

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2013] NZLCDT 9
LCDT 025/12

IN THE MATTER

of the Lawyers and
Conveyancers Act 2006

AND

IN THE MATTER

of **BOON GUNN HONG**,
Lawyer, of Auckland

CHAIR

Mr D Mackenzie

MEMBERS OF TRIBUNAL

Ms S Hughes QC

Mr C Lucas

Mr P Shaw

Mr W Smith

HEARING at Auckland on 21 February 2013

APPEARANCES

Mr P Collins, for the Legal Complaints Review Officer

Mr B Hong, Practitioner, self-represented

**RESERVED DECISION OF NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

Introduction

[1] Mr Hong faces one charge of misconduct under s 7(1)(b)(ii) Lawyers and Conveyancers Act 2006. The charge is based on a series of acts by Mr Hong, and it is alleged that either together or individually those acts constitute the misconduct charged under s 7(1)(b)(ii).

[2] The misconduct with which Mr Hong has been charged is unconnected with the provision of regulated services by him, but is said to be of a nature which would justify a finding that Mr Hong is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer.

[3] While Mr Hong acknowledges that he conducted himself as alleged, he denies his conduct constitutes misconduct as charged.

Background

[4] The charge arose from Mr Hong's conduct following proceedings being commenced against him and some others by a Mr and Mrs Ma, former clients of Mr Hong. The proceedings related to the purchase of a property which had issues relating to weather-tightness ("Ma proceedings").

[5] Following receipt of the Ma proceedings, Mr Hong initially corresponded by letters and emails with the Ma's legal representatives, solicitors Baker Law and two barristers from Amicus Chambers instructed by Baker Law, Messrs Zhao and Ram. As a result of the content of those letters and emails, Mr Deliu, a barrister who described himself as head of Amicus Chambers, made a complaint to the Lawyers' Complaints Service. This complaint against Mr Hong was subsequently enlarged to cover matters arising from further material from Mr Hong.

[6] In response to that complaint, Mr Hong claimed that he had written in the first instance to the Ma's legal representatives because he had been concerned about the standard of professional advice he considered was being provided to Mr and Mrs Ma, and the fact that they could be put to unjustified expense.

[7] Mr Hong proposed a complaint of his own to the Lawyers Complaints Service, about Messrs Zhao and Ram, but did not follow through on this complaint after what Mr Hong described as an abusive telephone message he had received from Mr Deliu. Instead, he advised the Complaints Service that he wanted his complaint to be focused on Mr Deliu's conduct.

[8] After considering both Mr Hong's complaint against Mr Deliu, and Mr Deliu's complaint against Mr Hong, the Standards Committee determined to take no further action on either.

[9] Mr Hong left it at that, but in respect of his complaint about Mr Hong, Mr Deliu did not accept the outcome and sought a review by the Legal Complaints Review Officer ("LCRO"). On that review, the LCRO confirmed the decision of the Standards Committee to take no further action.

[10] Mr Deliu then applied to the High Court for a judicial review of the LCRO's determination. The High Court granted Mr Deliu's application and made orders quashing the LCRO's determination and remitting the matter back to a Review Officer for reconsideration.¹ The Deputy Legal Complaints Review Officer undertook this required review.

[11] After conducting the review, the Review Officer determined that Mr Hong's conduct should be considered by this Tribunal. The misconduct charge Mr Hong now faces was subsequently laid by the LCRO on 10 September 2012.

¹ *Deliu v Hong and Another* [2012] NZHC 158.

The misconduct charge

[12] The misconduct charge which Mr Hong faces is of a special nature, being an exception to the normally required position of charged conduct occurring at a time when the practitioner is providing regulated services. In the misconduct charge against Mr Hong, the relevant section² provides, so far as applicable:

“Misconduct, in relation to a lawyer.....includes –

(i)

(ii) Conduct of the lawyer.....which is unconnected with the provision of regulated services by the lawyer.....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.....”

[13] For the LCRO, Mr Collins confirmed that the misconduct charge was brought under this particular section because it was considered that Mr Hong’s conduct was not connected with the provision of regulated services by Mr Hong. Mr Collins said that the charge could only have been brought under the usual misconduct provisions in the Lawyers and Conveyancers Act 2006 if Mr Hong’s conduct had occurred at a time when Mr Hong was providing regulated services. The definition of regulated services required Mr Hong to have been carrying out legal work for another person at the time of his conduct, and that was not the case in the circumstances of this charge, he said.

[14] The factual basis of Mr Hong’s conduct was not disputed by Mr Hong. The issue was whether statements he had made in the letters and emails he had sent (and in respect of one particular, in submissions he had made to the Review Officer) amounted to misconduct as charged. That is, did the statements, as set out in the particulars of the charge, breach Mr Hong’s professional obligations and amount to misconduct of a nature which would justify a finding that Mr Hong was not a fit and proper person or was otherwise unsuited to engage in practice as a lawyer?

[15] The LCRO’s position was that Mr Hong’s conduct had breached various provisions of the Lawyers and Conveyancers Act 2006 (“the Act”) and the Lawyers

² Section 7(1)(b)(ii) Lawyers and Conveyancers Act 2006.

and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (“CCCR”), and that those breaches amounted to misconduct in terms of s 7(1)(b)(ii) of the Act.

[16] The provisions said to be breached were:

- (a) Section 4(a) of the Act and Rule 2 CCCR, by Mr Hong failing in his obligation to facilitate the administration of justice;
- (b) Rule 2.2 CCCR, by Mr Hong obstructing, preventing, or defeating the course of justice;
- (c) Rule 2.7 CCCR, by Mr Hong making threats to fellow lawyers that he would make allegations against them for an improper purpose;
- (d) Rules 10 and 10.1 CCCR, by Mr Hong failing to promote and maintain proper standards of professionalism and by treating fellow lawyers with disrespect and discourtesy;
- (e) Rule 10.2 CCCR, as a consequence of Mr Hong threatening to engage in conduct which, if carried out, would have breached that rule;
- (f) Rule 13.2.1 CCCR, by Mr Hong failing to treat others in Court processes with respect.

Basis of the Charge

[17] Particulars, said to show that the provisions of CCCR noted above had been breached, were set out in the charge. Mr Collins, for the LCRO, identified in his submissions which provisions were alleged to have been breached in respect of each of the particulars, as the charge itself did not specifically identify such matters.

[18] As to the alleged breach of s 4(a) of the Act, Mr Collins submitted that the overall pattern of Mr Hong’s conduct, as recorded in all of the particulars, represented a failure of his fundamental duty to facilitate the administration of justice.

[19] There were nine matters particularised, set out as paragraphs 2.2 to 2.10 of the misconduct charge. Each matter particularised was said to demonstrate a breach of certain rules in the CCCR, as outlined by Mr Collins.

[20] The various particulars were divided into three categories:

- (i) correspondence by Mr Hong with legal representatives of Mr and Mrs Ma;³
- (ii) correspondence with and submissions to the Lawyers Complaints Service by Mr Hong;⁴ and,
- (iii) Mr Hong's submissions to the Review Officer undertaking the review following remission of the matter from the High Court.⁵

[21] The first issue for the Tribunal is to consider whether the particulars specified demonstrate breaches as alleged. If there is a breach, the second issue for the Tribunal to consider is whether any such breach, either on its own or together with any other such breaches, constitutes misconduct in terms of s 7(1)(b)(ii) of the Act.

Particulars of the Charge

Correspondence with legal representatives of Mr and Mrs Ma

[22] Letter dated 5 May 2010 from Mr Hong to Baker Law and the two barristers (Messrs Zhao and Ram) instructed by Baker Law.⁶

The particulars relied on from this letter are set out at paragraph 2.2 of the misconduct charge, where Mr Hong said:

³ Three particulars numbered 2.2 to 2.4 in the charge.

⁴ Five particulars numbered 2.5 to 2.9 in the charge.

⁵ One particular numbered 2.10 in the charge.

⁶ See affidavit of Owen William John Vaughan dated 11 September 2012 filed with the Tribunal in this matter, Exhibit "C".

“As I am most concerned with the impact of the action on my good reputation, I am giving you the opportunity to have withdrawn immediately the action against me, failing which I will:-

- (a) File a strike out action;
- (b) File a complaint with the NZ Law Society on the ground that you are not competent to undertake litigation for the client;
- (c) On the strike out, seek for full costs against you (rather than the clients)
- (d) File defamatory action and an action in tort against you on the grounds that as the clients’ counsels, you ought to be aware such frivolous action against me will cause a loss of my good reputation and name”.

This letter was written by Mr Hong when he first received the Ma proceedings. In his submissions on behalf of the LCRO, Mr Collins said that this letter constituted an attempt by Mr Hong to dissuade the plaintiffs from proceeding against him, and to intimidate their legal representatives so that they might withdraw the proceedings.

Mr Hong said that he could see the proceedings were doomed to failure, and submitted that his demands were based on nothing but the lack of legal merit in the action against him which he had identified, and his concern for his former clients who were the plaintiffs. Mr Hong went on to note that his motivation was to protect them against incompetent actions and advice, unnecessary cost, and his desire that their various legal representatives be accountable for what he identified as the inevitable failure of the action.

Mr Collins submitted that parts of this letter, as set out in the particular noted above, breached Rules 10, 10.1, and 13.2.1 CCCR.

Rule 10 provides:

“A lawyer must promote and maintain proper standards of professionalism in the lawyer’s dealings.”

Rule 10.1 provides:

“A lawyer must treat other lawyers with respect and courtesy.”

Rule 13.2.1 provides:

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

Mr Collins said that Mr Hong breached these rules in his letter of 5 May 2010 because he was attempting to bully, threaten and intimidate. This arose from Mr Hong’s threats of a claim for “*full costs*” personally against the legal representatives acting for Mr and Mrs Ma, and his threat of legal actions, it was submitted.

Mr Hong’s submission was that he made the demand that the action against him be withdrawn on the basis of his genuinely held view that the action was without merit and that the legal advice the plaintiffs had received regarding the action was incompetent. He made the point that the proceedings against him were in fact subsequently withdrawn, and that he was awarded indemnity costs.

We do not consider that Mr Hong stating that if the proceedings were to be continued he would seek to strike them out, seek indemnity costs against the legal representatives involved, and take such proceedings against them as he considered appropriate (he nominated actions in defamation and tort), breached the rules alleged. While the language used by Mr Hong was aggressive, it is not a breach of the rules to set out proposed actions and indicate the grounds on which the applications and proceedings will be based, even if aggressively expressed.

Mr Hong’s statement in the letter, that he would file a complaint with the Law Society to the effect that the plaintiff’s legal representatives were not competent to undertake the litigation, was said by Mr Collins to be a breach of Rule 2.7 CCCR. He said that it was a threat made for the improper purpose of influencing or intimidating the solicitor (we note that this also applies to the barristers, who were co-addressees), not to continue with the proceedings.

Rule 2.7 provides:

“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.”

The threat to file a professional disciplinary complaint based on incompetence is the one part of this particular that does have more substance in our view. A practitioner must always be entitled to make a complaint of incompetence if that is his bona fide view. The difficulty for Mr Hong here is, if he had real concerns about competence that concern should not evaporate simply if the proceedings were withdrawn as he sought.

We conclude that he did use the threat of complaint for an improper purpose, that is, to have the proceedings against him withdrawn. That must have been the prime purpose of the complaint, because, if the proceedings had been withdrawn, no complaint would have been made. That is notwithstanding Mr Hong's stated concern about competence and the public interest implications of incompetent practitioners which he suggested justified his position.

[23] Email dated 13 May 2010 from Mr Hong to Baker Law.⁷

The particulars relied on from this email are set out at paragraph 2.3 of the misconduct charge, where Mr Hong said:

“Am glad you adhere to this cordiality among practitioners. Obviously if none is shown towards me by a practitioner I will not return that. My guess is one fellow at your end, exercised character assassination of me with my clients when he had an opportunistic meeting with them. At the conclusion of this action, it is my intent to determine whether my guess is correct and to deal with that accordingly.

Note this advice, from a practitioner with ample of [sic] years experience. You better get what you said you could for the clients or they will surely turn on you.”

Mr Collins submitted that Mr Hong's statement that the plaintiffs would “*surely turn on you*” was disparaging of the character of the plaintiffs, Mr and Mrs Ma. He said that it was suggesting that Mr and Mrs Ma would exact retribution against the solicitor if the litigation was unsuccessful, and as a consequence breached Rules 10 and 13.2.1 CCCR.

⁷ n 6 above, Exhibit “D”.

Mr Hong submitted that he was commenting on possible reactions which were reasonably within contemplation given his view of the merits of the case and the competence of the barristers handling the matter.

While that may be correct, we agree Mr Hong's statement that the plaintiffs would probably react adversely to a loss was unprofessional in the way it was expressed. While clients involved in litigation may sometimes react adversely and criticise their legal representatives, it was unprofessional for Mr Hong to make that comment in the way he did in the context of the proceedings against him. Associated with that is a failure to treat Mr and Mrs Ma with respect, in suggesting they would "*turn on*" their legal representatives.

Mr Collins also submitted that there was an implication in Mr Hong's letter that someone on the plaintiffs' side had improperly counselled the plaintiffs to take the action against Mr Hong. Words used by Mr Hong, regarding whether his guess about this was correct and that he intended to deal with it accordingly, implied a threat of a menacing nature it was said. That constituted an attempt to obstruct the course of justice, by threatening retribution if the solicitor continued to act, Mr Collins submitted, and was a breach of Rule 2.2 CCCR.

Rule 2.2 provides:

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

We do not consider that the words used by Mr Hong, as recited in this particular, could reasonably be interpreted as threatening retribution in an attempt to obstruct the course of justice. That is a strained interpretation of the facts and circumstances that were in evidence before us.

It is also a breach that would require Mr Hong to mean to obstruct, prevent, pervert, or defeat the course of justice, and having read Mr Hong's affidavit evidence, and observed Mr Hong give evidence at the hearing, we do not consider that he had any such intention in mind when he somewhat angrily reacted to the Ma proceedings as set out in the email of 13 May 2010.

In any event, the Tribunal does not accept that the words referred to allow that Mr Hong was making an unspecified threat of a menacing nature as submitted by Mr Collins. That is not reasonably available either on the plain reading of the words or in the particular circumstances.

[24] Letter dated 13 May 2010 from Mr Hong to Baker Law.⁸

The particulars relied on in this letter are set out at paragraph 2.4 of the misconduct charge, where Mr Hong said:

“I hope that you have checked that the barristers you engaged carry sufficient PI insurance.

Do not for a moment think that we could just take on anything, collect the fees and if anything goes wrong, that we can rely on PI insurance.

Once a claim is made and paid out, you will actually be bearing the brunt of it by way of much higher premiums.

Do not also think also that by trading through a limited liability company (and if without insurance) that one can avoid paying up, by winding up the company.”

Mr Collins submitted that this breached Rules 10 and 10.1 CCCR, in that Mr Hong had failed to promote and maintain proper standards of professionalism and was lacking in respect and courtesy. He said that it also breached Rule 13.2.1 CCCR because Mr Hong failed to treat others involved in Court processes with respect. In addition, Mr Collins submitted that these particulars showed an attempt to obstruct justice, a breach of Rule 2.2 CCCR.

Mr Hong submitted that he was simply sharing a view of risk with the instructing solicitor.

We agree that Mr Hong has been unprofessional in these comments and thereby breached Rule 10. Associated with that unprofessional behaviour, there is also a breach of Rule 10.1, particularly with regard to the suggestion that limited liability and liquidation could be used by Baker Law to “*avoid paying up*”. This view also

⁸ n 6 above, Exhibit “E”.

allows a finding that Rule 13.2.1 was breached, but we note that is really just a duplication of the breach of Rule 10.1.

Mr Collins also submitted that this particular demonstrated an attempt to obstruct justice, contrary to Rule 2.2 CCCR. We do not agree that the unprofessional conduct and lack of respect constitutes an obstruction of justice. There has been petty behaviour, which we consider constitutes low level (in terms of seriousness) breaches of Rules 10, 10.1, and 13.2.1, and it does not rise to the level of an attempt to obstruct justice. We doubt that Mr Hong even considered that his response could have that effect, let alone intended that it should.

Correspondence with and submissions to the Lawyers' Complaints Service

[25] Letter dated 23 May 2010 from Mr Hong to the Lawyers' Complaints Service.⁹

In the parts of this letter relied on by the LCRO, specified as the particulars in paragraph 2.5 of the charge, the LCRO alleges Mr Hong expressed himself in abusive and unprofessional terms when he said (the emphasis is Mr Hong's):

- (a) The drafting of pleadings by the Mr Deliu and Messrs Zhao and Ram was characterised by "...**blatant** mistakes in material facts...which in my view was due to lack of due care and skill and their lack of courtesy to a fellow practitioner";
- (b) Mr Deliu and Messrs Zhao and Ram "...are not competent in the areas and fields of the law that have an impact on the issues as raised in this action";
- (c) Mr Deliu was improperly motivated in complaining to the Lawyers' Complaints Service because the complaint was "An attempt to silence me" and "An attempt to prevent me from communicating with [Messrs Zhao and Ram, and their instructing solicitor]";
- (d) Messrs Zhao and Ram may be treated as "half fledged lawyers";¹⁰
- (e) Mr Deliu and Messrs Zhao and Ram lacked "in-depth knowledge of conveyancing matters and legal precedents" and were acting outside their competency;
- (f) Mr Deliu and Messrs Zhao and Ram had inadvertently and incompetently breached their clients' privileges;

⁹ n 6 above, Exhibit "F".

¹⁰ We note that a full reading of the relevant letter shows that Mr Hong actually said there was no such thing as half fledged lawyers - n 9 above at [14.1] and [14.2], and see [7] (a) – (f) for further context.

- (g) Mr Deliu and Messrs Zhao and Ram “...*have no idea what a fiduciary duty is*”;
- (h) Referring to pleadings prepared by Mr Deliu and Messrs Zhao and Ram “...*the general consensus will be that they have been done by amateurs*”;
- (i) Mr Deliu and Messrs Zhao and Ram had not complied with the intervention rule and were failing in their professional responsibilities because they “...*wanted to run this litigation free of any scrutiny* [by the instructing solicitor]”; and
- (j) He [Mr Hong] would contact the plaintiffs directly, being the clients of the instructing solicitors, Baker Law, “...*if these Counsels proceed with the action in its present form for [Mr and Mrs Ma] and disaster struck, I intend to seek out [Mr and Mrs Ma] and advise them of their right to have another senior Counsel look into addressing these concerns with the NZ Law Society*”.

It was alleged that statements in this letter by Mr Hong to the Complaints Service breached Rules 10, 10.1, and 10.2 CCCR.

Mr Collins noted that this letter to the Lawyers Complaints Service, in response to the complaint submitted by Mr Deliu, was expressed as constituting a cross-complaint and sought the urgent intervention of the Law Society. He submitted that it continued the threatening, discourteous, and disrespectful content and tone of the earlier correspondence.

The suggestion by Mr Hong in the letter, that he would contact Mr and Mrs Ma on completion of the Ma proceedings with a view to advising them to retain counsel to review the position they would then be in with the New Zealand Law Society, was submitted as contrary to Rule 10.2 CCCR. It was said that it constituted a threat to engage in conduct which if carried out would have breached that rule.

Dealing with this last submission first, Rule 10.2 provides:

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

There then follow a number of exceptions to the rule, involving matters such as urgency and the unavailability of a person’s legal representative, belief that the other person has no current legal representation, and various other situations not relevant for current purposes.

Mr Hong noted that as he did not communicate with Mr and Mrs Ma the rule could not have been breached. He submitted that no breach could arise simply from an indication from him that he was considering approaching Mr and Mrs Ma “*post-adjudication*”. In his letter Mr Hong had made this clear, as the paragraph heading above the words relied on in this particular of charge stated - “*Pending possible approach of the MAs post adjudication.*”¹¹

We note also that in this letter, which was to the Complaints Service of the New Zealand Law Society, Mr Hong wrote that he considered his proposed approach did not breach any rule “*but if that is not correct, please do give me some pointers.*”¹² He appears to have been aware of his responsibilities in this regard.

We do not consider that his suggestion that post-adjudication he may approach Mr and Mrs Ma constitutes a matter that could be said to be an attempt to breach Rule 10.2.

As to the alleged breaches of Rule 10 and 10.1, Mr Hong submitted that what he had said was his description of the essence of his complaint. He was communicating his complaint and grounds therefore to the Lawyers Complaints Service in circumstances that he thought were behind “*closed doors*”. His intention was to communicate his concerns, not to attack Mr Deliu personally he said.

We consider that while his use of language could not be described as considered, it is an important factor that Mr Hong was expressing the issues he wanted to complain about to the Complaints Service as he saw them. The matters complained about were not objectionable matters in themselves, and they represented his genuinely held views. Mr Hong was setting out the detail of his position for the Lawyers Complaints Service, in response to Mr Deliu’s complaint, and in support of his own complaint against Mr Deliu.

Except in a truly outrageous case, that went beyond what was reasonably required to answer a complaint, or to set out grounds for one’s own complaint, we would be

¹¹ Ibid, at [16].

¹² Ibid, at [16.3].

loathe to treat communications with the Lawyers Complaints Service about such matters as a basis for finding misconduct because a complainant or respondent is said to be intemperate in their communication style.

An examination of what Mr Hong said in his letter to the Complaints Service does not in our view indicate a breach of the rules. They were genuinely held views, certainly capable of more refined expression, but they were expressed in the context of the Complaints Service process, and they reflected underlying unobjectionable concerns properly aired in the complaints environment, admittedly poorly expressed.

We do not consider that this particular demonstrates a breach of the rules relied on to support the misconduct charge.

[26] Email to the Lawyers Complaints Service dated 25 May 2010.¹³

This email is the subject of the particular set out in paragraph 2.6 of the charge, which we have summarised below.

In this email, Mr Hong suggested to the Complaints Service that the investigation of the complaint be “*put on hold*” until the Ma proceedings had been determined. Mr Hong indicated he was prepared to work with the barristers (apart from Mr Deliu, whom he described as a “*waste of my time*”) in an attempt to resolve issues.

For the LCRO Mr Collins submitted that this was a further example of a serious lack of professionalism, and respect and courtesy, again breaching Rules 10 and 10.1 CCCR.

Mr Hong said that he considered it a genuine attempt to break out of the position the complaints process had got to, relating to both Mr Deliu’s complaint against Mr Hong, and Mr Hong’s complaint against Mr Deliu. He submitted that he considered he was engaging with the Law Society and a solution was being sought by him to assist Mr and Mrs Ma whom he thought were at risk for the reasons he had noted.

¹³ n 6 above, Exhibit “G”.

Mr Hong said that he did not consider Mr Deliu could add anything to the approach he proposed, and expected that Mr Deliu's involvement would likely result in a lack of resolution of the matter (as Mr Hong saw it). That was the basis of his comment, he said, to the Complaint's Service that to involve Mr Deliu would be a waste of time.

Mr Hong's approach to the Law Society in an attempt to resolve this matter is certainly unusual. We accept that describing Mr Deliu's participation in Mr Hong's proposal as a "*waste of my time*" could be considered disrespectful and discourteous on its face. In the circumstances of Mr Hong's engagement with the Law Society, we do not consider this to be conduct that requires the intervention of the disciplinary regime.

When Mr Hong was engaging with the Complaints Service, he considered he was broaching a solution to the various issues around the complaints and the Ma proceedings. In the Complaints Service environment, and as part of a proposal seen by Mr Hong as assisting in the resolution of matters, we do not consider the rules have been breached as alleged.

It would be inappropriate in our view to apply rules intended to operate in the wider practice environment and to protect the public to iterations between a practitioner and the regulator in the disciplinary context in a situation such as this. The conduct is at a relatively low level in terms of seriousness, and has occurred in the context of describing the alleged failings of the practitioner about whom Mr Hong's complaint had been made. Those circumstances do not indicate a public interest issue warranting a finding that a practice rule has been breached.

[27] Email dated 9 June 2010 from Mr Hong to The Lawyers Complaints Service.¹⁴

The particular relied on is set out in paragraph 2.7 of the charge, where Mr Hong said in this email:

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

¹⁴ n 6 above, Exhibit "H".

- b. *It is quite clear to me [Mr Deliu] never accepts what anyone says, even learned Justices, to grave detriment of his clients. ...*
- h. *I invite [Mr Deliu] to ride this case against me as [Mr and Mrs Ma's] counsel. We both agree to a contingent fee. The one who loses pays that contingent fee to the other party as agreed award of costs. [Mr Deliu] and his...Chamber counsels do not charge [Mr and Mrs Ma] at all. No costs need to be sought. I nominate \$30,000.00 plus GST. I have a counsel in mind already who was admitted in 2003. I am prepared to go as high a contingent fee as [Mr Deliu] has funds for.*
- i. *This will ensure as to the action against me [Mr and Mrs Ma] could not be any worse off and would only be better off, the pit will be between counsels and practitioners and [Mr Deliu] and his counsels will not be able to feed on such a vexatious claim. He will do so now at his own cost".*

Mr Collins submitted that this proposal was disrespectful of, and discourteous to, Mr Deliu, breaching Rules 10 and 10.1 CCCR. He described it as a form of wager which was demeaning to Mr Hong himself and which brought the legal profession into disrepute.

Mr Hong denied it was a wager and said that he outlined such a proposal for consideration by the Complaints Service in a genuine attempt to find a way to protect Mr and Mrs Ma from what he perceived to be poor advice and to save them from unnecessary cost. He considered that it would act to test Mr Deliu's confidence in continuing the Ma proceedings. Mr Hong said that he likened it to a contingency fee, and that it had the advantage of protecting (as he saw it) Mr and Mrs Ma and testing Mr Deliu.

We agree that the proposal was unusual and on its face is unprofessional, but the matter was raised for consideration by the Complaints Service in the context of a complaint/cross-complaint situation between Mr Deliu and Mr Hong. It was not a matter in the normal course of practice and inter-action with clients. It was a suggestion to the Complaints Service which it rightly did not take up. It was driven by Mr Hong's sense of frustration and concern.

We do not consider this communication with the Complaints Service, suggesting the possibility of what Mr Hong saw as a form of contingency fee arrangement as a means of resolving his perception of Mr and Mrs Ma's risk, requires the intervention

of the disciplinary regime. It is a suggestion that could fairly be described as silly, but we do not find that, in its context, this particular shows a breaches of the rules alleged.

[28] Letter dated 17 June 2010 from Mr Hong to the Lawyers' Complaints Service.¹⁵

The particulars relied on are noted at paragraph 2.8 of the charge, where Mr Hong said in this letter:

- (a) *"Holds utter contempt for our Judges";*
- (b) *"Holds utter contempt for our Law Society";*
- (c) *"Holds utter contempt for the rest of us, his fellow Kiwi colleagues as he reckoned he is the best and the rest of us incompetent";*
- (d) *"Has no respect of any of us, legal practitioners and showed us no courtesy whatsoever (which makes his complaint of my being disrespectful and discourteous ludicrous and farcical)";*
- (e) *"By reference to Kiwis and Chinese, holds racists inclinations";*
- (f) *"...had shown such thuggery towards others";*
- (g) Is *"mentally unstable";*
- (h) *"...should [Mr Deliu] be stupid enough to try, either the defamation action or anything physical, he will surely end up at the sorry end of the stick...";*
- (i) Routinely breached fiduciary duties to his clients and that he *"...instigated actions that were clearly not in the interest of his clients";*
- (j) Routinely breached his duties to the Court and intentionally misled the Court; and
- (k) Routinely breached the intervention rule.

In this letter Mr Hong was relaying the concerns he had and on which he had based his complaint. He detailed the basis of the complaint he had made about Mr Deliu, and set out factors he considered relevant. Mr Hong set out, in a forthright way, issues as he saw them, based on facts he considered relevant. He wanted the Law Society to investigate the matters he raised, and he was outlining some detail for investigation as part of his complaint.

¹⁵ Supra, Exhibit "I".

Except in an exceptional case, where a practitioner went far beyond what was reasonable or necessary, and made claims of an extreme or outrageous nature, responding to or providing detail of a complaint to the Complaints Service should not put a practitioner at risk of going too far in describing genuinely held concerns, and facing disciplinary charges for statements made in that context.

While not suggesting that Mr Hong's assertions about Mr Deliu were justified, we do not consider that Mr Hong's assertions, as reflected by this particular, are of such a nature that we should find that he has thereby breached practice rules. This was part of an ongoing iteration with the Complaints Service about the complaint and cross-complaint involving Mr Hong and Mr Deliu, and except in a special case, as noted, findings of breaches of CCCR should not result.

We note also that the context and content of the whole letter, which was before us in evidence, should be considered when assessing these particulars relied on for the purposes of the charge.

In this letter Mr Hong amplified the basis of his complaint against Mr Deliu, and asked for the "*NZ Law Society's urgent intervention, if possible*". He noted that Mr Deliu had left a message on Mr Hong's telephone answering device which Mr Hong said had objectionable content. Mr Hong provided a digital sound copy and a written transcript of Mr Deliu's telephone message to the Lawyers Complaints Service with his letter. The content of that telephone message is reflected in Mr Hong's claims about Mr Deliu set out in the particulars taken from Mr Hong's letter to the Complaints Service.

Mr Hong said in this letter that he was concerned at what he considered to be veiled physical threats by Mr Deliu, the basis of which Mr Hong set out for the Complaints Service, and he also questioned Mr Deliu's mental stability. In support of this belief regarding physical threats, he noted a media report of a physical confrontation involving Mr Deliu at a Law Society meeting. This was said to involve a matter where a solicitor from the Crown Solicitor's Office in Auckland, investigating the matter for the Law Society, had been reported in the media as describing Mr Deliu and another as aggressive, belligerent, intimidating and at times threatening.

Whether that is correct or not is, of course, not the point. What is important is that it was the basis of Mr Hong's belief that he had been threatened by Mr Deliu, and reasonably supported his belief that Mr Deliu posed a threat to him. In particular Mr Hong was concerned at the message he said that Mr Deliu had left for him on his telephone answering device. In that message the evidence was that in Mr Hong's letter to the Complaints Service he had specified that Mr Deliu had used phrases such as "*know that there will be retaliation for what you do*"; "*there will be consequences*"; "*you will be sorry for what you have done in the end*"; and, "*it is time to pay and you will see how you will pay*".¹⁶

We make no comment on these statements and threatened actions alleged to have been made by Mr Deliu. We are conscious that Mr Deliu was not participating in these proceedings and consequently was unable to either explain their meaning or even to deny that he had made the statements.

What is important is that we consider that it was not unreasonable for Mr Hong to form the view he did of the risk he considered Mr Deliu posed for him (whether correct or not) as a consequence of the message he received, and which he provided to the Law Society with this letter.

In all these circumstances, we do not find that this particular demonstrates a breach of professional rules relating to discourtesy or disrespect, or that it is realistic to say the words used by Mr Hong constitute a threat of violence, as alleged in respect of this particular. His style was unnecessarily direct and unsophisticated perhaps, and he used unfortunate colloquialisms such as "*sorry end of my stick*", but we see nothing that requires the intervention of the disciplinary regime by finding certain rules in CCCR to be breached.

[29] Letter from Mr Hong to the Lawyers Complaints Service dated 15 September 2010¹⁷.

¹⁶ n 6 above, Exhibit "I" at [5] and [7].

¹⁷ n 6 above, Exhibit "J".

The particulars relied on are set out at paragraph 2.9 of the charge, where Mr Hong wrote:

“As to [Mr Deliu’s] comments on my two Rottweilers and [Mr Deliu’s] worry of his and his staff’s safety, I have to add these:-

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

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

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

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

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

Mr Hong told the Complaints Service in this letter that he was concerned about what he considered Mr Deliu’s “*veiled physical threat*” to him, his understanding of Mr Deliu’s history of intimidating behaviour against others, and that he considered Mr Deliu’s threats to him indicated to Mr Hong that Mr Deliu may have some mental instability. We note here that there is no suggestion that there was any evidence of any mental instability affecting Mr Deliu before the Tribunal, and that this was a matter of Mr Hong’s belief following his receipt of what he considered threats from Mr Deliu, and his understanding of Mr Deliu’s involvement in other matters. It was this belief, Mr Hong said, that drove his comments. He wanted to warn Mr Deliu away from his office and himself.

Mr Hong also made the point that in assessing what he wrote in correspondence, the substance and context should be considered, not just his actual words which he said included colloquial language.

Mr Collins submitted that once again what was said in this letter was characterised by discourtesy and disrespect for a fellow lawyer. He noted that it included threats of physical violence which were unprofessional and damaging to the reputation of the profession. He submitted that it breached Rules 10 and 10.1.

In the circumstances of Mr Hong's genuinely held belief about risk to him from Mr Deliu (and we note that the nature of this risk is the same as Mr Deliu had made clear in his correspondence to the Complaints Service that he perceived he was exposed to regarding Mr Hong), and in the context of communications with the Lawyers Complaints Service about the detail of his complaint against Mr Deliu, we do not consider that there is a breach of rules 10 or 10.1 shown by this particular.

The rules in CCCR are intended to preserve minimum standards of conduct and competence, normally in the course of practice. They are not of a nature that indicates a purpose that should affect the conduct we are examining here, correspondence in the course of progressing complaints made to the Complaints Service, particularly in the circumstances applying, unless of course the correspondence contained outrageous or extreme claims. That is not the case here.

That is not to suggest CCCR do not apply widely, irrespective of whether or not regulated services are being provided. They have a wide application, even to former lawyers no longer practising¹⁸ (eg to ensure the maintenance of client confidentiality), but their purpose has to be taken into account and they are not to be applied rigorously with no regard to context and circumstances. Mr Hong's conduct, specified in the particulars relating to correspondence with the Complaints Service to progress the detail of complaints made, appears to be based on honest and reasonable belief. While in some cases some of his suggestions could be described as silly, and in others as intemperate, such conduct is not at a level that should be taken as breaching CCCR for the various reasons noted earlier.

Submissions to the Review Officer, following remission from the High Court

[30] Mr Hong's submissions on review.¹⁹

The final particular relied on in support of the misconduct charge is set out in paragraph 2.10 of the charge. This involved Mr Hong's written submissions to the LCRO made for the purposes of the Review Hearing following remission of the

¹⁸ Section 107 Lawyers and Conveyancers Act 2006.

¹⁹ n 6 above, Exhibit "K".

matter by the High Court. The submissions occupy five pages, but it is two paragraphs which constitute the particular relied on for the misconduct charge. The two paragraphs are set out in paragraph 2.10 of the charges, and are as follows (the emphasis is Mr Hong's):

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

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

These paragraphs were said to constitute an acknowledgement by Mr Hong of what Mr Collins described as "*his own unethical practises, purportedly justified by achieving results for his clients*". Mr Collins submitted that it was unprofessional for Mr Hong to "*boast*" about potentially unethical behaviour, and said that it conveyed a view that Mr Hong considered he was entitled to conduct himself unethically if justified by his clients' objectives. The memorandum attached to Mr Hong's submissions he had filed with the LCRO and referred to in this particular did not form part of Exhibit "K".

We do not give this particular any weight, as we are unable to assess the memorandum and thus the relevance of the statement recited in the particulars, but more importantly, this is a matter that has arisen out of Mr Hong's submissions to the Review Hearing itself. We question whether it is properly included as a matter to support the misconduct charge which resulted from the Review undertaken after remission by the High Court.

This particular has been added to the actual matters the subject of review on which Mr Hong was asked to submit. It is a new matter, outside the scope of the subject matter of the Review itself, to allege that Mr Hong's submissions on the Review indicate an attitude that is unprofessional and reflects on his practice ethics.

We would have thought that any such additional matter should be put to Mr Hong separately, and he should have been given the chance to answer this allegation before it became part of the particulars supporting the misconduct charge. Introducing the matter in the way it has, by adding it to the particulars supporting the misconduct charge, raises questions of natural justice. The misconduct charge arose from matters previously put to Mr Hong in the Standard's Committee's investigation and in respect of which the review was initiated. That has not occurred regarding this particular.

While appreciating the wide powers available to the LCRO in a Review, the relevant sections of the Act make it clear that the scope of review has boundaries which preclude new elements being introduced in support of the complaint.

The LCRO, when reviewing a final determination of a Standards Committee, may review aspects of any inquiry or investigation involved "*in relation to the complaint or matter to which the final determination relates*".²⁰ There is no power to consider matters beyond the scope of the complaint or matter to which the determination relates. Mr Hong's submissions on the Review did, of course, occur after the determination by the Standards Committee, so are outside the scope of Review.

Similarly the LCRO may obtain further information regarding what the Standards Committee has done regarding the inquiry or investigation it undertook, and the reasons for its final determination, and may make further inquiries or investigations, but only into the complaint addressed by the Standards Committee.²¹ Subsequent conduct, not the subject of complaint or other matter forming part of the determination, are not matters for further investigation as part of the Review.

There is a distinction to be made between new evidence in support of the original complaint, which may be investigated and considered in a Review, and a new complaint. Apart from the natural justice implications, which also suggest that such new matters should not be introduced as part of this charge, we consider that this

²⁰ Section 203 Lawyers and Conveyancers Act 2006.

²¹ *Ibid*, s 204.

particular, being a new matter which never had any place in the determination being reviewed, should not form part of the particulars supporting the misconduct charge.²²

Discussion

[31] The misconduct charge is based on conduct said to involve objectionable statements and allegations made by Mr Hong, as outlined earlier in this decision. The statements and allegations by Mr Hong are said to reflect misconduct in that they represent breaches of provisions of the Act and CCCR.

[32] We have found some breaches of CCCR. In particular we consider that Mr Hong has breached:

- (a) Rule 2.7 CCCR, as a consequence of his threat to complain to the Law Society unless the Ma proceedings were withdrawn, as noted in the particular set out at paragraph 2.2 of the misconduct charge.
- (b) Rules 10 and 13.2.1 CCCR, as a consequence of his lack of professionalism and respect demonstrated by matters found to breach those rules in the particular set out at paragraph 2.3 of the misconduct charge.
- (c) Rules 10, 10.1 and 13.2.1 CCCR, as a consequence of his lack of professionalism and respect arising from his comments regarding competence in his statement about professional liability and indemnity as referred to in particular 2.4 of the misconduct charge.

[33] The charge also alleges that statements and allegations made by Mr Hong breach s 4(a) of the Act. That section provides:

²² And see also s 211(1)(b) Lawyers and Conveyancers Act 2006, which makes it clear that powers exercisable on review are limited to those that could have been exercised by the Standards Committee in the original proceedings. The submissions forming the last particular in support of the misconduct charge occurred subsequent to the proceedings before the Standards Committee and the determination arising from that which became the subject of review.

“4 Fundamental obligations of lawyers

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

- (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
- (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.”

[34] The introduction to this section, with its references to the provision of “*regulated services*”, and to obligations “*in the course of.....practice*”, and references in this section to obligations to “*clients*”, indicates that it applies where regulated services are involved. The charge Mr Hong faces is predicated on there being no regulated services being provided in the course of the conduct being examined.

[35] We consider that the wording of s 4(a) indicates that it may apply only in the context of the provision of regulated services. The LCRO has accepted, and laid the charge against Mr Hong, on the basis that there are no regulated services involved, so on that basis we doubt that there can have been a breach of s 4(a) of the Act.

[36] Even if that was not the case, and it was not necessary that regulated services be provided for s 4(a), to apply, we do not consider Mr Hong’s conduct found to breach various rules in CCCR amounts to a failure to uphold the rule of law and to facilitate the administration of justice. The various particulars said to show a breach of that section were not specified in the charge, but in considering each particular in turn ourselves, we do not identify any which is at a level that represents a failure to facilitate the administration of justice, either together or alone.

[37] There is also a context to these charges which needs to be taken into account. This was an unseemly dispute between two practitioners, involving complaint and cross-complaint. Mr Hong made an ill-considered response. It was

intemperate because he had been angered by what he considered unfairness to him and risk to his former clients arising from incompetent advice. While Mr Hong suffered some significant provocation from Mr Deliu, which of course does not excuse his conduct, he genuinely thought that he was free to spell out the detail of his complaint to the Lawyers Complaints Service, as he saw it. That context also affects our view of his conduct regarding some of the particulars relied on, as we have noted earlier in this decision.

[38] For the purposes of considering whether Mr Hong has breached s 4(a) of the Act, and putting to one side for present purposes the issue of regulated services not being involved, we consider that this context reinforces the view that Mr Hong's conduct is below that needed to find that he has failed to uphold the rule of law and facilitate the administration of justice. Nothing in the particulars, either alone or in combination, elevates his conduct as put before us in the particulars to that level.

[39] In respect of the conduct we have identified as breaching some rules of CCCR, for the misconduct charge itself to be proven on the basis of those breaches, Mr Hong's conduct must be of such a nature that it would justify a finding by this Tribunal that Mr Hong is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer. That is the level of misconduct required under s 7(1)(b)(ii) of the Act, the section under which Mr Hong has been charged.

[40] The threshold set by s 7(1)(b)(ii) is relatively high. Not only must there be misconduct, it must be misconduct that indicates a question as to whether Mr Hong should be in practice.

[41] The disciplinary regime for legal practitioners is intended to ensure protection of the public and to maintain public confidence in the provision of legal services.²³ The Tribunal, as part of the range of powers available to it to assist the achievement of these purposes, is given the power to hear and determine professional disciplinary charges and to make orders aimed at ensuring the public interest is protected.²⁴

²³ Section 3(1) Lawyers and Conveyancers Act 2006.

²⁴ Ibid, ss 241 and 242.

[42] It is well established that any sanction imposed is not intended as a punitive response, although that may be one of its effects. A disciplinary sanction is primarily aimed at public protection, including protecting the reputation of the profession so that the public may have confidence in the provision of legal services.²⁵

[43] The misconduct alleged here is said to arise from a series of letters and emails sent by Mr Hong. Certain breaches of CCCR have occurred, as noted earlier in this decision in relation to some of the letters or emails, and we are satisfied that in the ordinary course Mr Hong's breaches were either wilful or reckless. That is not the end of the matter however, as the particular charge Mr Hong faces requires that the level of his misconduct be such that we would be justified in finding that he is not a fit and proper person, or that he is otherwise unsuited to engage in practice as a lawyer.

[44] For the LCRO, Mr Collins acknowledged that Mr Hong's statements and allegations in his letters and emails might be seen in isolation as being foolish, ill-advised, and unprofessional, but not rising to the level of misconduct required. He submitted that the force of the charge lay in the persistent pattern of behaviour. From that behaviour it was reasonable to conclude that Mr Hong could not claim momentary ill-temper or lapse of judgment Mr Collins submitted. It was a premeditated course of conduct he said.

[45] Our view of the evidence is that the behaviour was reactionary rather than premeditated, reflecting its context as an unseemly and unprofessional dispute between two practitioners involved in a personal clash that escalated into complaint and cross complaint and investigation under the disciplinary regime.

[46] Mr Collins also submitted that the conduct rose to the required standard because poor judgment and lack of constraint by Mr Hong indicated a failure to meet acceptable standards of professionalism required of a lawyer. He referred the Tribunal to an Australian case, *Re Bell*,²⁶ involving refusal of admission to the legal

²⁵ See for example *Daniels v Complaints Committee 2 of the Wellington District Law Society* HC WN CIV-2011-485-000227 [8 August 2011] at [22].

²⁶ *Re Bell* [2005] QCA 151.

profession on the basis that the applicant was not a fit and proper person to be a legal practitioner. He submitted that this case showed that conduct of the type Mr Hong had undertaken was properly a fitness for practice issue.

[47] In *Bell* a practitioner was refused admission as a practitioner on the basis that the court concluded he was not a fit and proper person to undertake the obligations and functions of a legal practitioner in the administration of justice because Mr Bell:

- (a) had failed to make full and frank disclosure of his breaches of a number of domestic violence orders in his application, and some other matters relating to his suitability for admission as a legal practitioner;
- (b) lacked proper regard for the authority of the judicial system, in a number of instances personally threatening judicial officers dealing with matters affecting him in the Family Court jurisdiction and in the Federal Magistrates Court, threats he later affirmed he considered appropriate;
- (c) had an unresolved contempt of court allegation against him; and,
- (d) was prepared to make unsubstantiated, scandalous claims about those involved in the administration of justice.

[48] These matters are of a more serious nature than the acts of Mr Hong, and in our view when considering Mr Hong's conduct and its context, show that the threshold for finding a lack of fitness to practice sits somewhat higher than arises from Mr Hong's conduct.

[49] Mr Collins also relied on *Waikato Bay of Plenty Standards Committee v Parlane*,²⁷ where he noted that this Tribunal had found two instances of objectionable and unprofessional conduct to constitute misconduct.

²⁷ *Waikato Bay of Plenty Standards Committee v Parlane* [2010] NZLCDT 8.

[50] In *Parlane* the practitioner faced a charge of misconduct based on eight different particulars, some of which were proven and found to support the misconduct charge, including the two instances raised by Mr Collins.

[51] The two instances noted by Mr Collins had been predicated on a claim that Mr Parlane had obstructed the Complaints Committee and the Standards Committee by communicating with them in an unprofessional and belligerent manner. Mr Collins compared the unprofessional and belligerent communications by Mr Parlane with those of Mr Hong.

[52] The Tribunal did say in *Parlane* that Mr Parlane's allegations and statements were unprofessional and belligerent, but the particulars alleged in the two instances raised by Mr Collins actually recited obstruction of the investigation by the Complaints Committee and the Standards Committee as the matter supporting the misconduct charge. The finding made by the Tribunal in respect of these two particulars was that Mr Parlane had obstructed the Committees in the exercise of their statutory duties.²⁸ It was the fact of that obstruction which supported the misconduct finding, rather than simply the writing of unprofessional and belligerent communications, which was the mode of obstruction. We note also that the two obstruction charges were of lesser seriousness than some of the other particulars found proven against Mr Parlane.

[53] Mr Collins also drew the Tribunal's attention to *New Zealand Law Society v Dorbu*²⁹ where the Tribunal had found that Mr Dorbu was not a fit and proper person, as an initial step to striking his name off the Roll of Barristers and Solicitors. In that decision the Tribunal had commented on Mr Dorbu's inability to treat fellow practitioners with respect and courtesy in breach of the rules of professional conduct. This demonstrated, the Tribunal had said in *Dorbu*, an inability to understand the fundamentals which underpin the operation of the profession. It also noted that the number and frequency of Mr Dorbu's breaches of core and fundamental obligations was serious.³⁰

²⁸ Ibid, at [85] and [92].

²⁹ *New Zealand Law Society v Dorbu* [2011] NZLCDT 24.

³⁰ Ibid, at [35] and [36].

[54] In considering the charge of misconduct against Mr Hong, with its requirement that his misconduct be at a level justifying a finding that he is not fit to practice, we note that Mr Hong's breaches of the rules are much less serious than the situation confronting the Tribunal in *Dorbu*.

[55] Mr Dorbu was found not to be a fit and proper person as a result of ten charges of misconduct being found against him involving, inter alia, particularly serious matters: acting for more than one party in the same transaction where there was an irreconcilable conflict of interest; swearing a false affidavit of discovery; swearing a false affidavit; misleading the court by swearing an affidavit with false answers to interrogatories; and failing to maintain proper standards by undermining the dignity of the judiciary.

[56] We accept that what Mr Hong has done is less than satisfactory, but it is not at the level of seriousness found in *Bell*, *Parlane*, or *Dorbu* as submitted to us by Mr Collins. Mr Hong's conduct does not reach the level of misconduct that would justify finding that he was not a fit and proper person or was otherwise unfit to practice. His actions and all of the circumstances of this matter do not indicate a requirement that Mr Hong's right to continue in practice should be threatened because of any public interest issues, something that a finding of misconduct as charged against Mr Hong would effectively require.

[57] Mr Collins also submitted that Mr Hong had not shown he was contrite or that he had any insight into his failings. In questioning of Mr Hong at the hearing by the Tribunal, it was clear that the likelihood of Mr Hong letting his standards slip again in this way was remote. He said that he did not resile from his belief that it was appropriate to raise the matters he had raised, but he had learnt his lesson and would not deal with any such matter in the same way again. He said he was somewhat bewildered that the various processes had taken him to a point where his ability to continue practice was under threat, and he would be careful to ensure he never got into such a position again.

[58] We have accepted that there have been failures in acceptable standards in respect of some of the particulars, for the reasons noted, but we do not consider

those failures reach the level required by the charge. They are not failings which indicate that Mr Hong's is not fit to practice. His conduct has been examined within the professional disciplinary context, and while there are aspects that we find proven, overall we do not consider that the public interest is threatened by Mr Hong.

[59] Mr Collins also referred to what he described as adverse judicial comment directed at Mr Hong, a matter the LCRO had also referred to in his affidavit in support of the charge. Mr Collins submitted to the Tribunal that we should take account of certain judicial criticism of Mr Hong. The criticism was said to be relevant because it showed Mr Hong's disrepute with the Court as a measure of his unprofessionalism. It was said that adverse judicial comment was consistent with the misconduct asserted, as it demonstrated Mr Hong's unfitness and unsuitability to engage in practice as a lawyer.

[60] Mr Hong made the point, so far as comments about him that were made in the determination of Mr Deliu's judicial review proceedings³¹ were concerned, that he had not actually participated in that hearing as he had not appreciated that it was anything other than a procedural review involving the LCRO.

[61] We do not consider that the fact of the judicial criticism is a matter of any weight in determining whether Mr Hong's conduct is misconduct as charged. Our determination must be dependent on the charge that has been formulated, the particulars relied on, and the totality of the evidence provided and tested before us. The judicial criticisms were made without the advantage of that detail, and in other contexts, and the fact that they were made has no probative value in proving the charge.

[62] Absent the full detail that has been put before us at the substantive hearing of the charge, we do not consider that the criticisms were intended to indicate definitive views on Mr Hong's conduct. We accept that if the charge had been proven, judicial criticism of Mr Hong, to the extent it is based on some of the facts which supported the charge, may be something to consider at the time penalty is considered, but we

³¹ n 1 above.

do not consider that such criticism itself contributes to proof of the charge by indicating possible fitness to practice issues.

Conclusion

[63] In its determination granting Mr Deliu's application for judicial review of the LCRO's decision not to interfere with the Standards Committee determination to take no further action on Mr Deliu's complaint, the High Court said that there was sufficient in Mr Deliu's complaint against Mr Hong for a Review Officer to consider the complaint within the appropriate legal framework. That was done, and the Review Officer subsequently referred the matter to the Tribunal in the form of a single misconduct charge supported by the nine particulars included in the charge, said to show breaches of the Act and CCCR.

[64] We have considered all the evidence provided in support of those particulars, and we have found some alleged breaches proven and some not proven. Those proven have then been considered in the context of whether they constitute misconduct at such a level as would justify a finding that Mr Hong is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer.

[65] We do not consider that the breaches proven do have such a degree of seriousness, having regard to the purposes of the disciplinary regime with its protection of the public interest emphasis. We do not consider that there is a public risk issue in Mr Hong practising. Our view is reinforced by the fact that Mr Hong has clearly learnt his lesson in this unfortunate episode. He made it clear to the Tribunal in questioning that he accepted he had lost his way when he personalised matters and he would be vigilant to ensure that he did not expose himself again to such proceedings. His evidence also noted that in his many years of practice this was his sole indiscretion resulting in disciplinary charges.

[66] Taking into account the particular circumstances and context of Mr Hong's conduct found to breach CCCR, Mr Hong's belief and consequent motivation for his behaviour in evidence before us, and Mr Hong's acknowledgement that he would take care not to let himself get into such a situation again, we do not consider that

there are issues here which require disciplinary intervention to ensure the public interest is protected. In short, we do not consider that the conduct rises to a level of seriousness which reflects fitness to practice issues or that Mr Hong is unsuited to engage in practice as a lawyer.

[67] Accordingly we find the misconduct charge not proven, and it is dismissed.

Costs

[68] For the purposes of s 257 Lawyers and Conveyancers Act 2006 costs are certified at \$12,850.

[69] We make no orders for costs. We consider that costs should be borne by each of the parties, as incurred.

DATED at AUCKLAND this 22nd day of March 2013

DJ Mackenzie
Chair