THIS JUDGMENT IS SUBJECT TO THE SUPPRESSION ORDERS CONTAINED IN PARAGRAPH [246]

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-5076
CIV-2012-404-5528

BETWEEN	BARRY JOHN HART Appellant
AND	AUCKLAND STANDARDS COMMITTEE 1 OF NEW ZEALAND LAW SOCIETY Respondent

Hearing: 10 & 11 December 2012

Court: Winkelmann J
Lang J

Counsel: A Trenwith, J Bioletti and M Porner for Appellant
P Collins and M Treleaven for Respondent

Judgment: 5 February 2013

JUDGMENT OF THE COURT

This judgment was delivered by the Court on 5 February 2013 at 12 noon pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

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Introduction

[1] Mr Hart faced four charges before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal ("the Tribunal"). The charges were laid by the Auckland Standards Committee No 1 under the provisions of the Lawyers and Conveyancers Act 2006 ("LCA"), and under the Conduct and Client Care Rules 2008 ("the Rules").

The charges

Charges one and two

[2] These charges arose after Mr Hart hired a private investigator, Mr D, to carry out investigation work for a client whom Mr Hart was representing in relation to criminal charges.

[3] There was significant delay in Mr Hart paying Mr D's fees. Although Mr Hart's client applied for legal aid, this was declined. Mr D rendered invoices in mid-2008 for sums totalling $4,682.36. Mr Hart paid half of this sum after Mr D complained to the Law Society in April 2009, and paid the balance after Mr D filed a claim against Mr Hart in the Disputes Tribunal.

[4] Charge one alleged that Mr Hart was guilty of misconduct in his professional capacity in failing to inform Mr D that payment of his fees was subject to the Legal Services Agency ("LSA") approving the fees, and that the LSA might not approve the fees either in whole or in part. The charge also alleged that Mr Hart failed to inform Mr D of any alternative arrangement for payment in the event that the LSA did not approve and pay his fees in whole or in part.

[5] Charge one further claimed that Mr Hart failed to honour the full payment of Mr D's account in circumstances where he was required to do so under r 7.03 of the then applicable Rules of Professional Conduct for Barristers and Solicitors. Rule 7.03 provides that a practitioner engaging another person to provide services for a

client is liable for prompt payment for the fee of that person. The rule also required Mr Hart to inform Mr D that the client was legally aided and of the requirements and consequences of this.

[6] Charge two was laid in the alternative to charge one. It alleged that the same failures amounted to conduct unbecoming of a barrister.

Charge three

[7] The third charge alleged that Mr Hart had refused to disclose his file relating to a former client, Mr W, after having been required to do so by the Auckland District Law Society Complaints Committee 2 and the s 356 Standards Committee.[1] The latter committee had assumed responsibility for the investigation of a complaint made by Mr W under the transitional provisions of the LCA.

[8] This charge alleged that Mr Hart's failure to disclose the file amounted to misconduct in his professional capacity because it obstructed the Complaints Committee and the Standards Committee in the course of their investigations.

Charge four

[9] The fourth charge was laid after the family of Mr A, a 19 year old man who faced serious criminal charges, engaged Mr Hart to represent Mr A. This charge alleged Mr Hart was guilty of misconduct in his professional capacity by grossly overcharging Mr A's family; Mr Hart had charged the family the sum of $35,000 in relation to services he and his colleagues provided. The charge also alleged that Mr Hart breached r 3.4 of the Rules because he failed to provide information to Mr A's family about the basis upon which he proposed to charge them for his services, including his hourly rate and the nature and extent of legal services covered by particular fees. It was alleged that this behaviour constituted professional misconduct.

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1 Established under s 356 of the Lawyers and Conveyancers Act 2006.

[10] In a decision delivered on 2 August 2012, the Tribunal held that charges one, three and four had been proved to the required standard.[2] As the Tribunal found the first charge proved, it was therefore not required to consider the second charge. After hearing submissions as to penalty, the Tribunal delivered a further decision on 14 September 2012 in which it ordered that Mr Hart be struck off the roll of barristers and solicitors. The Tribunal also ordered Mr Hart to pay costs of just over $116,000, and to pay the sum of $20,000 to the complainants in relation to one of the charges.[3]

[11] Mr Hart now appeals to this Court against both decisions. The grounds of appeal can be shortly stated as follows:

(1) The Tribunal erred in refusing Mr Hart's application to adjourn the hearing of the charges, brought on the ground that he was medically unfit to attend. The decision to proceed in his absence has resulted in a miscarriage of justice.

(2) The Tribunal erred in considering charge three. It was insufficiently serious for referral to the Tribunal and should have been dealt with by the Standards Committee.

(3) The Tribunal should not have found the first charge proved in circumstances where the complainant did not appear at the hearing.

(4) The Tribunal erred in failing to request that Mr Daniel Gardiner appear before it in connection with charge one, and in failing to request that Mr Alistair Haskett appear before it in connection with charge four. Both were legal practitioners who had sworn affidavits for Mr Hart.

(5) The Tribunal erred in rejecting the expert evidence tendered for Mr Hart in connection with charge four.

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2 *Auckland Standards Committee No 1 v Hart* [2012] NZLCDT 20.
3 *Auckland Standards Committee No 1 v Hart* [2012] NZLCDT 26.

(6) The decision to strike off Mr Hart was a disproportionate response.

(7) Changes in Mr Hart's financial position (partly flowing from the Tribunal's penalty decision) have made the order requiring him to pay costs manifestly excessive.

Approach on appeal

[12] This is a general appeal by way of rehearing under s 253 of the LCA. On an appeal by way of rehearing, the appellate court must come to its own view on the merits, and need not defer to the views of the Tribunal. However, when forming its view of the merits the appellate court is entitled to take into account that the Tribunal may have an advantage in terms of technical expertise, and may also have had the opportunity to assess issues of credibility where witnesses have given evidence before it. Where credibility determinations of the Tribunal are in issue on appeal, the appellate court may properly be cautious in differing from the Tribunal in relation to those findings. But the extent of consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment.[4] The Court has the power under s 253 to confirm or modify the decision of the Tribunal.

First ground of appeal – refusal to adjourn/proceed in the appellant's absence

[13] This ground challenges the Tribunal's refusal to grant Mr Hart's application for adjournment of the hearing, and its decision to proceed to hear the charges in his absence.

[14] The hearing was scheduled to commence on Monday, 16 July 2012. On the Friday preceding the hearing, Mr Hart communicated to the Tribunal that he would not be able to attend on the Monday due to ill health, providing a medical certificate as part of that communication. On the following Sunday, Mr Hart asked Mr Cooke, the solicitor on record for the Tribunal proceedings, to attend the hearing on the Monday to seek an adjournment. When he appeared before the Tribunal on Monday

4 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

morning, Mr Cooke tendered two medical certificates signed by Mr Hart's family doctor: the one issued on Friday which Mr Hart had already transmitted to the Tribunal, and the other issued by Mr Hart's doctor earlier that morning.

[15] These certificates read as follows:

> 13/07/2012.
>
> …..
>
> Barry has been seen and examined by myself today.
>
> Barry has significant chest pains, breathing difficulties and fatigue.
>
> These have been a previous issue and are worse lately.
>
> Barry has been referred to a specialist for further examination and assessment of his symptoms.
>
> He is in my opinion not [fit] for any work, in particular court work, for next week.
>
> He will be reviewed after that.
>
> 16/07/12
>
> Barry has been reviewed today regarding his breathing issues.
>
> There is no improvement over the weekend.
>
> He has a specialist appointment on Friday, (wait listed for tomorrow).
>
> In my opinion he continues to be unwell and not fit to attend his scheduled appearances this week.

[16] In support of the application for adjournment, Mr Cooke submitted that because of ill-health Mr Hart was not able to be present to defend the charges against him, and it was therefore neither fair nor reasonable for the Tribunal to proceed against him in his absence. He said he had no instructions that would enable him to defend the charges on Mr Hart's behalf, as Mr Hart had intended to represent himself. Mr Collins, for the Standards Committee, opposed an adjournment.

[17] The Tribunal's secretary had advised Mr Hart on the Friday that the Tribunal might require the doctor who signed the medical certificate to attend the hearing on Monday. When Mr Cooke made his application on the Monday morning, the Tribunal asked that the certifying doctor attend so that it might obtain more

information about Mr Hart's medical condition. The Tribunal adjourned for approximately 40 minutes to allow arrangements to be made for the doctor to attend, but on resumption of the hearing Mr Cooke advised that the doctor wished to take independent advice as to the nature of the Tribunal's enquiry and had refused the request to attend that morning.

[18] The Tribunal then adjourned to consider the application for adjournment. On its return the Chairperson, Judge Clarkson, delivered a ruling on behalf of the Tribunal declining the application. She said it was not clear to the Tribunal whether the doctor was aware of the particular nature of the appearance that Mr Hart was required to make that week. She noted the "extraordinary history of delay and prevarication on the part of the practitioner".[5] She observed that the delay had been commented upon by the High Court when adjourning the matter for the third time in February of last year, the two earlier adjournments having been granted at Mr Hart's request.[6] She referred to the late withdrawal of Mr Katz QC, Mr Hart's counsel, and to a minute issued by the Tribunal after his withdrawal in which it had advised Mr Hart that any future counsel engaged by him must be prepared to proceed on 16 July 2012.

[19] The Chairperson expressed "grave concerns" as to Mr Hart's willingness to participate in the hearing.[7] As an example, she cited Mr Hart's failure, despite repeated requests by the Tribunal, to clarify what arrangements he had made for an overseas witness (whom the Tribunal had said it would accommodate) to give evidence by video link. Of that morning's certificate she said:[8]

> The Tribunal is hampered by the lack of detail in the medical report. There are very bald assertions with little detail provided. Clearly the illness is not so serious as to require hospitalisation. No tests are reported and the certificate seems to be based on Mr Hart's reports only.

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5 *Hart v Standards Committee (No 1)* "Transcript" HC Auckland LCD 021/10, 16 July 2012 [Transcript] at 7.

6 *Hart v Standards Committee (No 1)* HC Auckland CIV-2011-404-7750, 16 February 2012. There had in fact been at least four adjournments of the proceedings by that point in time, however nothing turns upon this factual error.

7 Transcript, above n 5, at 8.

8 Transcript, above n 5, at 8.

[20] Judge Clarkson said that the doctor's refusal to attend made the Tribunal's task in evaluating the medical certificate extremely difficult. She recorded that the rules of natural justice must be observed in proceedings before the Tribunal, but noted that the Standards Committee was present and willing to proceed and that at least one complainant had waited over three years for his complaint to be heard. She referred the Tribunal to the leading case on the right to legal representation, *Condon v R*,[9] and said:[10]

> It was held that the right to representation is not an absolute right, that what is required is an overall assessment of whether the trial can be fair. Can Mr Hart receive a fair hearing when he absents himself and is therefore unrepresented? [At] [p]aragraph [18] in *Condon* it is said:
>
> > "In some circumstances the manner in which the accused, through his or her own choice or conduct, came to be unrepresented may be relevant to the assessment of fairness."
>
> We consider that [that] is applicable in this case, given the history which has been recounted. In this matter considerable evidence has already been filed by the respondent, Mr Hart. This is not a situation where the respondent's absence means the matter will merely proceed on an entirely one-sided basis. The Tribunal's quasi-inquisitorial role means that we will be actively examining all of the evidence, including some questioning of the witnesses of the Law Society. The Tribunal has a role of protecting the public and the reputation of the profession which requires us to undertake an independent analysis of the entirety of the material before us. We have an expectation that Mr Collins will be aware of his duties to the Tribunal as prosecutor, particularly in the absence of the respondent.

[21] The Tribunal resolved to proceed, saying:[11]

> Balancing the public interest and a final resolution of professional disciplinary proceedings against the rights to a fair process for the respondent and representation for him, we consider the matter ought to proceed.

[22] The Tribunal's decision of 2 August 2012 records further reasons behind the Tribunal's decision to proceed:

> [5] At the commencement of the hearing Mr Cooke, instructing solicitor on the record throughout these proceedings, appeared to seek an adjournment on Mr Hart's behalf on the grounds of his client's ill health. A further medical certificate was provided which simply stated that Mr Hart had been reviewed and one of his symptoms had not improved. He was said

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9 *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300.
10 Transcript, above n 5, at 9.
11 Transcript, above n 5, at 9.

> to be unfit to attend his scheduled appearances that week. It was not clear whether the Doctor understood the nature of the appearance which had been scheduled for Mr Hart. Mr Cooke said that the Doctor was not prepared to attend Court. This was despite the Tribunal indicating that certain conditions, which the Doctor had sought, would be met by the Tribunal.
>
> [6] On two occasions leading up to the hearing it had been necessary for the Tribunal Chair to clearly state that, given the number of previous adjournments and delays which had been encountered in the course of this proceeding, the fixture must proceed. The Chair had reminded Mr Hart of the critical comments of Her Honour Justice Winkelmann in February of this year, concerning the delays which had occurred in this proceeding.
>
> [7] The Tribunal reached the view that, following the departure of Mr Hart's last counsel on 27 June, Mr Hart did not intend to engage in these proceedings. We formed that view because it is clear none of his witnesses were told they were required for cross examination (because the only one who appeared did so at the specific request of the Tribunal following the first day). Furthermore, despite numerous requests to provide the Tribunal with information about the video conference which had been approved for the cross examination of Mr Hart's expert witness, who was overseas, Mr Hart did not respond or indicate to the Tribunal how these arrangements had been made. Furthermore, Mr Hart did not engage new counsel. On the adjournment application he was simply represented by his instructing solicitor who was without further instructions or knowledge of the file.

Relevant principles

[23] It was common ground between counsel that the principles to be applied in the present context are usefully set out in the English Court of Appeal decision in *R v Hayward*.[12] These were approved by the House of Lords on appeal in *R v Jones*,[13] and have been applied in New Zealand in the context of criminal trials.[14] In *Hayward*, the Court of Appeal had said:[15]

> ... the principles which should guide the English courts in relation to the trial of a defendant in his absence are these:
>
> 1. A defendant has, in general, a right to be present at his trial and a right to be legally represented.
>
> 2. Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be

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12 *R v Hayward* [2001] EWCA Crim 168, [2001] 3 WLR 125.
13 *R v Jones* [2002] UKHL 5, [2003] 1 AC 1.
14 *R v van Yzendoorn* [2002] 3 NZLR 758 (CA).
15 *R v Hayward*, above n 12, at [22].

waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.

3. The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.

4. That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.

5. In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:

(i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;

(ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;

(iii) the likely length of such an adjournment;

(iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;

(v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;

(vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;

(vii) the risk of the jury reaching an improper conclusion about the absence of the defendant;

(viii) the seriousness of the offence, which affects defendant, victim and public;

(ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;

(x) the effect of delay on the memories of witnesses;

(xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

6. If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. In summing up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case.

[24] The House of Lords disagreed with the Court of Appeal, however, that the seriousness of the offence was a factor which should be taken into account in exercising the discretion. Lord Bingham of Cornhill said:[16]

> The judge's overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome. These objects are equally important, whether the offence charged is serious or relatively minor.

[25] The New Zealand Court of Appeal in *R v Chatha*[17] was subsequently faced with the issue of whether the defendant had an obligation to appear at his own trial and, consequently, whether it was reasonable for the trial Judge to deny the defendant bail on the first day of the trial. The Court confirmed the effect of its previous judgment in *van Yzendoorn*,[18] describing it as authority to the same effect as *Jones*. Those cases, it said, stood for the proposition that:[19]

> ... the discretion to continue a trial in the absence of the accused must be exercised sparingly and...it can never be exercised if an accused's defence could be prejudiced by his or her absence.

[26] The Court held, with reference to *Jones*, that the right of an accused to be present at his trial did not encompass a right to absent himself from the trial. The Court went on to explicitly adopt *Jones*, saying that:[20]

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16 R v *Jones*, above n 13, at [14].
17 *R v Chatha* [2008] NZCA 547.
18 *R v van Yzendoorn*, above n 14.
19 At [66].
20 At [67].

> Absenting oneself voluntarily runs the risk that a trial may be carried on in one's absence but the discretion to do so is only exercised with caution and is subject to the absolute right to a trial that is as fair as circumstances permit and that would lead to a just outcome.

But, the Court continued, anyone who chose not to be present could not complain about the "inevitable consequences" of a trial being held in their absence.[21]

[27] The Privy Council also applied *Jones* in the context of disciplinary proceedings in *Tait v Royal College of Veterinary Surgeons.*[22]

Analysis

[28] Counsel for Mr Hart argued that the Tribunal erred in refusing the application for adjournment because it asked itself the wrong questions when considering the application for adjournment. The error arose because the Tribunal failed to direct itself to the relevant authorities and, in particular, the principles applied in *Jones*. Had it done so, the Tribunal would have taken a more nuanced approach to the issue of whether it should proceed in Mr Hart's absence. This was particularly so when the refusal of the adjournment meant not only that Mr Hart was absent during the hearing of the charges against him, but also that he was unrepresented. The Tribunal also said that it was not satisfied that Mr Hart was unable to attend, whereas the question for the Tribunal was whether he was unwell and therefore not fit to attend.

[29] We accept counsels' submission that the principles articulated in *Jones* provide the framework for consideration of the present issue, with of course the necessary modifications to reflect the fact that the hearing was not before a jury. While the Tribunal did not refer to *Jones*, (there is no suggestion the Tribunal was referred to that authority), it does not follow that it erred in its approach. Consideration has to be given to the questions that it did address itself to.

[30] The Tribunal was not correct in stating it was required to balance Mr Hart's right to a fair process against the public interest in the hearing proceeding. The right to a fair process is absolute. Nevertheless, from the reasons given by the Tribunal

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21 At [67].

22 *Tait v Royal College of Veterinary Surgeons* [2003] UKPC 34.

and in spite of its reference to a balancing exercise, it seems that the Tribunal's approach was in accordance with the principles identified in *Jones.* The passage to which the Tribunal referred from *Condon v R*[23] was entirely consistent with the authorities referred to by counsel for Mr Hart. This shows that the Tribunal was correctly focused on the reason for Mr Hart's non-attendance and also the impact of proceeding in his absence. It was conscious of his right to a fair hearing of the charges against him, whilst noting that the reasons for his absence were relevant to assessing what was required for a fair hearing. Consistent with the Tribunal's approach, the first issue related to the reason for Mr Hart's absence. The second was, was a fair hearing possible in his absence? Finally, the Tribunal had to, and did, address itself to other matters relevant to the issue of an adjournment, such as the continued delay to the complainants and the public interest in the prompt disposition of disciplinary proceedings.

[31] Counsel for Mr Hart further submits that the Tribunal's observation that Mr Hart's illness was "not so serious as to require hospitalisation" suggests that it applied too high a standard when determining whether he was unfit to attend. We agree that it would not be proper to require a person to establish, for that purpose, that he or she is sufficiently unwell to require hospitalisation. However, we are satisfied that it is at least implicit in the Tribunal's decision that it rejected Mr Hart's claim that illness was the true reason for his non-attendance. As counsel for Mr Hart himself accepted, the Tribunal's decision was based upon its finding that Mr Hart had voluntarily absented himself not because he was unwell, but because he had made a conscious decision to disengage from the proceedings as a strategy to delay the hearing. Therefore, the issue of just how unwell Mr Hart was did not arise.

[32] Counsel for Mr Hart also challenged the Tribunal's evidential findings, saying that the Tribunal was wrong to reject the certificate from a medical professional when there was no evidence to contradict that certificate. He says the Tribunal gave no, or at least no adequate, reasons for this rejection. It also made an unwarranted inference of malingering – unwarranted because there was no evidence produced at that time, or subsequently, to contradict or undermine the statement in the doctor's certificate that Mr Hart was unfit to attend. Counsel for Mr Hart

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[23] *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300.

submits that on the contrary, as shown in the medical records annexed to Mr Hart's affidavit, Mr Hart had been suffering from the symptoms that prevented him from attending the hearing for some time both prior to and after the substantive hearing.

[33] Counsel for Mr Hart submits that the Tribunal was fixated with ensuring that the hearing proceed on that day. This became an end in itself. The emphasis placed on previous adjournments and delays, along with the Chair's statements prior to the hearing that it "must" proceed as scheduled, leads, it is argued, to the conclusion that the Tribunal fettered its discretion. Moreover, not all delay was attributable to Mr Hart.

[34] We do not accept these arguments. The Tribunal gave its reasons for rejecting the certificate that Mr Hart was unfit to attend. It was not bound to accept the medical certificates provided by Mr Hart in the absence of medical evidence to contradict or undermine them. The certificates were only one source of evidence available to the Tribunal in forming its view on the reasons for the application for adjournment. On their own, the certificates were not particularly helpful. They contained, as the Tribunal noted, little detail. Moreover, in issuing them the doctor explicitly relied upon Mr Hart's self reporting of symptoms, and offered no diagnosis.

[35] The Tribunal was entitled to take into account the other information it had available to it in considering the application, including the procedural background to the proceedings. The Tribunal referred in both its adjournment and substantive decisions to the extraordinary history of delay and prevarication on the part of the practitioner. We consider that to be a fair characterisation by the Tribunal, even if, as counsel for Mr Hart submits, not all of the delay that occurred in the proceeding is attributable to Mr Hart.

[36] The proceedings had been adjourned on four previous occasions, three of which were on the application of Mr Hart. A fixture on 20 June 2011 was adjourned because of the unavailability of counsel. Mr Hart filed a memorandum dated 23 May 2011 in which he said:

> I would like to be able to keep the suggested fixture date of 20 June 2011. However, I am not sure this will be possible for the following reasons ….
>
> I currently have no counsel instructed in this matter.

[37] A fixture for 29 August 2011 was similarly adjourned on Mr Hart's application because of the unavailability of counsel. In a memorandum dated 5 August 2011 Mr Hart said:

> In view of the unavailability of my counsel, and the seriousness of the possible outcome of these matters for me, I ask that another date be set.

[38] A fixture was then allocated for 5 and 6 December 2011. The hearing did not proceed on that date because Mr Hart filed a judicial review proceeding challenging various rulings made by the Tribunal. A further hearing date of 20 February 2012 was then set for the disciplinary proceeding.

[39] Neither party sought an urgent hearing of the substantive application for judicial review, notwithstanding the imminence of the February hearing date before the Tribunal. It was only on 14 February 2012 that Mr Hart applied to this court for interim orders restraining the Tribunal from proceeding with the hearing on 20 February. That application was heard as a matter of urgency on 16 February 2012. By the time of that hearing, the Standard Committee's expert witness, Mr David Smith, had been appointed a District Court Judge.[24] Although there was no formal pleading relating to this point, it was argued for Mr Hart in this Court that it would be unfair to allow the disciplinary hearing before the Tribunal to proceed if the Standards Committee was to call a District Court Judge as its expert witness.

[40] Following a short hearing, the application for judicial review was resolved by agreement between the parties, including agreement that the Standards Committee would instruct a new expert witness. The parties' memorandum recorded that the fixture before the Tribunal scheduled for 20 February 2012 would be adjourned at the direction of the Court, and the Tribunal would be asked to convene a directions conference to fix a timetable for the hearing of the charges as soon as that could reasonably be achieved.

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[24] He was appointed some time earlier, but the exact date of his appointment is not apparent from the material produced.

[41] It was not Mr Hart's fault that the Standard Committee's expert witness was appointed a District Court Judge. For this reason it is clear that the fault for the last two adjournments cannot be attributed entirely to him. But he does bear some responsibility for the delay that led to the difficulty with the witness, as the longer a proceeding is delayed, the more likely it is that there will be difficulty with witnesses.

[42] The next step in the chronology is that on 3 April 2012 the parties were told that the charges would be heard before the Tribunal on 16 July 2012. On 30 April 2012, Mr Katz, counsel then acting for Mr Hart filed a memorandum in which he told the Tribunal that he had been unable to obtain any instructions from Mr Hart for five to six weeks. He said that, in light of instructions he had now received, it was apparent that the fixture for 16 to 18 July 2012 would cause extreme difficulties. Mr Burcher, one of Mr Hart's principal witnesses, would be absent from New Zealand at the time of the hearing, so an adjournment was sought. The Tribunal issued a minute on 1 May 2012 declining the adjournment application on the ground that Mr Burcher's evidence could be taken at the July hearing by way of video link.

[43] On 27 June 2012, Mr Katz advised the Tribunal that his retainer had been terminated and he would not be representing Mr Hart. The next day the Chair of the Tribunal issued a minute noting the number of counsel who had represented Mr Hart to date, and drawing attention to the many previous adjournments. The Chair said that if Mr Hart sought to retain further counsel, that counsel would have to be in a position to proceed on 16 July 2012. She also asked Mr Hart to confirm the arrangements that he had made for Mr Burcher's evidence to be received by video link. This aspect of the chronology is important because, in declining the adjournment, it is apparent the Tribunal attached some weight to the fact that there was no evidence to suggest that Mr Hart had taken steps to arrange for Mr Burcher to give his evidence remotely. The Tribunal considered this supported its conclusion that Mr Hart had no intention of participating in the July hearing.

[44] On 3 July 2012, counsel for the Standards Committee filed a memorandum in which he gave notice of his intention to cross-examine some of Mr Hart's witnesses:

Mr LaHatte, Mr Burcher, Mr McKenzie, Mr Haskett, Ms Murray and Mr Williams QC.

[45] On the morning of Friday 13 July 2012 a Tribunal case manager sent an email to Mr Hart's office, requesting confirmation of the arrangements in respect of Mr Burcher's evidence. The initial response from Mr Hart's office was that Mr Hart would respond later that day. In a subsequent response, the Tribunal was told that he was unwell. Finally, at 4.21 pm, a scanned copy of Mr Hart's medical certificate dated 13 July 2012 was emailed to the Tribunal.

[46] When assessing the true reasons for the application for adjournment, the Tribunal was also entitled to take into account other aspects of procedural delay on the part of Mr Hart. Some of this was apparent from the Tribunal's own record, and some of it was detailed in the affidavits filed by Mr Garreth Heyns, the team leader of the Lawyers' Complaints Service of NZLS.

[47] This included significant delay by Mr Hart in providing copies of relevant documents in relation to the complaint the subject of charge four. The Standards Committee struggled to obtain a copy of Mr Hart's file in respect of the work he did for this complainant. At the request of the Standards Committee, the Tribunal directed Mr Hart to produce this file by 18 February 2011. Through his counsel, Mr Hart responded that he did not have the file and that he believed it had gone to Mr A's new lawyer. The Standards Committee then obtained an affidavit from Mr A's new lawyer confirming he did not have the file. On 27 May 2011, the Chairperson directed that Mr Hart file an affidavit of documents within 21 days. When Mr Hart did not comply with that direction, a telephone conference was sought by the Standards Committee. By the time of that conference (9 August 2012) Mr Hart had provided the affidavit of documents, but not the documents themselves. He was directed to do so by 12 August 2011. Again he did not comply with this direction. He finally provided his file on 7 September 2011, nearly seven months after first having been required to do so.

[48] Finally, the Tribunal also had the evidence of obstruction on the part of Mr Hart that formed the basis for charge three. We detail this conduct later in this judgment.[25]

[49] This account of Mr Hart's conduct demonstrates that Mr Hart had persistently delayed and obstructed the investigation and disciplinary processes associated with these charges. Although it is true that not all of the delay is attributable to Mr Hart, the complete chronology provides strong, indeed very strong, evidence that he pursued a concerted strategy of delay and obstruction.

[50] Drawing these various threads together, we are satisfied that the Tribunal was well justified, on the evidence and information available to it, in concluding that Mr Hart was not unfit to attend, and that his absence was consistent with his earlier delaying and obstructive conduct.

[51] In reaching this conclusion we have not ignored counsel for Mr Hart's submission that the Tribunal erred in finding that Mr Hart had told none of his witnesses that they would be required for cross-examination, so that it erred in treating this factor as further evidence of his disengagement with the proceedings. Counsel for Mr Hart makes the point that the Tribunal could not have been confident that the witnesses had not been told to attend, as witnesses are not typically asked to attend at the beginning of a hearing, but rather when they are required. There may have been some force in this submission were it not for the further evidence available to us strongly supporting the Tribunal's conclusion that witnesses had not been notified of the need to attend for cross-examination. When Ms Murray gave oral evidence before the Tribunal on the second day of the hearing, she said that she had not been told about the hearing. We also received an updating affidavit from Mr Haskett,[26] in which Mr Haskett states that "I was never contacted and requested to give viva voce evidence at the hearing by the [committee]. I was willing to give viva voce evidence should I have been requested to do so". The Standards Committee had notified Mr Hart that Mr Haskett was required for cross-examination. It was for Mr Hart to convey that request to Mr Haskett. We also note

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25 At [196]-[207].

26 Provided by Mr Hart and received on a consent basis.

the absence of any up-dating evidence suggesting that arrangements had been put in place for Mr Burcher to give evidence at the hearing.

[52] Mr Hart does however rely on fresh evidence filed by him and received by consent in this Court, regarding his health at the time of the hearing. It is necessary to consider this to determine whether, in light of the new evidence, Mr Hart has established that he was unfit to attend the hearing. He has deposed in an affidavit that in the months leading up to the hearing he had been under incredible pressure and stress resulting from the fact that his bank had initiated the mortgagee sale of his properties, including his home. He was busy at the office during the day, and trying to deal with bank-related issues at night. He was exhausted and had lost five kilograms in weight over this period. He developed breathing problems and chest pains. In October 2011, his health problems became more severe and as a consequence he sought treatment from his doctor. He was referred to several specialists and underwent a number of tests. On 7 October 2011, he was given a cardio assessment and echocardiogram by a cardiologist. Toward the end of 2011 he was off work for about a month due to ill-health, and again for a shorter period at the beginning of 2012. On 3 April 2012, he had a CT scan of his head, chest, abdomen and pelvis. Initial results from that scan caused him anxiety, in light of his family's medical history.

[53] Mr Hart says that in the week prior to the Tribunal hearing he felt extremely unwell. He was sleeping only one to two hours a night because, when he did sleep, he would wake with severe tightness in his chest, struggling for breath. He was physically exhausted due to a combination of stress, overwork and lack of sleep. He visited his doctor on 13 July, and spent most of the weekend in bed. On the day of the hearing of 16 July he again attended the doctor. Mr Hart says the doctor confirmed his condition had worsened, and after examining him his doctor certified that he was unfit to attend the hearing. He was again referred to a specialist.

[54] Mr Hart concludes:

> Ultimately, I was simply physically incapable of appearing at the hearing at all, let alone in a self-represented capacity. I firmly reject any suggestion that I was malingering or somehow attempting to frustrate the Tribunal's

> processes and consider that this is borne out by my medical records. I was, and remain, firmly committed to defending the charges against me.

[55] Mr Hart attaches to his affidavit some excerpts from his medical records in respect of the period from 20 March 2012 until 20 August 2012. Those records show that on 20 March 2012 Mr Hart presented at the doctor's feeling "still tired" with coughing and a wheezy chest. He had a flu vaccination and blood tests taken. On 2 April 2012 he attended the doctor's clinic with symptoms of being tired and was sent for a CT scan of his head, chest and abdomen. On 5 April 2012 his CT scan was reviewed and reported to be normal, and he was given a one-week medical certificate. On 28 May 2012 he attended the doctor with tenderness to his ribs, having suffered these injuries in a fall.

[56] The next attendance recorded in the medical notes is on 13 July 2012. It records as follows:

> Fatigue, Wakes at night with feeling of difficulty of breathing throat/chest. Feeling of blockage and wheeze.
>
> Increasing fatigue and feels a "flu" coming on.
>
> Occasional daytime symptoms.
>
> Currently on Seretide BD,
>
> Recent cardiology and CT tests enclosed.
>
> Main symptom is of fatigue. Note work stress. Tribunal hearing coming up.
>
> Some weight loss earlier in year. 79 to 75 kg but now stable.
>
> Bloods essentially normal, repeated today.
>
> Omeprazole BD trial commenced today.
>
> PEF 400 chest clear, usually keeps pretty fit.
>
> ….
>
> Question reflux plus/minus asthma.

[57] The next notation is for 16 July 2012. The notation is:

> Has had a bad weekend, spent mostly in bed. Fatigue. Hot and cold feelings, nasal congestion, cough.

> O/E temperature 36.8 degrees Celsius. PO2 98% on air, chest clear RR20. Looks pale.
>
> Inflammatory markers normal.
>
> Has Tribunal hearing scheduled this week and would have impaired concentration with likelihood of getting worse.
>
> Specialist's appointment. Friday, on cancellation list for tomorrow. No relief yet from Omeprazole.
>
> Advised best to put it off if possible as unfit to participate the way he is feeling now.

[58] These notes reveal that Mr Hart had been suffering from difficulty with sleeping over a period of months. Perhaps this difficulty was on and off. Perhaps it was persistent. That is not clear from the notes or Mr Hart's affidavit. In any case, it did not come on suddenly just prior to the hearing. On the day of the hearing he presented with feelings of a blocked nose and a cough, but no objectively observable evidence that he was ill – his temperature was normal, his chest clear, his oxygen saturation normal and his inflammatory markers normal.

[59] In short, these additional medical records tend to corroborate the Tribunal's observation that the basis of the medical certificate was Mr Hart's self-reported symptoms. The material contained in the body of the affidavit merely repeats the self-reported symptoms recorded in the medical records. We also attach some significance to the fact that, although the notes record that the doctor had organised an urgent appointment with a specialist, there is no reference in the updating material to the diagnosis Mr Hart received from the specialist. Counsel for Mr Hart concedes that Mr Hart was not diagnosed with any ailment at this time.

[60] To conclude on this point, we consider that the additional evidence takes Mr Hart no further in establishing he was unfit to attend through ill health. Nor does it show that the Tribunal erred in rejecting this as being the true reason for his application for adjournment. The Tribunal viewed Mr Hart's self-reports of being unwell and unfit for hearing within the context of his overall conduct, as it was entitled to do.

[61] Counsel for Mr Hart contends that the Tribunal's discretion was also not exercised with what the House of Lords in *R v Jones* described as the "utmost care and caution",[27] as was required. No consideration was given to the serious consequences of the proceedings from Mr Hart's point of view, nor was detailed consideration given to whether Mr Hart would be able to receive an objectively fair hearing in his absence.

[62] A related point made is that although the Tribunal has quasi-inquisitorial functions, it could not provide anything remotely approaching an effective substitute for a party with a legal representative. Indeed, it is argued for Mr Hart that the Tribunal's greater engagement in questioning witnesses may well have had the opposite effect. Counsel for Mr Hart referred us to the comments by Lord Greene MR in *Yuill v Yuill*:[28]

> A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.

[63] We are not persuaded by these arguments. Having concluded that Mr Hart was well enough to attend but had decided not to, it is clear that the Tribunal did go on to consider other considerations relevant to the exercise of its discretion as identified in *Jones*. It carefully considered whether, if it decided to proceed, Mr Hart would receive a fair hearing in the circumstances. In assessing that issue, the Tribunal was entitled to take into account the conclusion that Mr Hart had elected not to attend, and not to have counsel instructed to represent him.

[64] The Tribunal noted it had extensive evidence filed on behalf of Mr Hart. We also think it relevant that over the lengthy procedural history of the charges, there had been numerous interlocutory arguments, so the Tribunal was well aware of the nature of the defences Mr Hart intended to raise to the charges. As the Tribunal observed, it has a quasi-inquisitorial role and it had a right to question witnesses. We

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27 *R v Jones* [2002] UKHL 5, [2003] 1 AC 1 at [13].
28 *Yuill v Yuill* [1945] All ER 183 (CA) at 189.

are satisfied that it exercised appropriate caution in electing to proceed in the absence of a self-represented litigant.

[65] It is clear, also, that the Tribunal had in mind the public interest in the prompt disposition of disciplinary charges, particularly where serious misconduct is charged. As counsel for Mr Hart noted, the Tribunal made much of its concern, and of the concern expressed in the earlier judicial review proceedings, that there had been unacceptable delay. However, we do not accept the submission that the Tribunal allowed this concern to override all other considerations. It is apparent that the Tribunal took time to consider the adjournment application, and that it carefully weighed the relevant considerations. There is no evidence that it fettered its discretion as counsel for Mr Hart suggests.

[66] In this case there was a strong public interest in the hearing proceeding. Mr Hart was facing serious charges. The events that formed the basis of the charges were, by the time of the hearing, quite some considerable time in the past. The more time that passed, the more difficulty there was likely to be with witnesses and complainants. The Tribunal knew that the passage of time had already meant that the Standards Committee had been obliged to brief a new expert witness, and that the complainant in respect of the first charge now resided overseas.

[67] A review of the transcript reveals that the Tribunal did more than conduct a formal proof exercise. It required the Standards Committee to call many of its witnesses, although it had their affidavit evidence before them. It questioned those witnesses at some length. Where the Tribunal was concerned with a conflict of evidence which it assessed as relevant, it asked counsel for the Standards Committee to arrange for one of Mr Hart's witnesses, Ms Murray, to appear before it. We also considered counsel for Mr Hart's submission that the active role the Tribunal adopted caused it to become partisan, but have found no evidence of that in the transcript. Counsel for Mr Hart did not attempt to develop this submission further by referring us to passages in the transcript allegedly supporting it. Having reviewed the transcript and the Tribunal's decision ourselves, we are satisfied that no miscarriage of justice flowed from the decision of the Tribunal to proceed with the

hearing notwithstanding Mr Hart's absence from the hearing, even though that meant he was unrepresented.

[68] For these reasons, we are satisfied that the Tribunal did not err in the approach it took to the application for adjournment. Having considered the evidence afresh, and having regard to the additional material filed on behalf of Mr Hart, we are also satisfied that the Tribunal was correct to conclude that Mr Hart did not attend not because of ill health. Rather, he made a conscious decision to disengage from the proceedings.

2. Second ground of appeal - was the Tribunal entitled to consider the third charge?

[69] Counsel for Mr Hart submits that the third charge, which alleged Mr Hart had obstructed the two investigating committees by refusing to produce his file in relation to services provided to Mr W, was insufficiently serious to warrant consideration by the Tribunal. He contends the charge could, and should, have been heard and determined by the Standards Committee. He argues that the Standards Committee had the power to impose an appropriate remedy in the event that it found the charge proved. For that reason he submits it was inappropriate for the Tribunal to have considered it.

[70] This submission relies on the reasoning contained in *Orlov v New Zealand Law Society*.[29] The judgment in *Orlov* was released on 24 August 2012, three days before the Tribunal heard submissions as to penalty in the present case. The Tribunal sought and received submissions from counsel regarding the effect of *Orlov* before it issued its penalty decision, but ultimately declined to alter its earlier decision that Charge Three had been established.

[71] *Orlov* concerned an application by a practitioner, Mr Orlov, for judicial review of decisions made by each of three Standards Committees that complaints before them ought to be referred to the New Zealand Lawyers' and Conveyancers' Disciplinary Tribunal ("the Tribunal"). In support of his application, Mr Orlov

[29] *Orlov v New Zealand Law Society* [2012] NZHC 2154.

submitted that each of the Standards Committees had failed to apply a threshold test. This test was "whether there was enough evidence to justify the extreme step of referring a complaint to the Tribunal, to consider whether misconduct had been proved."[30] Mr Orlov contended that a Standards Committee should only lay charges with the Tribunal if there is a real risk that, if the charges are proved, the practitioner might be suspended from practice or struck off the roll of Barristers and Solicitors of the High Court.

[72] Heath J upheld Mr Orlov's submission. In doing so, Heath J relied heavily upon the differences between Standards Committees and the Legal Complaints Review Officer ("LCRO") on the one hand, and the Tribunal on the other, in respect of their composition, functions and powers. The process of appointing members to the Tribunal, and the Tribunal's greater powers and tighter procedural constraints all suggested to His Honour that the Tribunal ought to be limited in jurisdiction to the most serious of cases. As these factors were central to the reasoning in *Orlov*, it is necessary to set out the statutory framework now contained within the LCA.

Statutory framework

[73] Until August 2008, regulation of the legal profession in New Zealand was governed by the Law Practitioners Act 1982 ("the 1982 Act"). The 1982 Act provided for the legal profession in New Zealand to be supervised in the first instance by District Law Societies. These made up the New Zealand Law Society ("NZLS"). The NZLS promulgated rules under which lawyers practised, with enforcement of the rules primarily being the responsibility of the District Law Societies. Disciplinary charges were heard by judicial bodies: a District Disciplinary Tribunal ("District Tribunal") for each district and the New Zealand Law Practitioners Disciplinary Tribunal ("NZ Tribunal").

[74] Complaints from the public were received by the District Law Society of which the relevant practitioner was a member. If the Council of that Society had reasonable cause to suspect that the practitioner had been guilty of conduct of a kind

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30 *Orlov*, above n 29, at [4].

set out in s 106(3)(a) to (c),[31] had been convicted of an offence punishable by imprisonment or had been guilty of an offence that would render him or her liable to being struck off, the Council could itself investigate the matter.[32] That inquiry could be carried out either by the Council or one or more Complaints Committees.[33]

[75] If, at the conclusion of its investigation, the Council or Complaints Committee was of the opinion that the case was of sufficient gravity to warrant the laying of a charge, it was required to lay a charge before either the District Tribunal or the NZ Tribunal.[34]

[76] A District Tribunal could make a finding that the practitioner had been guilty of any of the types of conduct set out in s 106(3)(a) to (c) of the 1982 Act, or had been convicted of an offence punishable by imprisonment. If, having made such a finding, the District Tribunal was of the view that the case was of sufficient gravity to warrant its referral to the NZ Tribunal, it was required to refer the case to the NZ Tribunal accordingly. If the case did not meet that threshold, the District Tribunal could make one or more of the orders specified by s 106(4).[35]

[77] If the matter was not referred to the NZ Tribunal, and the District Tribunal did not find the practitioner to be guilty of any of the conduct described in s 106(3) but was nevertheless of the opinion that the laying of the charge was justified, it had the power to make one or more of the orders set out in s 106(4)(e) – (i).[36] These included the orders for payment of compensation, reduction of fees, reporting on practice and the taking of advice in relation to practice management.

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31 Being misconduct, unbecoming conduct, or negligence or incompetence so as to reflect on his or her fitness to practice or bring the profession into disrepute.

32 Law Practitioners Act 1982, s 99.

33 Constituted under s 100 of the Law Practitioners Act.

34 Section 101(2).

35 Including imposing a penalty payable to the District Law Society, censuring the practitioner, placing conditions on the practitioner's work, requiring him or her to complete work for or pay compensation to any specified person, or requiring him or her to pay to the District Law Society such sums the Tribunal thinks fit in respect of costs.

36 Section 106(5).

[78] If the matter was referred to the NZ Tribunal, and the Tribunal was of the view that the practitioner had been guilty of any of the conduct listed in s 112(1),[37] it could make orders of a "more severe"[38] nature, including striking the practitioner's name off the roll, suspending the practitioner from practice for up to three years, restricting the practitioner's ability to practise on his or her own account, fining and censuring the practitioner.[39]

[79] The 1982 Act was replaced by the LCA, which came into force on 1 August 2008. Part 7 of the LCA is designed to enable complaints to be addressed, and for disciplinary charges to be heard and determined expeditiously.[40] To achieve these goals, the NZLS is authorised to make rules to give effect to the complaints and disciplinary framework.[41]

[80] That framework requires the NZLS to establish one or more Lawyers' Standards Committees,[42] and to make rules governing the operation of Standards Committees. Such rules must include, amongst other things, the procedures to be followed in relation to complaints and the manner in which a Standards Committee is to exercise its functions and powers.[43]

[81] Each Standards Committee consists of at least three persons, one of whom must be a lay person.[44] The relevant functions of these Committees are as follows:

> **130 Functions of Standards Committees**
>
> The functions of each Standards Committee are (subject to any limitations imposed on the committee by or under this Act or the rules that govern the operation of the committee)—
>
> (a) to inquire into and investigate complaints made under section 132:
>
> ...

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37 Being misconduct, unbecoming conduct, negligence or incompetence so as to reflect on his or her fitness to practice or bring the profession into disrepute, or that the practitioner had been convicted of an offence punishable by imprisonment

38 *Orlov*, above n 29, at [32].

39 Section 112(2).

40 Lawyers and Conveyancers Act 2006, s 120(3).

41 Section 120(4).

42 Section 126.

43 Section 131(a) and (b).

44 Section 129.

> (c) to investigate of its own motion any act, omission, allegation, practice, or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner or any other person who belongs to any of the classes of persons described in section 121:
>
> ...
>
> (e) to make final determinations in relation to complaints:
>
> (f) to lay, and prosecute, charges before the Disciplinary Tribunal.

[82] A Standards Committee may receive complaints from any person,[45] that complaint having been referred from a Complaints Service.[46] The Standards Committee must consider the complaint either by inquiring into it,[47] giving a direction that the parties explore the possibility of resolution by negotiation, conciliation or mediation,[48] or by deciding to take no action on the complaint.[49] The Standards Committee must notify the complainant and the practitioner against whom the complaint is made as to which of these procedures is being utilised as soon as practicable.[50] The Standards Committee must also exercise and perform its duties, powers, and functions in a manner consistent with the rules of natural justice.[51]

[83] If the Standards Committee elects to take no further action, it must give written notice of that fact forthwith to the complainant and the practitioner against whom the complaint has been made.[52] That notice must provide reasons for the decision, and advise both parties of the right of review conferred by s 193 of the Act.[53]

[84] If, on the other hand, the Standards Committee decides to inquire into a complaint, it must do so as soon as practicable[54] and give notice to the practitioner against whom the complaint has been made in accordance with s 141.

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45 Section 132.
46 Sections 132-135(1).
47 Section 137(1)(a).
48 Sections 137(1)(b) and 143.
49 Sections 137(1)(c) and 138.
50 Section 137(2).
51 Section 142(1).
52 Section 139(1)(a) and (b).
53 Section 139(2)(a).
54 Section 140.

[85] In the course of its investigation, the Committee may require an investigator to look into the complaint and furnish it with a report.[55] It may also conduct a hearing under s 152(1), which is to be on the papers unless directed otherwise.[56] The procedures to be followed in respect of hearings on the papers are set out in s 153(3)-(8). These prescribe the manner in which evidence is to be heard, as well as providing that written, but not oral, submissions may be received from both the complainant and the practitioner. Section 151 governs the evidence that the Standards Committee may consider.

[86] After inquiring into the complaint and conducting a hearing with regard to the matter, the Standards Committee may make one or more of the following determinations:[57]

> (2) The determinations that the Standards Committee may make are as follows:
>
> (a) a determination that the complaint or matter, or any issue involved in the complaint or matter, be considered by the Disciplinary Tribunal:
>
> (b) a determination that there has been unsatisfactory conduct on the part of—
>
> (i) a practitioner or former practitioner; or
>
> (ii) an incorporated firm or former incorporated firm; or
>
> (iii) an employee or former employee of a practitioner or incorporated firm:
>
> (c) a determination that the Standards Committee take no further action with regard to the complaint or matter or any issue involved in the complaint or matter.
>
> (3) Nothing in this section limits the power of a Standards Committee to make, at any time, a decision under section 138 with regard to a complaint.
>
> (4) Subject to the right of review conferred by section 193 and to section 156(4), every determination made under subsection (1) and every order made under section 156 or section 157 is final.

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55 Sections 144-146. Consideration of any such report must occur in private: s 148(1). However, the report must generally be disclosed to the practitioner against whom the complaint is made: ss 149 and 150.

56 Section 153(1).

57 Section 151(2).

[87] If the Standards Committee determines that the complaint or other matter ought to be considered by the Tribunal, s 154 applies:[58]

> **154 Reference of complaint or matter to Disciplinary Tribunal**
>
> (1) If a Standards Committee makes a determination that the complaint or matter be determined by the Disciplinary Tribunal, the Standards Committee must—
>
> (a) frame an appropriate charge and lay it before the Disciplinary Tribunal by submitting it in writing to the chairperson of the Disciplinary Tribunal; and
>
> (b) give written notice of that determination and a copy of the charge to the person to whom the charge relates; and
>
> (c) if the determination relates to a complaint, give both written notice of that determination and a copy of the charge to the complainant.
>
> (2) If the person who is the subject of the complaint or matter is a provider under the Legal Services Act 2011, the Standards Committee must provide a written notice of the determination to the Secretary for Justice.

[88] Unlike a Standards Committee, the Tribunal must hold its hearings in public[59] and parties are entitled to be heard in person or through counsel.[60] If misconduct or unsatisfactory conduct is proved, the Tribunal has a wider range of orders available to it, including the more serious orders of suspension and striking practitioners off the roll of barristers and solicitors.[61]

[89] The membership of the Tribunal is larger than the Standards Committees, with a more stringent process of appointment. The Tribunal consists of a chairperson and deputy chairperson, and not less than 7 but not more than 15 lay persons. It also comprises not less than 7 but not more than 15 lawyers, of whom not less than 3 but not more than 5 must be conveyancing practitioners. The chairperson and deputy chairperson of the Tribunal must each be a person who, whether or not he or she holds or has held judicial office, is not a practitioner but has not had less than 7 years' experience in practice as a lawyer.[62] Both of these members are appointed by

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58 Section 151(2)(a).
59 Section 238.
60 Sections 237 and 238.
61 Section 242(1)(c) and (e).
62 Section 230(1).

the Governor-General on the recommendation of the Minister of Justice.[63] The lay members are appointed by the Governor-General on the recommendation of the Minister (following consultation with persons identified in s 233(1)). The members who are lawyers are appointed by the Council of the NZLS.[64]

[90] The decision of a Standards Committee may be reviewed at the request of either party (among others) by the LCRO.[65] The LCRO has a duty to conduct a review following receipt of the application,[66] with the review being conducted in private.[67] Such reviews are to be conducted with "as little formality and technicality, and as much expedition" as is consistent with the requirements of the LCA, proper consideration of the review and the rules of natural justice.[68] Heath J observed in *Orlov* that this emphasises Parliament's intention that complaints were to be dealt with promptly, with the rules of natural justice being tailored to achieve that object.[69]

[91] The LCRO is empowered to direct the Standards Committee to reconsider complaints or decisions.[70] Alternatively, the LCRO may confirm, modify or reverse the Standards Committee's decision, and may exercise any power that the Standards Committee could have exercised. This includes the power to lay a charge before the Tribunal.[71]

The reasoning in Orlov

[92] In *Orlov*, counsel for the NZLS had submitted that it would be inappropriate to impose any restriction on, or threshold in respect of, the type of case that a Standards Committee could refer to the Tribunal. The NZLS contended that the imposition of a threshold would place a gloss on s 152(2)(a), and would result in the courts reintroducing a test that Parliament had deliberately discarded. Further, although a Standards Committee is required to provide reasons for a decision that

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63 Section 230(2).
64 Section 233(2) and (3).
65 Sections 193 and 194.
66 Section 199.
67 Section 206(1).
68 Section 200.
69 *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154 at [71].
70 Section 209.
71 Sections 211 and 212.

there has been unsatisfactory conduct or that no further action will be taken, it is not required to provide reasons for any decision to refer a complaint to the Tribunal. Counsel submitted that this supported the conclusion that the ability of a Standards Committee to refer a complaint to the Tribunal is not constrained in any way. Counsel also pointed out that s 154 of the LCA imposes obligations on the Standards Committee when referring a complaint,[72] but does not restrict the type of case that it may refer to the Tribunal.

[93] Heath J considered the LCA required the Standards Committee to evaluate complaints on a case by case basis. His Honour acknowledged that, unlike the 1982 Act, the LCA does not require a Standards Committee to determine that a complaint is "of sufficient gravity" to warrant consideration by the Tribunal. He held, however, that a similar test must necessarily be implied in order to avoid relatively trivial matters being referred to the Tribunal "at the whim of a Standards Committee".[73]

[94] Heath J considered two factors to be relevant to determining whether a threshold test applied. The first of these is the differing functions and powers vested in the Tribunal on the one hand, and a Standards Committees on the other.

[95] Heath J noted the differences in the appointment procedures between the two bodies. He considered these indicated "the importance of the Tribunal's jurisdiction in the context of the serious charges it is expected to hear and determine".[74] He also had regard to the following differences in the functions and powers vested in a Standards Committees on the one hand, and the Tribunal on the other:

(a) Only the Tribunal may make findings on charges of misconduct.

(b) Where a finding of unsatisfactory conduct is made, the Standards Committee has extensive powers,[75] but these do not include the ability to strike a practitioner from the roll of barristers and solicitors nor to

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72 Including framing an appropriate charge, laying it before the Tribunal and giving the requisite notices.

73 *Orlov*, above n 69, at [63].

74 At [65].

75 Lawyers and Conveyancers Act, s 156.

suspend him or her from practice. Those powers are reserved for the Tribunal.[76]

(c) Unlike a Standards Committee or the LCRO, the Tribunal sits in public, and parties are entitled to be heard in person or through counsel.[77] The Tribunal is required to observe the rules of natural justice, while the LCRO is to conduct reviews with "as little formality and technicality, and as much expedition" as is consistent with the requirements of the LCA, proper consideration of the review and the rules of natural justice.[78]

(d) While a Standards Committee performs investigative, judicial and prosecutorial functions, the Tribunal's role is strictly judicial.[79]

[96] Secondly, Heath J noted that an adversarial standard of proof had to be met before the Tribunal could make a finding of misconduct. Heath J accepted, however, that this factor does not affect an assessment of whether a threshold requirement is present.[80] He also observed that there is "no express provision [in the LCA] as to the standard to which a Committee needs to be satisfied before it decides what determination to make under s 152(2)."[81] Referring a complaint to the Tribunal is one of the determinations that may be made under s 152(2).

[97] These factors led Heath J to conclude that the Tribunal should only deal with cases where there is a real risk that orders going beyond those within a Standards Committee's jurisdiction may be made.[82]

[98] Having concluded that a threshold test ought to apply, Heath J held that the test ought to be similar to that provided by the 1982 Act. His Honour articulated the test as being "whether there is a real risk that the practitioner might be suspended or

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76 Section 242(1)(c) and (d).
77 Sections 237 and 238.
78 Section 200.
79 *Orlov*, above n 69, at [78].
80 At [77].
81 At [77].
82 At [78].

struck off".[83] This test would, His Honour said, have the advantage of "focusing" the minds of the Standards Committee on the likely outcomes of a consideration of a charge. It would also act as a disincentive ("in far less likely circumstances") to anyone who might be motivated by animosity or ill will towards a particular practitioner.[84]

[99] Heath J concluded by stating that he had not overlooked the fact that a Standards Committee does not have to provide reasons for deciding to refer a complaint to the Tribunal. His Honour commented that reasons are not prohibited and, where they are not given, judicial review of the decision may still occur. In such a case the Court will consider the nature of the conduct, as well as the form of any charge drafted and the bases for it, in order to determine whether the Standards Committee had exceeded its jurisdiction.

[100] Heath J considered that, taken individually, ten of the 12 charges the Standards Committee had laid against Mr Orlov were not sufficiently serious to justify referral to the Tribunal. One of these contained an allegation of misconduct based on an alleged failure to provide a file to an investigating committee. Counsel for Mr Hart contends that, adopting the same reasoning in the present case, the Standards Committee should not have referred charge three to the Tribunal for determination.

Analysis

[101] We respectfully take a different view to that taken by Heath J in relation to this issue.

[102] We consider the wording used in the LCA indicates that Parliament made a deliberate decision not to circumscribe or restrict the circumstances in which a Standards Committee may refer a complaint to the Tribunal for determination. Parliament's decision to exclude from the LCA the "sufficient gravity" test previously contained in the 1982 Act must be regarded as deliberate. It reflects, in

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83 At [80].
84 At [81].

our view, Parliament's intention that such a test is no longer to govern the referral of a complaint to the Tribunal for determination. Moreover, the LCA contains no other provisions limiting the ability of a Standards Committee to refer a complaint to the Tribunal. The fact that a Standards Committee has no obligation to provide reasons for a decision to refer a complaint to the Tribunal is also important. It is inconsistent with the notion that jurisdiction for referral depends upon the Standards Committee being satisfied that a particular threshold test has been met.

[103] In practice, Standards Committees will in most cases only refer a complaint to the Tribunal if the alleged conduct forming the basis of the complaint is sufficiently serious to warrant consideration of suspension or striking off. It is important to bear in mind, however, that the Tribunal has a significant role to play in maintaining public confidence in the legal profession. It plays an important part in determining national standards, and has a greater ability than a Standards Committee to maintain oversight of the profession at a national level. It therefore plays a vital role in assisting to achieve two of the LCA's purposes, which are to maintain public confidence in the provision of legal services and to protect consumers of those services.[85] For those reasons we consider that some complaints may appropriately be determined by the Tribunal even though the likely sanction will not involve suspension or striking off.

[104] A complaint may, for example, raise very complex factual or legal issues. Alternatively, it may be likely to create a significant precedent for the legal profession. In such situations a Standards Committee could not be criticised for referring a complaint to the Tribunal, even where it was unlikely that orders for suspension or striking off would ultimately be made if the complaint was upheld. The factual matrix of individual cases will, however, vary infinitely. For that reason it is neither necessary nor desirable for us to attempt to prescribe the circumstances in which a Standards Committee should refer a complaint to the Tribunal for determination.

[105] We accept it would be wrong for a Standards Committee to refer a complaint to the Tribunal arbitrarily, on a whim or for a collateral purpose. The decision in

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[85] Lawyers and Conveyancers Act, s 3(1)(a) and (b).

each case will need to be made having regard to the purposes and objectives of the LCA. It is also important that the resources of the Tribunal are not expended in determining trivial or inconsequential complaints. We do not consider, however, that the risk of inappropriate referral is high. Standards Committees can be taken to understand the limits of their own powers and functions, and to be aware of the proper role of the Tribunal within the framework of the LCA. They will also be aware of the desirability of having complaints determined expeditiously, and of keeping the costs of all involved to a minimum. We therefore consider that Standards Committees will generally be best placed to determine which cases should properly be referred to the Tribunal for determination.

[106] Other practical considerations suggest that this approach is appropriate. As in the present case, a Standards Committee may encounter a complaint or series of complaints arising out of different incidents. Standing alone, some of the allegations may not warrant referral to the Tribunal. They may be relevant, however, when considering the nature of the orders to be made in relation to complaints arising out of other more serious allegations. In that situation the Tribunal ought to be able to deal with all of the complaints together. Any other approach would result in fragmentation of the disciplinary process, and would create a risk that the Tribunal might make orders without a full appreciation of the practitioner's overall conduct.

[107] For these reasons we do not accept that the Tribunal did not have the necessary jurisdiction in the present case to determine the third charge.

[108] Furthermore, we consider any refusal to comply with a lawful requirement made by an investigating committee to be a potentially serious matter. Any suggestion to the contrary would not be consistent with the approach taken recently in this Court. In *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No 2*, for example, Cooper J said:[86]

> [108] The purposes of the Lawyers and Conveyancers Act include maintenance of public confidence in the provision of legal services, protection of consumers of legal services and recognition of the status of the

[86] *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No 2)* HC Hamilton CIV-2010-419-1209, 20 December 2010.

> legal profession.[87] To achieve those purposes the Act provides for what it described as "a more responsive regulatory regime in relation to lawyers and conveyancers".[88] The provisions of Part 7 of the Act dealing with complaints and discipline are central to achieving the purposes of the Act. I consider that legal practitioners owe a duty to their fellow practitioners and to the persons involved in administering the Act's disciplinary provisions (whether as members of a Standards Committee or employees of the New Zealand Law Society) to comply with any lawful requirements made under the Act. There must also be a duty to act in a professional, candid and straightforward way in dealing with the Society and its representatives. It is completely unacceptable for a practitioner to engage in what appears to have been an abusive campaign such as Mr Parlane conducted here.
>
> [109] The duties to which I have referred do not exist to protect the sensibilities of those involved in administering the Act's disciplinary provisions. While courtesy is a normal aspect of professional behaviour expected of a practitioner, it is not an end in itself. The purpose of the disciplinary procedures is to protect the public and ensure that there is confidence in the standards and probity met by members of the legal profession. It is therefore axiomatic that practitioners must co-operate with those tasked with dealing with complaints made, even if practitioners consider that the complaints are without justification. …

[109] Similarly, in *Legal Complaints Review Officer v B*, Goddard J resorted to the inherent power of the Court to compel a practitioner to provide a file that the LCRO had lawfully required the practitioner to produce.[89] Her Honour noted that the exercise of the inherent jurisdiction was being sought:[90]

> [44] … to compel compliance with the lawful directions of a duly appointed statutory authority with a specific mandate to ensure confidence in the provision of legal services and to protect the consumers of legal services. Commensurate with this is the duty of every legal practitioner to facilitate the administration of justice and to not wilfully obstruct the administration of justice by non-compliance. B's submission that there is no justiciable cause of action is not apt and his repeated failure to comply with the Legal Complaints Review Officer's lawful requests over such a lengthy period of time is effectively frustrating the review to which the complainant is lawfully entitled.

[110] We are also satisfied, for the reasons set out later in this judgment, [91] that the facts giving rise to the third charge were serious. Coupled with the other charges and Mr Hart's disciplinary history, we are satisfied that they were of sufficient gravity to

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87 Lawyers and Conveyancers Act, s 3(1).
88 Lawyers and Conveyancers Act, s 3(2)(b).
89 *Legal Complaints Review Officer v B* [2012] NZHC 1349.
90 Ibid, at [44].
91 At [196]–[210].

warrant the charge being considered by the Tribunal. This ground of appeal therefore fails.

Third and fourth grounds of appeal - did the Tribunal err during the hearing by failing to call witnesses who had provided evidence in support of Mr Hart?

[111] We are able to deal with these grounds together, because they raise similar issues.

[112] The third ground of appeal is based on a submission that the Tribunal should not have found the first charge proved in circumstances where the complainant did not appear at the hearing. The fourth ground overlaps with the third ground, and is based on the fact that the Tribunal did not require more of Mr Hart's witnesses to give oral evidence at the hearing. As noted above,[92] the Tribunal asked counsel for the Standards Committee to arrange for one of Mr Hart's witnesses, Ms Murray, to appear before it to give oral evidence. Counsel for Mr Hart contends that, having taken that step, the Tribunal ought to have required at least two of Mr Hart's other witnesses to give oral evidence at the hearing.

[113] Mr Hart indicated prior to the hearing on 16 July 2012 that he would require the complainant in relation to the first charge to be present for cross-examination at the hearing. The complainant was by that stage either living overseas, or about to depart overseas. It is common ground that he was not present when the hearing commenced on 16 July, and that the Tribunal did not require him to give oral evidence at the hearing.

[114] Counsel for Mr Hart submits that, once the complainant did not appear at the hearing, the Standards Committee ought to have withdrawn the first charge. Counsel also submits that, had the Standard's Committee refused to do so and had Mr Hart been able to attend the hearing, he would have sought to cross-examine the complainant. Once it became apparent that the complainant would not appear, Mr Hart would have asked the Tribunal to dismiss the first charge. Had this occurred, it is argued, it is "indisputable" that the Tribunal would have dismissed the

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92 At [67].

charge. Mr Hart therefore seeks an order quashing the Tribunal's determination in relation to the first charge.

[115] To a large extent, the answer to this submission lies in our earlier conclusion[93] that the reason for Mr Hart's non-appearance at the hearing was his deliberate decision to disengage from the proceedings. This was therefore not a case of Mr Hart's inability to appear to conduct his own defence. Once he elected not to appear, Mr Hart ran the risk that the hearing would continue in his absence. In that event he would have no ability to cross-examine witnesses, or to make submissions to the Tribunal. If he did not arrange for his own witnesses to attend, he had no reason to expect the Tribunal to arrange for that to occur. Nevertheless, we propose to consider whether the fact that the Tribunal did not require more of Mr Hart's witnesses to give oral evidence led to a miscarriage of justice.

[116] The third ground of appeal overlaps with the fourth ground because counsel for Mr Hart submits that, in critical respects, the evidence of the complainant in relation to the first charge was in conflict with that given by one of Mr Hart's witnesses, Mr Gardiner. He contends that the Tribunal ought to have called Mr Gardiner to give evidence, just as it had required Ms Murray to give evidence. He submits that the Tribunal was not entitled to prefer the evidence contained in the complainant's affidavit over that given by Mr Gardiner when it had not heard orally from either witness.

[117] Having reviewed the evidence of both witnesses, however, we do not consider it was necessarily in conflict. The relevant portions of the complainant's affidavit are as follows:

> 3 I met with Mr Hart, at his chambers in Ponsonby, on 9 May 2008, for discussion about the work he wanted me to undertake and the payment arrangements. He explained that he would be applying for legal aid (and had not yet done so) but that he might not be able to pay my invoices immediately on the same month they were rendered but would be able to pay very soon after, probably within a month. I agreed to undertake the work on those terms. Nothing further was said about legal aid or payment arrangements.

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93 At [50].

> 4 I undertook the work for Mr Hart and issued invoices to him, dated 31 May 2008 for $3,772.35 including GST and a second and final invoice dated 30 June 2008 for $910.01
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> …
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> 6. Mr Hart did not pay me over a prolonged period, and it was not until after I had submitted my complaint to the Law Society that he paid me half the invoiced amount. He paid me $2,341.18 on 20 April 2009. I have not received any further payment and remain unpaid for the balance of the invoiced amounts.
>
> 7. I am aware that Mr Hart says that he told me that any payment was dependent on approval of my invoices by the Legal Services Agency, although it is not clear to me what actually happened with that approval. Mr Hart has simply not explained any of this to me. I deny that he said that my invoice had to be approved by the Legal Services Agency or that payment was dependent on approval by the LSA. The only discussion we had about legal aid, which was very brief, was as I outlined earlier – that the client was being funded by legal aid which might mean a delay in payment of about a month after my invoices had been rendered.

[118] Mr Gardiner's response to the complainant's evidence on this point is as follows:

> 11. The matters to which [Mr D] refers happened about three and a half years ago. I do not have a precise recall as regards what occurred because of that. I have however refreshed my memory, referring to my timesheets for 9 and 10 May 2008.
>
> …
>
> 18. I remember Mr Hart discussing legal aid with [Mr D]. He explained that the work he was doing for [the client] was on legal aid and that the work that [Mr D] did would also be covered by it. I do not recall Mr Hart referring specifically at any stage to when invoices submitted by [Mr D] would be paid.
>
> 19. I believe that it should have been clear to [Mr D] that any invoice he submitted would need to be approved by the Legal Services Agency.
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> 20. I note that [Mr D] does refer (paragraph 7) to the discussion about legal aid being brief but I do not remember any specific mention of when approval or payment might be given. I do not believe that Mr Hart would have given a timeframe for whatever the Legal Services Agency might do as he had no control over the LSA's processing of any application or invoice.

[119] The critical aspect of the complainant's evidence for present purposes was that Mr Hart did not advise the complainant that his invoices had to be approved by the Legal Services Agency, or that payment for his services was dependent on

approval of the invoices by the Agency. Mr Gardiner does not contradict these aspects of the complainant's evidence. Rather, his evidence supports the complainant because he specifically recalls Mr Hart telling the complainant that the client was in receipt of legal aid, and that any work the complainant did would be covered by legal aid. Nor does Mr Gardiner say that Mr Hart specifically told the complainant his invoices would need to be approved by the LSA. Rather, Mr Gardiner deposes that "it should have been clear" to the complainant that any invoice he submitted would need to be approved by the Agency.

[120] For these reasons we do not consider the evidence given by the complainant and that given by Mr Gardiner to be in conflict. The Tribunal was therefore not required to summons Mr Gardiner to give oral evidence at the hearing.

[121] Counsel for Mr Hart also submits that the Tribunal should have required another of Mr Hart's deponents, Mr Alistair Haskett, to give oral evidence in relation to the fourth charge. This charge related to the alleged overcharging of Mr A and his family. The facts in connection with this charge are more fully set out in the next section of the judgment.[94]

[122] Counsel for Mr Hart contends that Mr Haskett's written evidence was in conflict with that given by Mr A's sister, Ms T. He says the Tribunal could not properly resolve that conflict in favour of Ms T without hearing from Mr Haskett. He contends that resolution of this issue was critical to the determination of the fourth charge, and that the Tribunal therefore erred in the manner in which it determined the fourth charge.

[123] The Tribunal did not refer to Mr Haskett's evidence when considering the fourth charge, so it clearly did not regard his evidence as being material, let alone critical, to determination of that charge. Having reviewed Mr Haskett's evidence, we have no difficulty in understanding why the Tribunal did not feel the need to refer to it.

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[94] At [132]-[143].

[124] Mr Haskett was a barrister working in Mr Hart's chambers at the time Mr Hart received instructions to act on behalf of Mr A. Mr Haskett met with Ms T on 13 November 2008 in order to obtain initial instructions from her, and to provide her with preliminary advice. He also spoke with Ms T by telephone later that same day.

[125] The relevant portions of Mr Haskett's written evidence regarding these attendances is as follows:

> I met with [Ms T] on 13 November 2008. I was asked to meet with her on Mr Hart's behalf to get and provide initial information. She provided background about the allegations against [Mr A] and explained how he had been declined bail in the North Shore District Court.
>
> I explained that legal aid may be available to [Mr A] however, Mr Hart would not be in a position to act on that basis. [Ms T] stated that the family would meet legal fees. I was not asked for an estimate of fees but I did offer that fees for the type of case were likely to be substantial. [Ms T] stated that she knew the fees paid to Mr Hart by her cousin, Mr Stephen [A], and added that money was not an issue. I am aware that Mr Hart acted for [Mr Stephen A] on a manslaughter trial and that the fees paid in that case were substantial.
>
> [Ms T] was very clear that she wanted Mr Hart to act for her brother. I explained the need for an instructing solicitor. I set up a further meeting between [Ms T] and Mr Hart. I am aware that Mr Hart subsequently met with [Ms T] and that he met with [Mr A] the next day at North Shore District Court. …

[126] Mr Haskett annexed two internal emails to his statement. Counsel for Mr Hart contends that the information contained in the first of these was in direct conflict with material potions of Ms T's evidence. Mr Haskett sent this email to Mr Hart at 11.02 am on 13 November 2008, summarising what he had discussed with Ms T when he had met with her earlier that morning. The relevant portion of the email for present purpose is as follows:

> - **Next appearance is 10 am tomorrow at AHC**. Apparently this is jointly with co-accused.
>
> - **Family to meet at 2 pm today with BJH**. Want to talk further about instructing BJH and about bail and ISON.
>
> - Private retainer okay. Explained that fees for agg rob case can be high depending on the facts and how the case progresses. [Ms T] said

> she knows how much Stephen [A] paid and there is no problem with that or more if needed.

[127] The second email annexed is from Mr Hart to Mr Haskett in which Mr Hart detailed the offending and concluded "money is no option". We assume he meant "money is no issue".

[128] There is some conflict between the evidence of Ms T and Mr Haskett as to whether Stephen [A] was a cousin, and whether she communicated, in effect, that money was "no issue". However the important feature of Ms T's evidence was that she maintained she was never advised of the hourly rate Mr Hart proposed to charge for his services, the basis upon which he was to charge for his services, and the nature and extent of the work Mr Hart would need to undertake. The Tribunal held that Mr Hart had an obligation to provide that information when he was first engaged by Mr A and his family, and that he failed to meet that obligation. Mr Hart had instead taken the opportunity during his meetings with the family to require them to make lump sum payments to him without specifying the attendances those payments would cover. Ms Murray's evidence conflicted with Ms T's evidence on whether Ms T was advised of Mr Hart's hourly rate, and it was for this reason the Tribunal asked her to attend, ultimately preferring Ms T's evidence.

[129] Mr Haskett's evidence did not assist Mr Hart on this point. He did not say that he advised Ms T of the rate at which Mr Hart would be charging for his services, or of the nature and extent of the work Mr Hart would need to undertake. He told her only that Mr Hart's fees were likely to be substantial. It was not therefore necessary for the Tribunal to have regard to Mr Haskett's evidence, or to require him to give oral evidence.

[130] The third and fourth grounds of appeal fail as a result.

Fifth ground of appeal: fees charged to Mr A and his family

[131] This ground of appeal relates to the finding in relation to the fourth charge that Mr Hart was guilty of misconduct by grossly overcharging his client, Mr A,[95] and failing to provide members of Mr A's family, who instructed Mr Hart and who assumed responsibility for paying his fees, with information in connection with his fees.[96] For Mr Hart it is argued that the Tribunal erred in rejecting the evidence of two of the witnesses called on behalf of Mr Hart: Mr Burcher and Mr McKenzie. It is also argued that the Tribunal erred by placing too little weight on the value to the client of the work that was done, and the value to them of having a senior criminal lawyer representing Mr A. For Mr Hart, counsel submitted that the Tribunal's approach showed a bias in its thinking – a bias toward undervaluing the work of those at the Criminal Bar. He submitted that if such work had been undertaken in a civil context, the Standards Committee would have had no issue with the fee charged.

Background

[132] To prove this charge the Standards Committee relied upon the evidence of Ms T (Mr A's sister), and Ms Basnayake (a junior solicitor who worked in Mr Hart's office for a short period of time). It also relied upon the expert evidence of Mr John Billington QC. In response to the charge, Mr Hart filed an affidavit from himself and affidavits from two lawyers who had worked in his office, Ms Murray and Mr Haskett. He also provided expert evidence in affidavit form from Mr Burcher, Mr McKenzie, Mr LaHatte and Mr Williams.

[133] The facts as they emerged from the affidavits, and from evidence given by some deponents before the Tribunal, were as follows. Mr A was arrested and held in custody on charges of aggravated robbery and causing grievous bodily harm with intent to do so. Ms T said that she phoned Mr Hart's office on 13 November 2008 to arrange legal representation for her brother. She spoke with Mr Haskett. It was agreed that she would come in to Mr Hart's offices later that day. When she did so,

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95 Contrary to Rule 9 of the Conduct and Client Rules 2008.
96 As required by Rule 3.4 of the Conduct and Client Care Rules.

she initially met with Mr Haskett. We have set out the essential features of those discussions earlier.[97]

[134] Later that afternoon Ms T met with Mr Hart, who was joined in that meeting by Mr Haskett and another young lawyer. The family told Mr Hart that Mr A was a young man from a stable and supportive family background, and had previously not been in trouble with the law. They wanted him home. The meeting was focused mostly on bail and also on interim name suppression – both issues being important to the family. Ms T's evidence was that she asked Mr Hart about fees because she knew little about how legal services were costed, and costs were important to the family. She recalled that Mr Hart was evasive about fees. She said that he did not tell her his charge out rate, then or later, nor did he give an estimate or indication of fees for particular stages of work. He did, however, ask about family assets and she told him her parents had a freehold home.

[135] Ms T's recollection is that Mr Hart said he needed $10,000 immediately before starting on any work. He did not explain the nature of the payment, nor did he explain whether it was required to cover particular activities, or to take the case to any particular stage. He did not mention hourly rates. In her affidavit, Ms Murray said she was present at that meeting, and heard Mr Hart tell Ms T that his charge out rate was $1,000 an hour. As earlier noted,[98] Ms Murray was called by the Tribunal because of the conflict between her evidence on this pointand that of Ms T.

[136] Ms T arranged to borrow the money from an aunt in Samoa. She gave Mr Hart a cheque for $10,000 when they met at the North Shore District Court the next day. She described a lot of waiting around at the District Court, and said that they were at the Court from about 10 am until around 3 pm.

[137] The next significant event was a meeting with Mr Hart at his office three days later, on 17 November 2008. The purpose of this meeting was for Mr Hart to explain to Ms T her brother's situation, and to explain the bail appeal process. Ms T said there was little discussion about the criminal charges themselves; the focus was on

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97 At [124]-[128].
98 At [67] at [128].

bail and name suppression. Mr Hart raised the matter of fees again, and said he required a further payment of $15,000 to continue with the bail appeal and application for name suppression. Ms T says that she told Mr Hart of her father's insistence that he appear personally when Mr A came before the Court, including for the bail appeal in the High Court. This was because they had instructed Mr Hart based on his reputation.

[138] On 19 November 2008, Ms T delivered a cheque to Mr Hart which was again funded by her aunt in Samoa. However, on the day before the bail appeal was due to be heard, Mr Hart spoke with Ms T on the telephone, saying he would not be able to conduct the appeal. He said another lawyer, Mr Malik, would appear instead. When she attended the Court the next day, Mr Malik was there along with Ms Basnayake. The appeal was dismissed, but the Judge suggested that an application to the District Court for electronically monitored bail ("EM bail") might be successful.

[139] Ms Basnayake's evidence was that she had drafted the High Court documents in support of the appeal against the refusal to grant bail. This included drafting seven affidavits concerning details of a surety offered in support of the appeal. She also drafted the papers in support of the application for interim name suppression, and for the subsequent application for EM bail.

[140] There was another family meeting with Mr Hart at his office on 1 December 2008. This took about one hour and 30 minutes, and concerned EM bail and further interim name suppression. Mr Hart asked for payment of a further sum of $10,000 to cover attendances at the North Shore District Court. Ms T arranged a further loan from her aunt in Samoa, and delivered a bank cheque to Mr Hart at the time of the EM bail hearing.

[141] Mr Hart appeared for Mr A at the North Shore District Court to obtain both interim name suppression and EM bail. Neither application was ultimately opposed, and both were granted. However, Ms T says that by this time she had lost confidence in Mr Hart and terminated the relationship.

[142] In Mr Hart's affidavit he says that the charges Mr A faced were serious and complex. Because of this it was going to be difficult to obtain interim name suppression and bail for him. He said he received instructions to appear and apply for name suppression and bail, to deal with prison authorities and matters relating to Mr A's general welfare, to appeal to the High Court against the refusal to grant bail, to apply to the District Court for EM bail, and to consult and advise Mr A including prison visits, telephone discussions and meetings.

[143] He said that the value of the total amount of time recorded on the file was $45,455.91. That sum did not reflect other considerations such as the seriousness of the charges, the need for urgency on many occasions and the outcome. He considered relevant the fact that he ultimately succeeded in securing interim name suppression and EM bail for Mr A even though bail was initially declined in the District Court and in the High Court on appeal. The justification for his accounts was, he said, set out in Mr Burcher's affidavit.

Expert Evidence

[144] The Standards Committee instructed Mr Billington to give his opinion about the reasonableness of the fee. Mr Billington reviewed the time records. He noted that time records indicated that counsel appeared in court as follows:

(a) 14 November. Mr Hart appeared in the District Court for a total appearance time of 3 minutes and 20 seconds.

(b) 25 November. Two counsel appeared in the High Court in support of the appeal for 59 minutes.

(c) 15 December. Mr Hart appeared on the unopposed bail and name suppression applications for a total of 3 minutes and 4 seconds, and 30 minutes 35 seconds respectively.

[145] Mr Billington said that it was appropriate that Mr Hart made the first appearance, but noted that he spent a good part of the day on 14 November 2008 at

the court, notwithstanding the very short appearance time. He said the question must be asked whether, in making what was essentially a formal appearance, Mr Hart had explained to his clients that he would be charging $1,000 an hour for every hour spent at court. The issue also arose as to why he had not asked the Registrar to call his matter either at the beginning or end of the list to meet his convenience as senior counsel. Mr Billington observed that the courts are generally very accommodating of senior counsel in this respect.

[146] Mr Billington qualified his comments regarding the time spent by the lawyers on particular client matters, observing that the time spent cannot on its own determine the reasonableness of the fees:

> It is a measure of the time spent by the lawyer on a matter, efficiently or not, and may or may not be reflected in the value to the client.

[147] He said that to achieve an indication of what might be involved in a matter such as this it would be reasonable to allocate a half day for each of the relevant matters. On that basis, Mr Hart could have estimated three half days for the two appearances in the District Court, together with one appearance in the High Court. At $4,000 per half day (based on an hourly rate of $1,000), the cost would be approximately $12,000 plus GST. To that amount should be added some time for preparation. Allowing for six half days, that would total $24,000 plus GST. This would be an appropriate fee if all attendances had been by Mr Hart, but they were not. Most were by people who were much more junior than Mr Hart.

[148] In relation to Mr Hart's charge out rate, Mr Billington observed that $1,000 is a high hourly rate even for senior counsel. He expected that a client would only be charged $1,000 an hour for work justifying that rate. On that basis it was difficult to see any justification for Mr Hart charging $1,000 for sitting in court waiting for a case to be called, for travelling time and for some of the other attendances charged at that rate.

[149] Mr Billington's conclusion was that, on the information available and for the reasons he had set out, Mr Hart could not contend that the fees charged in the case were reasonable. If Mr Hart had been involved in all attendances the fee should not

have exceeded $24,000, but given that the majority of the work was done or should have been done by junior lawyers, the fee should have been significantly less. Mr Billington said that a number of people would happily have performed these tasks for $15,000, and performed them well.

[150] When questioned by the Tribunal, Mr Billington accepted that the fees had to be reviewed on the basis that Mr Hart achieved the desired results for Mr A. He also accepted that representing a young man such as Mr A, facing such serious charges, was a profound responsibility. He referred to Mr Williams' observation that some senior counsel can and do charge large fees, perhaps naming a lump sum amount for a defined task, so that the hourly rate works out very high because the task takes relatively little time. Mr Billington said that such an approach is acceptable, but only if the client has a clear understanding that that is the basis on which he or she will be represented and charged.

[151] Mr Billington placed significant emphasis on the provision of information to clients early in the process so they know what is ahead of them and what it is likely to cost. He argued that this step is particularly important where clients may not have dealt with lawyers before, and were perhaps less sophisticated than commercial clients who were more likely to ask the practitioner about costs. This was particularly important in a stressful situation, where a client's judgment might be impaired. While putting the scope of work in writing to clients was the best practice, not all barristers did so. The important thing was to explain (in terms the client understands) what is required by the client, what can be done for them, and whether their expectations can be met. Mr Billington stressed that all private clients have finite means. Ability to pay was and always is a key issue. It is therefore a key part of a practitioner's role to advise clients as to how they can conserve their resources so that the end goal is possible. In the present context this would require advice beyond the immediate goal, that of obtaining bail and name suppression, aimed at conserving resources for the ultimate trial.

[152] Mr Hart relied upon the affidavits of Mr Burcher, Mr McKenzie, Mr Williams and Mr LaHatte. Mr Burcher described his extensive experience as a Law Society Costs Reviser, saying that he had peer reviewed or mediated in excess

of 250 costs revisions. He said that in 2003 he established a pricing consultancy service for the legal profession.

[153] Mr Burcher said that through questioning Mr Hart and Ms Basnayake, he had satisfied himself that Mr Hart's time records were accurate. He described having conducted a survey of the hourly rates of New Zealand's Queen's Counsel and Senior Counsel and, by that means, he was satisfied that Mr Hart's rates sat within the parameters established by that exercise.

[154] Mr Burcher regarded the seriousness of the charge that Mr A faced and Mr Hart's seniority in the profession as relevant factors. So, too, the urgency for Mr A's family, who were keen to have him out of prison. Another factor was the complexity of obtaining interim name suppression for a person facing such serious charges. These factors could be seen to justify an uplift in the fee beyond the time recorded. However, in Mr Burcher's opinion Mr Hart and his colleagues' notional actual charge out rates were sufficiently high to adequately reflect these factors so an uplift was not justified in this case. He was therefore satisfied that the fees were reasonable. He said that any residual doubt about the appropriateness of Mr Hart's hourly charge out rate was met by the fact that a significant portion of time recorded had been written off.

[155] Mr McKenzie was admitted as a Barrister and Solicitor of the High Court in 1972 and has, apart from taking health sabbaticals and directing a venture bank for a period in the 1980s, practised as a lawyer from his admission until 2011. In his affidavit, Mr McKenzie described the analysis he had performed by applying a retrospective costing system based on Mr Hart's file (comprising the file notes, email and correspondence). Having applied the charge out rate for each staff member to those tasks, he concluded that the attendances by the chambers justified a total fee of $63,595 excluding GST ($71,545 GST inclusive). He noted, however, that the calculation did not include some attendances revealed by the affidavit of Ms Murray.

[156] Mr LaHatte is a barrister who has practised in the field of criminal law for more than 30 years. He was asked by Mr Hart to provide an opinion on the appropriateness of the fees charged. To do this he reviewed Mr Burcher's and

Mr McKenzie's reports and Mr Hart's file. He endorsed the methodology employed by both Mr Burcher and Mr McKenzie. He said that as the fee charged by Mr Hart was less than the time recorded on the file, there can be little doubt that the fee was reasonable based purely on a time and attendance basis.

[157] Finally, Mr Hart asked Mr Williams QC to provide an opinion as to Mr Billington's assessment of what would have been an appropriate fee for the services provided to Mr A. Mr Williams said that Mr Billington had not approached the issue from a practical perspective. He said it was clear that Ms T engaged Mr Hart because she considered him to be the best in the field, and so must have expected to pay a reasonably high cost. He confirmed that Mr Hart was a senior criminal lawyer, and observed that the family's priorities were to obtain bail and interim name suppression, both of which Mr Hart achieved.

[158] Mr Williams said that the usual way a barrister works is to make some assessment of the work involved in the case and to require a retainer, usually through a solicitor's trust account. When the barrister considers that the amount of the retainer has been consumed, he or she gives an invoice to the client. This informs the client that another instalment is necessary. He concluded that:

> ...this particular client [Ms T] has been well served by Mr Barry Hart and...the fees that she has paid are within the parameters of reasonable fees when one takes into consideration that she employed Mr Hart on the basis that he was the best lawyer and that he acted for her with the help of a reasonably large team of assistants.

Tribunal's decision

[159] The Tribunal noted that, despite requests, none of Mr Hart's witnesses had appeared for cross-examination except Ms Murray, who had been specifically asked by the Tribunal to attend.

[160] The Tribunal made a number of comments in relation to the factual narrative that emerged from the affidavits and evidence it had heard. In relation to the first attendance at the District Court, it accepted Mr Billington's observation that Mr Hart could have handed the Registrar a note asking to have his matter called promptly

after 10 am for what was a very routine appearance. It also noted the lack of explanation as to why such an experienced practitioner would require two hours to prepare for that hearing.

[161] The Tribunal referred to the conflict in evidence between Ms T and Ms Murray as to whether Mr Hart had told Ms T of his charge out rate. It considered Ms Murray's memory of the events was poor and that she had not in fact attended the meeting she claimed, but rather the meeting on 17 November. The Tribunal said:[99]

> In particular the advice as to $1,000 per hour she said was likely to have been given because that was standard practice and not because she recalled that actually having occurred. "Well, at the time I swore this affidavit … last December, what I relied on was the common practice we have." Furthermore when asked to describe the family's reaction to the figure of $1,000 per hour being mentioned, she was unable to do so. Ms Murray further conceded that she must have been in error about the $10,000 figure.

[162] The Tribunal said that to the extent Ms T's account conflicted with that of Ms Murray's in relation to the 17 November meeting, it preferred Ms T's account. It said of Ms Murray's evidence:[100]

> Indeed, we were most concerned with one of her passages of evidence where, in response to the issue of whether the family was aware of the $1000 hourly rate she described them as "desperate" and thus willing to pay anything. She did not appear to understand that this level of vulnerability in clients imposes a significantly greater obligation upon a lawyer to be very clear in explaining the level of charges and how they are incurred.

[163] In relation to the appeal to the High Court against refusal of bail, the Tribunal observed that all of the documents prepared for the appeal, specifically the submissions and seven affidavits concerning sureties, were drafted by Ms Basnayake. At that time Ms Basnayake had been admitted to the bar for just two months. While Ms Basnayake was charged out by Mr Hart at $175.00 per hour, her hourly cost to Mr Hart was $20.00 per hour.

[164] The Tribunal then addressed the application for EM bail, referring to Ms Basnayake's evidence that she had re-used the contents of the affidavits and

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99 At [73].
100 At [149].

submissions prepared for the High Court appeal to support the subsequent applications for EM bail and for continued interim name suppression. She also undertook the necessary liaison and negotiation with various authorities to prepare the reports in respect of the application for EM bail. The Tribunal commented that she clearly did an excellent job of this, because Police consent to both applications was indicated in advance of the hearing. The Tribunal said:[101]

> Despite this consent, Mr Hart has recorded in his time records a total of four hours 55 minutes in the three days leading up to and including the appearance for the consent orders. This time is recorded as "preparation" and "review".

[165] The Tribunal said it was implicit in the evidence offered on behalf of Mr Hart that some of the recorded time was purportedly spent checking Ms Basnayake's work. The Tribunal said that while it could not exclude the possibility that Mr Hart did spend time reviewing her work, it noted Mr Billington's evidence that a highly experienced practitioner would take a matter of minutes to review documents such as these. For that reason, the Tribunal expressed itself as puzzled by the recording of four hours and 55 minutes by Mr Hart for these attendances.

[166] The Tribunal said that in order to address the "grossly excessive costs" aspect of the alleged misconduct, it was necessary to consider Rules 9 and 9.1 of the Conduct and Client Care Rules.[102] Rule 9.1 provides:

> 9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:
>
> (a) the time and labour expended:
>
> (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
>
> (c) the importance of the matter to the client and the results achieved:
>
> (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:

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101 At [81].
102 At [85].

(e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:

(f) the complexity of the matter and the difficulty or novelty of the questions involved:

(g) the experience, reputation, and ability of the lawyer:

(h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:

(i) whether the fee is fixed or conditional (whether in litigation or otherwise):

(j) any quote or estimate of fees given by the lawyer:

(k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:

(l) the reasonable costs of running a practice:

(m) the fee customarily charged in the market and locality for similar legal services.

[167] The Tribunal assessed and traversed the evidence adduced on behalf of Mr Hart, including the evidence of Mr Burcher, Mr McKenzie, Mr LaHatte and Mr Williams. It said that Mr Burcher was clearly the primary source relied upon by Mr Hart, and that the other witnesses added little to the assessment required to be undertaken by the Tribunal. For that reason the Tribunal had put Mr Burcher's affidavit, in all important respects, to Mr Billington.

[168] It noted Mr Billington's seniority and his breadth of experience. It noted the difference in approach between Mr Billington and Mr Burcher. It said that Mr Burcher's starting point for analysis of what constitutes a reasonable fee was the amount of time and labour expended at the established hourly rate for Mr Hart and other practitioners. From that point, he offered his opinion on the various factors to be given weight.

[169] Mr Billington's approach was different. He worked backwards, not simply from the time records, but also by assessing what was actually done, including the attendances he enumerated and allowing a reasonable time for prison visits and normal ongoing communications with members of the client's family. Whilst agreeing with Mr Burcher that the time spent on a job at the relevant hourly rate

would tell you what the job cost you, Mr Billington pointed out that it did not tell you what the job was actually worth.

[170] The Tribunal commented on Mr Burcher's omission to provide an opinion on whether the time expended was reasonable having regard to the type of work undertaken:[103]

> No doubt that might have proved difficult for a practitioner lacking experience in this field, and may have been omitted because it was beyond his expertise. Unfortunately, that is a serious omission because that is one of the central issues to be determined in this case.

[171] It noted Mr Burcher's opinion that any residual doubt about the appropriateness of Mr Hart's hourly charge out rate was more than adequately addressed by the fact that he billed less time than he had recorded. The Tribunal said this was not a justifiable view if the billable time was objectively excessive for the task performed. The Tribunal concluded:[104]

> For reasons already outlined Mr Burcher's evidence was unable to be properly tested and we were left with question marks over some aspects of it. Given the particular expertise lacking in this field of legal practice, where the evidence of the experts differ, we prefer the evidence of Mr Billington. We also consider the evidence [of Mr Burcher] to be flawed in not examining the reasonableness of time taken for particular tasks.

[172] In relation to Mr McKenzie's evidence, the Tribunal observed that Mr LaHatte referred to Mr McKenzie as being "currently engaged as a law clerk for Barry Hart".[105] The Tribunal said that, as such, they did not consider his evidence to be independent. In any event, the Tribunal felt that his evidence largely failed to address the central issue of the value of the work or reasonable levels of charge in relation to the type of work undertaken. For that reason, the Tribunal gave it little weight.

[173] Finally, in relation to Mr Williams' affidavit, the Tribunal noted that he did not touch on the fees charged or the time spent.

[174] The Tribunal summarised its position in relation to overcharging as follows:

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103 At [121].
104 At [125].
105 At [115].

> [152] …. we consider that $35,000 does constitute gross overcharging for the very standard form of criminal work involved in this file, despite its seriousness to the client. We accept that a senior lawyer, as Mr Hart is, is entitled to charge at a high rate for his services in acting for a first time offender facing very serious charges. However we accept the evidence of Mr Billington that this work could have been comfortably carried out even at Mr Hart's very high hourly rate for between $15,000 to $16,000. This would include allowances for the work of junior barristers to support Mr Hart. We consider $1000 an hour for this type of work as probably not justified, however it is not necessary to finally rule on that matter because even at that rate the amount by which the Hart fee exceeds a reasonable fee for the work done (excluding GST) is between 95 percent and 107 percent. We consider this to be gross overcharging.
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> [153] We certainly cannot see how Mr Hart could justify seven hours at $1000 per hour for the first attendance at the District Court, nor indeed the "preparation and review" of almost five hours charged at that rate, in addition to the hours for the actual appearance on 15 December. We consider that charging such an excessive fee in itself would constitute professional misconduct, but if we are wrong in that when combined with Mr Hart's actions in failing to properly advise the clients about his hourly rate and the attendances for which they would be charged, professional misconduct is certainly made out. For example Ms T's evidence was that many family members were telephoning Mr Hart's chambers to ask questions, sometimes in a repeated fashion. She said that had they known they were going to be charged for telephone calls they would have coordinated their actions carefully and thereby sought to minimise the costs. They were completely ignorant as to the manner of charging and this speaks of extremely poor client communication on the practitioner's part.

Analysis

[175] In the written submissions filed for Mr Hart in this Court, it was submitted that the Tribunal erred in rejecting the evidence of Mr Burcher and Mr McKenzie. Although counsel for Mr Hart did not address this issue in oral argument, he did not abandon it and so we address it here. Counsel argued that it was erroneous for the Tribunal to prefer Mr Billington's evidence to that of Mr Burcher on the ground that Mr Burcher was not an experienced criminal lawyer, particularly when Mr Burcher's opinion was endorsed by Mr LaHatte. He also argued that the Tribunal erred in criticising Mr Burcher for not considering the reasonableness of time taken for particular tasks.

[176] The basis on which the Tribunal weighed Mr Burcher's evidence against that of Mr Billington's was conventional. Having considered the expert evidence, we find ourselves in agreement with the Tribunal and for the reasons it gave. The

exercise undertaken by Mr Burcher (and for that matter Mr McKenzie) was of a mechanical nature. It placed too much emphasis on the time recorded, and paid insufficient regard to the value of the task done and to the steps available to a responsible practitioner to achieve the task in a reasonably economical fashion. At the heart of the Tribunal's rejection of Mr Burcher's evidence was its view that the time recorded was excessive for the nature of the tasks undertaken. Mr LaHatte's endorsement of Mr Burcher's affidavit does not assist as Mr LaHatte himself endorsed a flawed methodology. Mr LaHatte did not carry out the exercise that was undertaken by Mr Billington to assess the reasonableness of the time recorded, or what the tasks were worth.

[177] The Tribunal was likewise justified in rejecting Mr McKenzie's opinion. As the Tribunal observed, Mr McKenzie's approach was flawed in that he failed to address the central issue of the value of the work or the reasonableness of the level of charges. The Tribunal was also correct to take into account the fact that Mr McKenzie was working for Mr Hart as a law clerk at the time he prepared his evidence. That highly relevant fact does not emerge from Mr McKenzie's own affidavit, but was instead mentioned by Mr LaHatte in his affidavit.

[178] Counsel for Mr Hart argued during the hearing that the fees were reasonable when regard is had to what was achieved for Mr A, and the fact that the family secured Mr Hart's services for the trial. For this argument he relied upon the affidavit of Mr Williams. He says that when the issue is addressed in this way, the amount of time recorded becomes a red herring.[106] This argument is inconsistent with how Mr Hart has previously sought to justify his fee. The evidence of both Mr Burcher and Mr McKenzie relied upon the amount of time recorded as the starting point for substantiating the reasonableness of the fee. In any case, in the course of giving its decision the Tribunal specifically considered whether the fee was reasonable having regard to Mr Hart's seniority and to the fact that he achieved interim name suppression and EM Bail. It accepted the evidence of Mr Billington that it was not.

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[106] Counsel for Mr Hart did, however, concede that Mr Hart's communication with Mr A's family about the fee had been sub-standard.

[179] We have read all of the expert evidence, including the evidence of Mr Billington both in his affidavits and before the Tribunal. We found Mr Billington's evidence compelling. The tasks undertaken by Mr Hart for Mr A could and should have been achieved at a far lower cost to the family. Mr Hart seems to have made little or no attempt to manage the cost of the work done. Although some of the information as to time recording is puzzling, we are persuaded by Mr Billington's evidence that the fees were far too high. Further, the suggestion of bias on the part of the Tribunal lacks credence given that it relied upon the opinion of a very senior criminal lawyer in reaching its view.

[180] We also wish to say something about Mr Hart's communication with Mr A's family, which his counsel conceded was inadequate. It emerges from the evidence filed on behalf of Mr Hart that the family were seen as ready to pay anything to help Mr A, as they were "desperate", with "money no [issue]". Even if that was the impression Mr Hart gained, it provided no justification for charging more than the work was worth. To take that approach would be to exploit the client, and that is something a lawyer must not do. It would have been open to Mr Hart to say that he would only do the work for a defined sum. But he did not do that. We also think there is much in the approach suggested by Mr Billington that a lawyer should assist the client to ensure that funds remain for the ultimate defence campaign, rather than exhaust resources during early skirmishes. Such a conversation seems never to have occurred here. Nor was there any communication from Mr Hart about the likely cost of each phase of the criminal justice process. We consider the degree of communication between Mr Hart and the family to have been wholly inadequate.

Sixth ground of appeal - was striking off a disproportionate response?

[181] There is no dispute regarding the principles to be applied in this context. In *Dorbu v New Zealand Law Society* this Court said recently:[107]

> [35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner.[108] Professional misconduct having

[107] *Dorbu v New Zealand Law Society* [2012] NZAR 481 (HC).
[108] Law Practitioners Act, s 113 and Lawyers and Conveyancers Act, s 244.

> been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off.[109] The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession.[110] It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending.[111] Wilful and calculated dishonesty normally justifies striking off.[112] So too does a practitioner's decision to knowingly swear a false affidavit.[113] Finally, personal mitigating factors may play a less significant role than they do in sentencing.

The approach taken by the Tribunal

[182] The Tribunal declined to determine the issue of penalty by analysing individually the three charges it had found proved.[114] Instead, the Tribunal found the most salient features of Mr Hart's conduct to be:[115]

(a) The fact that three different types of misconduct had been established;

(b) Mr Hart's previous disciplinary history; and

(c) The lack of any remorse.

[183] Having regard to these factors, the Tribunal was "absolutely clear" that the seriousness of the misconduct could not be adequately addressed by means of a lesser penalty such as a fine or censure.[116] The Tribunal considered that a total overview of Mr Hart's conduct, including the way in which he had responded to the proceedings before it, led to the conclusion that the public required protection from him.[117] As a consequence, only three outcomes were possible. These were: an order that he be struck off, an order suspending him from practising for a specified period,

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109 *Wellington District Law v Cummins* [1998] 3 NZLR 363 (HC).
110 *Bolton v Law Society* [1993] EWCA Civ 32, [1994] 1 WLR 512 at [15]; *Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162 (HC) at 173.
111 *Bolton*, above n 110, at [14].
112 Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 140.
113 *Bolton*, above n 110, at [14]; *Coe v NSW Bar Association* [2000] NSWCA 13CF at [10]-[11]; *Re a Practitioner: ex Parte Legal Practitioners Disciplinary Tribunal* [2004] WASCA 115 at [13] and [19]; and *Barristers' Board v Young* [2001] QCA 556 at [15]-[17].
114 *Auckland Standards Committee No 1 v Hart* [2012] NZLCDT 26 at [58].
115 At [59].
116 At [54].
117 At [60].

or an order permitting him to practise only under the supervision of another practitioner.

[184] The Tribunal noted that Mr Hart had not put forward any proposal that he practise under the supervision of a named practitioner. The only realistic options, therefore, were orders for strike off or suspension. The Tribunal held that an order striking Mr Hart off was the appropriate response for the following reasons:

> [68] We accept that striking off, particularly in a practitioner of such seniority, is a last resort response. We have grappled as to whether a significant period of suspension would suffice. The essential issue is whether the practitioner is a fit and proper person weighing all of the conduct discussed. Likelihood of rehabilitation is also relevant to suspension considerations.
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> [69] Had Mr Hart approached the various investigations to these proceedings differently, and had there been a less serious recent disciplinary history, suspension would have been the option adopted. But the arrogant and derisory manner in which he has approached any complaint – right up to the penalty hearing where he attempted to defend his failure to produce yet another file for inspection following a complaint, has meant that we can have no confidence in either his rehabilitation or protection of the public by ensuring there is no risk of reoffending. The practitioner's approach is crucial as discussed in our review of the *Fendall* decision where the practitioner's fulsome acceptance of responsibility clearly had a strong role in the Tribunal adopting which could be described as a very compassionate penalty (upheld on appeal).
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> [70] By comparison Mr Hart sought to justify his failure to produce files to his disciplinary body right to the end of his penalty hearing. We have referred to the delay and prevarication and the difficulties in discovery. We consider that there was a deliberate advance attempt to frustrate the hearing in July by not having witnesses available, including advanced arrangements for video conferencing of the expert which had been previously approved by the Tribunal. This demonstrates not only a pattern of obstruction but also a lack of remorse and inability to change.
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> [71] **[Suppressed material].**
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> [72] We accept Mr Collins' submissions that Mr Hart's attitude to a distressed and vulnerable family was exploitative and that there was a lack of integrity in his whole approach to the family, demanding payment of large sums of money without clear communication as to how this was to be applied, and what work would be undertaken.[118]
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> [73] We put these factors against the mitigating factors put before us. We have noted his pro bono and Howard League contributions. This practitioner has had a long career where many of his clients refer to "good" outcomes. We do however note that mere advocacy with fierce determination is not to be confused with "the

[118] *Auckland Standards Committee No 1 v Hart* [2012] NZLCDT 20 at [141].

> discharge of … professional duties with integrity, probity and complete trustworthiness" (*Bolton*).[119] The flavour of the submissions in mitigation and the references provided was that because there was hard work and determined advocacy, that this equated with integrity. We disagree and do not consider that these positive attributes compensate for the deficits demonstrated repeatedly over a long period of time. Mr King's submission that the practitioner "could change" is contradicted by his other submission that it is understandable that someone who has had years of experience of taking every point to advance a client's position might not fall into line when his own behavior is challenged. It also fails to take [into] account that, at most times, Mr Hart has had legal representation. The submission is insufficiently reassuring when set against the pattern of behaviour demonstrated by previous offending and the manner of conduct in each of the disciplinary processes in which he has been involved.

Discussion

[185] As the Court noted in *Dorbu*, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.

[186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.

[187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.

[188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the

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[119] *Bolton*, above n 110, at [65].

present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.

[189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.

[190] In the present case, several factors are relevant to the assessment of whether Mr Hart is not fit to remain in practice as a lawyer. The first of these is the nature and effect of the conduct giving rise to the present charges.

1. The nature and effect of the conduct giving rise to the present charges

(a) The first charge

[191] Standing alone, the conduct disclosed in relation to the first charge would not be sufficient to warrant either suspension or striking off. As the Tribunal found, it amounted to misconduct at the lower end of the scale.[120] Nevertheless, Mr Hart engaged the services of a private investigator in circumstances where he failed to advise that investigator that payment of his account was subject to approval by the LSA. As a consequence, the investigator's account in the sum of $4,682.36 was not paid when legal aid was subsequently declined. The Tribunal, rightly in our view, described Mr Hart's conduct in this context as being cavalier in his professional responsibility to the complainant. It therefore brought the legal profession into disrepute.

[192] The significance of the first charge in the present context is that in August 2012, shortly before the penalty hearing in the present case, a Standards Committee of the Auckland District Law Society found Mr Hart guilty of two charges involving unsatisfactory conduct. Both arose as a result of similar conduct to that found to be established in relation to the first charge. In each case Mr Hart had instructed an expert to carry out work on behalf of a client, and had failed to pay the expert's account.

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120 At [24].

[193] On 14 November 2012, another Standards Committee found Mr Hart guilty of unsatisfactory conduct by failing to pay amounts owing to a forensic psychologist whom he had instructed on behalf of a client. On two occasions he had received payments from the LSA to cover outstanding invoices rendered by the psychologist, but had failed to use the funds to pay the invoices.

[194] Mr Hart entered into an arrangement with the psychologist to pay the invoices prior to the point at which the Standards Committee determined the complaint. The Standards Committee nevertheless found that Mr Hart's failure to pay the invoices after he had received payments from the LSA was at the higher end of unsatisfactory conduct. The Standards Committee censured Mr Hart, and fined him $8,000. It also ordered him to pay costs in the sum of $2,000.

[195] These incidents demonstrate that the conduct giving rise to the first charge cannot be regarded as an isolated, or "one off", incident.

(b) The third charge

[196] The third charge was laid after one of Mr Hart's clients, Mr W, asked the Auckland District Law Society to revise the fees Mr Hart had charged Mr W between September 2004 and June 2006. Mr Hart and Mr W subsequently settled their dispute in or about May 2007, but only after Mr W's counsel had obtained confirmation from the Society that settlement of the dispute would not prevent the Society from continuing to investigate the appropriateness of Mr Hart's fees.

[197] In May 2008, the Society's Complaints Committee No 2 resolved under s 99 of the Law Practitioners Act to investigate the level of fees charged. The Committee advised Mr Hart of its resolution on 30 June 2008, and asked him to respond to Mr W's complaint. Despite several extensions of time being granted at the request of Mr Hart's counsel, no response had been provided by 10 October 2008. By that stage the transitional provisions of the LCA had come into effect, and the s 356 Standards Committee took over the investigation into the fees rendered to Mr W.

[198] On 6 November 2008, the Standards Committee notified Mr Hart's counsel that it had resolved to require Mr Hart to produce Mr W's files to it for inspection.[121] Thereafter Mr Hart and/or his counsel sought further extensions of time within which to respond to Mr W's allegations.[122] The Committee granted these, finally granting an "absolute final extension" until 19 December 2008. This was followed by yet another extension until 13 March 2009. The Tribunal regarded 13 March 2009 as being the final date by which the Committee required Mr Hart to produce Mr W's files for inspection.

[199] By 15 May 2009, however, the Standards Committee had received no response from Mr Hart or his counsel. On that date it resolved to investigate Mr Hart's failure to produce the files as an "own motion" inquiry. It notified Mr Hart of its resolution on the same date, and asked him to respond to it by 11 June 2009.

[200] Mr Hart did not produce the files or respond substantively to the Committee over the next two months. As a consequence, on 31 July 2009 the Committee advised him that it would conduct a hearing to consider the matter on 18 September 2009.

[201] This prompted Mr Hart to assert that the Standards Committee had no jurisdiction to hear and consider the matter. After several adjournments this assertion was ultimately the subject of a hearing on 20 November 2009, and was rejected by the Committee on the same date. At that point the Standards Committee resolved to place Mr Hart's failure to produce the file before the Tribunal in the form of a charge of misconduct by obstructing the Complaints Committee and the Standards Committee.[123]

[202] We were advised during the hearing that Mr Hart did not produce the files to the Standards Committee until 25 September 2012, approximately two weeks after the Tribunal delivered its penalty decision.

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121 Law Practitioners Act, s 101(3)(d) and (e).
122 Extensions were sought on 18 November 2008, and 4 and 5 December 2008.
123 Lawyers and Conveyancers Act, s 262.

[203] Although Mr Hart was undoubtedly guilty of delay in responding to the Standards Committee during the period leading up to 20 November 2009, we consider the most serious aspect of this charge relates to the period between 20 November 2009 and 25 September 2012. The Tribunal rejected Mr Hart's jurisdiction argument on 20 November 2009, and he did not take any steps to challenge that decision. Thereafter, he had no justifiable reason to withhold the files, and he has not provided any explanation for this failure.

[204] Several factors assume significance when considering the nature and effect of this charge. First, it cannot be described as inadvertent. Mr Hart had known since 6 November 2008 that the Standards Committee required him to produce his files. He and/or his counsel had sought several extensions of time within which to respond, but by 13 March 2009 they had taken no steps to comply with the requirement that he produce the files for inspection.

[205] By October 2009 Mr W had provided a written waiver of privilege; Mr Hart could not, therefore, withhold the files on the basis of client confidentiality or privilege. Once the Standards Committee rejected his jurisdictional argument on 20 November 2009, he knew there was no further basis upon which he was entitled to withhold the files any longer. From that point onwards, he was consciously disregarding the Standard Committee's requirement that the file be produced.

[206] Secondly, the failure to produce the files continued for a very considerable period. Even taking 20 November 2009 as the latest date by which the files should have been produced, the failure continued for nearly three years.

[207] Thirdly, this failure effectively prevented the Standards Committee from advancing its investigation into the appropriateness of the fees Mr Hart had charged Mr W. By mid-2008 Mr W was residing in China. As a result, the Standards Committee needed to gain access to the material contained in Mr Hart's files in order to understand the nature and extent of the work he had carried out for Mr W. Without that material, and in the absence of any detailed response from Mr Hart, the Standards Committee could take matters no further.

[208] These factors persuade us that the Tribunal was correct to regard the failure as a reasonably serious form of misconduct. Any deliberate refusal by a practitioner to comply with a lawful requirement made by a Standards Committee tasked with investigating a complaint must be regarded as serious. It indicates a lack of candour that may be significant when considering the fitness of a practitioner to remain in the legal profession.

[Paragraphs [209] and [210] are suppressed from publication as they are subject to pre-existing suppression orders made by this Court in another proceeding]

[209] The seriousness of this conduct is exacerbated by the fact that this is not the first occasion on which Mr Hart has failed to produce his files for inspection when requested to do so by a body authorised to seek production of his files. **[Suppressed material].**

[210] [Suppressed material].

(c) The fourth charge

[211] The fourth charge, which relates to overcharging, is also marked by aggravating factors. In particular, we agree with the Tribunal's conclusion[124] that Mr Hart's attitude towards Mr A and his family was exploitative and showed a lack of integrity.

[212] Mr Hart's clients were vulnerable in several respects. First, they were vulnerable because of their lack of knowledge about the criminal process. The wider family, who were meeting Mr Hart's fees, had not previously encountered the criminal justice system in New Zealand. As a consequence, they had no appreciation of the manner in which it worked, or the nature and extent of the work Mr Hart would be required to undertake to achieve a satisfactory outcome. They therefore had no means of assessing whether or not the fees he charged were reasonable.

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[124] **[Suppressed material].**

[213] Secondly, the family was extremely anxious to achieve an outcome that saw their relative released on bail. This rendered them vulnerable to paying an inflated fee in order to ensure that they achieved that outcome.

[214] We endorse the Tribunal's finding that in these circumstances Mr Hart had an obligation to inform the family of the work he would be required to do, and the basis upon which he proposed to charge for that work. Mr Hart failed to meet that obligation. Instead, he charged the family large sums of money without providing any explanation regarding the nature of the services he intended to render, or how he proposed to charge for them. We agree that the conduct giving rise to the fourth charge amounted to reasonably serious misconduct.

[215] The conduct giving rise to the fourth charge is further aggravated by the fact that this is not the first occasion on which Mr Hart has been found to have overcharged clients. On 3 March 1982, the New Zealand Law Society Disciplinary Committee found Mr Hart guilty of professional misconduct by charging a fee that was grossly excessive. On this occasion Mr Hart was censured and ordered to pay a fine of $750, together with costs in the sum of $2,750. We acknowledge that this concerned events that occurred approximately 30 years prior to the penalty hearing. However, there have been other instances in which Mr Hart has overcharged clients.

[216] On 12 March 2010, a Standards Committee of the Auckland District Law Society upheld two related complaints involving allegations that Mr Hart had overcharged a client. The Standards Committee found that in overcharging his client, Mr Hart had engaged in conduct unbecoming a law practitioner. The Standards Committee reduced the fees from $10,000 to $5,000, and fined Mr Hart the sum of $2,000. It also ordered him to pay costs of $1,000. These orders were upheld on review by the LCRO.

[217] On 14 June 1010, a Standards Committee upheld another complaint involving alleged overcharging. It held that this amounted to unsatisfactory conduct in the form of conduct unbecoming a law practitioner. The Committee reduced Mr Hart's fee from $8,437.50 to $1,250, and ordered him to pay costs. Again, the LCRO upheld these orders.

[218] On 11 July 2011, a Standards Committee determined that it would take no further action in respect of a complaint alleging that Mr Hart had provided poor quality service to a client. The LCRO reversed the Standards Committee's decision, and held that Mr Hart's conduct amounted to unsatisfactory conduct. The LCRO censured Mr Hart, and ordered him to pay compensation in the sum of $5,000. Mr Hart was also ordered to reduce his fee by $5,000, and directed to pay a total sum of $10,000 to the complainant.

[219] Mr Hart's disciplinary history therefore strongly suggests that he has a tendency to overcharge clients, and that previous sanctions have not deterred him from engaging in that type of conduct.

2. The manner in which Mr Hart responded to the present charges

[220] There are two aspects to this issue. The first relates to the events leading up to the hearing on 16 and 17 July 2012. The second relates to the manner in which Mr Hart responded to the charges after the Tribunal had found the charges proved.

(a) The events leading up to the hearing on 16 and 17 July 2012

[221] We have already summarised the events leading up to the hearing on 16 and 17 July 2012.[125] Although Mr Hart was not solely responsible for the substantial delay that occurred in having the charges heard, we have accepted the Tribunal's conclusion that the events that occurred prior to the hearing reveal extraordinary delay and prevarication on the part of Mr Hart.[126]

[222] We have also already referred to Mr Hart's delay in providing his file in connection with the fourth charge.[127] He has not provided an explanation as to why he was unable to provide his file when originally asked to do so by the Tribunal.

[223] We have also accepted[128] the Tribunal's conclusion that Mr Hart made a deliberate decision to disengage from the hearing scheduled for 16 and 17 July 2012.

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125 At [36]-[45].
126 At [50].
127 At [47].

This placed the Tribunal in a very difficult position, because it meant that it had to carefully determine whether it was possible for Mr Hart to have a fair hearing notwithstanding his deliberate decision to disengage from the disciplinary process. Having decided to proceed with the hearing, the Tribunal was obliged to conduct the hearing in a scrupulously fair manner in order to ensure that Mr Hart's interests were properly protected. In a sense, the Tribunal became responsible by default for conducting Mr Hart's defence.

[224] The manner in which Mr Hart treated his obligations to the Tribunal was, in our view, an extremely serious matter. Public confidence in the legal profession depends significantly upon the premise that practitioners will co-operate fully in the investigative phase of the disciplinary process. By co-operation, we mean, as a minimum, that they will comply promptly with lawful requests made by investigating bodies and with timetables imposed. Mr Hart did not meet that minimum requirement. Rather, he deliberately obstructed the investigation and misused the processes of the disciplinary bodies for the purpose of delay. We therefore agree with the Tribunal's conclusion that the manner in which Mr Hart elected to respond to the disciplinary process was highly relevant to the issue of penalty.

(b) Mr Hart's response to the Tribunal's liability decision

[225] Another significant issue in this context is the manner in which Mr Hart responded to the findings that the Tribunal made in its liability decision. He was represented by counsel at the penalty hearing on 27 August 2012, and was therefore in a position to respond fully to the issues raised by that the Tribunal's liability decision.

[226] It would have been obvious to Mr Hart and his counsel by this stage that they needed to persuade the Tribunal that those issues could be adequately addressed by means of a lesser order than striking off. For that reason it was important for the Tribunal to be satisfied that Mr Hart had insight into the events that had given rise to

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[128] At [68].

the charges. Acceptance of at least a degree of responsibility for those events may also have assisted with persuading the Tribunal that the protection of the public did not require Mr Hart to be struck off.

[227] The transcript of the penalty hearing makes it clear, however, that Mr Hart was largely content to rely upon character references provided by other members of the legal profession to establish he was a fit and proper person to remain in practice. These provided an evidentiary foundation for his counsel to submit that Mr Hart was an extremely hard working and committed advocate, who was regularly prepared to act on a pro bono basis and had always done his utmost to achieve the best available outcome for his clients.

[228] His counsel also submitted that Mr Hart's principal shortcomings were in failing to properly attend to matters of administration, and failing to communicate properly with others. He argued that these deficiencies were principally due to the enormous demands made on Mr Hart's time as an experienced and highly successful criminal advocate. In that sense he argued that Mr Hart could be viewed as a victim of his own success. Mr Hart's counsel also pointed out that legal aid requirements have altered considerably in recent years, and that in his dealings with experts whom he instructed, Mr Hart may have naively acted on the basis of legal aid requirements that were out of date.

[229] These submissions may have some relevance to the conduct underlying the first charge relating to the failure to pay an expert engaged on behalf of a client. They do not, however, demonstrate any insight or understanding by Mr Hart into the nature and gravity of the conduct underlying the third and fourth charges. Mr Hart's counsel went no further at the penalty hearing than to submit that Mr Hart was "smart enough" to know that he must change his way of reporting to clients and his way of obtaining instructions.

[230] There is nothing in the material before the Tribunal, or in the material presented to us at the hearing, to suggest that Mr Hart fully comprehends the nature and gravity of the conduct of which he has been found guilty. There is also little to

suggest that he accepts responsibility for it or that he is committed to changing the manner in which he interacts with others in his professional life.

[231] Another issue we consider to be material is Mr Hart's failure to comply with the Tribunal's order requiring him to repay the sum of $20,000 to the complainant in relation to the fourth charge. During the penalty hearing, Mr Hart's counsel advised the Tribunal that Mr Hart accepted it was appropriate to make that order. He also told the Tribunal that Mr Hart had advised him the payment could be made within 14 days. To date, however, Mr Hart has not complied with the order, and he has never provided an explanation for his failure to do so.

[232] During the hearing, counsel now appearing for Mr Hart advised us that Mr Hart's financial position had deteriorated significantly following the hearing before the Tribunal, preventing him from making the payment. We do not consider this to be an adequate explanation. Mr Hart must have known at the time of the penalty hearing whether or not he would be in a position to pay the sum of $20,000 within the next two weeks. His failure to make the payment calls into question his bona fides in dealing with the Tribunal. It raises an issue as to whether Mr Hart knew at the time of the hearing that he would not be able to make the payment within 14 days. It suggests that he instructed his counsel to advise the Tribunal that he would make the payment within that period so as to bolster his counsel's submission that the Tribunal should make a lesser order than striking off.

Decision

[233] It is unrealistic, in our view, to suggest that an order requiring Mr Hart to practise under the supervision of another practitioner[129] would be sufficient to properly protect the public. Mr Hart's unsatisfactory response to disciplinary proceedings to date suggests he is unlikely to be compliant with supervision by another practitioner. It would be difficult, in any event, to supervise Mr Hart to the extent required to ensure the protection of the public. He would require constant supervision in his dealings with clients and all others with whom he would be

[129] Under s 242(1)(g) of the Lawyers and Conveyancers Act.

required to deal in a professional capacity. In our view these difficulties preclude an order being made prohibiting Mr Hart from practising on his own account, but permitting him to practise under the supervision of an employer.

[234] It is also noteworthy that Mr Hart has not put forward any concrete proposal for implementing such an option. His counsel advised us only that other members of the legal profession would be willing to supervise Mr Hart's activities in order to ensure he maintains appropriate professional standards in the future.

[235] The only realistic options are therefore orders for suspension or striking off. During the hearing, counsel for Mr Hart submitted that an order striking Mr Hart off would be grossly disproportionate to the nature and gravity of his offending, but that Mr Hart would consent to an order suspending him from practising for a period of six months. But we consider the Tribunal was correct to view striking off as the appropriate order to make in the present case. We have reached that conclusion for several reasons.

[236] First, the nature and gravity of the charges of which he has been found guilty are such that they require a firm response that properly protects the public from similar conduct in the future. Secondly, the fact that Mr Hart has been found guilty of similar conduct in the past suggests he has not learned from past mistakes and sanctions. This does not bode well for his rehabilitation in the future. Nor does the fact that he appears not to appreciate the seriousness of his conduct underlying charges three and four. His failure to comply with the Tribunal's order that he pay the complainant in charge four the sum of $20,000 similarly suggests a willingness to ignore orders made by lawfully constituted disciplinary authorities.

[237] Thirdly, like the Tribunal, we view extremely seriously Mr Hart's decision to delay and then deliberately disengage from the present disciplinary proceedings. If Mr Hart was to remain in practice, he would need to demonstrate a preparedness to engage fully with the bodies entrusted by Parliament to maintain discipline within the legal profession. The conduct underlying charge three, coupled with the manner in which Mr Hart has approached the proceedings before the Tribunal, paints a picture of a person who has sought to remove himself from oversight by those

bodies. We agree with the Tribunal that this factor is determinative in the present context.

[238] Finally, the difficulty with an order for suspension is that it would not resolve the underlying issues exposed by the present proceedings. At the end of any period of suspension Mr Hart would be free to return to the legal profession. The stance taken by Mr Hart to date means that there can be no guarantee that he will co-operate with, and subject himself to oversight by, investigative bodies in the future. For that reason the only way in which the public can be properly protected is for an order to made preventing him from practising at all.

[239] An order striking Mr Hart off was therefore not a disproportionate response having regard to the factors we have identified.

Seventh ground of appeal – should the orders as to costs be revisited having regard to Mr Hart's current financial circumstances?

[240] This ground of appeal is based largely on a submission that Mr Hart's financial circumstances have now deteriorated to the point where he is unable to meet the awards of costs imposed by the Tribunal.

[241] Mr Hart has not provided the Court with a statement as to his financial position, although his counsel advises us that he can do so if required. As a consequence, we do not know if Mr Hart currently has the ability to meet the costs awards imposed by the Tribunal.

[242] Assuming that he does not have that ability, this ground of appeal needs to be considered having regard to the approach Mr Hart took when his counsel made submissions at the penalty hearing before the Tribunal. During that hearing, counsel then acting for Mr Hart advised the Tribunal it should proceed on the basis that Mr Hart had the ability to meet his financial obligations. Counsel acknowledged that if that turned out not to be the case, logical consequences would follow. By that we take counsel to mean that if Mr Hart could not meet the awards of costs, he accepted he would be subject to whatever consequences might follow.

[243] Given that approach, we consider it inappropriate to revisit the issue of costs on appeal. If Mr Hart cannot now meet the awards of costs that the Tribunal imposed, he must accept the consequences of that fact.

Summary of findings

[244] Our conclusions in respect of each issue are as follows:

(a) Did the Tribunal err in refusing to grant Mr Hart's application for an adjournment on 16 July 2012, and deciding to proceed in his absence?

We are satisfied that the Tribunal made no error in declining the application for adjournment and deciding to proceed to hear the charges in Mr Hart's absence. The Tribunal addressed itself to the correct questions. It was entitled to conclude that Mr Hart had deliberately chosen not to participate in the hearing as part of a strategy to delay and obstruct disciplinary proceedings. The Tribunal applied the correct principles in determining it could provide Mr Hart with a fair hearing notwithstanding his absence, and no miscarriage of justice flowed from its decision to proceed: see paragraphs [23]-[68] of this decision.

(b) Was the Tribunal entitled to hear the third charge?

The Tribunal had jurisdiction to hear the third charge, and the Standards Committee was entitled to refer that charge to the Tribunal. A complaint need not be of sufficient gravity to warrant consideration of striking off or suspension for the Standards Committee to refer it to the Tribunal for determination: see paragraphs [69]-[110] of this decision.

(c) In respect of the first and fourth charges, was the Tribunal required to hear oral evidence from Mr Gardiner and Mr Haskett respectively in order to resolve conflicts in the evidence?

It was for Mr Hart to arrange for those witnesses to attend the hearing if he wished them to give evidence. Their non-attendance was the result of his failure to do so. No miscarriage of justice was caused by their non-attendance in any event, as their evidence did not assist Mr Hart in any material respect: see paragraphs [111]-[130] of this decision.

(d) Did the Tribunal err in rejecting the evidence of Mr Burcher and Mr McKenzie in respect of the reasonableness of Mr Hart's fees, and accepting the evidence of Mr Billington, the expert witness called by the Standards Committee?

The Tribunal preferred the evidence of Mr Billington to the expert evidence called by Mr Hart for good reason. The Tribunal gave appropriate weight to the relevant expertise of each of the witnesses. The Tribunal was entitled to reject the opinions of Mr Burcher and Mr McKenzie that the fees were reasonable. Their evidence focused on the time recorded, and did not address whether the time recorded was reasonable and what the work undertaken by Mr Hart was worth. The tasks undertaken by Mr Hart for Mr A could and should have been achieved at a far lower cost to Mr A's family, and Mr Hart made no attempt to manage those costs: see paragraphs [131]-[180] of this decision.

(e) Was striking off a disproportionate response?

Striking Mr Hart off the roll of barristers and solicitors was a proportionate response in light of the nature and seriousness of those charges, Mr Hart's disciplinary history, his decision to disengage from the disciplinary proceedings, and the lack of evidence to suggest he has insight into his conduct: see paragraphs [181]-[239] of this decision.

(f) Should the orders as to costs be revisited in light of Mr Hart's current financial circumstances?

It would be inappropriate to revisit the award of costs when Mr Hart's counsel advised the Tribunal that it should proceed on the basis that Mr Hart could meet his financial obligations, and conceded that if that turned out not to be the case, "logical consequences" would follow: see paragraphs [240]-[243] of this decision.

Result

[245] The appeals are dismissed.

Suppression

[246] We make orders suppressing from publication the names and all identifying particulars of the complainants in the disciplinary proceedings. We also make orders suppressing from publication all but the first sentence of paragraph [209], paragraph [210] including footnote 124, and that part of paragraph [184] citing paragraph [71] of the Tribunal's decision.

Costs

[247] Our initial view is that the respondent should be entitled to a single award of costs on a category 2B basis, together with disbursements as fixed by the Registrar.

[248] If either party advocates a different approach, a brief (i.e. less than seven pages) memorandum regarding costs should be filed and served within 14 days. We will then set a further timetable for the filing and service of memoranda in response and reply.

Solicitors

New Zealand Law Society, Auckland

Nigel Cooke, Ponsonby

Counsel

Paul Collins, Barrister, Auckland

A Trenwith, Barrister, Auckland