed a restraint on the expression of those objections - ie: an

[10] *Di Suvero v Bar Association (LSD)* [2001] NSW ADTAP 9.
[11] At paragraph 34.
[12] At paragraph 41.

> objection is improper when there is no factual foundation for it, and it is improper if expressed in a form, even with a factual foundation, that is bound to cause offence. The latter standard seeks, as we see it, to deal with plainly intemperate behaviour which seeks to, or has the effect of, undermining the ability of the Judge to control the conduct of proceedings especially by attacking their integrity."

[59] We respectfully endorse these *dicta* in our examination of the manner of expression used by Mr Orlov in each of the communications relied on.

Section 50 Evidence Act 2006 (EA)

[60] The evidence relied on by the NSC comprises documents including a number of judgments from the High Court, some of which are decisions of His Honour Justice Harrison and some of other Judges or on appeal from the Judge's decisions. Three of the Judges' decisions were sent to the Law Society for consideration as to Mr Orlov's competence. Because the issue of falsity and "proper foundation" are squarely in issue, the decisions are produced effectively to demonstrate the reasonableness of the Judges actions.

[61] Mr Orlov has raised s 50 of the EA as a bar to the Tribunal considering these decisions. We reject Mr Orlov's submission for the following reasons:

[62] Subject to the exceptions set out in ss 239(1)-(3) LCA, the Tribunal is bound by the EA as if it was a court (s 239(4), LCA). Section 239(1) LCA allows the Tribunal to receive as evidence any statement, document, information, or matter that may, in its opinion, assist it to deal effectively with the matters before it notwithstanding that it would be inadmissible in a court of law.

[63] Section 7 of the EA establishes the fundamental principle that relevant evidence is admissible in a proceeding except where it is inadmissible or excluded under the EA or any other act. Relevance is the fundamental test.

[64] Section 50 of the EA sets out the law relating to the use of civil judgments in other civil or criminal proceedings:

> "**S 50 - Civil judgment as evidence in civil or criminal proceedings**
>
> (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove

> the existence of a fact that was in issue in the proceeding in which the judgment was given.
>
> (2) This section does not affect the operation of—
>
> (a) a judgment *in rem*; or
>
> (b) the law relating to *res judicata* or issue estoppel; or
>
> (c) the law relating to an action on, or the enforcement of, a judgment."

[65] In discussing the effect of this provision, the High Court in *Dorbu* stated, at [21]:

> "If a court or tribunal has an independent obligation to determine whether alleged facts are proved or not, it cannot discharge that obligation by accepting without inquiry the findings of another court or tribunal as to the existence of those facts. To do that would be to abdicate its responsibility to determine the facts for itself."

[66] The Supreme Court has also discussed this provision in relation to defamation proceedings where the defendant sought to use a finding of fact in a civil proceeding to establish the truth of their allegedly defamatory statement; *APN New Zealand Ltd v Simunovich Fisheries Ltd*[13]:

> A finding of fact in other litigation over the allocation of quota for catching scampi cannot be relied upon by the defendants to prove the existence of that fact. *The making of the finding can be proved, if the fact of its making is relevant in the later proceeding.* But that would not assist the defendants in establishing the defence of truth because, as we have already demonstrated, they are required to establish independently the accuracy of the fact which was the subject of the earlier finding. Section 50 simply reinforces that position. (*Emphasis added*)

[67] While the statements on which the NSC seeks to rely were made in the course of a judgment, they are not "evidence of a judgment or a finding of fact" within the meaning of s 50(1), EA. The statements are therefore not covered by the ruling in *Dorbu* which would otherwise preclude the Tribunal from relying on such statements.

[68] In *Dorbu* the applicant sought judicial review of the Tribunal's decision that he was not a fit and proper person to be a barrister or solicitor in New Zealand. The decision stemmed from a number of charges relating to Mr Dorbu's alleged

[13] *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93; [2010] 1 NZLR 315 at [33].

involvement in an unlawful conspiracy. Civil proceedings had already determined that such a conspiracy had existed and that Mr Dorbu was a conspirator (*Barge v Freeport Development Ltd*[14] ('Barge')). In its hearing, the Tribunal had allowed Mr Dorbu to bring evidence which negated his own involvement in the alleged conspiracy but had treated the *Barge* case as binding proof that a conspiracy had in fact occurred. In deciding the judicial review proceedings, the High Court in *Dorbu* found that s 50 of the EA prohibited the Tribunal from relying on *Barge* as proof of the existence of a conspiracy and that it had further erred in treating the finding that Mr Dorbu had been involved in said conspiracy as a presumption which he then had the onus of disproving (at [27]-[35]).

[69] The judicial statements on which the Tribunal erroneously relied in *Dorbu* were "evidence of a judgment and findings of fact" as to the existence of a conspiracy and Mr Dorbu's involvement (although the latter was treated as rebuttable).

[70] In this matter, Harrison J's statements are clearly distinguishable as they do not relate to evidential matters which were to be decided in the cases at hand. Rather they relate to the opinion of the judge as to the conduct and competency of counsel during the course of the trial. They are therefore unrelated to the factual matters that were "in issue in the proceeding in which the judgment was given" and so fall outside the scope of s 50(1) EA.

[71] The judgments therefore fall to be considered under normal rules of relevance. The Judge's comments are clearly relevant to the current proceedings as they help to establish the Judge's motivations in acting as he did.

[72] Additionally, the Tribunal has jurisdiction to accept the judgments as part of the evidence irrespective of whether they would be admissible in a court of law although, the EA being subject to s 239(1), LCA, provided natural justice is observed.

Analysis of the Charges

Charge 1

[73] The elements of the charge are:

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[14] *Barge v Freeport Development Ltd* (2005) 7 NZCPR 361.

[74] **First,** that the statement was made by the practitioner. The statements are not denied by Mr Orlov but for completeness we record the substance of them: In a letter to the then Chief High Court Judge, Randerson J, of 6 August 2008 which contained annexures provided by the practitioner, Mr Orlov alleged actual and/or apparent bias on the part of Harrison J towards Mr Orlov personally. This both appears in the letter itself and is repeated in the annexures. The allegations also included wide ranging criticism of the Judge made in strong language which gathers momentum as the document progresses. On our view of it, the document and its attachments including the covering letter clearly attacked the reputation of the Judge in terms which suggested he was unsuitable to continue in office.

[75] One of the annexures is a somewhat extraordinary document marked "A" which Mr Orlov refers to in his letter as a "draft submission" but which is on its face, a draft of a memorandum of counsel of some eight double-sided pages apparently intended for His Honour Harrison J. In this and a number of other attachments he amplifies extensively on his complaint. The document is intituled for filing in an existing Auckland High Court proceeding which Mr Orlov is recorded as the instructing solicitor. It is not signed by him and was not ultimately filed with the Court in this form but was filed in an expanded form, in a document which has emerged through Mr Orlov's own affidavit. An example of the assertions can be found at paragraph 49.30 of the annexed draft where Mr Orlov states:

> "[30] In my submission your attitude and statements in the *L* case show an apparent bias not only against me but against the political beliefs that I hold and a desire which appears from your statements to punish me and my colleagues for my (sic) political opinions."

[76] Further, in the letter to the Chief Judge, Mr Orlov refers to the Judge having referred a copy of his decision (in the *G* matter) to the Law Society as being "improper, unsubstantiated by any particulars or matters and therefore frivolous and vexatious". Also in the memorandum at 49.12 Mr Orlov claims:

> "There is an appearance of bias that leads to an inference that you are not properly performing your judicial function and rather attempting to punish us for our beliefs or our ethnicity or both."

[77] Mr Orlov claimed that due to the "attitude and intemperance" of the Judge in the *G* proceeding that "a miscarriage of justice occurred". A final example is contained at paragraph 49.25 of the memorandum:

> "... I submit your various complaints directions and findings sent to the Law Society have intentionally and maliciously caused me harm and your complaints to my fellow Law Society colleagues have damaged irreversibly their view of me and my reputation in a manner which is now irreversible. I submit your actions are taken in bad faith and compromise your integrity as a judicial officer and your conduct has created an atmosphere of such horrific denigration and insult that I am fearful of appearing before you and your uncontrolled and completely unpredictable rage against me."

[78] **The second** element of the charge is that the statements are false or made without foundation. On the face of them, a number of the statements are patently false and without foundation. For example, at para 49.12 of the document previously referred to, Mr Orlov asserts to the Judge:

> "In my submission your attempt to punish myself and my colleague in the various cases cited above demonstrates that at least there is an appearance of bias that leads to an inference that you are not properly performing your judicial function but rather attempting to punish us for our beliefs or our ethnicity or both."

[79] Objectively viewed, this accusation is not only insulting but is completely without foundation, when regard is had to the reasons stated by His Honour for the referral to the Law Society. There is no evidence that the judge has any knowledge of Mr Orlov's beliefs, and nothing to suggest that he is being singled out for any other reason than the judge's concern about the manner of representation of clients and the presentation by Mr Orlov in court.

[80] The suggestion of "uncontrolled and unpredictable rage" is extraordinary. Furthermore, it is contradicted by the evidence of Mr Jefferson and Ms Irving. These two witnesses, who were called as reply witnesses to Mr Orlov's affidavit, were not cross-examined by him although he was repeatedly offered the opportunity of doing so. Their evidence is before us and as senior and experienced counsel, carries considerable weight. One of them appeared in the *G* matter and another in the *R* matter.

[81] In the *G* matter, Ms Irving refers to Mr Orlov's allegation (supported by a statement attributed to his client):

> "That Harrison J "screamed at" Mr Orlov and told him to "shut up".

She says:

> "...I have no recollection of either of these things. I have no recollection of ever experiencing hearing any High Court Judge screaming at either a party or a counsel or telling any counsel to "shut up" so I would have expected to recall such an incident had it occurred. ... Mr Orlov appeared to me to be unfamiliar with process, the papers and even with the statute under which the appeal was brought. I do recall Justice Harrison asking Mr Orlov what statute the proceeding was under, there being a pause and Mr Orlov replying 'the family law act'. Ms Ryan who was sitting along from me and behind him then whispered to him 'Children Young Persons and their Families Act' which was in fact the relevant statue (sic). Justice Harrison heard the prompt and commented on it and on Mr Orlov's apparent unfamiliarity with the statute. I certainly recall Justice Harrison remonstrating with Mr Orlov for a lack of respect in failing to attach the appellation of "Judge" to Judge Mahoney's name. As I recall Mr Orlov on a number of occasions referred to the Judge as "Mahoney", without any appellation at all ... ."

[82] Ms Irving has further evidence which is relevant to this matter:

> "I also recall Justice Harrison enquiring as to Mr Orlov's qualifications to appear and as to where he obtained his degree. That enquiry as I recall followed a lot of the earlier discussion including the issues of Mr Orlov's evident unfamiliarity with the papers, process and statute. My recollection is that the response by Justice Harrison and his Honour's enquiries were generally consistent with what could be anticipated by any counsel appearing on such a matter, where unfamiliarity with papers law and process was shown by counsel. My surprise was more at Mr Orlov's presentation than at Justice Harrison's responses".

[83] In relation to the *R* matter, Mr Jefferson had this to say:

> "I had not previously met Mr Orlov in any capacity so far as I know. I do recall that there was tension between Mr Orlov and Justice Harrison. Mr Orlov was making insistent submissions (the details of which I cannot now recall) and Justice Harrison was responding firmly (again I recall no details). I do recall that at one stage Mr Orlov indicated an unavailability to return to the Court later in the day as had been suggested by Justice Harrison. He indicated that he had some important international client commitment (again, I do not recall the details). For reasons which I also do not now recall, Justice Harrison felt moved to suggest to Mr Orlov that Mr Orlov take advice from Senior Counsel and the matter was stood down for that purpose ... I have no doubt whatsoever that had Justice Harrison acted in an unjudicial or excessive fashion, that would have been noteworthy to me. I have no such recollection. My recollection is that Justice Harrison was firm (possibly robust) but did nothing that resulted in my forming the impression that he had in any way exceeded the bounds of Judicial propriety. That is something, I have no doubt, I would have recalled."
>
> Similarly, the claim that a judicial officer has created an "atmosphere of horrific denigration and insult" is extreme and unsupported by any evidence other than Mr Orlov's subjective claim.

[84] The element of "false or without foundation" is relevant for a number of reasons, both in relation to this charge which deals with behaviour outside the

provision of regulated services but also in relation to the alternative Charge 2 and the other charges which deal with the provision of regulated services.

[85] Whether providing regulated services or not a practising lawyer enjoys a special status as an officer of the court which has concomitant responsibilities.

[86] Rule 2 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 ("Conduct and Client Care Rules") states:

> **2** A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.
>
> **2.1** The overriding duty of a lawyer is as an officer of the court.
>
> **2.2** A lawyer must not attempt to obstruct, prevent, pervert, or defeat the course of justice.

[87] Rule 13 states:

> **13.2** A lawyer must not act in a way that undermines the processes of the court or the dignity of the judiciary.
>
> 13.2.1 A lawyer must treat others involved in court processes with respect.
>
> **13.8** A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.
>
> 13.8.1 A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegations exist.
>
> 13.8.2 Allegations should not be made against persons not involved in the proceeding unless they are necessary to the conduct of the litigation and reasonable steps are taken to ensure the accuracy of the allegations and, where appropriate, the protection of the privacy of those persons.

[88] The making of unsubstantiated or false allegations, particularly in relation to a judicial officer is also in our view relevant to s 7(1)(a)(i), that is *"disgraceful or dishonourable"* conduct.

[89] Finally the making of allegations about a Judge which are false or without sufficient foundation also bears on s 7(1)(b)(ii), in considering whether the lawyer is *"a fit and proper person or is otherwise unsuited to engage in practice as a lawyer."*

[90] That takes us to the **third element** of the offence and that is by virtue of the statements made, misconduct has occurred which would justify a finding that he is not a fit and proper person to practise, or that he is unsuited to the practise of law.

[91] When making statements which denigrate, a lawyer has an obligation to have a reasonable, objective basis for those statements. In litigation this is a positive obligation (Rule 13.8.1). While this letter was not part of litigation, similar principles and standards of conduct must arise from the lawyer's obligation under s 4(a) of the LCA and Rule 2 of the Conduct and Client Care Rules quoted above.

[92] Section 4 reads:

> *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:
>
> (b) the obligation to be independent in providing regulated services to his or her clients:
>
> (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
>
> (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[93] Furthermore, as discussed in the section of this decision headed "Freedom of Expression" we are of the very clear view that there must be limits upon the manner of such expression, particularly in relation to a judicial officer. Respect for the judicial system and the importance of public confidence in it demands that those who are officers of the court must set the standard of dignity and self-control.

[94] Thus we consider the multiple statements relied upon in this charge, differing only modestly in their turpitude, certainly lead us to the finding on the balance of probabilities, having regard to the serious nature of the allegation, that this behaviour amounts to misconduct in that it would justify a finding that he is not a fit and proper person to practise.

Charge 2

[95] Since we have found the charge proved under Charge 1 it will be apparent that we do not consider that Mr Orlov was providing regulated services at the time he wrote his letter to His Honour Randerson J and thus we dismiss Charge 2.

Charge 3

[96] This charge relates to the statements made in the originating application for permanent recusal of Harrison J. This application named Mr Orlov as first applicant and sought that Harrison J not preside over any matters in which Mr Orlov or his colleague Mr Deliu were involved.

The first element of the offence

[97] Was Mr Orlov the maker of the statements complained about? Mr Orlov was evasive when asked about this application in the course of his submissions to us. He acknowledged he was an applicant and said:

> "Mr Orlov: Whether or not it's signed on my behalf, there's no proof currently before the Tribunal that I had anything to do with its making
>
> The Court: Despite the fact that you are first applicant?
>
> Mr Orlov: In other words, there is no proof that I drafted it or filed it which is what the charges are. Do you see?
>
> Mr Maling: And you are not prepared to tell us whether you took any part in the preparation of that document, is that your position?
>
> Mr Orlov: Yes, I have no case to answer.
>
> Mr Maling: You are not prepared to tell us?

Mr Orlov: Because of the no case to answer.

Mr Maling: I understand that."

[98] The document on its facing page records "Evgeny Orlov, Lawyer", as first applicant. The attached memorandum shows Equity Law as solicitors on the record and Frank Deliu as the solicitor filing. Given the nature of the content of the application Mr Deliu needed to comply with Rule 13.8 of the Conduct and Client Care Rules requiring him to be satisfied that reasonable grounds existed for making the allegations. We take the view that Mr Orlov as a principal party and as a practising litigation lawyer shared that responsibility.

[99] The record also shows that in December 2008 at the time when these proceedings were discontinued, Mr Orlov himself signed a letter of apology on Equity Law letterhead which was filed by his counsel along with the discontinuance. In that letter both Mr Orlov and Mr Deliu say:

> "If our pleadings have unintentionally caused offence to His Honour or the Court, we deeply and sincerely apologise."

[100] We infer from all of this Mr Orlov was well aware of the contents of the application and approved the same. To claim he did not draft them is disingenuous and disrespectful. He must take responsibility for the statements made.

[101] We also note that at this time Mr Orlov and Mr Deliu swore affidavits seeking Harrison J's recusal in the *L* case. It is submitted by the NSC that the filing of originating application, coinciding as it does with the *L* recusal application tends to suggest that the Orlov and Deliu originating application is connected with the provision of regulated services. Again, some examples of the statements made are:

- That the judge conducted himself in an actual or apparently biased manner "which is continuing in all cases ..." where the applicant's appear or on the record.

- That Harrison J had "treated one or both of the applicant's disproportionately".

- That (to quote from Particular 3.3) "that Justice Harrison had filed untenable and insufficiently particularised complaints with the Law Society, which were

frivolous, malicious, vexatious, vindictive, oppressive, and/or punitive in nature."

- That Harrison J had "oppressed one applicant's right to free speech, political opinions and freedom of association".

- That Harrison J had attempted to remove him and Mr Deliu as lawyers in a collateral proceeding in which he was not presiding.

- That (Mr Deliu's and Mr Orlov's) "human rights are being violated arbitrarily and/or capriciously" and that these breaches "are ongoing" and "the severity of the breaches is likely to increase".

- Finally, that Harrison J is "discriminating against" one or both applicants, Mr Deliu and Mr Orlov.

[102] Once again on the face of it, these statements are absolutely without foundation. To take the most extreme example, that the alleged breaches of Mr Orlov's rights are "ongoing" and their severity is "likely to increase" is extravagant and impossible to substantiate as a lawyer, who is a party to the filing of litigation (Rule 13.8.1 Obligation). The words "frivolous, malicious, vexatious, vindictive, oppressive or punitive" are extraordinary allegations to make about a Judge.

[103] The lack of substance of the assertions should also be viewed in the light of the discontinuance of the application and apology and costs agreement reached. Thus we find the second element of the offence proved, that is the statements were either false or made without sufficient foundation.

[104] In relation to whether this was in the course of providing regulated services, we consider that given this application sought an order which would have, if granted, prevailed in all matters in which the applicant was appearing as counsel or instructing solicitor we consider it is closely enough associated with the provision of regulated services to fall within the provisions of s.7(1)(a)(i). We are strengthened in this view by the timing of the application which closely coincided with the specific application for recusal in a case where Mr Orlov was counsel. In addition, the letter of apology provided refers to the applicants' ability to continue to be "vigorous and strong in

support of arguments for the client...". This supports the connection with the provision of regulated services.

[105] In respect of the third element of the charge, would Mr Orlov's conduct in making an application which contains allegations of this sort, be considered disgraceful or dishonourable by lawyers of good standing? We consider that the answer to this question is most certainly "yes".

[106] Thus we find this charged proved to the required level of proof on the balance of probabilities.

Charge 4

[107] If we are incorrect in relation to our interpretation of the provision of regulated services in this matter, that is if we were wrong in finding a connection between this application and the provision of regulated services, we consider that the alternative charge of Charge 4 would be established because the making of such by a lawyer given also his obligations as an officer of the Court is a serious breach and so blatant as to warrant a finding that he is unsuited to practice. However we consider the charge is properly laid as it appears in Charge 3 and therefore do not make a finding on Charge 4.

Charge 5

[108] This charge deals with the comments made in the notice of application for special leave to appeal to the Supreme Court, in the *Ls* case.

[109] These statements are not denied by Mr Orlov and largely repeat the allegations made in respect of the originating application for recusal referred to in Charges 3 and 4. However there are additional statements which refer to His Honour Justice Harrison as having discriminated against Mr Orlov and Mr Deliu on the basis of their "foreign nationality, imputed political beliefs and/or status as human rights advocates".

[110] Once again, quite extreme allegations are made and very strong language is used - such words as "*mala fides*", "spitefully" and "unduly punitive and/or with an

ulterior motive to harm Messrs Orlov and Deliu personally". There is a further allegation that His Honour abused the Court's process and was a "danger to the public". The prayer for relief sought an order that the Judge be ordered to pay the costs of appeal personally, on a "solicitor-client basis".

[111] These statements were clearly made by Mr Orlov while providing regulated services and thus s 7(1)(a)(i) is the relevant section. What is pleaded by the NSC is that these comments (if false or made without sufficient foundation), would be reasonably regarded as disgraceful or dishonourable by lawyers of good standing.

[112] In the further Particulars the specific breaches of Rules 2.1, 13.2, 13.8 and 13.8.1 are also pleaded. Mr Orlov has not denied being the maker of these statements. He has merely put the NSC to the proof once again, that the statements are false or without sufficient foundation.

[113] By referring to a Judge's "ulterior motive to harm" personally, a lawyer Mr Orlov has certainly undermined the dignity of the judiciary as he has in comments such as that the Judge was a "danger to the public" (Rule 13.2). Furthermore we are not satisfied he has complied with 13.8.1, that is that he took "appropriate steps to ensure that reasonable grounds for making the allegation" existed when alleging "reprehensible conduct" on the part of the Judge.

[114] The allegations of discrimination based on nationality or reputed political beliefs are repugnant and are simply not supported by the evidence put before us. In his decision about costs, the Judge clearly set out the reasons why he considered this to be one of those exceptional cases where a costs award against counsel was justified given the wasted expenditure involved. Mr Orlov seems to contend that because a subsequent appeal against the costs order was partially successful that in some way this automatically demonstrates not just an error on the part of the Judge but bad faith. This is an extremely serious allegation to make. It is unsupported by objective evidence and it undermines respect for and the dignity of the judiciary.

[115] As an officer of the Court Mr Orlov is required to act in a way that does not undermine the processes of the Court or the dignity of the judiciary (Rule 13.2). The Rules make it plain that this obligation to the Court is a primary one which overrides the obligation to the client.

[116] We have referred, in the section of this decision relating to "freedom of expression", to the restrictions on a lawyer's ability to make criticism of the Bench. Once again in relation to Charge 5 we consider that Mr Orlov went well beyond the role of assertive counsel and crossed decisively into the territory of undermining the judiciary and therefore the administration of justice. There is no question that such behaviour would be considered as disgraceful and dishonourable, in terms of the section. Thus we find this charge also proved in relation to all of its elements.

Charge 6

[117] This charge relates to allegations about the Judge made in a notice of claim and accompanying letter filed in the Human Rights Review Tribunal in March 2009. The allegations made about the Judge were along similar lines already described in respect of the other charges. However, Mr Orlov also alleges specific breaches of the Human Rights Act 1993 and of the BORA. Mr Orlov alleged the Judge's language, tone and demeanour to be abusive and insulting and alleged that this was because the Judge perceived Mr Orlov's client was Russian and that Mr Orlov was a Russian lawyer. He thus alleged that the Judge was behaving in a particular manner as a result of Mr Orlov's ethnic identity or his "imputed political opinion (his human rights stand and fearless representation of his clients)".

[118] In the claim (letter), Mr Orlov describes the Judge having threatened him with contempt in the initial stages of the *R* matter. After Mr Orlov arranged, at the Judge's suggestion, to be represented by Dr Harrison QC he alleges "...at which point the Judge recanted on his threats without apology...". The implication of this wording is that only after representations from Senior Counsel, was the Judge moved. However, this does not accord with the statement of Dr Harrison, filed by Mr Orlov in these proceedings, that the Judge had rethought the matter over the morning adjournment, before Dr Harrison appeared before him. This is an example of the distortion employed by Mr Orlov, perhaps unconsciously, because of his inability to approach situations with an objective mind.

[119] We encountered other examples of Mr Orlov's distortions, in respect of this Human Rights claim. The assertion that the Judge had handed a child "to a paedophile(sic)(when).....at the time of making the order the judge had before him clear evidence that the father spent time in a mental institution for shooting his first

wife...". The "clear evidence" provided to the judge by Mr Orlov (who was at the same time denying that he was acting as counsel) was a magazine article. The Judge was enforcing an order which had been made by consent.

[120] He further alleges an intention on the part of the Judge, of "compromising or hurting (Mr Orlov) financially" by sending a copy of the judgment to the Legal Services Agency. Mr Orlov further alleged malicious denigration of himself in front of judicial colleagues that created an atmosphere where it was difficult for him to appear in Court.

[121] In the *Ls* decision[15], the Judge was (justly) critical of Mr Orlov, as the parties' advisor, for the procedural approach adopted by him, which was ultimately to the detriment of the clients. The judge described the statement of claim drafted by Mr Orlov as "a jungle of conceptual confusion". That description was affirmed by the Court of Appeal[16]. While the appeal was ultimately allowed in part, in spite of pleadings which the Court later described as "a mess"[17], the process had taken two and a half years, during which time the children were in care, with their future undetermined. Despite these findings, Mr Orlov described the Judge's language in the judgment as "...extravagant, vicious and defamatory...as to be unprecedented in a judgment, and demonstrated.....an attitude of discrimination towards (him)".

[122] The NSC alleged that these allegations breach an overriding duty as an Officer of the Court to uphold Rule 2.1 and Rule 13.2 of the Conduct and Client Care Rules.

[123] As the first element of the offence, again the statements are not denied and of course they are plainly available in evidence to the Tribunal and could not sensibly be denied by Mr Orlov. The claim was dismissed by the Human Rights Review Tribunal but Mr Orlov contends that it was only dismissed as a result of lack of jurisdiction rather than on a merits basis. The fact that he was unable to acknowledge that the Judge's criticisms of him (for example in the *Ls case*) had been upheld, again demonstrates Mr Orlov's complete inability to take responsibility for his actions and adopt an objective stance.

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[15] *RL and WL v MSD and Ors*, High Court CIV2007-404-7031,24 July 2008, Harrison J.
[16] *RL and WL v MSD and Ors* [2009] NZCA 596 at [7].
[17] *RL and WL v MSD and Ors* [2010] NZCA 91 at [3].

[124] We find once again, that the extreme statements made by Mr Orlov are without apparent foundation, and in some instances are downright false. In respect of the third element of the charge: in taking such an application, based on insupportable information, we find that this conduct is capable of being viewed as disgraceful or dishonourable.

Charge 7

[125] This is the charge arising out of the complaint to the Judicial Conduct Commissioner. We have no difficulty in accepting that a lawyer must be free to make such a complaint in the proper manner.

[126] Once again by using, in his complaint, such language as that the Judge's judgments "knowing, maliciously and recklessly destroyed his reputation" (see Particular 7.7) Mr Orlov has approached the matter from a purely speculative and subjective perspective, rather than an objective and proper laying of a foundation for making such serious allegations as to reprehensible behaviour.

[127] Similarly, in alleging that the Judge had referred his judgment in the *G* proceeding to the Law Society falsely, maliciously and "with reckless indifference to the truth" is intemperate and again lacking in objectivity. The judgment plainly sets out His Honour's views as to his concerns about counsel's competence while representing a very vulnerable client. The findings themselves about Mr Orlov's conduct are not relied upon by the Tribunal, rather, the fact of reasons having been given, for referral of the decision to the Law Society, which undermines Mr Orlov's allegations of bias and ill-disposition.

[128] A more objective view of this proceeding is able to be gleaned from the evidence quoted above (paras 81 and 82) of Ms Irving. We prefer the evidence of Ms Irving which is entirely consistent with the description in relation to a number of details in the decision (such as the failure to use a judicial title when referring to His Honour Judge Mahony), and the Judge's reprimand of Mr Orlov in this regard.

[129] We note that in his own affidavit to the Tribunal Mr Orlov repeatedly refers to the Learned Judge as "Harrison" without any proper or deferential use of the Judge's title. This is but one example of the behaviour observed by us during this hearing,

which reflected and repeated that which had been adversely commented on by the Judge and other judges.

[130] The timing of this letter to the Judicial Conduct Commissioner is significant, following a day after the Judge has again, tested the practitioner in court on jurisdictional issues and procedure adopted by him, in the *H* case. This is the one interaction in which we have the assistance of a transcript - a matter about which Mr Orlov also complained, as he regarded it as discriminatory. Indeed, Mr Orlov inaccurately reported, to us the Judge's reasons for recording the hearing, as was apparent from the transcript.

[131] What emerges is that Mr Orlov persisted with his request for an amendment but when pressed was uncertain of the names of the parties to be cited. He described the change as 'just a question of intituling'. This provoked a comment from the Judge that it was not a question of intituling, it was a matter of substance. He added "Incompetence of this nature is not acceptable here."

[132] Then followed this exchange:

> "Mr Orlov: Sir, if I may, this is simply a mention. In light, as you said, of our recent disagreements on various matters, it is perhaps not appropriate for me to appear before you because….
>
> Bench: Mr Orlov, this is not the issue. I am just simply making sure there is a proper record. I did not refer to previous disagreements. I simply want to ensure that there are no misunderstandings at a later date about what might pass between us.
>
> Mr Orlov: Well, sir, I don't think you did that in relation to other counsel and I think the reason you have done that is because of our previous disagreements.
>
> Bench: Mr Orlov, I am not concerned about previous disagreements. I am concerned about documents that satisfy elementary standards and requirements in this Court and with compliance with the High Court Rules and in compliance with the Companies Act……"

[133] Following an adjournment Mr Orlov addressed the Court at length (one and a half pages of the transcript) and without interruption from the Judge, complaining that he had not been given a fair hearing and repeating the now familiar theme that the judge was criticising his competence without justification. He accused the Judge of

singling him out "*to the point of even recording this proceeding which you haven't done in relation to other counsel"* and suggested recusal, which the Judge declined.

[134] As the transcript itself shows there was good reason for the Judge to make a record to ensure that there were no misunderstandings at a later date. It was Mr Orlov who first introduced into their exchange that day the suggestion of previous disagreements, not the Judge. And the Judge felt moved to pick up on that point making it plain to Mr Orlov that he had not said the words attributed.

[135] The proceedings before us are the subject of a transcript as well. That is standard process. And the record amply demonstrates Mr Orlov's rambling style of advocacy which was short on accuracy and sometimes economical on the truth. He called a witness a liar without any justification, Mr Pyke was accused of deliberately misstating things, the Law Society was impugned for a conspiracy to put him out of practice and the Tribunal was not spared either. He repeatedly told us that he was being dealt with unfairly, and he spoke over the Chair on numerous occasions. He complained he had been called a liar by a member of the Tribunal when none such had taken place and when challenged refused or declined to find the reference in the transcript. Given our experience of Mr Orlov in court we can well understand why the Judge considered it necessary to record the proceedings.

[136] We find the statements made by Mr Orlov, and particularised in the charge to be false and or without foundation. We consider that the conduct was not directly connected to the provision of regulated services, although there is clearly a link, having regard to the reliance by Mr Orlov on the cases in which he had acted. We consider this to be the more appropriate charge than Charge 8 .

[137] We find that Charge 7 is established to the high standard of proof, on the balance of probabilities.

Charge 8

[138] For the reasons stated above, this Charge is dismissed, we having found in the alternative.

No case to answer submission

[139] Mr Orlov submitted that there was no case to answer, at the conclusion of the NSC case. He repeated a number of these submissions in reply to the NSC closing submissions and it is convenient to refer to these submissions together.

[140] Mr Orlov had submitted that he was not obliged to file evidence in advance of the hearing, and having done so, only a matter of days before the hearing, contended that the Tribunal was not entitled to take account of it. We note that this does not conform with the decision of Her Honour Katz J[18] upon which we relied in ruling on evidence in the course of the hearing. In that decision Her Honour had to say:[19]

> "[35] I note that in both **Hall**[20] and the present case, the view of the relevant practitioners appears to have been that the disciplinary process is analogous to criminal proceedings, in which a defendant is entitled to refrain from disclosing their defence until the 11th hour, only electing whether or not to give evidence after the close of the prosecution case.
>
> [36] That is not, however, how the Act is structured. Reflecting the strong public interest element, the Act envisages that the practitioner will fully co-operate in the disciplinary process and provide all relevant information to the Tribunal. A practitioner cannot "*keep his powder dry*". A response to the charges must be filed within 10 working days. The Tribunal is able to order that schedules of admissions or denials be filed. The legislative regime envisages a default position of evidence by affidavits, to be filed pre-hearing. In this context, I endorse the observation of Woodhouse J and **Hall (No 2)**[21] that the cases relied on by the appellant in that case did not even go so far as to support a proposition that a disciplinary tribunal would be bound to consider the merits of a charge without requiring all of the evidence *for the practitioner* to be put before the Tribunal".

[141] Next, Mr Orlov submitted that the NSC had not filed any evidence (despite numerous volumes of evidence before the Tribunal). Given that Mr Orlov actually admitted most of the statements were made by him, we assume that his submissions as to inadequacy of evidence, relate to the issue of falsity or lack of foundation.

[142] Mr Orlov contended that without the direct evidence of Randerson J and Harrison J and the two Judicial Conduct Commissioners, the Tribunal could not establish the falsity or otherwise of his statements. Mr Orlov's application to have

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[18] *E Orlov v National Standards Committee 1 and Auckland Standards Committee 1* [2013] NZHC 1955, Katz J, 6 August 2013.
[19] At paragraphs 35 and 36.
[20] *Hall v Wellington Standards Committee (No. 2)* [2013] NZHC 798, Woodhouse J, 18 April 2013.
[21] *Hall v Wellington Standards Committee (No. 2)* [2013] NZHC 1867, Woodhouse J, 26 July 2013.

summonses issued for those potential witnesses was declined in a pre-trial decision dated 4 July 2013, for the reasons stated in that decision. Mr Orlov incorrectly referred to those witnesses as *"refusing*" to give evidence.

[143] Mr Orlov correctly asserts that the prosecution must establish insufficient grounds for making his allegation. He submits that there is no evidence to contradict the facts as asserted by him. This submission would seem to rely on his view that the judgments of the Judge and of other Courts are inadmissible – we have dealt with this issue under the heading of Section 50 EA.

[144] Mr Orlov then submitted that the charges are *"unknown to law"* or *"an abuse of process".* Mr Orlov supports this by the assertion that he has been prosecuted merely for complaining about a Judicial Officer through the correct channels – that is misconduct is alleged to arise merely because he has alleged bias in the Judge. To use his words he "*...is being attacked solely for the fact that he exercised his rights before the Human Rights Tribunal, the Judicial Conduct Commissioner and the High Court...".*

[145] Mr Orlov asserts a lawyer has never before been prosecuted for this. He submitted the Tribunal could only find that the Judge was not biased if it had heard evidence from the Judge personally.

[146] Mr Orlov submitted initially that s 7 only applies to misconduct arising in the course of providing regulated services. Similarly, that the Client Conduct and Care Rules *"only refer to lawyer's (sic) duties when acting for a client".* Mr Orlov later addressed s 7(1)(b)(ii) – the non-regulated services provision and submitted that, involving as it does, an assessment that the practitioner is not a fit and proper person, it can only be established "for the most seriously reprehensible conduct". We agree with that submission.

[147] Mr Orlov went on to refer us to the well known authority of ***Ziems***[22]

> "yet it cannot be that every proof which he may give a human frailty so disqualifies him. But it will generally be agreed that there are many kinds of conduct deserving of this approval and many kinds of convictions of breaches of the law, which do not spell unfitness for the bar, and to draw the dividing line is by no means always an easy task."

[22] *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298.

[148] Mr Orlov then reminded us of the standard of proof having regard to the serious nature of the allegations.

[149] As to misconduct, Mr Orlov referred us to the well known dicta in ***Pillai v Messiter***[23] describing misconduct as:

> "...a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner."

[150] In this context we are reminded of our responsibility to not only consider whether there has been a breach of the relevant rule, but to assess the gravity of the breach in each case.

[151] The abuse of process argument put forward by Mr Orlov resides in alleged breaches of BORA, which are discussed under the heading *"freedom of speech".*

[152] Mr Orlov is not content to leave it at that, however, in referring to the allegation that he is not a fit and proper person he says:

> "...considering that even criminals and paedophiles and fraudsters have been allowed to practice law, this is an abuse of process to attempt to disbar the appellant (sic) merely for exercising statutory rights. It places New Zealand in the same campus (sic) Fiji and Iran and worse."

[153] Mr Orlov also sets out a number of instances of alleged unfairness in the Tribunal's process. We reject these assertions as either distorted, failing to accept pre-trial rulings and decisions (but not appealed), or self serving opinions expressed by Mr Orlov.

[154] In support of his Abuse of Process argument, Mr Orlov asserts that there has been a deliberate failure on the part of the prosecutor in the taking of these proceedings. He has repeatedly made assertions impugning Mr Pyke's integrity in the manner of presenting his case. He is critical of Mr Pyke whom he says: "deliberately fails to provide the whole record and opposes discovery". The Tribunal has been assured that extensive discovery has been made available to Mr Orlov and we are aware that this has involved a number of applications to the High Court, in order to provide comprehensive material to the Tribunal. If Mr Orlov has not availed

[23] *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197 (CA) at 200.

himself of the opportunity of inspecting this material, that is a matter for which he must take responsibility.

[155] Finally Mr Orlov submits that, relying on the ***Muir***[24] decision relating to bias that the Judge's *"intemperate criticisms and statement and referrals could be viewed by the reasonable observer to have constituted actual or apparent bias or at least cannot be said to be entirely unreasonable for the defendant to hold that view".*

Legal Standard for finding of misconduct

[156] These charges are not in fact without precedent as can be seen from the decision of *Gazley v Wellington District Law Society.*[25] In that matter the practitioner refused to accept that a page of a Judgment had been left out inadvertently. He issued a writ in the name of his client against the three Judges who had comprised the Court of Appeal alleging wilful and/or malicious (or negligence in breach of judicial duty) failure to adjudicate on certain of the practitioner's submissions and that they had *"wilfully, dishonestly or negligently failed to exercise the jurisdiction".* The practitioner faced a disciplinary charge of professional misconduct. In these proceedings he swore an affidavit stating that he did not accept there was a missing page and claimed to have evidence suggesting that it had been written after the Judgment was delivered. However, he produced no evidence to sustain this claim. He was found guilty of misconduct in his professional capacity. He appealed to the then Supreme Court which dismissed his appeal and followed the decision in *Rondel v Worsley*[26] where in relation to the duty of counsel it was held:

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information."
>
> and

[24] Muir v C I R [2007] 3 NZLR 495 (CA).
[25] *Gazley v Wellington District Law Society* [1976] 1 NZLR 452.
[26] *Rondel v Worsley* [1969] 1 AC 191 [1967] 3 ALLER 993.

> "the same public duty applies when drawing pleadings or conducting subsequent stages in a case as applies to counsel's conduct during the trial."

[157] This *dicta* was adopted by the High Court of Australia in *Clyne v NSW Bar Association*[27] *w*hich was followed in the *Gazley* case. In referring to *Clyne* and in turn *Rondel's* case:

> "...Later in the Judgment the Court refers to: "great privileges both de jure and de facto" which a member of the bar enjoys and the absolute privilege conceded on the grounds of public policy to ensure freedom of speech (abid). Within that, however, there is the professional duty to which Lord Reid referred in *Rondel's* case, stated in *Clyne's* case as follows:
>
> > "but, from the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of doing harm which it confers, should not be abused. Otherwise grave and irreparable damage might be unjustly occasioned. The privilege may be abused if damaging irrelevant matter is introduced into a proceeding. It is grossly abused if counsel, in opening a case, makes statements which may have ruinous consequences to the person attacked, and which he cannot substantiate or justify by evidence. It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that he has, and definitely intends to adduce, evidence to support them. It cannot of course be enough that he thinks that he may be able to establish his statements out of the mouth of a witness for the other side..."
>
> The privilege and the immunity bring with them professional responsibility not to make allegations "*without a sufficient basis"* or *"without reasonable grounds"*. This responsibility applies irrespective of the persons against whom allegations are made. We emphasise, as did the Disciplinary Committee, that this case does not turn on the fact that the persons against whom counsel made allegations were Judges".

[158] The Tribunal notes the references in those decisions to such terms as *"gross abuse*" of counsel's privilege and *"unfair and improper in the highest degree..."*. There can be no doubt that the Court of Appeal considered the allegations made without proper foundation by the practitioner in that matter to be of an extremely serious nature and properly justifying a finding of misconduct.

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[27] *Clyne v NSW Bar Association* (1960) 104 CLR 186.

[159] The term "*dishonourable"* was considered in the more recent decision of *Shahadat v Westland District Law Society*:[28]

> "*Dishonourable"* behaviour on the part of a practitioner may well be different to that which is seemed to be *"dishonest"* in the fraudulent sense. *"Dishonest*" may carry a connotation of "*fraudulent*", whereas "*dishonourable*" behaviour may cover a wide range of disgraceful, unprincipled, wrongful acts or admissions comprising blatant breaches of duties owing by a professional person".

[160] In the section of this decision in which each of the charges is analysed, we have, in relation to the regulated services charges found that this description, unfortunately, fitted the behaviour of this practitioner.

[161] Mr Orlov, in making these statements about the learned Judge expressed himself in an unrestrained, unprofessional, and at times outrageous manner. In doing so he has utterly failed in his duty to his profession, to the Court and indeed to the public in terms of their reasonable expectations of his behaviour. He has shown himself to be incapable of viewing the matter objectively or of conceding that any actions on his part could have properly lead to a Judicial Officer reprimanding him or being concerned about the standard of his advocacy for Mr Orlov's clients.

Dissenting View

[162] The above reasons comprise the view of four members of the Tribunal (the Chair, the two lawyer members and one lay member). The following is the decision of the remaining lay member, Mr Clarke.

[163] I have appreciated the assistance and patience of my colleagues with whom I now differ. I have no knowledge of any of the parties to this case and remain dispassionate and objective in my assessment.

[164] After considerable re-reading of the evidence and reflection upon the evidence and presentations received in connection with the case since I became acquainted by LCDT about 11 months ago, I am of the opinion that the National Standards Committee have not, on balance, proven the 8 charges (some in the alternative) presented to this Disciplinary Tribunal.

[28] *Shahadat v Westland District Law Society* [2009] NZAR 661, at 31.

[165] By way of further explanation I set out, as Lay Member, the following.

[166] I am not satisfied that there is a sufficient evidential basis to justify a finding, as per the Charges, against Mr Orlov.

[167] It is well established and incontrovertible that the burden of proving the eight charges rests with the NSC. Proof of the allegations must be to a high standard having regard to the serious nature of the allegations (complaints made 'without foundation') and the possible effects of them on Mr Orlov (*Z v Dental*). I do not find that there is, on balance, sufficient evidence to support the NSC's eight charges.

[168] There is no doubt that several 'altercations' occurred between Mr Orlov and the Judge at the centre of the NSC charges against Mr Orlov circa 2005 - 2007. [Exampled by the R '*contempt'*; in G '*exposed to costs'* and *'questioning in public Mr Orlov's qualifications as a lawyer'* and in L *'costs against Mr Orlov'.*] These altercations provide for me sufficient and proper cause by which to understand the Orlov complaints, for them not to be considered 'false' or 'without foundation' as set out in the charges.

[169] The subsequent and consequential complaint letters and claims lodged by Mr Orlov circa 2009 - raising the charges 6, 7 and 8 - reflect the dysfunctional, unresolved and on-going nature of the relationship between the Judge, the Auckland District Law Society and Mr Orlov.

[170] The belated Irvine and Jefferson affidavits of August 2013 - 8 years after the originating event - confirm, at the very least, an interaction between the Judge and Mr Orlov and the slow progress in any attempt to resolve these matters. While Mr Orlov must expect Judges to be entitled to criticise a lawyers pleadings, a lawyer should at all times expect to be treated fairly and appropriately. Mr Orlov submits that the treatment he had received from the Judge was not fair and appropriate. The appropriate professional body also appears to have taken little constructive action (e.g. training, professional development, conflict resolution) to respond to or resolve the situation. In these circumstances, relying upon disciplinary procedures several years later is unsatisfactory.

[171] In my opinion, the NSC has not proven that Mr Orlov has presented his concerns 'without foundation'. There is an insufficiency of evidence presented by the NSC to lead me to a conclusion that the concerns raised by Mr Orlov were false or without foundation. To me, in the plain sense of the wording, the Orlov complaints had foundation.

[172] There are no examples of Mr Orlov making scandalous allegations *without foundation* or being intemperate in his interactions within the Court. Nor are there any complaints from the public within these eight NSC charges.

[173] The NSC has provided no 2005 transcripts to assist the Tribunal. The 'H' transcript 9/2/2009 does little to assist the deliberations - other than to illustrate that the relationship between the two protagonists was still dysfunctional four years later.

Penalty Hearing

[174] Counsel for the NSC is to file submissions as to penalty within 10 days of the release of this decision (29 October, allowing for Labour Day). The practitioner may file submissions in response within a further 10 days (by 8 November). The hearing as to penalty will take place on Tuesday 12th November 2013.

DATED at AUCKLAND this 18th day of October 2013

Judge D F Clarkson
Chair

SCHEDULE 1

CHARGES

Charge Nr 1

1.0 The National Standards Committee charges Evgeny Orlov, lawyer of Auckland, with misconduct that would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer in terms of s.7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations about the Honourable Justice Rhys Harrison that were either false or were made without sufficient foundation, in his letter dated 6 August 2008 sent to the Chief High Court Judge, the Honourable Justice Randerson.

Particulars of the allegations made by Mr Orlov:

1.1 that Justice Harrison acted towards him and continued to act towards him in a manner of actual and/or apparent bias;

1.2 that by Justice Harrison's direction in paragraph 30 of His Honour's judgment dated 14 November 2005 in *G v Chief Executive Officer of the Department of Child Young & Family Services & Another* (CIV2005-404-424, High Court Auckland ("the *G* Proceeding") Justice Harrison improperly referred Mr Orlov's conduct in that case to the Professional Standards Director of the Auckland District Law Society;

1.3 that a miscarriage of justice had occurred due to the attitude and intemperance of Justice Harrison in the *G* Proceeding;

1.4 that Justice Harrison subjected him and his client to highly improper, inflammatory and intemperate criticisms;

1.5 that Justice Harrison had signalled him out and was attacking him personally;

1.6 that Justice Harrison subjected him and unspecified colleagues to improper persecution and discrimination;

1.7 that Justice Harrison was attempting to punish him and his colleagues for their beliefs or ethnicity, or both;

1.8 that Justice Harrison intentionally and maliciously caused him unspecified harm, and had conducted himself as a judicial officer in an atmosphere of horrific denigration and insult, with uncontrolled and unpredictable rage against him.

Further Particulars of the Charge:

1.9 by making the allegations as aforesaid Evgeny Orlov breached his over-riding duty as an officer of the Court, in breach of Rule 2.1 of the Lawyers & Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Conduct and Client Care Rules");

1.10 by making the allegations as aforesaid Evgeny Orlov acted in a way that undermined processes of the Court and the dignity of the judiciary, in breach of Rule 13.2 of the Conduct and Client Care Rules.

Charge Nr 2 (Alternative to Charge Nr 1)

2.0 The National Standards Committee charges Evgeny Orlov, lawyer of Auckland, with misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, in terms of s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations about the Honourable Justice Rhys Harrison that were either false or were made without sufficient foundation, in his letter dated 6 August 2008 sent to the Chief High Court Judge, the Honourable Justice Randerson. The particulars of the allegations and of the charge appearing at clauses 1.1 to 1.10 hereof are repeated and adopted for the purposes of this Charge Nr 2.

Charge Nr 3

3.0 The National Standards Committee charges Evgeny Orlov, lawyer of Auckland, with misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, in terms of s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations about the Honourable Justice Rhys Harrison that were either false or were made without sufficient foundation, in his originating application dated 5 September 2008 filed in the High Court at Auckland in CIV2008-404-5878, whereby he applied for an order that Justice Harrison be permanently recused from all cases filed by him and his colleague Frank Deliu.

Particulars of the allegations made by Mr Orlov:

3.1 that Justice Harrison had conducted himself towards him such as to create an appearance of bias, or that the learned Judge was actually biased against him;

3.2 that Justice Harrison had treated him disproportionately;

3.3 that Justice Harrison had filed untenable and insufficiently particularised complaints with a law society, which were frivolous, malicious, vexatious, vindictive, oppressive, and/or punitive in nature;

3.4 that Justice Harrison had oppressed his right to free speech, political opinions and freedom of association;

3.5 that Justice Harrison had attempted to remove him and Mr Frank Deliu as lawyers in a collateral proceeding in which he was not presiding;

3.6 that his human rights were being violated arbitrarily and/or capriciously by Justice Harrison, and that these breaches were ongoing and likely to increase;

3.7 that Justice Harrison was discriminating against him and/or Mr Frank Deliu.

Further Particulars of the Charge:

3.8 by making the allegations as aforesaid Evgeny Orlov breached his over-riding duty as an officer of the Court, in breach of Rule 2.1 of the Conduct and Client Care;

3.9 by making the allegations as aforesaid Evgeny Orlov acted in a way that undermined processes of the Court and the dignity of the judiciary, in breach of Rule 13.2 of the Conduct and Client Care Rules;

3.10 by making the allegations as aforesaid Evgeny Orlov attacked the reputation of Justice Harrison without good cause in documents filed in Court proceedings, in breach of Rule 13.8 of the Conduct and Client Care Rules;

3.11 by making the allegations as aforesaid Evgeny Orlov was a party to the filing of a document in Court alleging reprehensible conduct by Justice Harrison, without having first taken appropriate steps to ensure that there were reasonable grounds for the making of the allegations, in breach of Rule 13.8.1 of the Conduct and Client Care Rules.

Charge Nr 4 (Alternative to Charge Nr 3)

4.0 The National Standards Committee charges Evgeny Orlov, lawyer of Auckland, with misconduct that would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer in terms of s.7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations about the Honourable Justice Rhys Harrison that were either false or were made without sufficient foundation, in his originating application dated 5 September 2008 filed in the High Court at Auckland (in CIV2008-404-5878), whereby he applied for an order that Justice

Harrison be permanently recused from all cases filed by him and his colleague Frank Deliu. Particulars of the allegations and of the charge appearing at clauses 3.1 to 3.11 hereof are repeated and adopted for the purposes of this Charge Nr 4.

Charge Nr 5

5.0 The National Standards Committee charges Evgeny Orlov, lawyer of Auckland, with misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, in terms of s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006, that by Notice of Application for Special Leave to Appeal to the Supreme Court in SC77/2008 dated 14 October 2008, against a costs judgment of the High Court dated 13 October 2008, he prepared and filed, or he authorised the filing of, an application for leave to appeal to the Supreme Court that made allegations about the Honourable Justice Rhys Harrison that were either false or were made without sufficient foundation.

Particulars of the allegations:

5.1 that Justice Harrison was actually or apparently biased;

5.2 that Justice Harrison discriminated against him and Mr Frank Deliu on the basis of their foreign nationality, reputed political beliefs and/or status as human rights advocates;

5.3 that Justice Harrison acted without jurisdiction, ultra vires, mala fides, maliciously, vexatiously, vindictively, spitefully, oppressively, unduly punitive and/or with an ulterior motive to harm him and Frank Deliu personally, and thus His Honour abused the Court's process;

5.4 that Justice Harrison was a danger to the public;

5.5 that Justice Harrison was breaching his and Mr Frank Deliu's human rights.

Further Particulars of the Charge:

5.6 by making the allegations as aforesaid Evgeny Orlov breached his over-riding duty as an officer of the Court, in breach of Rule 2.1 of the Conduct and Client Care;

5.7 by making the allegations as aforesaid Evgeny Orlov acted in a way that undermined processes of the Court and the dignity of the judiciary, in breach of Rule 13.2 of the Conduct and Client Care Rules;

5.8 by making the allegations Evgeny Orlov attacked the reputation of Justice Harrison without good cause in documents filed in Court proceedings, in breach of Rule 13.8 of the Conduct and Client Care Rules;

5.9 by making the allegations Evgeny Orlov was a party to the filing of a document in Court that alleged reprehensible conduct by Justice Harrison without having first taken appropriate steps to ensure that there were reasonable grounds for the making of the aforesaid allegations, in breach of Rule 13.8.1 of the Conduct and Client Care Rules.

Charge Nr 6

6.0 The National Standards Committee charges Evgeny Orlov, lawyer of Auckland, with misconduct that would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer in terms of s.7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations about the Honourable Justice Rhys Harrison that were either false or were made without sufficient foundation, in his Notice of Claim dated 13 March 2009 filed in the Human Rights Review Tribunal (Reference Nr. HRRT 09/09).

Particulars of the allegations made by Mr Orlov:

6.1 that Justice Harrison had repeatedly breached the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 in relation to him;

6.2 that Justice Harrison improperly and unlawfully threatened to incarcerate him for contempt;

6.3 that Justice Harrison made innuendoes that he was a foreign lawyer and therefore did not understand the New Zealand Legal System;

6.4 that Justice Harrison's language, tone and demeanour were abusive and insulting;

6.5 that Justice Harrison acted in such a manner largely because His Honour perceived that Mr Orlov's client was Russian and that Mr Orlov was a Russian lawyer;

6.6 that Justice Harrison made threats in part or in whole due to Mr Orlov's clients actual or "imputed" ethnic identity and that the Judge's view of Mr Orlov as "foreign or overseas lawyer" and/or his imputed political opinion ("his human rights stand and fearless representation of his clients") informed the alleged threats;

6.7 that Justice Harrison intended his judgment in the case to have the effect of destroying the reputation of Mr Orlov with the full knowledge that as a Judge he could not be liable in law for defamatory statements;

6.8 the language used in the judgment of Justice Harrison was such an extravagant, vicious and defamatory nature as to be unprecedented in a judgment and demonstrated even from the language alone an attitude of discrimination towards Mr Orlov and/or his client;

6.9 that by Justice Harrison sending a copy of his judgment to the Legal Services Agency Justice Harrison intended it to have the effect of affecting Mr Orlov's reputation as a legal aid provider and compromising and hurting him financially;

6.10 that Justice Harrison had maliciously denigrated Mr Orlov in front of his judicial colleagues creating an atmosphere whereby it was difficult for the plaintiff to appear.

Further Particulars of the Charge:

6.11 by making the allegations as aforesaid Evgeny Orlov breached his over-riding duty as an officer of the Court, in breach of Rule 2.1 of the Conduct and Client Care;

6.12 by making the allegations as aforesaid Evgeny Orlov acted in a way that undermined processes of the Court and the dignity of the judiciary, in breach of Rule 13.2 of the Conduct and Client Care Rules.

Charge Nr 7

7.0 The National Standards Committee charges Evgeny Orlov, lawyer of Auckland, with misconduct that would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer in terms of s.7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006, by virtue of making allegations against the Honourable Justice Rhys Harrison that were either false or were made without sufficient foundation, in his letter dated 11 February 2009 sent to the Judicial Conduct Commissioner.

Particulars of the allegations made by Mr Orlov:

7.1 that Justice Harrison's conduct towards him when appearing in Court was obviously improper;

7.2 that over the two year period prior to 11 February 2009 Justice Harrison had acted towards him in a fashion that was discriminatory, unfair and improper, such as to bring the administration of justice into disrepute;

7.3 that Justice Harrison had insulted him and maliciously made complaints about him to the Auckland District Law Society;

7.4 that Justice Harrison's referral of the judgment in the *G* Proceeding to the Auckland District Law Society was a false complaint, made maliciously and with reckless indifference to the truth;

7.5 that in cases subsequent to the *G* Proceeding Justice Harrison took steps which maliciously and in bad faith were attempts to cause him harm;

7.6 that Justice Harrison had openly abused his position of power as a judicial officer in order to hurt and slander him;

7.7 that Justice Harrison's judgments knowingly, maliciously and recklessly destroyed his reputation;

7.8 that Justice Harrison acted improperly, and outside his powers and functions as a judicial officer;

7.9 that Justice Harrison was a danger to the legal profession and to the public and that it was not in the public interest that he be allowed to continue his discriminatory and unlawful behaviour;

7.10 that Justice Harrison was discriminating against him and harassing him in an attempt to destroy his legal career because of his ethnicity, his political opinions, or both.

Further Particulars of the Charge:

7.11 by making the allegations as aforesaid Evgeny Orlov breached his over-riding duty as an officer of the Court, in breach of Rule 2.1 of the Conduct and Client Care;

7.12 by making the allegations as aforesaid Evgeny Orlov acted in a way that undermined processes of the Court and the dignity of the judiciary, in breach of Rule 13.2 of the Conduct and Client Care Rules.

Charge Nr 8 (Alternative to Charge Nr 7)

8.0 The National Standards Committee charges Evgeny Orlov, lawyer of Auckland, with misconduct when providing regulated services that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, by virtue of making allegations against the Honourable Justice Rhys Harrison that were either false or were made without sufficient foundation, in his letter dated 11 February 2009 sent to the Judicial Conduct Commissioner. The particulars of the allegations and of the charge appearing at clauses 7.1 to 7.12 hereof are repeated and adopted for the purposes of this Charge Nr 8.