IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-7381

BETWEEN	JOHN EVANS DORBU Applicant
AND	THE LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL First Respondent
AND	NEW ZEALAND LAW SOCIETY Second Respondent

Hearing: 16 March 2011

Counsel: Applicant in person
H Keyte QC and M A Treleaven for Respondents

Judgment: 11 May 2011

JUDGMENT OF BREWER J

This judgment was delivered by me on 11 May 2011 at 4:00 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

SOLICITORS
Applicant in person
Crown Law (Wellington) for First Respondent
New Zealand Law Society (Auckland) for Second Respondent

COUNSEL
Howard Keyte QC

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Introduction

[1] The applicant, Mr Dorbu, challenges by way of judicial review the findings of the first respondent that 11 of 12 charges brought against him were proved.[1] He represents himself. The first respondent abides the decision of the Court. The second respondent opposes the applicant's claims.

[2] The applicant is a lawyer. The 12 charges alleged that he misconducted himself in his capacity as a barrister entitled to practice as such in New Zealand.[2]

[3] The outcome for the applicant of the findings of the first respondent was significant. Following a penalty hearing held on 24 August 2010, the first respondent found that Mr Dorbu was not a fit and proper person to be a barrister or solicitor. The unanimous decision of the five members of the first respondent was that it order Mr Dorbu's name to be struck from the roll of barristers and solicitors.

[4] This order meant that Mr Dorbu was no longer able to practice the profession of law in New Zealand.

Judicial Review

[5] It is important to set out clearly the Court's jurisdiction in this matter. In particular, it must be emphasised that the applicant's challenge to the first respondent's findings is not by way of general appeal.[3] The Court's role is not to look at the charges afresh and make its own determination of them on the merits. It is more limited than that. The Court's role is to ensure that the decisions challenged

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1 *Auckland District Law Society v Dorbu* [2010] NZLCDT 9.

2 I use general terms because nine of the charges were brought under the Law Practitioners Act 1982 and the remaining three under its successor Act, the Lawyers and Conveyancers Act 2006. Terminology in the two Acts can differ.

3 An appeal against a decision of the Disciplinary Tribunal must be brought within 20 working days after the decision is given: Law Practitioners Act 1982, s 118; Lawyers and Conveyancers Act 2006, s 253; High Court Rules, r 20.4. In a judgment delivered on 18 February 2011, Venning J held that the Court had no jurisdiction to grant Mr Dorbu special leave to appeal six months out of time from the Tribunal's decision: *Dorbu v New Zealand Law Society* [2011] NZAR 174 (HC) at [20].

by the applicant were made according to law. It has no jurisdiction to overturn a decision of the first respondent which was made within its power and according to due process.

The charges

[6] In professional disciplinary proceedings the civil standard of proof applies. The onus was on the second respondent to prove on the balance of probabilities each of the charges against the applicant.[4]

[7] The charges against the applicant fell into three groups. I will address separately the applicant's submissions in relation to each group of charges, and his submissions as to bias in respect of all charges. I refer to the first seven charges as the "Barge litigation charges", charges eight, nine and 10 as the "G & KA charges", and charges 11 and 12 as the "judiciary charges".

Barge litigation charges

[8] These charges arose from transactions in which the applicant was involved as a legal practitioner (to use a neutral phrase). Priestley J in this Court found that those involved directly in these transactions were conspirators whose aim was to deprive Mr Barge, by unlawful means, of the benefit of an agreement for sale and purchase of real estate.[5] Those findings were upheld by the Court of Appeal[6] and the Supreme Court.[7] The first respondent found that the applicant was a party to that unlawful conspiracy and that six other charges associated with the applicant's involvement in related transactions were also proved.

[9] The applicant's amended statement of claim in relation to the Barge litigation charges is inchoate. He does not address the charges individually. Instead, he pleads matters of fact, matters of law, and matters of submission. These pleadings are

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4 *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) at [26], [97], [102], [146].
5 *Barge v Freeport Development Ltd* HC Auckland CIV-2002-404-1771, 27 October 2005, Priestley J.
6 *Jiao v Barge* CA236/05, 19 July 2006.
7 *Jiao v Barge* (2006) 18 PRNZ 396 (SC).

jumbled together. His written submissions repeat most of his pleadings and then add to them; again in a way which makes it difficult for the Court to discern the applicant's position with regard to all of the individual charges.

[10] The applicant's oral submissions were largely repetitive of his written material.

[11] I have decided not to apply the normal rigorous approach to the interpretation of pleadings. This is not an argument about money; it is an argument about the right to practice a profession.

[12] Counsel for the second respondent approached his task with much the same attitude. He did not apply to have pleadings struck out or elucidated. Instead, he did his best to identify and address the substance of the applicant's complaints. I think that was an entirely proper approach in this particular case, and I shall do the same.

[13] In my view, the applicant's complaints can, generally, be said to be these:

(a) The first respondent should not have had any regard to the decisions of Priestley J and the Court of Appeal. It should have set them entirely to one side and considered afresh every aspect of the case against the applicant. For judicial review purposes, this is a submission of error of law.

(b) The first respondent should have found that the applicant's evidence and the logic of his submissions on the facts (when compared to the "uncorroborated" evidence called by the second respondent) made it more likely than not that he was not a party to a conspiracy by unlawful means. For judicial review purposes, this is a submission of unreasonableness/ irrationality.

(c) The first respondent should have allowed the applicant to call Mr Gaudin as a witness. For judicial review purposes, this is a submission of unfairness through breach of natural justice.

(d) In relation to charge 5 (communicating with the client of another practitioner), the first respondent should have found that the practitioner's refusal to deal with the applicant entitled the applicant to communicate with the client. For judicial review purposes, this is a submission of error of law.

(e) The first respondent should have concluded that the second respondent had no basis on which to bring the charges and acted irrationally and without good faith in doing so. For judicial review purposes, this is a submission of error of law or illegality.

[14] I will now consider the applicant's case in relation to the Barge litigation charges under each of these statements.

(a) The status of the previous decisions

[15] In his oral submissions the applicant said that his "fundamental point" was that the judgment of Priestley J was not admissible against him. He submitted that the first respondent should not have had regard either to that decision or the subsequent decision of the Court of Appeal. In other words, that the first respondent made an error of law.

[16] It is fundamental that decision-makers must apply the law correctly and base their findings on sufficient evidence. The Courts hold a central constitutional role to rule on questions of law and to ensure that public bodies comply with the law.[8] A decision will be reviewable if it is based on a material error of law: that is, an error in the actual making of the decision, which affected the decision itself.[9] An unreasonable finding of fact may support a finding of error of law, as may inadequacy of reasons, or a failure to make a finding of fact on a key issue for decision.[10] There is a presumption that an authority's decisions will be reviewable

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8 *Peters v Davison* [1999] 2 NZLR 164 (CA) at 188.
9 Ibid, at 201-202; *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 225.
10 *Edwards v Biarstow* [1956] AC 14 (HL); *Madlener v Lester* HC Christchurch CP263/91 31 July 1996, Tipping J.

where a statute requires it to apply an "ascertainable test", but not where there is legitimate scope for the authority to exercise judgment and discretion.[11]

[17] In his written submissions, the applicant simply repeated paragraph 28 of his pleading, stating:[12]

> In deciding whether or not the applicant had been guilty of the charge of conspiracy, the Tribunal erroneously fettered itself and pre-empted its statutory power to find facts *de novo* to the extent that those facts were relevant to the charges.

[18] The second respondent made no written submission on this pleading because, like the Court, counsel for the second respondent did not know what the applicant relied upon. Having heard the applicant's oral submissions, Mr Keyte simply submitted that the first respondent had determined for itself the facts upon which it based its decisions.

[19] The first respondent is bound by the Evidence Act 2006 as if it were a Court.[13]

[20] The starting point for consideration of the submission, therefore, is s 50 of the Evidence Act 2006:

> **50 Civil judgment as evidence in civil or criminal proceedings**
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> (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.
>
> (2) This section does not affect the operation of—
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> (a) a judgment "in rem"; or
>
> (b) the law relating to "res judicata" or issue estoppel; or
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> (c) the law relating to an action on, or the enforcement of, a judgment.

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11 *Bulk Gas Users Group Ltd v Attorney-General* [1983] NZLR 129 (CA) at 136.

12 Applicant's submissions in support of application for judicial review, dated 16 March 2011, at [34].

13 Lawyers and Conveyancers Act 2006, s 239(4).

[21] This is consistent with the common law. Put simply, if a court or tribunal has an independent obligation to determine whether alleged facts are proved or not, it cannot discharge that obligation by accepting without inquiry the findings of another court or tribunal as to the existence of those facts.[14] To do that would be to abdicate its responsibility to determine the facts for itself.

[22] In this case, prior to the hearing, the applicant sought from this Court, on an interim basis, a determination as to whether he was bound by the findings of Priestley J. This was dealt with by Randerson J as follows:[15]

> [8] Two matters can be promptly disposed of. The first is the question of law raised. Mr Keyte properly accepted on behalf of the second respondent that Mr Dorbu cannot be bound by the findings made by Priestley J in the named proceedings since Mr Dorbu was neither a party nor a witness to those proceedings and did not have any opportunity to defend himself against the adverse findings which Priestley J made against him. It follows that, to the extent that findings made by Priestley J in the named proceeding are relevant to the disciplinary proceedings before the Tribunal, Mr Dorbu must be at liberty to challenge those findings.

[23] With respect, I agree with Randerson J's conclusion and the reasons given are illustrative, cogently, of the need for the first respondent to make its own findings of fact.

[24] The first respondent reminded itself of Randerson J's dicta and then held:[16]

> [33] We consider that, in the course of the hearing before us, Mr Dorbu had significant and ample opportunity provided to him to challenge the relevant findings of Priestley J through his own evidence and through his ability to cross-examine key witnesses in the Barge litigation including Mr Barge himself, Mr Colin Girvan, and Mr Doug Hickson, solicitors for Mr Barge, and Mr Michael Fisher, Barrister, who acted on behalf of Mr Barge in the litigation.

[25] However, in its consideration of the Barge litigation charges, the first respondent made considerable reference to the findings of the Courts.[17] It appears to

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14 *Simunovich Fisheries Ltd v Television New Zealand Ltd* CA447/07, 8 September 2008, at [95]–[99]; *Carran v Druids Friendly Society (North Island) New Zealand* CA132/98, 6 May 1999 at [23]–[26]; *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 (SC) at 42.

15 *Dorbu v The Lawyers and Conveyancers Disciplinary Tribunal* HC Auckland CIV-2009-404-7381, 13 November 2009.

16 See also paras [25], [26] and [32].

17 See, for example, paras [65]-[66].

have taken the decisions of the Courts as providing an outcome which it was for Mr Dorbu to rebut. For example:

> [85] Mr Dorbu repeated in his closing submissions the argument that, contrary to the findings in the Courts, Mr Barge had no valid contract with Freeport. For example, he argued there was no acceptance of the offer in law; in particular that Ms Chou had no "actual, implied or ostensible" authority to sell the property. He relied on certain evidence, not accepted in the Courts, that Ms Chou had made a mistake in signing the agreement, and hence the offer of "compensation" (an offer of $30,000 made to Mr Barge to walk away from the agreement). He also argued that Ms Chen's evidence in the High Court that she had not given her daughter a power of attorney to sell Freeport should be accepted, as with her assertion that the property was not for sale due to the prior sale of the shares. There were a number of similar points raised about the evidence in the High Court, and the view of the law taken by respective Courts.
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> [86] This Tribunal considers it is bound by the consecutive findings of the Courts on these matters. However, it has considered the evidence and arguments referred to us by Mr Dorbu and we consider the factual position to be clear. The Courts have given reasons for their findings of fact and we can see nothing in Mr Dorbu's arguments that could undermine them.

[26] In explanation of the Tribunal's approach, Mr Keyte QC submitted:

> 18.2 Paragraphs [85] and [86] deserve special care. At first sight one might think that the first sentence of paragraph [86] was contrary to both Randerson J's ruling and paragraph [26] of the Tribunal's own judgement. However, on closer inspection, it can be seen that that sentence is really only referring to the matters of law spoken about in the last sentence of the previous paragraph. The matters of fact are then dealt with in the remaining sentences of paragraph [86]. It is submitted that on matters of law, the statement that the Tribunal is bound by a decision of the High Court or the Court of Appeal must be correct. However, overall it is abundantly apparent that the Tribunal engaged in a rigorous investigation of all the facts and evidence for itself.

[27] In my view, the notes of evidence show that the first respondent did feel itself bound by factual findings of the Courts which it considered did not relate directly to the applicant. This included the Courts' finding that there was a conspiracy by unlawful means:[18]

> Ms Scholtens: Mr Dorbu, I am just trying to get a sense of where you are going with this and you have said earlier today that it wouldn't make any sense for the people involved in what we are referring to as the conspiracy to do what they did?

[18] Notes of evidence, p 414, line 7, to p 416, line 16.

Mr Dorbu: Yes, and therefore they didn't do it for that reason.

Ms Scholtens: Is that part of where you are taking us to with this figure?

Mr Dorbu: Yes, exactly.

Ms Scholtens: Is part of your case, that what they were found to do didn't make sense? Therefore, we should take the view they didn't do it?

Mr Dorbu: Exactly, as far as I am concerned, because I'm accused of being a party to a conspiracy, which means I knew everything that was going on and I went forward and facilitated it.

Chair: You want us to find no conspiracy?

Mr Dorbu: Yes.

Chair: We can't do that. That's already been made clear. We are bound by the Courts' findings so far as the other parties are concerned, not so far as your participation is concerned.

Mr Dorbu: The reason why I wouldn't be a party to any such conspiracy is what I am explaining because they came to me as counsel to advise them.

Mr Keyte: Now we are giving evidence.

Chair: You are getting into the realms of evidence. That is to be reserved, if you don't mind, until later.

Mr Dorbu: I am just putting some propositions to Mr Fisher which logically he could answer yes or no.

Ms Scholtens: In the end, you might be saying to us, to me, John Dorbu, to do this conspiracy would make no sense at all, so it didn't occur to me that that is what they were doing? That's different from saying they didn't do it.

Mr Dorbu: My knowledge is very important. Any perception is not relevant to me. My knowledge of what was happening is all that I am concerned about, you will agree?

Ms Scholtens: And that's for your evidence. This witness isn't going to be able to help you with that.

Mr Dorbu: He will help a lot because what makes sense is universal.

Ms Scholtens: I think I understand.

Mr Dorbu: The import is, $122,000 extra that they were going to get from the purchasers was why they wanted to collapse Mr Barge's agreement.

Ms Scholtens: You are looking at motive for conspiracy?

Mr Dorbu: Yes, financial motive behind all this. What I want to show is that, in fact, the contract is true, in the sense that the transfer of the mortgage is for the purpose of keeping the property, not selling it, and you will see –

Ms Scholtens: I think you need to have a think about where you're taking us.

Mr Dorbu: Yes, I will get there. Because a financial motive is the reason alleged to be the conspiracy, I am by this means going to very shortly demonstrate that not at all and, in fact, on my timetable, this is not what occurred.

Chair: We have reached the morning adjournment, so we will give you an opportunity to see if you can find those other documents, Mr Dorbu.

Hearing adjourned from 10 am until 10.15 am

Mr Dorbu: Your Honour, I have not found the document and my assumption is I may have sighted it on the High Court file but when the staff were copying it for me, it has somehow got lost but I do not need that again in order to illustrate the point and I certainly didn't need it at any time.

Chair: I am going to remind you, Mr Dorbu, as I think I have a number of times through the hearing, that this Tribunal is bound by the findings that have gone all the way up to the Supreme Court and it is only in respect of your level of knowledge and involvement that we are going to be interested in. We are perfectly prepared, of course, to let you explore that aspect but that's as far as it can go.

[28] Other examples in the notes of evidence are:

(a) Chair: How is that relevant to your involvement or the level of your involvement that we're trying to ascertain in these transactions which are the subject of High Court and Court of Appeal and Supreme Court findings?[19]

[19] Ibid, p 450, lines 6-9: Mr Dorbu's cross-examination of Mr Barge.

(b) Chair: What are you saying? This contract has been the subject, as I've already made clear to you, of findings in the High Court. Your involvement doesn't come in at this point. So, you need to move to the area where your involvement is at issue because that's the only area that this Tribunal can examine.

Mr Dorbu: Yes, Your Honour, but –

Chair: We are bound by the – the contract was upheld and orders were made on the basis of that contract being upheld by the Court.[20]

(c) Mr Dorbu: We know very well from the evidence so far that after the Whittaker caveat fell by the wayside it was not defended at all. There was a necessity for the litigation. There was a necessity for High Court –

Chair: Yes, because your clients received a better offer and wanted to get out of this agreement.

Mr Dorbu: I do not know about that.

Chair: That is a finding of the High Court and is the basis of how we proceed.[21]

[29] In my view, the first respondent was in error of law in holding that it was bound by findings of fact made by the Courts unless those facts related directly to Mr Dorbu. The second respondent had brought the charges against the applicant. The onus was on the second respondent to prove the essential ingredients of each charge on the balance of probabilities. There was no onus on Mr Dorbu. He was entitled to, and did, challenge the prosecution case in cross-examination and by giving evidence himself. But that did not alter the onus which was on the second respondent.

[30] The second respondent did not submit that the first respondent could take as proven, facts essential to the prosecution case which had been accepted by the Courts. However, the first respondent clearly took that view. In doing so it was in breach of s 50 of the Evidence Act 2006 and therefore in error. I must now consider the effect of that error on the first respondent's consideration of the Barge litigation charges.

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[20] Ibid, p 454, lines 5-14.
[21] Ibid, p 457, lines 18-26.

[31] The first charge is:

> 1. Between January 2002 and November 2006 he was a party to a conspiracy by unlawful means, particulars of which are set out below.

[32] To succeed with this charge, the second respondent had to prove, on the balance of probabilities:[22]

(a) That there was a conspiracy; and

(b) That it was unlawful; and

(c) That Mr Dorbu was a party to it.

[33] The second respondent called evidence on which the first respondent could have found all three essential elements proved (assuming that it did not accept Mr Dorbu's evidence and submissions). However, the first respondent took the first two elements as having been established by the Courts and was concerned only with the third. The heart of Mr Dorbu's case was that there was no conspiracy, lawful or unlawful, for him to be a part of. He was entitled to have the first respondent approach that issue with an open mind and to decide it on the evidence called before it.

[34] An unfortunate effect of the first respondent's approach to the case was that the word "challenge" used by Randerson J in the sense that all the Courts' findings of fact relevant to the charges were at issue, came to be used as if there was an onus on Mr Dorbu to prove that the findings of the Courts were incorrect. The first respondent, of course, was aware that it was for the prosecution to prove the charges. But having taken the view that it was bound by the findings of fact of the Courts not directly related to Mr Dorbu, it was inevitable that it would adopt a mindset that it was for Mr Dorbu to "challenge" the Courts' decisions relevant to him. An effective reversal of the onus.

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[22] *SSC & B: Lintas New Zealand Ltd v Murphy* [1986] 2 NZLR 436 (HC) at 461.

[35] In my view this was a material error of law, which influenced the first respondent's decision in relation to the first charge.[23] It was for the second respondent to prove all three elements, and for the first respondent to determine on the evidence whether the charge had been proved on the balance of probabilities.

[36] Having found a material error of law, the Court retains a discretion whether to grant relief.[24] The determination on whether to grant a remedy depends less on clear and absolute rules than on an overall evaluation.[25] Nevertheless, as the Court of Appeal observed in *GXL Royalties Ltd v Minister of Energy*, where a material error of law is established there is generally a presumption that relief will be granted:[26]

> [67] It would be rare for a court to refuse relief where an error of law was involved, including where relevant considerations had been missed or irrelevant considerations had been taken into account. The same applies in a case which involves an irrational decision.

[37] In relation to charge 1, I allow the application. The error materially affected the first respondent's decision on charge 1, and this is not a case where I can safely find that the outcome would have been inevitable notwithstanding the error.[27]

[38] I do not say that the first respondent should have avoided referring to the Courts' judgments altogether. The Tribunal was entitled to refer to the judgments if they would "assist it to deal effectively with the matters before it".[28] But the judgments were not binding upon it.

[39] I accept Mr Keyte's submission that there was ample, indeed on its face overwhelming, evidence against Mr Dorbu. Unfortunately, the first respondent did not consider charge 1 afresh, curtailed Mr Dorbu's argument as to the absence of a

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23 *Peters v Davison* [1999] 2 NZLR 164 (CA) at 181, 189, 210.

24 Judicature Amendment Act 1972, s 4(3); *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 (CA) at 840; *Peters v Davison* at 204; *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 (SC) at 42.

25 *AJ Burr & Co Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) at 4; *Barker v Queenstown Lakes District Council* [2007] NZRMA 103 at [54].

26 *GXL Royalties Ltd v Minister of Energy* [2010] NZAR 518 (CA) at [67]; see *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA) at [59]–[61].

27 *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA) at 553; approved in *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513 (PC) at [27]; see *Lalli v Attorney-General* HC Auckland CIV-2006-404-435, 27 April 2006, Asher J at [96]–[97].

28 Lawyers and Conveyancers Act 2006, s 239(1).

conspiracy, and imposed upon him an obligation to challenge the Courts' findings. The first respondent's error of law had serious effects on its consideration of this charge and accordingly I must quash its finding thereon.

[40] The error of law is not relevant to charges 2 to 7.

(b) Ineluctable nature of the applicant's case

[41] In [12](b) above, I set out the second of the applicant's complaints identified by me; in broad terms, that it was unreasonable/irrational for the first respondent not to have been persuaded by his evidence and his submissions that he was not a party to a conspiracy by unlawful means.

[42] In view of my finding that the first respondent's decision on the first charge must be quashed, it is unnecessary for me to decide this complaint. However, I am satisfied that it has no merit. The evidence before the first respondent would have entitled it to find the first charge proved if it had not held in error that it was bound by facts decided by the Courts.

[43] The complaint is not relevant to charges 2 to 7.

(c) Mr Gaudin wrongly excluded as a witness

[44] The second charge is:

> 2. Being the holder of a practising certificate as a barrister sole between about June 2002 and September 2002 he acted as a solicitor when he was not holding a current practising certificate as a barrister and solicitor in breach of s 56(2) of the Law Practitioners Act 1982.

[45] The particulars to this charge set out the factual background:

> 2.1 On or about 9 July 2002 he advised the Bank of New Zealand that he acted for Freeport in respect of the bank's mortgage over the property and he said the account would be settled and the bank would be required to discharge the mortgage on the property and execute a transfer of the mortgage to the new mortgagee.

2.2 On or about 11 July 2002 Mr Dorbu, as solicitor for the transferee, certified as correct for the purposes of the Land Transfer Act 1952 a memorandum of transfer of mortgage from the Bank of New Zealand to Shou-Lung Chiao ("the memorandum of transfer").

2.3 On or about 19 July 2002 Mr Dorbu lodged the memorandum of transfer with the Registrar-General of Land.

2.4 On or about 29 July 2002 he instructed Mr Lineen of Chester Grey, Chartered Accountants, to prepare a settlement statement for his client Shou-Lung Chiao who was said to be selling the property by way of mortgagee sale.

2.5 On or about 2 August 2002 Mr Dorbu, as solicitor for the transferee, certified as correct for the purposes of the Land Transfer Act 1952 a memorandum of transfer of the property from Shou-Lung Chiao to Hsie Wu Huang, Yi Hua Jiao and Shou Chen Chiao ("the first memorandum of transfer").

2.6 On or about 12 August 2002 Mr Dorbu, as solicitor for the transferee, certified as correct for the purposes of the Land Transfer Act 1952 a memorandum of transfer of the property from Shou-Lung Chiao to Hsueh Wu Huang, Yi Hua Jiao and Shou Chen Chiao ("the second memorandum of transfer").

2.7 On or about 12 August 2002 Mr Dorbu lodged for registration documents, including the second memorandum of transfer, for the transfer of the property by mortgagee sale.

[46] In his amended statement of claim the applicant pleads:

22. In the course of the hearing before it, the Tribunal wrongfully ordered the applicant not to call a Mr Graeme Gordin, a senior staff at Land Information New Zealand, who in July 2002, informed the applicant that it was proper for him as barrister sole to certify correct a memorandum of transfer of mortgage from the Bank of New Zealand to a private financier, Mr Shou Lung Chiao, even though the Tribunal had previously issued a witness summons to call inter alia, Mr Gordin as witness for the applicant.

23. Mr Gordin's role in advising the applicant that he could certify the memorandum of transfer even though he was a barrister was material to the charges numbered 1 and 2 against the applicant, and which the Tribunal later determined to have been proven against the applicant.

[47] This pleading can be characterised as an allegation of unfairness through breach of natural justice.[29]

[29] New Zealand Bill of Rights Act, s 27(1); Lawyers and Conveyancers Act, ss 236 and 239.

[48] Natural justice involves "a duty lying on everyone who decides anything" to "act in good faith and fairly listen to both sides".[30] It requires that parties be given adequate notice and opportunity to be heard and to respond to allegations made against them.[31] The requirements of natural justice and the standards of fairness are flexible, depending on the nature of the power being exercised and the effect of the decision on personal interests:[32]

> In determining the presence and level of natural justice, one must start with the body's rules themselves. Subject to anything in the rules, other relevant factors will include the nature of the interest at stake, whether an adverse decision would amount to a finding of misconduct and the severity of the sanction which the body is empowered to impose. Those criteria – by no means exhaustive – will be important when deciding what the parties intended or implied in their contract. In one form or another they are all concerned with the seriousness of the proceedings. Expulsion from an organisation essential to one's trade or livelihood, or a finding of unethical professional conduct, is not to be approached in the same light as a refusal to send a bridge club member to a regional bridge tournament.

[49] In professional disciplinary proceedings a respondent may call and cross-examine witnesses in accordance with the provisions of the Evidence Act.

[50] The submissions of the second respondent on this point are as follows:

> 4.1 The transcript at 312-314 shows an exchange between the applicant and the Tribunal concerning the question of whether Mr Gaudin was to give evidence. It is submitted that the applicant clearly indicated to the Tribunal that he no longer wished to call that witness. That should be the end of the matter.
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> 4.2 That same exchange refers to a letter from Crown Law to the applicant dated 23 October 2009 which had been copied to the Tribunal... It is clear that the applicant had not followed the procedure of seeking an order from the High Court, and on that basis also, that should be the end of the matter.
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> 4.3 It is apparent that the only reason the applicant wished to call Mr Gaudin to give evidence was to confirm what the applicant himself told the Tribunal – namely, that Mr Gaudin had told him to sign the memorandum of transfer correct and that the memorandum would not be registered unless it was signed correct. See transcript 519, L.17. It is submitted that such evidence does not assist the applicant for two reasons –

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30 *Board of Education v Rice* [1911] AC 179 (HL) at 182 per Lord Loreburn.
31 *O'Regan v Lousich* [1995] 2 NZLR 620 (HC) at 631.
32 *Peters v Collinge* [1993] 2 NZLR 554 (HC) at 567 per Fisher J.

(a) Signing the two memoranda of transfer correct was but one of several steps which he took – all of which, in combination, were found to have been the carrying out of conveyancing. It does not assist him to say that he was told to sign it by someone in what we used to call the Land Transfer Office, now called LINZ.

(b) The applicant took that important step of signing a memorandum of transfer correct when he knew that what it contained was not correct – in his own words it was a nonsense. Nothing Mr Gaudin could say could possibly recover or change that position.

[51] The calling of Mr Gaudin to give evidence is addressed in the transcripts of the hearing of the case before the first respondent commencing at page 310. It begins with an exchange between the Chair of the first respondent and Mr Dorbu in relation to the propriety of the issuing of summonses by the first respondent to Mr Gaudin. The exchange then developed as to why it was that Mr Dorbu required Mr Gaudin to appear in person and the following is recorded:[33]

Mr Dorbu:	In my discussion yesterday, I informed Mr Oliver why I wanted him to appear.
Chair:	Why is that?
Mr Dorbu:	When you look at the document, there is a blank, I am looking at page 28, this was the executive transfer from BNZ's lawyers, Buddle Findlay, which was forwarded to me. Your Honour will see at the top right hand corner that the LTOs barcode is on it which means this document was forwarded to the LTO as it is, blank, because I didn't want to do anything with it.
Chair:	And it was subsequently replaced by the one that appears at page 31?
Mr Dorbu:	Yes. There is no letter here in the interim which referred me to the non-completion or non-execution or the impropriety of this document, which means that what I was saying was right, that I was called on the phone instead by Mr Gordon and he said I was going to forward this document to you but now that I get you on the phone can you come? Can you do this? And I said, well, I am a barrister, I can't do it, that's why I sent it to you the way it is. He said no you can do it, so I said well I need to put my seal on it so that everybody knows when I sign it I am a barrister.

[33] Notes of evidence, p 311 from line 30.

Chair:	I am sure this will be the subject of cross-examination in due course and you can address the issue then. I am still not clear why the Registrar is required to give evidence, rather than a certified copy.
Mr Keyte:	Could I assist? I am not sure if I am assisting my learned friend or the Tribunal or who I am assisting but as far as the Law Society is concerned, there is no issue that the first time the memorandum of transfer was attempted to be registered it was rejected. If my learned friend is satisfied that the reasons for that rejection are those that are set out in paragraph 2 of this letter you have just handed me this morning, I am certainly satisfied with that and there is no issue as far as the Law Society is concerned also that it was then replaced with the transfer that appears at page 31 which does have a date and is certified correct at the bottom. Now, if that assists my learned friend, I can't think of any other reason why he needs his witness.
Chair:	Does that dispose of the matter, Mr Dorbu?
Mr Dorbu:	I believe so, I just want the Tribunal to be very clear about what happened so that there is no misconceptions of the facts. I will do as Your Honour –
Chair:	Yes, at the break will you please contact Crown Law as a matter of courtesy to let them know that we have considered the matter and the witness is not required.
Mr Dorbu:	As Your Honour pleases.

[52] The second respondent's submissions correctly summarise the nature of the applicant's evidence to the first respondent. Under cross-examination, he confirmed on oath the explanation he had given earlier to the Chair of the first respondent, namely that Mr Gaudin had advised him that, although a barrister, he could sign correct the memorandum of transfer.

[53] The first respondent does not mention this issue in its decision. That is not surprising. The first respondent's focus in relation to charge 1 was on whether the evidence before it proved that the applicant was party to the conspiracy which had been identified by the Courts. In reaching its finding, the first respondent considered the applicant's involvement with the "conspirators" throughout the events furthering their conspiracy. The point of relevance with regard to signing correct the

memorandum of transfer was not that Mr Gaudin had told the applicant that he was capable of signing it correct but why the applicant then did so.

[54] In relation to charge 2, I accept the submission of Mr Keyte.[34] The fact that Mr Gaudin did not give evidence did not result in any unfairness to Mr Dorbu. There was no breach of natural justice. The issue for this charge was not whether Mr Dorbu thought he was technically able to sign the document correct; it was whether, taking into account all the particulars, he had involved himself in solicitors' work to the extent that he was acting as a solicitor.

[55] In any event, I find that the first respondent did not prevent the applicant from calling Mr Gaudin. The applicant accepted at the time that there was no relevant purpose to be served in having Mr Gaudin give evidence.

(d) Communicating with the client of another practitioner

[56] Charge 5 was:

> 5. In or about June 2002 he breached Rule 6.02 of the Rules in that he communicated directly and in writing with the client of another practitioner in relation to a matter in which the practitioner was, or had previously been, dealing with the other practitioner.

[57] The applicant does not address this charge specifically in his amended statement of claim, and nor did he address it specifically in his written submissions. I infer, however, that the applicant relied upon the decision by Castle Brown not to engage in any further correspondence with him until he had provided the address of his instructing solicitors in New Zealand to be justification for his correspondence with Mr Barge. This, I take it, is what is behind paragraph 30 of the amended statement of claim:

> 30. The Tribunal unlawfully treated as irrelevant evidence of Mr Bruce Hickson's refusal to deal with the applicant at a vital stage in the course of acting for Freeport, and the fact that such refusal was the reason for the entire sets of facts for which the said Bruce Hickson complained, followed by the laying of charges.

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[34] Quoted above at [50].

[58] The first respondent's decision on this charge is expressed succinctly as follows:

> Rule 6.02 reads:
>
> > "It is only in very exceptional cases that a practitioner should communicate either directly or in writing with the client of another practitioner in relation to a matter in which the practitioner is, or has previously been dealing with the other practitioner."
>
> [138] Mr Dorbu did not deny that he had directly communicated on or about 21 June 2002 with Mr Barge, the client of Castle Brown. Mr Dorbu justified this action by reference to correspondence with Castle Brown whereby they refused to communicate with him until he supplied them with the name of his instructing solicitor. Mr Dorbu did not supply this name. He argued that as a Barrister with an overseas instructing solicitor he was entitled to act.
>
> [139] Counsel for the Society submits that the offence is made more serious by Mr Dorbu purporting to give Mr Barge legal advice and by inviting him to change solicitors in the course of his letter.
>
> [140] The letter which comprises the communication speaks for itself. Mr Dorbu is clearly writing directly to a client whom he knows to be represented by other legal advisors. He purports in the course of that letter to give (incorrect) legal advice and concludes the letter by inviting Mr Barge to call him to discuss the matter or to "advise about your new solicitors with whom I should communicate".
>
> [141] In our view there cannot be a more blatant breach of Rule 6.02 and we find this proved. We find that this constitutes misconduct under s 112(a).

[59] The factual background to the first respondent's decision was, as indicated, that Mr Barge's solicitor, Mr Hickson, had refused to correspond with Mr Dorbu, a barrister, because Mr Dorbu had no instructing solicitor in New Zealand.

[60] The exchange of correspondence is relevant to the charge:

(a) Fax from Mr Dorbu to Mr Hickson dated 20 June 2002:[35]

> FREEPORT DEVELOPMENT LIMITED
>
> I refer to my letters dated 29 May and 6 June 2002.
>
> It appears clearly that you and your client have, notwithstanding clear notice alerting you to your mistaken belief as to a caveatable interest in the 45 Anzac Avenue Property, continue to maintain a caveat on the property.

[35] Second respondent's bundle of documents, vol 6, p 959.

> Pursuant to s 146 of the Land Transfer Act 1952, you are liable for the financial losses incurred and continued to be incurred by Freeport Development Limited. I am in receipt of instructions to institute proceedings, which in due course will be served on you.

(b) Fax from Mr Hickson to Mr Dorbu dated 20 June 2002:[36]

> IVAN BARGE V FREEPORT DEVELOPMENT LTD – M NO.480/IM02
>
> Thank you for your fax of this afternoon.
>
> Please note that we do not intend to engage in any further correspondence with you in relation to this matter until such time as you are able to confirm to us, in writing, that you are properly instructed to act (i.e. provide us with the address of your instructing solicitors in New Zealand).

[61] The following day Mr Dorbu wrote to Mr Barge in the terms described by the first respondent as quoted in [58] above.

[62] The applicant's submission to the first respondent was to the effect that Mr Hickson's letter made this a very exceptional case within the meaning of Rule 6.02 and justified him writing to Mr Barge. He repeated that submission before me, laying emphasis on his statement in his letter of 26 June 2002 to Mr Hickson that he would deal directly with Mr Hickson's client. However, that letter is dated five days after the date of the letter to Mr Barge.

[63] Mr Dorbu's letter to Mr Barge came at a time when Mr Barge had already commenced proceedings in this Court against Mr Dorbu's client applying for an order that Mr Barge's caveat not lapse.

[64] Mr Barge's address for service was at the offices of his solicitors, Castle Brown.

[65] In my view, the first respondent was correct at law in holding that Mr Hickson's refusal to correspond with Mr Dorbu in the circumstances of this case did not create an exceptional circumstance entitling Mr Dorbu to send to Mr Barge

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[36] Ibid, p 960.

the letter of 21 June 2002. That letter was an attempt to persuade Mr Barge that his solicitors were acting in error and were exposing him to legal risk. It was improper no matter how it is viewed. Proceedings had already been issued and if Mr Dorbu had valid points to make concerning the merits of those proceedings then he should have made them to Castle Brown. Notwithstanding Castle Brown's position at that time, it would still have been obliged to consider the points and to give advice on them to Mr Barge.

[66] I see no reason to interfere with the first respondent's finding on this charge.

(e) No basis for bringing the charges

[67] The applicant under this heading takes issue with the first respondent's findings on all of the Barge litigation charges.

[68] The applicant's pleadings are as follows:

> 34. The second respondent acted irrationally and without good faith in bringing and prosecuting the charges as follows:
>
> **PARTICULARS**
>
> (a) In June 2002, notwithstanding Doug Hickson's challenge to his entitlement to act on overseas instructions, the second respondent, by its statutory proxy the Auckland District Law Society, ruled in favour of the applicant's entitlement to act.
>
> (b) Hickson notwithstanding the clear ruling of the District Law Society, refused to deal with the applicant. Mr Hickson in the course of the hearing before the Tribunal in November 2009, admitted he had been wrong in his refusal to deal with the applicant back in 2002.
>
> (c) There had been no complaints against the applicant by the party he had represented in the course of that instruction.
>
> (d) In about November 2005, following a judgment by the High Court (Priestley J) dated 27 October 2005, the same firm of Castle Brown then saw fit to make accusations against the applicant which subsequently led to the charges being laid against the applicant.
>
> (e) The second respondent, in collaboration with the Auckland District Law Society, pursued the applicant in a biased and

irrational manner as though it had had no previous knowledge of the facts and circumstances of the instruction.

(f) The second respondent failed to deal fairly with the complaints and the charges were subsequently laid without good cause.

(g) The second respondent acted *mala fides* against the applicant in a patently hateful, irrational and unlawful manner:

PARTICULARS

(i) The second respondent proposes that certifying a memorandum of transfer was wrong and/or constituted conspiracy.

(ii) The second respondent, however, failed to prove that under law a barrister instructed by practitioners overseas could not certify the document for the purposes of the Land Transfer Act 1952.

(iii) Both the first respondent and the second respondent colluded to refuse the calling of evidence to prove the legality or otherwise of the applicant's certification of the memorandum of transfer in the circumstances in which he did so, and by doing so consciously and maliciously pre-empted the calling of evidence which to their knowledge and belief would exculpate the applicant of the charge(s).

(h) The second respondent as a national law society, preferred Bruce Hickson and his firm, Castle Brown, on grounds that are irrational, illegal and unlawful, or maliciously shut its eyes to the patently unethical, unprofessional and negligent manner in which those practitioners rendered their services to Mr Barge.

PARTICULARS OF BIAS, MALA FIDES ETC

(i) Between 2003 and 2004 Messrs Castle Brown, Doug Hickson and Michael Fisher, in representing the alleged complainant, Mr Barge, had drawn up and filed proceedings in which fraud was alleged against the applicant even though he was not a party to the proceeding.

(ii) The applicant thereafter filed a written complaint with the Auckland District Law Society drawing the circumstances to the Law Society's attention.

(iii) The then Professional Standards Director, Mr Andrew Burger, and Mr Martin Watts, refused to investigate the complaints and returned both the written complaint and the evidence in support of the complaint to the applicant.

(iv) In 2005, however, Mr [G] made a similar complaint against the applicant. Both the Auckland District Law Society and the New Zealand Law Society sprang into action to prosecute the applicant.

[69] The pleadings self-evidently have no merit. They are not supported by the evidence and are conceptually wrong. They do not provide any basis for judicial review of the first respondent's findings.

Bias

[70] In his amended statement of claim the applicant alleges that the decisions of the first respondent are impeachable for bias. This would apply to all of the charges although neither in his amended statement of claim nor in his submissions does he refer to charges 11 or 12. For completeness, I consider this pleading on the basis that it applies to all of the first respondent's findings.

[71] Bias is unfairly regarding with favour or disfavour the case of a party to the issue under consideration.[37] Decision-makers must be disinterested and unbiased.

[72] There are three main types of bias: actual, apparent, and presumptive bias. Actual and apparent bias involve the principle that a decision-maker should not impartially favour one side over another. Presumptive bias involves the principle that it is improper for a decision-maker who has an interest in the outcome of a case, no matter how small, to decide that case.[38]

[73] The test for apparent bias is a two-stage inquiry. First, the actual circumstances which have a direct bearing on a suggestion that the decision-maker was or may be seen to be biased must be established. Secondly, it must be asked whether the circumstances as established might lead a fair-minded lay observer reasonably to apprehend that the Judge might not bring an impartial mind to the resolution of the instant case.[39]

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37 *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78 (CA) at [32].

38 *Anderton v Auckland City Council* [1978] 1 NZLR 657 (SC) at 680.

39 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35 (SC) at [3]–[4], [37], [89], [127]; *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA) at [62].

[74] In this case, Mr Dorbu alleges apparent bias and actual bias. The basis of his submission for apparent bias is that a member of the first respondent, Ms Scholtens QC, had previously acted as counsel for the New Zealand Law Society on several occasions. The pleadings of actual bias relate to particular decisions of the first respondent.

(a) Apparent bias

[75] In his submissions to me the applicant submitted that the circumstances of Ms Scholtens's association with the Law Society were such that an objective onlooker might have a reasonable apprehension of bias. He further submitted that Ms Scholtens should have disclosed her "close association with the second respondent".[40]

[76] On this issue I accept the submissions of Mr Keyte QC, which I set out as follows:

> 16.3 The applicant's first complaint is that one Tribunal member, Ms Scholtens QC, was biased because she had previously acted for the New Zealand Law Society. In his affidavit dated 15 November 2010, at paragraph 6, the applicant mentions five cases where she had acted. An analysis of them shows:
>
> 16.3.1 CIV-2002-485-886
> Ms Scholtens acted for NZLS which was first defendant in an application for a declaratory judgment as to the appropriate test to be applied in determining whether, in the case of an application for civil legal aid, the matter is one which falls within the scope of s 7 of the Legal Services Act 2000.
>
> 16.3.2 CIV-2006-404-6382 and CIV-2006-404-6369
> She acted for NZLS as intervener and filed submissions but was not called on in an application by the Legal Services Agency for a stay pending an appeal concerning two prison inmates who had been declined legal aid by the Legal Services Agency for appearances at parole hearings but granted legal aid on review to the Legal Aid Review Panel.
>
> 16.3.3 CIV-2006-404-4728

[40] Applicant's submissions in support of application for judicial review, dated 16 March 2011, at [65](c).

She acted for NZLS as an intervener in an appeal by the Legal Services Agency against a decision of the Legal Aid Review Panel. An important issue of principle related to the extent which an applicant for legal aid in a criminal matter involving more than one person is entitled to a grant to enable his or her legal advisor to read the entire Police Disclosure File.

16.3.4 CIV-2007-404-7732 (and others)
She acted for NZLS as intervener in an appeal by the Legal Services Agency regarding four decisions of the Legal Aid Review Panel.

16.3.5 CIV-2008-404-1645
She acted for NZLS as intervener in an appeal by the Legal Services Agency against a decision of the Legal Aid Review Panel to reverse the Agency's refusal to approve a travel disbursement. The question was whether it was lawful for the Agency to set and adhere to detailed guidelines as to the grant of travel disbursements.

16.4 It is noted that none of those cases were disciplinary matters and indeed were far removed from issues of discipline. All of them contained issues of either broad public interest, or at least interest to the legal profession generally. Ms Scholtens's function in each was clearly to argue the broad principles on behalf of the profession.

16.5 The first respondent is a specialist Tribunal, set up by statute. That statute provides for the Council of the New Zealand Law Society to make appointments to the Tribunal. Therefore it is only to be expected that NZLS will choose as candidates persons who have some experience of Law Society matters.

[77] As I have said, I accept those submissions. Ms Scholtens QC is a member of the New Zealand Law Society sitting on a specialist Tribunal exercising a disciplinary jurisdiction. The fact that she had previously represented the New Zealand Law Society in matters not related to the jurisdiction of the specialist Tribunal would not, in my view, lead a fair-minded lay observer reasonably to apprehend that she might not bring an impartial mind to the resolution of the questions that the first respondent was required to decide. There was no requirement, therefore, for her to disclose her previous work for the Society.

(b) Actual bias

[78] In paragraphs 56-60 of his amended statement of claim, the applicant attacks findings of the first respondent adverse to his case by alleging that they were biased. Mr Dorbu, in the course of his submissions to me, gave me the strong impression that he simply could not accept that the first respondent could ever have any grounds for making any adverse findings against his version of events. However, I can detect no hint of bias in the first respondent's conduct and consideration of this lengthy and difficult proceeding. I will address each of the applicant's pleadings in short order.

[79] In paragraph 56 of his amended statement of claim the applicant alleges bias in relation to charge 5 because of the conclusion that Mr Dorbu was in breach of Rule 6.02 despite him having written to Mr Hickson and his firm giving notice that he would deal directly with their client. The applicant submitted that this notice constituted an exception to Rule 6.02 but that the first respondent perversely ignored that evidence.

[80] I have already ruled that the first respondent was not incorrect at law in finding charge 5 proven. There is no basis for a finding of bias, but in any event the notice to which the applicant refers was dated some days after the letter to Mr Barge which formed the centrepiece of the charge.

[81] In paragraph 57 of the amended statement of claim the applicant pleads bias in respect of charge 6 in that the first respondent had ignored "inflammatory language against the applicant" by Mr Hickson in the course of his complaint to the Auckland District Law Society. I agree with Mr Keyte QC that this allegation is misconceived. If Mr Hickson used inflammatory or intemperate language then that might be a mitigating factor which could be taken into account in relation to penalty but it could never have been taken by the first respondent to be an answer to charge 6.

[82] In paragraph 58 of the amended statement of claim the applicant alleges bias in relation to charges 3 and 4 in that the first respondent "unfairly refused to have regard to or to deal with, the arguments, submissions and the evidence and/or

explanations offered by the applicant. The Tribunal arbitrarily declared the applicant 'not credible' so as to justify its conclusions".

[83] Charge 3 was a charge of acting for all parties in circumstances where there were irreconcilable conflicts between those parties. During the course of the hearing the applicant accepted that he had acted for all of the parties. It was then the task of the first respondent to apply simple legal principles to the undisputed facts as to the transactions in which the applicant was involved. There is no question of bias.

[84] Charge 4 alleged that the applicant swore affidavits of documents (non-party discovery) which were false in that reference to certain documents were omitted. The applicant acknowledged that the affidavit was his and that he had knowledge of the documents which were omitted from the list. His explanation was that they were omitted because they were no longer in his possession. With that background, the first respondent was entitled to find the charge proven and the allegation of bias is without foundation.

[85] In paragraph 59 of the amended statement of claim the applicant alleged that the first respondent was biased in "its refusal to take into account evidence showing that the cost base of the property to Freeport was higher than the tax exclusive price offered by Mr Barge". This is relevant to the applicant's argument that there was in fact no conspiracy. I have already ruled in relation to charge 1 that the first respondent misdirected itself that it was bound by the decisions of the Courts on matters of fact not directly related to Mr Dorbu. As a result of that misapprehension, the first respondent did curtail its consideration of Mr Dorbu's arguments. However, that is not the same thing at all as showing bias. On this particular point (which goes to the validity of the Barge agreement for sale and purchase), whether the sale to Mr Barge would result in a profit or a loss to Freeport was of peripheral relevance to whether or not the applicant participated in a conspiracy to deprive Mr Barge of the benefit of the agreement for sale and purchase. Indeed, it could have added to the motive for such a conspiracy existing. The first respondent showed no bias in this matter.

[86] In paragraph 60 of the amended statement of claim the applicant alleges that the first respondent showed bias in that it "wrongfully failed or refused to take into account the bona fide grounds of Freeport's commercial dispute to the Barge putative contract". I will not repeat the matters I have just traversed. There is no evidence of bias.

G & KA charges

[87] Charges 8 and 9 relate to a complaint made by a barrister, Mr G, and charge 10 to a complaint made on behalf of a finance company by its solicitors, KA.

[88] Charges 8 and 9 read:

> 8. Between about 3 August 2005 and 29 August 2006 he breached Rule 8.04 of the Rules by attacking Mr [G's] reputation without good cause and/or by being a party to the filing of Court documents attacking Mr [G's] reputation without good cause without first satisfying himself that such allegation could be properly justified on the facts of the case.
>
> 9. Between about 3 August 2005 and 29 April 2006 he breached Rule 6.01 of the Rules in that he failed to promote and maintain proper standards of professionalism in relations with other practitioners by attacking the reputation of Mr [G] without cause.

[89] The relevant finding of the first respondent is:

> [154] We have no difficulty in finding that, from the time of receipt of Mr G's affidavit and supporting documents, Mr Dorbu must have become aware that there was a version of events, particularly insofar as the other practitioner's conduct was concerned, which put seriously into question Mr Dorbu's client's version of events. Indeed, Mr Dorbu's client did not deny the assertions made by Mr G as to the train of events. However, Mr Dorbu chose to ignore the alternative version and pursued the matter through not only one but two levels of the Court system. We consider that his behaviour constituted an unjustified and unjustifiable attack on Mr G's reputation and the charge is proved and misconduct established.

[90] The first respondent then dismissed charge 9 as being, in essence, duplicative of charge 8. It need concern me no further.

[91] The applicant addresses charges 8 and 9 in his amended statement of claim (having first set out a narrative) as follows:

> 41. Mr [G] on cross-examination conceded that the arguments advanced by the applicant in the application to set aside judgment and a notice of appeal filed against the outcome of that application, were valid arguments even though the applicant had not succeeded in those proceedings.
>
> 42. Neither Mr [G] nor any of the other witnesses called in support of the charges were able to provide direct evidence supporting the charges, nor point out any facts or legal arguments that supported the charges.
>
> 43. The Tribunal dismissed one of the charges on grounds of duplicity but held the other charge proven even though the complainant had failed to prove his reputation was under attack.

[92] I take it that the applicant's case in relation to charge 8 is that the decision of the first respondent was unreasonable or irrational.

[93] Unreasonableness is a problematic ground of review because it can lead to a blurring of the line between the legality of a decision, which is reviewable, and its merits, which are not reviewable.[41] Where an applicant claims that a decision was irrational, the Courts adopt the test of "*Wednesbury* unreasonableness".[42] Under this test a decision is unreasonable if it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his or her mind to the question to be decided could have arrived at it. A plaintiff has to show something overwhelming is wrong with the decision.[43]

[94] I have looked at the evidence. It is quite clear that the applicant did attack Mr G personally. He alleged that he had a conflict of interest and acted in breach of his fiduciary duty, thereby causing an injustice. That was undeniably an attack on Mr G's reputation.

[95] The evidence put before the first respondent entitled it to conclude that the attack was without good cause and was continued despite it becoming clear that the allegations were unsustainable.

[96] The finding of the first respondent in relation to charge 8 must stand.

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41 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 397–420 per Thomas J.

42 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

43 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545, 552; *Awatere Huata v Prebble* [2004] 3 NZLR 359 (HC) at [37]–[40].

[97] Charge 10 was:

> 10. On or about 18 December 2007 he breached Rule 8.01 of the Rules in that he misled the Court by swearing and filing an affidavit in which he knew he gave a false answer(s) to interrogatories.

[98] The background to this charge is conveniently set out in the decision of the first respondent:

> [47] In the course of defamation proceedings which Mr Dorbu had personally instituted against a finance company, interrogatories were administered to him, including the following question:
>
> > 3. Have you, since commencing practice as a Barrister and/or Solicitor in New Zealand, received notice of complaints made about you to any regulatory body including, but not limited to, the Auckland District Law Society?
>
> [48] The answer given by Mr Dorbu was: "Yes".
>
> [49] A further interrogatory was posed:
>
> > 4. If the answer to 3 above is "Yes":
> >
> > (a) Have any such complaints being made by or on behalf of any member of the Judiciary?
>
> [50] The answer was:
>
> "Yes, the ADLS Committee reviewed and dismissed **the complaint**".
>
> (Emphasis ours)
>
> [51] It is alleged that at the time he swore the affidavit answering these interrogatories, Mr Dorbu knew that the answer to 4(a) was false in that the Auckland District Law Society ("ADLS") had referred to him two complaints by or on behalf of members of the Judiciary, one from His Honour Chambers J and one from His Honour Priestley J.
>
> [52] Mr Dorbu denied this charge on the basis that he considered that the Chambers J complaint had been dismissed and that the Priestley J referral was not "a complaint" made by or on behalf of His Honour.
>
> [53] The complaint by Chambers J was made in January 2002 and considered by the Complaints Committee in June 2002. It should be noted that some of the evidence initially filed with the Tribunal was excluded on Mr Dorbu's application and thus the details around the Chambers J complaint cannot be considered. However, it is sufficient for the purposes of determining this issue to simply consider the outcome of the complaint because it is the interpretation of that which is challenged by Mr Dorbu. In its decision of June 2002 the Complaints Committee resolved that no charges be laid against Mr Dorbu. This was conveyed to Mr Dorbu by means of a letter addressed to Mr TJ Darby, Solicitor, who was assisting Mr Dorbu in respect of the complaint. The text of the letter insofar as it is relevant reads as follows:

> 22 July 2002
>
> I advise that at its meeting on 24 June 2002, Complaints Committee No. 2 resolved that no charges would be laid against Mr Dorbu in relation to the complaint by Justice Chambers.
>
> However, the Committee directed that Mr Dorbu should be advised that it is imperative that he be scrupulously accurate and honest when answering questions put to him by a Judge. Would you please pass that on to Mr Dorbu.
>
> The Committee also resolved that, although the matter was not of sufficient gravity to warrant the making of a charge, the inquiry was justified and that Mr Dorbu should be asked for submissions on the question of whether or not any costs order should be made against him...

[54] The letter then sought submissions from Mr Dorbu on this issue. Subsequently the Committee resolved not to impose any costs order against Mr Dorbu.

[55] The first issue for the Tribunal to determine is whether the answer "Yes, the ADLS Committee reviewed and dismissed the complaint" fairly and honestly reflected the contents of the letter above.

[56] The second issue which arises under this charge relates to the referral by Priestley J of his decision in respect of the *Barge* litigation dated 27 October 2005 to the Law Society for investigation of Mr Dorbu's actions in relation to the various transactions which were the subject matter of that litigation.

[57] The situation is somewhat confused because initially the Law Society referred this judgment on to Mr Dorbu "*as a ... complaint in which His Honour is critical of (Mr Dorbu's) actions in the matter and your representation of your client*." The Society then set out, in its letter to Mr Dorbu of 8 November 2005, the particulars of the concerns held. The somewhat confused position is because subsequently, on 1 December 2005, the former Professional Standards Director of the ADLS wrote to Mr Dorbu in the course of which he said:

> Kindly note that this matter is not being investigated as a complaint from Justice Priestley. Rather, the investigation is pursuant to a District Council resolution in terms of s 99 of the Law Practitioners Act 1982.

[58] That section refers to the ability of the Society to conduct an "own motion" investigation and this was how it was being now put to Mr Dorbu. The position became further complicated because in the course of further correspondence between the Society and Mr Dorbu a complaint was received (on 14 March 2006) from Castle Brown, the Solicitors for Mr Barge, in respect of Mr Dorbu's actions. Thus, on 15 March 2006 the ADLS Professional Standards Director wrote to Mr Dorbu's counsel, then Mr Pidgeon QC, as follows:

> I acknowledge receipt of your letter of 13 March 2006. This was put before the Society Complaints Committee No. 2 at its meeting on 14 June 2006. On the same date, a complaint was received

> from Castle/Brown, Solicitors on behalf of Ivan Barge. The issues raised there seem to be largely similar to those raised under this complaint number. For practical purposes, the Committee has resolved that it may be more practical and expedient to now advance this matter on the basis of the complaint received from Castle/Brown. This will ensure that any duplicity in the various complaints is avoided.
>
> [59] Mr Dorbu relies on this correspondence to justify him having answered the interrogatories in respect of a singular complaint only. He argues that there was by that stage no complaint by Priestley J extant.

[99] The first respondent held that when Mr Dorbu saw the affidavit in December 2007 he was aware of the complaint by Chambers J and the referral of the *Barge* decision for investigation by Priestley J.

[100] The first respondent then analysed the evidence, including the evidence of Mr Dorbu. The first respondent concluded:

> [161] We consider that the answer provided by Mr Dorbu does not constitute a candid and honest answer from an officer of the Court. We therefore find this charge to have been proved. This is a serious breach of the Rules, and the earlier complaint by Justice Chambers confirms it is not the first time Mr Dorbu's integrity in communications with the Court has been called into question. We consider that it constitutes professional misconduct.

[101] At para 48 of his amended statement of claim the applicant pleaded that "the Tribunal's finding in this regard is perverse". The only ground given for this pleading is a reference in para 46 of the amended statement of claim to the evidence of Mr Burger, a witness called by the applicant who was at material times the Professional Standards Director of the Auckland District Law Society.

[102] I have reviewed the evidence and although it would have been open for the first respondent to have found that the applicant made his affidavit more in muddlement and without due care rather than dishonestly, its decision was nevertheless one that was open to it on the evidence before it. There is no *Wednesbury* unreasonableness and so the decision of the first respondent must stand.

The Judiciary charges

[103] These charges relate to Mr Dorbu's response to an interim decision in the course of the proceedings before the first respondent. Charge 11 related to an email sent by the applicant to the then case manager of the Tribunal in which he accused a Judge of this Court of being "a racist Judge and his decision against me in my absence is couched in racial bigotry".

[104] Charge 12 related to a further email in which he repeated the allegations of racism and added that the Judge had "perjured himself".

[105] Neither of these charges is referred to in the applicant's amended statement of claim nor in his submissions. I refer to them only because his pleading of bias[44] was wide enough to include them.

[106] During the course of the proceeding before the first respondent, the initial denial of the charges by the applicant was abandoned and effectively the charges were admitted. The applicant wrote (and produced to the first respondent) a letter of apology to the Judge of this Court.

[107] There is no doubt that the charges were properly brought, properly heard, and properly disposed of. It follows that the findings of the first respondent in relation to them must stand.

Remedy

[108] I have decided that I will set aside the first respondent's finding on the first charge but will not disturb its findings on the other charges. What remains to be decided are the consequences of my decisions.

[109] The order by the first respondent that the applicant's name be struck from the roll of barristers and solicitors was based on the totality of the applicant's offending as then determined. I do not know the weight given by the first respondent to each

[44] Addressed in [70] to [77] above.

of the charges in reaching that decision. I am not, therefore, in a position to leave undisturbed the first respondent's determination on penalty on the basis that setting aside the first charge would not affect it materially. But it would not be sensible to require the first respondent to conduct a rehearing of the first charge if in all the circumstances it does not consider that to be necessary or desirable.

[110] I have decided to exercise my discretion as to remedy to give the applicant the benefit of my finding on the first charge and to enable him to make submissions on penalty whether or not there is a rehearing of the first charge.

Conclusion

[111] The application in respect of charge 1 is allowed and the finding of the first respondent on charge 1 is set aside. Charge 1 is remitted back to the first respondent for rehearing. The first respondent may, having given the parties the opportunity to make submissions, choose not to hold a rehearing.

[112] The applications in respect of charges 2, 3, 4, 5, 6, 7, 8, 10, 11 and 12 are dismissed.

[113] The orders made by the first respondent as to penalty following the penalty hearing which took place on 24 August 2010 are quashed. A further penalty hearing will take place either in respect of charges 2, 3, 4, 5, 6, 7, 8, 10, 11 and 12 if no rehearing of charge 1 takes place or in respect of the outcome of any such rehearing.

[114] Submissions as to costs, if any, are to be filed by 1 July 2011.

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Brewer J