NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 68

LCDT 035/13

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **CANTERBURY WESTLAND STANDARDS COMMITTEE 2 OF THE NEW ZEALAND LAW SOCIETY**

AND **JOHN REVANS EICHELBAUM** of Auckland, Barrister

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Dr I McAndrew

Mr S Maling

Ms S Sage

Mr W Smith

HEARING at Auckland

DATE OF HEARING 6, 7, 8 October 2014

COUNSEL

Ms K Davenport QC for the Standards Committee

Mr A H Waalkens QC for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[1] This case has arisen following the breakdown of the relationship between the lawyer and his client(s). The unusual aspect is that the complaint does not arise out of the performance or non-performance of the actual legal work. Rather, it arises out of the manner in which the lawyer has sought payment of monies he claims are owed to him.

[2] Complicating the picture are the multiple roles undertaken by the lawyer and the multiple entities for whom it is alleged he acted, and therefore owed duties as a lawyer.

[3] The six charges faced by Mr Eichelbaum cover a range of conduct over a period of almost seven months (1 August 2012 to 28 March 2013). The charges and particulars on which they rely are annexed as Schedule 1 to this decision.

[4] To assess Mr Eichelbaum's conduct the Tribunal must determine the following issues:

Issue 1

In each instance was the alleged conduct professional conduct, or conduct unrelated to the provision of legal services?

Issue 2 - Charge 1

(a) Was the Statutory Demand unfounded?

(b) Did the lawyer know that?

(c) Was the purpose for its issue improper?

Issue 3 - Charge 2

(a) Did the sending of a draft affidavit with inflammatory content constitute a threat or improper purpose?

(b) Was it in other respects unprofessional/disgraceful/dishonourable conduct?

Issue 4 - Charge 3

(a) Who were Mr Eichelbaum's clients?

(b) When and in what capacity did he receive the information in respect of which confidentiality and privilege is claimed?

(c) If there were multiple roles performed do the obligations as a lawyer predominate?

(d) If a duty of confidence is upheld, has this been breached by filing the documents in question in Court?

Issue 5 - Charge 4

(a) Were any of the communications relied on by the Standards Committee and set out at paragraph [82] an attempt to secure an advantage for the lawyer personally and therefore made for an improper purpose?

(b) Were they made with a proper level of professionalism?

Issue 6 - Charge 5

(a) Did Mr Eichelbaum fail to consent to suppression?

(b) If so, did this breach a duty of confidence?

Issue 7 - Charge 6

(a) Is there duplication with Charge 4?

(b) Does the letter of 28 March 2013 fit more properly as a further particular of Charge 4?

(c) If so should the charges be amended to add that particular to Charge 4, and Charge 6 dismissed?

Background

[5] Mr N was the director and initially sole shareholder of a company ("J. Co.") which was underwriting a large piece of litigation involving multiple litigants against a group of directors of a failed company ("the litigation").

[6] In August 2009 Mr N approached Mr Eichelbaum to become involved in the litigation. Mr Eichelbaum was to act as one counsel for Mr Z, the plaintiff. In addition Mr Eichelbaum, who has had a background in share-broking and merchant-banking, was to assist in fund raising support.

[7] During October and November 2009 Mr N and Mr Eichelbaum negotiated the manner of payment for Mr Eichelbaum's work. It was agreed that he would receive a 10% shareholding in J. Co. as part of his remuneration although it was anticipated that legal fees would be paid in addition. There was a budget of $400,000 allocated in the funds (which amount was for Mr Eichelbaum's attendances) to be sought from a future underwriter of the litigation. Mr Eichelbaum was formally instructed by an Auckland firm on [redacted] 2009 to represent Mr Z on an appeal to be argued in the Court of Appeal later that month (but on the basis that they were not responsible for Mr Eichelbaum's fees).

[8] In relation to the litigation funding, it was agreed later that month that a further 10% of the J. Co. shares would be transferred to Mr Eichelbaum if he was successful in obtaining the overall litigation funding.

[9] Mr N signed two share transfers on 16 November 2009, each of 10%, in favour of Mr Eichelbaum, the consideration for which was described as "services as agreed". There was subsequently some dispute between Mr Eichelbaum and Mr N as to whether the shares had been transferred or merely represented an option, both taking different positions at different times, but for the purposes of this decision that dispute is not relevant.

[10] During 2010 Mr Eichelbaum continued his inquiries regarding funding and appeared in two hearings towards the end of the year for which he was separately paid. The degree of his effort and availability is disputed by Mr N. Again it is not necessary for us to traverse those matters.

[11] While Mr Z may have been the nominal client, as named plaintiff, it is clear that the litigation was at all times under the management of Mr N and his legal team which also included two other barristers.

[12] During 2011 it is clear that the relationship between Mr Eichelbaum and Mr N steadily worsened. In late May 2011 Mr N was successful in obtaining litigation funding. A term of that agreement provided a significant management fee for J. Co. Again, there is a dispute between Mr N and Mr Eichelbaum as to Mr N's drawings on J. Co. funds as management fees, thereby affecting the share value and again it is not necessary for us to comment other than to note that there was clearly a live dispute which is relevant to whether the issue of the statutory demand was a proper one and therefore affects Charge 1.

[13] In November 2011 a High Court Judge made orders suppressing aspects of the funding arrangements for the plaintiff in the litigation. Although some information was in the public arena it is these more sensitive suppressed aspects of the litigation about which Mr N complains that Mr Eichelbaum has breached confidentiality, or threatened to breach confidentiality, in his various communications and in the litigation initiated by him.

[14] Mr Eichelbaum is listed as one of the recipients intended to receive a copy of the judgment, however he denies having been aware of the specifics of the suppression orders until later advised by a Wellington firm N.B., who took over the conduct of Mr N and J. Co's affairs.

[15] By late 2011 and into the early months of 2012 there had been a complete breakdown of the relationship between Mr N and Mr Eichelbaum. At times the email correspondence between them is abusive and, at least on Mr N's part, contained obscene references. In late-February 2012 Mr Eichelbaum required the client to have his name removed from the Court papers so that the Court was aware he was no longer involved in the litigation.

[16] Mr Eichelbaum then sent a draft letter now described by him as "tongue-in-cheek", which is the subject of one of the particulars of the charges. In that letter he described Mr N as a "liar and confidence trickster" and went on to make even more personal and disparaging comments of a highly inflammatory nature. Mr Eichelbaum

says this letter was never intended to go beyond the recipient. The draft purported to be prepared by his instructing solicitors. The letter was passed on to the instructing solicitors and a principal of that firm wrote to Mr Eichelbaum objecting to its contents and to the assignment of their name to the letter. From early March 2012 the Wellington firm became engaged in the dispute between Mr Eichelbaum and Mr N, from whom Mr Eichelbaum was attempting to claim the funds he considered were owed to him for over two years' work.

[17] Another person who had been involved in the litigation funding and was also, through his trust company, to become a shareholder in J. Co. as a reflection of his efforts, had also fallen out with Mr N. On behalf of Mr Eichelbaum this person, Mr H, attempted to negotiate a resolution of the dispute between the company, Mr N and the barrister Mr Eichelbaum. Mr Eichelbaum says this was an informal "mediation" which resulted in an agreement that he be paid the sum of $150,000 to reflect the value of the work carried out and unbilled, as well as the shares which he either owned or over which he had an option.

[18] Although Mr N acknowledges having met with Mr H he denies that the meeting took place when alleged and denies that an agreement was reached for the payment to Mr Eichelbaum of the sum claimed.

[19] On 7 March 2012 N.B. wrote to Mr Eichelbaum warning him (as a result of the "tongue-in-cheek" letter). They suggested the letter contained matters which breached his duty of confidentiality to his clients, including Mr Z. They further indicated a fear that Mr Eichelbaum might provide information to the defendants in "the litigation" through their legal representatives.

[20] Mr Eichelbaum denies any breach of confidentiality and insists that he was as concerned that information, adverse to the plaintiffs' case in "the litigation" might become available to the defendants, and it was this expression of concern that he was voicing rather than the suggested threat to disclose, which seems to have been the inference taken by the new lawyers for Mr N, J. Co. and the plaintiff.

[21] In August Mr Eichelbaum issued a statutory demand against J. Co. for $150,000. This forms the basis for Charge 1. On the same day, Mr N sought to have Mr Eichelbaum assessed by the Mental Health Crisis Team. After speaking

with Mr Eichelbaum, they declined to detain him, and have since provided Mr Eichelbaum with confirmation that there was no basis for an examination of him.

[22] There then began the series of correspondence by email, letter and in the form of a draft affidavit by Mr Eichelbaum, which forms the basis for Charges 2, 3, 4 and 6. In the course of that correspondence Mr Eichelbaum accused N.B. of blackmail, improper behaviour, negligent behaviour (for which they could face significant liability), and threatening conduct.

[23] Mr Eichelbaum acknowledges that his language was intemperate, his allegations improper and has apologised for these. He denies however that they reached the standard of misconduct.

[24] The remaining charge, (Charge 5), alleges that Mr Eichelbaum failed to consent to suppression of documents in the proceedings in which he was claiming against J. Co.

[25] Mr Eichelbaum has two sets of proceedings, one in the High Court and another in the District Court. It is the District Court proceedings to which the allegations in Charge 5 are directed. Mr Eichelbaum points out that he took a neutral stance in respect of suppression. However, at the hearing, having had the High Court judgment referred to him, Mr Eichelbaum recorded that he no longer opposed suppression orders and a suppression order was granted in March 2013. For completeness, we note that in February 2014 an injunction was granted in the High Court proceedings requiring a percentage of the funding to be held pending resolution of the dispute.

Issue 1 - professional or personal misconduct?

[26] The charges are pleaded in the alternative, however are advanced in closing submissions as properly falling within the provisions of s 7(1)(a)(i) of the Act.[1] Counsel for the Standards Committee relies on the clarification of this part of the Act provided by the full Court in *Orlov*:[2]

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[1] Lawyers and Conveyancers Act 2006.

[2] *E Orlov v NZLCDT* (first respondent) and *National Standards Committee No. 1* (second respondent) 2014 NZHC 1987, R Young and S France JJ, 21 August 2014.

> "[106] We consider the Act's definitions continue to maintain the distinction between professional and personal misconduct. The latter involves moral obloquy. It is conduct unconnected to being a lawyer which nevertheless by its nature, despite being unrelated to the practitioner's job, is so inconsistent with the standards required of membership of the profession that it requires a conclusion that the practitioner is no longer a fit and proper person to practice law.
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> [107] The test of "fit and proper" person remains the touchstone for whether a lawyer is to be struck off. It is the assessment that is to be undertaken following a finding of professional misconduct under s 7(1)(a)(i). In other words it is recognised that misconduct in the performance of professional duties may lead to a conclusion of unfitness, but not necessarily. By contrast, with personal misconduct, the fit and proper person inquiry is an element of the actual offence. This in effect recognises that personal conduct unrelated to work must be of a nature which in itself justifies a conclusion that the practitioner is not a fit and proper person. <u>We think this structure supports giving a broad scope to professional misconduct with a consequent limiting of personal misconduct to situations clearly outside the work environment</u>." (emphasis added)

The Court analysed the activity in that case relating to Mr Orlov and determined that there was "*little doubt"* that the "*activity should be seen as connected to the provision of legal services and should have been charged and assessed under s 7(1)(a)(i).*[3]

[27] The Court in that case considered that one of the incidents of conduct was less clear. However because it "… *directly stems from litigation and puts what happened in litigation squarely in issue* …" it was held it could not be seen to be "unconnected to the provision of legal services".[4]

[28] At paragraph [112] the Court said:

> "However, it is necessary to return to the proposition that the two definitions of ss 7(1)(a)(i) and (1)(b)(i) cover the entire field. Mr Orlov's conduct will come under s 7(1)(b)(i) only if it is not the provision of regulated services (which it is not) and if it is unconnected with the provision of legal services. It is this aspect of the definitions that we consider is crucial. Whilst not regulated services, the conduct is very much connected with the provision of such services and therefore comes within the s 7(1)(a)(i) limb of professional misconduct."

[29] We have no doubt that in each of the instances alleged in these charges, the practitioner's conduct was clearly "connected with" the provision of legal services. The fact that he carried out other services, such as spending time attempting to explore financing options for the funding of the litigation does not detract from what we see as his primary role, which was as counsel in the proceedings. Furthermore,

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[3] Paragraph [109].
[4] Paragraph [110].

even as a person closely involved seeking funding for litigation and as a lawyer, it is difficult to escape the proposition that this conduct is connected with the provision of such services.

[30] Similarly, conduct which has arisen in attempts to recover his costs for his services, legal and otherwise, are also so intermingled as to be indistinguishable and must be seen as connected with the provision of legal services.

[31] Thus we find that the proper section to be applied to each of the charges is s 7(1)(a)(i). That leads to the proposition that it is not necessary for the conduct to be such as to reflect on the practitioner's fitness to practise in order to be established as misconduct.

Issue 2 - Charge 1

(a) Was the statutory demand unfounded?

[32] The statutory demand was issued by Mr Eichelbaum on 1 August 2012 and purported to be *"for services performed in preparing for and appearing at the Court of Appeal [at the forthcoming hearing]; preparing an opinion for distribution to Prospectus funders in 2010/2011, and other preparatory investigative work in relation to assistance with funding arrangements for the plaintiff in [redacted]*. It sought $150,000 from J. Co.

[33] It is accepted that at this time no fee invoice had been issued to J. Co. by Mr Eichelbaum. As a barrister, Mr Eichelbaum would not have been able to invoice J. Co. directly in any event.

[34] We consider the demand was unfounded, in the sense that it was not for a liquidated, undisputed debt.

(b) Did the lawyer know?

[35] Despite its wording, in his evidence Mr Eichelbaum contended "*I did not consider this to be a demand for payment of a fee for legal services*." He went on to acknowledge that the demand did not "*properly reflect the basis for the demand*" and was "*poorly worded*".

[36] While contending he did not know the amount was disputed and that he understood it to be based on the “mediated” agreement between Mr N and the lawyer’s agent Mr H, it is clear that Mr Eichelbaum ought to have known it was not a properly quantified and uncontested debt as was required to support such a demand.

[37] It was served on J. Co. despite Mr Eichelbaum subsequently denying that J. Co. was ever his client.

[38] In correspondence with N.B. following the demand, while acknowledging it was poorly worded, Mr Eichelbaum sought payment within 24 hours or proceedings would be issued. It was at that point that he provided a draft affidavit in relation to such contemplated proceedings. That however is the subject of another charge.

[39] Mr Eichelbaum was advised by Mr N on 3 August 2012 that the debt was disputed and that he had instructed N.B. to apply to set it aside. On 6 August 2012 N.B. wrote to Mr Eichelbaum advising that the debt was disputed. And on 8 August 2012 Mr Eichelbaum withdrew the demand. Thus it was in place for only seven days.

[40] The practitioner acknowledges that he was “sloppy” in the preparation of this demand and that he was attempting to obtain “leverage” to obtain payment for his services. We consider the issue of this demand was more than merely sloppy. Mr Eichelbaum is an experienced practitioner and would be well aware that a liquidated demand was required. We do not accept that this demand or its drafting was the result of mere carelessness.

[41] The practitioner set out a number of aspects of services provided. The only aspect left out of the demand was the alleged mediated settlement on which he has later sought to rely. It does not behove the lawyer to say he was merely acting as a creditor, as is submitted on his behalf. His responsibility to act professionally does not cease because he considers he is owed money.

(c) Was it used for an improper purpose?

[42] At the very least this demand was unprofessional.

[43] The Standards Committee alleges a breach of Rule 2.3 of the Client Care Rules[5] which provides:

> "A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation."

[44] In order to satisfy the definition of misconduct, the breach of the rule must be a "wilful or reckless contravention".[6] Alternatively it must be conduct that would "reasonably be regarded by lawyers of good standing as disgraceful or dishonourable".

[45] There is no doubt that at this stage of the dispute between the practitioner and Mr N, the lawyer had totally lost his sense of perspective. He accepted it was intended to provide "leverage". We consider it was used improperly.

[46] However, having regard to the fact that he ultimately (after only seven days) withdrew the statutory demand, we think it falls just short of misconduct as defined above. It does fall within "unsatisfactory conduct" as defined by s 12 as both s 12(a)(ii) (unprofessional conduct), and s 12(c) (a contravention of practice rules).

[47] We find it to be at the very highest level of unsatisfactory conduct. While unsatisfactory conduct is not specifically pleaded as an alternative charge, we consider we are able to find a charge proven, but to a lower level, constituting the lesser offence.

Issue 3 - Charge 2

(a) Did the sending of the draft affidavit with inflammatory content constitute a threat or improper purpose?

[48] Rule 2.7 of the Conduct and Client Care Rules states:

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

[5] Lawyer and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008.
[6] Section 7(1)(a)(ii).

[49] It is common ground that the proposed draft affidavit sent to N.B. by Mr Eichelbaum on 26 September 2012 contained unnecessary, inflammatory and deeply unpleasant allegations concerning Mr N. Mr Eichelbaum accepted that the allegations were "superfluous" and that the more unpleasant comments ought not to have been included in the affidavit.

[50] These inflammatory accusations were not included in the affidavit which was finally sworn and filed. Mr Eichelbaum says his purpose in sending the draft was to attempt to achieve a resolution without the need to file the proceedings. He wished to point out that the airing of the dispute might be unhelpful to the plaintiffs in the litigation. He thought his opposing counsel had not properly weighed the consequences of an escalation of the dispute by the filing of proceedings and felt beholden to point this out to her. He also concedes that "*given the heat of the moment I was distracted and included these allegations without thinking this through*". Mr Eichelbaum pointed out that some of the allegations about Mr N's honesty were able to be substantiated by him.

[51] Mr Waalkens QC submitted the Tribunal could view the behaviour of the lawyer as in a personal capacity, not as a lawyer representing a client other than himself. We do not consider this greatly assists Mr Eichelbaum who must still be held to adhere to full professional standards even if (unwisely it would seem) he is the litigant himself.

[52] We consider that Mr Eichelbaum's intention to influence by threatening to expose damaging information about Mr N was an improper purpose.

(b) Was it in other respects unprofessional or disgraceful or dishonourable conduct?

[53] We find that Mr Eichelbaum, by inclusion of such demeaning and pejorative statements about Mr N, did threaten him and his counsel by stating that an affidavit could be filed in those terms. We find that he did so, not as a conciliatory gesture, but in order to impose pressure to obtain the payment for his services.

[54] We consider this conduct goes beyond mere robust advancement of a case. The inclusion of this material was seriously reprehensible. We consider that, as used

with the intent to pressure settlement, it would be regarded by lawyers of good standing as disgraceful or dishonourable.

[55] Counsel for the respondent Mr Waalkens QC, referred us to the decision of *Lake*[7] as to whether expert evidence ought to be required for a finding of disgraceful or dishonourable conduct. We do not consider in this instance that expert evidence, beyond that which resides in the Tribunal itself by virtue of lawyer members, is required, because the rule itself is so plain and the facts as found by us so clearly fit within it. It is not a situation where specialist expertise of the type contemplated by s 25 Evidence Act 2006 pertains, rather it is a finding of facts measured against a professional standard.

[56] We do not propose to address the confidentiality aspect of this charge because that is addressed specifically in Charge 3. Even if the threat did not include the element of disclosure of confidential material, the charge is, in our view, made out.

[57] We consider that the practitioner's behaviour goes well beyond unsatisfactory conduct and constitutes misconduct.

Issue 4 - Charge 3

(a) Who were Mr Eichelbaum's clients?

[58] In order to establish whether a disclosure of confidential information has occurred, it is necessary to establish, (since this is challenged by the practitioner), who it was that he was representing. Mr Eichelbaum contends that he was only ever engaged to act for Mr Z as counsel in "the litigation" and that as counsel that is where his role as a lawyer began and ended. He does not regard his relationship with Mr N and J. Co. as that of lawyer and client. He contends that much of the confidential information received by him was received in his capacity as a shareholder (or option holder) of J. Co.

[59] Against that is the evidence provided by the Standards Committee which includes an affidavit sworn by Mr Eichelbaum, in support of his District Court application for property preservation orders. Mr Eichelbaum had forwarded this affidavit in draft to N.B. In paragraph 7 he deposed:

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[7] *Lake v Medical Council* HC Auckland, HC123/96, Smellie J, 23 January 1998.

> "In October 2009, I was briefed by the second defendant [redacted] to appear on its behalf [and for others] [redacted] in the primary litigation [redacted] in the Court of Appeal."[8]

[60] Mr Eichelbaum then sets out in following paragraphs the effort and work put in by him referring in particular[9] to a *"… 21 month period strategizing, seeking information and witnesses …"* He then refers to certain witnesses and the fact that those witnesses would not deal with Mr N. He goes on in the affidavit to discuss his role working with other counsel, both in funding and strategy work relating to the litigation.

[61] In two further affidavits Mr Eichelbaum also swore to the fact that J. Co. and Mr N were his clients. There is no distinction made in these affidavits between J. Co. and the plaintiffs in "the litigation." Mr Eichelbaum acknowledges that he only "made the distinction" once the issue of confidentiality had been raised with him.

[62] Mr N, one of the complainants, deposes to the fact that he regarded himself as a client of Mr Eichelbaum and that Mr Eichelbaum represented both him and J. Co., as well as the nominated plaintiff in "the litigation." The three were, it would seem, inextricably entwined.

[63] There is also the statutory demand and litigation in respect of his fees which are clearly said to include legal fees. Although it is somewhat puzzling this should emanate from a barrister sole, it is clear that Mr Eichelbaum has represented both J. Co. and Mr N as well as the plaintiff, Mr Z.

[64] He therefore owes a duty of confidentiality to all of these persons and entities. The rules make it plain that such an obligation continues even after termination of the retainer.

(b) When and in what capacity did he receive the information in which confidentiality and privilege is claimed?

[65] As stated in paragraph [58] above, Mr Eichelbaum contends that the information in issue (ie paragraphs 12 and following of the affidavit of 12 November 2012) was

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[8] Paragraph 7 Affidavit 12.11.12 in District Court proceedings. Similar statements were made in draft affidavits in other proceedings.
[9] Paragraph 11.

obtained in his capacity as a shareholder. He acknowledges having also received confidential information as a fundraiser, but not the information in issue.

[66] In his acknowledged state of agitation and resentment towards Mr N[10], we cannot be confident that Mr Eichelbaum was capable of distinguishing those portions of information he had received in one capacity, that is as a lawyer, from that in any other, for example a seeker of litigation funding, or as an investor in the litigation funding project.

(c) If multiple roles did the obligations as a lawyer predominate?

[67] Ms Davenport QC submitted that there was significant background information concerning the litigation which ought not to have been disclosed and was unnecessary for the purposes of Mr Eichelbaum's litigation. She submitted that material received in his other roles "*cannot be distinguished from the material he received in his capacity as counsel…..from 2009 to 2012"*. She noted that although Mr Eichelbaum tried to suggest his role as counsel ended in 2010, the evidence as to attendances at telephone conferences and an invoice for work up until July 2011 suggested otherwise. Certainly, Mr Eichelbaum did not formally end his status in the proceedings until early 2012 when he insisted on his name being removed from the Court records.

[68] Mr Waalkens QC also tended to minimise his client's role as counsel, describing it as "brief and episodic". However, that was clearly not the position at the outset, when fees for Mr Eichelbaum's legal work were budgeted at $400,000 (indeed Mr Eichelbaum complained that his fees budget had later been allocated to an overseas firm). In the affidavit of 12 November 2012 Mr Eichelbaum refers to having spent "several weeks writing an opinion on the respective merits of the primary group litigation".

[69] Mr Eichelbaum's role as a lawyer was a significant one. He must therefore be subject to the rules of his profession, regardless of other roles he may have had in relation to that client. We consider the answer to Issue 4(c) is "yes".

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[10] Email acknowledging he was "grumpy re unpaid bills", page 210 NOE "I was unhappy that Mr N had succeeded in putting one over me yet again …"

(d) If a duty of confidence is upheld has this been breached by filing in Court the documents in question?

[70] In addition to the submission that the information was gained in a role other than counsel, it was submitted on behalf of Mr Eichelbaum that much of the information contained in the affidavit was already in the public arena. While this might be correct in some instances, much of the information was very much "in house". We do not propose to examine every instance because even disclosure of a few matters such as in paragraphs [16] and [17], and Exhibit "JE7" of the affidavit of 12 November 2012, ("suppressed") would establish the breach of confidence. That submission is accordingly rejected.

[71] Mr Eichelbaum also seeks to rely on the exception to confidentiality contained in Rule 8.4(f) of the Client Care Rules. This rule expressly permits disclosure of confidential information where it is "...*necessary for the effective operation of a lawyer's practice including … collection of professional fees"*. Were Mr Eichelbaum to be a solicitor, who was able to sue for fees in Court, then he might well have been justified in revealing information relevant for those purposes albeit in breach of a client solicitor confidential relationship. However, as a barrister, unable to sue for fees, Mr Eichelbaum may not be able to take advantage of this provision unless by analogy.

[72] As framed in Mr Eichelbaum's claim for relief[11] the claim is for:

> "…Contractual duty to pay agreed settlement sum reached in settlement agreement dated 14 March 2012; Contractual duty not to breach terms of joint venture agreement; Tortious duty not to conspire to injure the plaintiffs by unlawful means; duties under s.9 & 13 Fair Trading Act 1986; duties under Frustrated Contracts Act 1944; Quantum meruit."

[73] Thus as presently framed the claim is much wider than a claim for fees simplicter.

[74] Rule 8.5 requires that client information disclosed under the rule should be limited to the extent reasonably necessary for the permitted purpose and disclosed

[11] Part 2, page 463.

only to the appropriate person or entity. On the face of it that would limit disclosure to the Court and immediate parties.

[75] It will be for the Court to determine whether the information put before it by Mr Eichelbaum is relevant to the issues it has to determine. It is not the Tribunal's role at this stage to determine whether the information is properly relevant. That is with the exception of the inflammatory and unnecessary material referred to in the previous charge, which was not ultimately put before the Court.

[76] However, we accept Mr Waalkens QC's submission that the only parties to whom the information has been disclosed are those to whom the duty was owed (and therefore already possessed the information) and the Courts. An affidavit filed in Court can be protected, and indeed was in this case, by suppression orders. Thus there is no wider publication, such as existed in the series of cases put to us by Ms Davenport QC.

[77] In these circumstances, we are uncomfortable about the concept of a lawyer pursuing lawful remedies thereby committing a disciplinary offence. We consider the lawyer ought to have the protection of Rule 8.4(f), by analogy and to the extent that he is pursuing claims other than legal fees.

[78] Thus we answer "no" to this issue posed. We do not consider the Standards Committee has made out this charge to the necessary standard on the balance of probabilities. The charge is dismissed.

Issue 5 - Charge 4

(a) Were any of the communications relied on by Standards Committee an attempt to secure an advantage for the lawyer personally and therefore made for an improper purpose?

[79] The Standards Committee relies on Rule 10 of the Client Care Rules in relation to this charge:

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

Respect and courtesy

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

[80] We consider Rule 2.7 also to be relevant although this was specifically referred to by the Standards Committee in relation to the final charge, Charge 6.

Rule 2.7 states:

"**Threats**

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

[81] We consider that there is a degree of duplication and cross over between Charges 4 and 6. Each relates to the manner of communication with other lawyers and two particulars relate to identical communications. We consider that the particulars pleaded in respect of Charge 6 ought to be included in Charge 4, and this ought to be amended accordingly. Thus the whole picture of this practitioner's manner of communication with other counsel should be considered together and in relation to both Rules 2.7 and 10. We consider there are elements of double charging if the charges remain as they are. On this basis we would dismiss Charge 6 as unnecessary having incorporated its particulars into Charge 4.

[82] Incorporating the particulars of Charge 6 with Charge 4 means that there are six communications relied on:

1. The draft letter to the High Court purportedly written by the instructing solicitors and sent to another barrister in the team on or about 6 March 2012. This was referred to as the "tongue-in-cheek letter".

2. Mr Eichelbaum's letter dated 8 March 2012 to N.B. making accusations of blackmail and demanding a written apology.

3. Mr Eichelbaum's 13 November 2012 email sent to Senior counsel.

4. Mr Eichelbaum's email of 30 November 2012 to N.B. attaching a call-over list and suggesting a risk that all lawyers attending that list would learn of the dispute. The email accuses of negligence in not settling his claim.

5. A letter of 5 December 2012 to N.B. asserting improper behaviour, conflict of interest, negligence and improper motive.

6. A letter of 28 March 2013 to N.B., again alleging improper motives and threatening conduct and seeking retraction and apology.

[83] While Mr Eichelbaum denies the 13 November 2012 email was problematic (Item 3) and says that Item 1 was an attempt at humour, he recognises that the communications with N.B. were intemperate and totally unacceptable on his part. In his affidavit he apologises for them. In cross-examination Mr Eichelbaum accepted particulars 2 and 3 of Charge 4. He denied particular 4 relating to Mr W and we consider that this particular was not established. He accepted particulars 5 and 6.

[84] By sending the correspondence complained of Mr Eichelbaum has clearly breached both rules. By his own admission the various threats and unjustified comments were made to gain an advantage in his own claim.

[85] We have concluded that Rule 2.7 can only be relevant to points 3 and 4 of para [81] above – the email to Senior counsel and the email to N.B. Both proceed on the essential premise that unless demands made by Mr Eichelbaum are met then disclosures will likely follow which could prejudice the interests of the primary litigants. The point which the emails completely fail to address is that it was always within the power of Mr Eichelbaum to take appropriate steps to protect from disclosure, yet nothing was suggested. That suggests strongly, and we so find, that Mr Eichelbaum was using the situation to leverage an outcome in his own interests. To do that without offering any safeguard from disclosures likely in his own view to prejudice these former clients, is in our view a threat to disclose for an improper purpose which contravenes Rule 2.7.

(b) Were they made with a proper level of professionalism?

[86] The practitioner’s own admissions demonstrate a breach of Rule 10 has been established. In order to determine whether that breach is at a level of unsatisfactory conduct or misconduct we must determine whether the breach is wilful or reckless.

[87] We consider the breach of Rule 10, given that it occurred on repeated occasions, namely the five occasions found and established by us, or accepted by the practitioner, demonstrated that he was impervious to the consequences and disregarded his professional standards entirely. These letters were lengthy and forceful. Mr Eichelbaum himself accepts that his behaviour was totally unacceptable and went so far as to assure us that he would never write such a letter on behalf of a client.

[88] In all of the circumstances we consider that this is at a level of contravention which constitutes misconduct as being either "disgraceful" (s 7(1)(a)(i)) or a wilful or reckless contravention of Rules 2.7 and 10 (s 7(1)(a)(ii)).

Charge 5

[89] We consider this charge to be strained. Mr Eichelbaum gave evidence that he had been unaware of the suppression order of the High Court Judge until told about it at the suppression hearing application and that as soon as he became aware of that, even though he subsequently considered the matters to fall outside that ruling, he withdrew any opposition. Thus his opposition was only in place for a very limited period and we do not consider that in the overall circumstances this constituted a breach of Rule 8, as pleaded.

[90] This charge is dismissed.

Charge 6

[91] For the reasons stated under the reasoning relating to Charge 4 we dismiss Charge 6, having amended Charge 4 to include the particulars contained in Charge 6.

Summary of Findings

Charge 1 - Unsatisfactory conduct

Charge 2 - Misconduct

Charge 3 - Dismissed

Charge 4 - Misconduct

Charge 5 - Dismissed

Charge 6 - Dismissed

Directions

[92] Counsel for the Standards Committee is to file submissions as to penalty within 14 days of the release of this decision. Counsel of the respondent is to file any submissions in reply within a further 14 days. Submissions are also to address the issue of permanent name suppression if this is to be sought. This decision will be released in the interim with the names as currently redacted, but will not be available publicly until three days after its release. Counsel are to confirm their availability with the Case Manager for a penalty hearing in late January.

DATED at AUCKLAND this 18th day of November 2014

Judge D F Clarkson
Chair

Schedule 1

CHARGES

Canterbury Westland Standards Committee 2 of the New Zealand Law Society charges Mr Eichelbaum of Auckland, Barrister, pursuant to section 241 of the Lawyers and Conveyancers Act 2006 that his conduct towards his former clients J. Co. and Mr N and their solicitors is such that it amounts to:

> Misconduct (section 241(a));
>
> *or in the alternative*
>
> Unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct (section 241(b));
>
> *or in the alternative*
>
> Negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise or as to tend to bring his profession into disrepute (section 241(c));
>
> *Or in the alternative*
>
> If in any of the charges Mr Eichelbaum has not provided regulated services then the behaviour described in each or any charge is conduct such that Mr Eichelbaum is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer.

or otherwise amounts to misconduct as set out in the charges below:

CHARGE ONE: Wrongful issue of a statutory demand against J. Co. for $150,000 on 1 August 2012

The particulars of the charge are that:

1. Mr Eichelbaum is a barrister. On 1 August 2012, Mr Eichelbaum issued a statutory demand against J. Co. for $150,000 on the following terms:

> *As at 1 August 2012 you owe Mr Eichelbaum, the sum of $150,000 for services performed, preparing for and appearing at the Court of Appeal on 22 and 23 November 2009, preparing opinion for distribution to prospective funders in 2010/2011 and other preparatory and investigative work in relation to assistance with funding arrangements for the plaintiffs in [redacted].*

2. At the time of the issue of the statutory demand no invoice had been issued for any fee to J. Co. by Mr Eichelbaum.

3. In the absence of any invoice for his fee Mr Eichelbaum knew that no fee was payable and thus no debt was due to Mr Eichelbaum.

4. Further, Mr Eichelbaum knew that the sum sought was disputed by J. Co.

5. The issue of the statutory demand is in breach of Rule 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 which provides:

> R2.3 *A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.*

CHARGE TWO: Threatening to issue proceedings and inclusion of inflammatory accusations in the draft affidavit

1. On or about 26 September 2012 Mr Eichelbaum sent to N.B. (the solicitors for J. Co. and Mr N) draft pleadings Mr Eichelbaum proposed issuing in the High Court, together with a proposed draft affidavit to be sworn by Mr Eichelbaum seeking property preservation orders.

2. The draft affidavit contained a number of serious allegations of dishonesty and inappropriate behaviour made by Mr Eichelbaum against Mr N. The draft affidavit contained confidential information gained while Mr Eichelbaum was counsel for J. Co. and Mr N. These allegations are contained in paragraphs 20 to 28 of the draft affidavit.

3. The purpose of sending these documents to N.B. was to threaten to disclose or use this information unless Mr N or J. Co. paid the sum claimed to Mr Eichelbaum.

4. Such conduct is in breach of any or all of Rules 2.7, 8, 8.7 and 10 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which provide:

> R 2.7 *A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.*
>
> R 8 *A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer and the client's business and affairs acquired in the course of the professional relationship.*
>
> R 8.1 *A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.*

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

CHARGE THREE: Disclosure of Confidential and Privileged Information

1. On 12 November 2012, Mr Eichelbaum swore an affidavit in proceedings issued in the District Court against J. Co. and Mr N. This affidavit disclosed confidential information that had been supplied to him, or obtained by him from the complainants (J. Co. and Mr N) while he had been acting for them in the course of his retainer in "the litigation".

2. The confidential information contained is at paragraph 12 and following in the affidavit, and in the exhibits, particularly JE1 which contains further confidential information.

3. The conduct is in breach of any or all of Rules 8, 8.1 and 8.7 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which provides:

R 8 *A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer and the client's business and affairs acquired in the course of the professional relationship.*

R 8.1 *A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.*

R 8.7 *A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer.*

CHARGE FOUR: Conduct concerning the interests of the plaintiff in "the litigation"

1. On 13 November 2012 Mr Eichelbaum sent an email to senior counsel in "the litigation", suggesting that he was obliged to disclose to the Court of Appeal Mr Eichelbaum's affidavit sworn and filed in the District Court, or risk recall of the judgment if the defendants later discovered it.

2. (Senior Counsel) was under no obligation to draw the Court of Appeal's attention to any internal dispute in JAFL.

3. The purpose of the email was an attempt to threaten J. Co. and Mr N to persuade them that they ought to settle with Mr Eichelbaum.

4. Further, the email could reasonably be regarded as suggesting that Mr Eichelbaum would allow a Mr W to make disclosure to one of the defendants in "the litigation" claim.

5. Mr Eichelbaum sent an email on 30 November 2012 to N.B. attaching a callover list for the Auckland District Court on 4 December 2012. In this email he suggested that N.B. were running the risk that the defendants would discover the contents of his affidavit and risk recall of the Court of Appeal judgment. He said that not to disclose the affidavit would also give rise to a claim on N.B's insurers.

6. On 5 December 2012 Mr Eichelbaum wrote to N.B. and suggested that:

    a. The litigation class action was at risk because of their actions in not settling.

    b. N.B. had a conflict of interest because of the fact they were defending the action.

    c. N.B. had probably incurred a $160million contingent liability.

    d. That N.B. were defending the action to make fees.

    e. The letter also set out further aspects of Mr N's behaviour.

7. These letters/emails were sent as N.B./Mr N had not settled the claim with Mr Eichelbaum and were a further attempt to threaten J. Co. and Mr N to promote the settlement of Mr Eichelbaum's claim.

8. This conduct amounted to a breach of Rule 10 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which provides:

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

CHARGE FIVE: Failure to Consent to Suppression Orders

1. In early March 2013, Mr Eichelbaum refused to consent to the suppression of all documents in the District Court claim, specifically excluding the Notice of Claim, the affidavit of Mr Eichelbaum, and the exhibit J7.

2. The effect of failing to consent to suppression orders for these documents was that Mr Eichelbaum allowed, or attempted to allow, confidential information to be made public.

3. The affidavit contained confidential information gained while he was counsel in "the litigation".

4. Mr Eichelbaum is in breach of Rule 8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008:

   R 8 *A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer and the client's business and affairs acquired in the course of the professional relationship.*

CHARGE SIX: Communications with Solicitors

1. In the course of claiming payment of the $150,000 Mr Eichelbaum made a number of objectionable or partially objectionable communications with solicitors for Mr N and J. Co. as follows:

   a. A draft letter sent by Mr Eichelbaum on 6 March 2012 to the instructing solicitors and/or N.B. advising the High Court that he no longer acted in "the litigation".

   b. Mr Eichelbaum's letter on 8 March 2012 to N.B. in which (inter alia) he accuses the solicitor at N.B. of blackmail and demands a written apology from her.

   c. On 30 November 2012 Mr Eichelbaum wrote to N.B. and asserted that N.B. were behaving improperly and advised that they were incurring a potential insurance liability.

   d. On 5 December 2012 Mr Eichelbaum wrote to N.B. and asserted they were behaving improperly and suggested this was to generate fees.

   e. On 28 March 2013 Mr Eichelbaum accused N.B. of threatening conduct and demanded a retraction and an apology from N.B. and Mr R.

2. These communications were in breach of Rules 2.7 and/or 10 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which provided:

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

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