INTERIM NAME SUPPRESSION ORDER FOR A FURTHER PERIOD OF 28 DAYS FROM THE DATE OF THIS DECISION TO ENABLE THE APPELLANT TO SEEK LEAVE TO APPEAL ON A QUESTION OF LAW AND TO OBTAIN AN INTERIM ORDER IN THE COURT OF APPEAL PENDING DETERMINATION OF THAT APPLICATION IN THE COURT OF APPEAL.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-003300
[2015] NZHC 1896

BETWEEN	MR A Appellant
AND	CANTERBURY WESTLAND STANDARDS COMMITTEE NO 2 OF THE NEW ZEALAND LAW SOCIETY Respondent

Hearing: 27 July 2015

Appearances: C R Carruthers QC and D C S Morris for Appellant
K Davenport QC and M A Treleaven for Respondent

Judgment: 12 August 2015

JUDGMENT OF VENNING J

This judgment was delivered by me on 12 August 2015 at 10.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: DLA Piper, Auckland
M Treleaven, NZLS, Auckland
Cook Morris Quinn, Auckland
Copy to: C R Carruthers QC, Auckland
K Davenport QC, Auckland

Introduction

[1] Mr A (the appellant) is a barrister. In a decision delivered on 18 November 2014 the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) found him guilty of two charges of misconduct and one of unsatisfactory conduct.[1] Three other charges were dismissed.

[2] In its subsequent penalty decision the Tribunal declined to suspend the practitioner as had been sought by the respondent Standards Committee. The Tribunal instead censured the appellant. It also ordered him to pay 50 per cent of the respondent's actual costs and, in addition, to pay the full amount of the costs of the hearing, namely $19,118 to the New Zealand Law Society. The Tribunal declined to make an order for permanent name suppression.

[3] The appellant appeals against both the substantive and penalty decisions. He also seeks permanent name suppression.

[4] The respondent appeals against dismissal of one of the charges. It also appeals against the penalty. It submits the penalty is inadequate. It otherwise supports the Tribunal's substantive decision and the decision not to grant permanent name suppression.

[5] An interim order for name suppression was made pending the determination of this appeal.

A preliminary matter – standing of third parties

[6] The disciplinary process in this case arose out of complaints by a Mr G and his company J. On 15 July Mr G filed a memorandum seeking to be heard on this appeal in relation to a claim for costs and compensation which he had submitted to the Tribunal. Mr G requested that if necessary the Court accommodate an adjournment to enable him to be heard on the issue of compensation and costs.

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1 *Canterbury Westland Standards Committee 2 v Mr A* [2014] NZLCDT 68.

[7] In a minute issued on 16 July the Court declined Mr G's request to be heard on the appeal. He and J are not parties who may appeal a decision of the Disciplinary Tribunal.[2] In the minute the Court noted that it would be for counsel for the respondent to determine whether the respondent wished to advance any of the matters that Mr G had raised in his memorandum.

[8] After taking instructions Ms Davenport QC confirmed that the respondent did not intend to pursue the matters that Mr G had raised. Mr G and J's solicitors Buddle Findlay then filed a further memorandum which was presented to the Registrar on the day of the hearing, 27 July. The solicitors did not, however, appear in support of that memorandum. The memorandum effectively recorded Mr G's instructions and renewed the request that Mr G's memorandum in relation to costs be considered by the Court.

[9] It is not appropriate for matters such as this to be raised by way of memorandum. It is irregular. If it was intended to seek leave to intervene a formal application was required. If the solicitors wished the Court to consider the matters raised in the memorandum they should have appeared in support and sought leave to be heard. It is not appropriate for a solicitors' firm to file a memorandum on behalf of a party who does not have standing simply for the purposes of recording a client's position.

[10] Next, it was for Ms Davenport's client to determine whether or not it wished to pursue the costs Mr G says he has incurred in relation to the matter or not. After taking instructions she advised the Court her client did not wish to do so. That is an end of the matter insofar as this appeal is concerned given that Mr G and J have no standing on the appeal.

[11] To the extent Mr G and/or J argue that the appellant's actions have caused them loss that is a matter they can raise in the civil proceedings which I understand remain on foot between the appellant and them in relation to the recovery of his fees. It is not, however, a matter that is relevant to the issues before this Court on this appeal.

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2 Lawyers and Conveyancers Act 2006, s 253.

Background

[12] I take the background summary from the decision of the Tribunal.[3]

[13] Mr G was the director and, initially, sole shareholder of J which was underwriting a large piece of litigation involving multiple litigants against a group of directors.

[14] In August 2009 Mr G approached the appellant to become involved in the litigation. The appellant was to be junior counsel for Mr H, the nominal plaintiff. In addition the appellant, who has also had some experience in share-broking and merchant-banking, was to assist J to find further investors for the litigation funding and, ultimately, a main underwriter.

[15] During October and November 2009 Mr G and the appellant negotiated how the appellant was to be paid. It was agreed that he would receive a 10 per cent shareholding in J as part of his remuneration, although it was anticipated that legal fees would be paid in addition. There was a budget of $400,000 allocated for the appellant's attendances in the funds to be sought from a future underwriter of the litigation.

[16] On 12 November 2009 the appellant was formally instructed by a solicitors' firm, WM, to represent Mr H on an appeal to be argued in the Court of Appeal later that month (but on the basis that the solicitors were not responsible for the appellant's fees).

[17] It was agreed later in November that a further 10 per cent of the J shares would be transferred to the appellant if he was successful in obtaining the overall litigation funding.

[18] Mr G signed two share transfers on 16 November 2009, each of 10 per cent, in favour of the appellant. The consideration for each transfer was described as "services as agreed". There was subsequently some dispute between the appellant and Mr G as to whether the shares had been transferred or merely represented an

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3 *Canterbury Standards Committee v Mr A*, above n 1, at [5] – [24].

option, both taking different positions at different times, but for the purposes of both the Tribunal's and this decision that dispute is not relevant.

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

[20] While Mr H may have been the nominal client as named plaintiff, the litigation was at all times under the management of Mr G and his legal team which also included a Queen's Counsel and Ms M, Mr G's partner.

[21] During 2011 it is clear that the relationship between the appellant and Mr G steadily worsened. In late May 2011 Mr G was successful in obtaining litigation funding with a London based litigation funder. A term of that agreement provided a significant management fee for J. There is a dispute between Mr G and the appellant as to the drawings Mr G took as management fees from J, thereby affecting the share value.

[22] In November 2011 a High Court Judge made orders suppressing aspects of the funding arrangements for the plaintiff in the litigation. Although some information was in the public arena it was the more sensitive suppressed aspects of the litigation which Mr G complained the appellant had breached confidentiality in, or threatened to breach confidentiality about, in his various communications and in the litigation initiated by him.

[23] The appellant is listed as one of the recipients intended to receive a copy of the Judge's decision, however he denies having been aware of the specifics of the suppression orders until later advised by Buddle Findlay, who took over the conduct of Mr G and J's affairs.

[24] By late 2011 and into the early months of 2012 there had been a complete breakdown of the relationship between Mr G and the appellant. At times the email correspondence between them was abusive and, at least on Mr G's part, contained

obscene references. In late February 2012 the appellant required Ms M to have his name removed from the Court papers so that the Court was aware he was no longer involved in the litigation.

[25] Following the breakdown in the relationship the appellant took a number of steps and entered into correspondence with Mr G, J and their then solicitors Buddle Findlay in an attempt to obtain payment of the money he considered was owed to him. The charges arose out of those actions.

The charges

[26] The appellant faced six charges as a consequence of the breakdown in the relationship:

(a) charge 1 – wrongful issue of a statutory demand against J for $150,000 on 1 August 2012;

(b) charge 2 – threatening to issue proceedings and the inclusion of inflammatory accusations in the draft affidavit;

(c) charge 3 – disclosure of confidential and privileged information;

(d) charge 4 – conduct concerning the interests of the plaintiff in the substantive litigation;

(e) charge 5 – failure to consent to suppression orders; and

(f) charge 6 – communications with solicitors.

[27] The Tribunal considered the particulars pleaded in respect of charge 6 ought to have been included as further particulars to charge 4 and dealt with the matter that way.

The Tribunal's findings

[28] The Tribunal ultimately found the appellant guilty of unsatisfactory conduct in relation to charge 1 and of misconduct in relation to charges 2 and 4. Charges 3, 5 and 6 were dismissed.

[29] The Tribunal found that in each of the instances alleged in the charges the appellant's conduct was clearly connected with the provision of legal services. In relation to charge 1, the Tribunal considered the conduct fell just short of misconduct but came within unsatisfactory conduct as defined by s 12(b)(ii) (unprofessional conduct) and s 12(c) (contravention of practice rules) of the Lawyers and Conveyancers Act 2006 (the Act). In relation to charges 2 and 4 the Tribunal found the conduct was misconduct within s 7(1)(a) of the Act.

[30] In dismissing charge 3 the Tribunal accepted that the disclosure of the confidential information was limited to the parties to whom the duty was owed and the Court. There was no wider publication. It considered that the appellant was entitled to the protection of r 8.4(f) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Rules) 2008 (LCCR) by analogy.

Principles – approach to this appeal

[31] Counsel are agreed that the appeal concerning the Tribunal's substantive decision and its decision regarding penalty are to be in accordance with the approach explained by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar.*[4] However, insofar as it relates to the decision for permanent name suppression counsel also agree the appeal is against a discretion. The principles identified by the Court of Appeal in *May v May* apply.[5]

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4 *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 at [16].

5 *May v May* (1982) 1 NZFLR 165 (CA); see *Hart v Standards Committee (No 1) of the NZLS* [2012] NZSC 4.

The substantive appeal

[32] Fundamental to the Tribunal's decision that the appellant was guilty of misconduct and unsatisfactory conduct was the Tribunal's finding that the appellant's conduct was clearly connected with the provision of legal services to Mr G and J.

[33] For the appellant, Mr Carruthers QC challenged that finding. He submitted that the appellant did not have a retainer with Mr G and J. The only regulated services the appellant provided were for Mr H, the plaintiff in the litigation, rather than for Mr G and J.

[34] Mr Carruthers referred to s 6, the interpretation section of the Act. He noted, "regulated services" means "legal services" which in turn are defined to mean "services that a person provides by carrying out legal work …". Legal work is defined to include:

> (a) the reserved areas of work:
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> (b) advice in relation to any legal or equitable rights or obligations:
>
> (c) the preparation or review of any document that—
>
> (i) creates, or provides evidence of, legal or equitable rights or obligations; or
>
> (ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property:
>
> (d) mediation, conciliation, or arbitration services:
>
> (e) any work that is incidental to any of the work described in paragraphs (a) to (d)

[35] Finally, reserved areas of work were defined as [work] carried out by a person—

> (a) in giving legal advice to any other person in relation to the direction or management of—
>
> (i) any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or

(ii) any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party; or

(b) in appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal; or

(c) in representing any other person involved in any proceedings before any New Zealand court or New Zealand tribunal; or

(d) in giving legal advice or in carrying out any other action that, by section 21F of the Property (Relationships) Act 1976 or by any provision of any other enactment, is required to be carried out by a lawyer.

[36] Mr Carruthers submitted the appellant did not carry out such work for Mr G and J.

[37] Next Mr Carruthers submitted that for s 7(1)(a) of the Act to be engaged there must be a connection between the regulated services and the conduct complained of. The scope of the appellant's legal work for Mr H was limited to the conduct of an appeal in the Court of Appeal in November 2009, an opinion written in April 2010, an appearance at an interlocutory hearing which concluded in December 2010, and two telephone conferences in 2011 when other counsel in the litigation was not available. The appellant was paid separately for interlocutory and teleconference work which did not feature as part of his attempt to recover fees for services.

[38] Further, Mr Carruthers submitted that by the time of the conduct in issue the appellant was no longer briefed. His retainer was terminated by March 2011. On any view of it he was not in a lawyer/client relationship providing regulated services at the time of the conduct complained of.

Did the appellant provide regulated services to Mr G and/or J?

[39] The first issue to be resolved therefore is whether the appellant provided regulated services to Mr G and/or J, or whether his lawyer/client relationship was limited to that with Mr H, the nominal plaintiff.

[40] Mr G gave evidence that the appellant provided legal services to him and J. The appellant denied that was the case.

[41] Mr Carruthers relied on the letter from WM as the only formal letter of instruction. However, the letter itself refers to the instructing solicitors having received instructions from Mr G on behalf of Mr H and records that "they" wish you to appear as counsel on behalf of Mr H until further notice. That supports a view that the instruction was a joint one, on behalf of both Mr G and Mr H. That is consistent with the practical position that Mr H was the nominal plaintiff, but Mr G and J were funding and controlling the litigation. It is clear that Mr G had the running of the litigation and that the appellant reported to him.

[42] Both Mr Carruthers and Ms Davenport referred to the funding arrangement and the agreement between Wakefield lawyers and J. It is correct that no similar document was entered between the appellant and J.

[43] However, other evidence supports the Tribunal's conclusion that the appellant provided regulated services to Mr G and J. The email exchanges between the appellant and Mr G of 31 October 2009 show the intention was that one-third of the appellant's fee was to relate to past efforts including the appeal, a new statement of claim, one-third to future involvement (including issuing the float) and one-third to staying on board after the float for the first year. The one-third for past efforts is a direct reference to the legal services carried out by the appellant. There is no evidence of any discussion or reporting between the appellant and Mr H directly or, for that matter with WM. The chain of instructions and reporting was always between the appellant and Mr G.

[44] The share transfers in the appellant's favour referred to the consideration as the provision of services as agreed. The services as agreed included legal services. There were also a number of invoices rendered by the appellant directed to J. While the invoices themselves are not relevant to the present proceedings to the extent they were paid, they do confirm the relationship. Perhaps most significantly, in his affidavit in support of the application for preservation orders, the appellant said:

> In October 2009 I was briefed by … J to appear on its behalf and on behalf of the representative plaintiffs …

[45] I do not accept the appellant's explanation that it was only after the issue of disclosure of confidential information was raised that he reflected on the true relationship with Mr G and J. As has been submitted on the appellant's behalf in relation to penalty, the appellant is an experienced practitioner of some 30 plus years standing. He would have understood his role and lawyer/client relationship with Mr G and J.

[46] I am satisfied that the evidence supports the Tribunal's finding that the appellant had a lawyer/client relationship with Mr G and J.

[47] Mr Carruthers next point was that the appellant was not providing regulated services at the relevant time when the conduct complained of occurred. Mr Carruthers submitted that the appellant's involvement in a legal capacity ceased by March 2011 at the latest. He noted the email from Mr G on 2 March 2011:

> there's no [the appellant] in "legal team" work
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> there's [the appellant] in "J shareholders list team" work.

And a subsequent email of Mr G of 6 April 2011:

> he is now part of the J shareholder team and will be remunerated only out of J fees, his budget will be available to one SGH [Slater and Gordon] suit if we want to use one.

[48] Mr Carruthers argued that the conduct in issue was not conduct in the course of the appellant's practice as a lawyer. The appellant could only be guilty of misconduct under s 7 of the Act if that conduct would justify a finding that the appellant was not a fit and proper person or was otherwise unsuited to engage in practice as a lawyer: s 7(1)(b)(ii). This was the approach adopted by the Tribunal in the case of *Hong*.[6]

[49] In Mr Hong's case the focus was on Mr Hong's actions and conduct after he was named as a defendant to a claim brought by former clients. The prosecution against him before the Tribunal proceeded on the basis that s 7(1)(a) of the Act did

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6 *Boon Gunn Hong* [2013] NZLCDT 9.

not apply. Mr Hong was not providing regulated services when the conduct complained of took place.

[50] Mr Carruthers accepted that a different approach was taken by a full Bench of this Court in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal.*[7] Mr Orlov faced charges relating to statements he had made concerning Harrison J to the effect that the Judge had behaved improperly towards him and that, in the circumstances of individual cases, had made poor decisions.

[51] In the course of its decision the Court discussed whether the conduct came within s 7(1)(a) or 7(1)(b)(ii). Mr Orlov had contended the conduct was in his personal capacity so that the conduct should fall under s 7(1)(b)(ii) and be assessed on the basis of whether he was a fit and proper person or was otherwise unsuited to practice law.

[52] The Court reviewed the historical background to disciplinary action for professional misconduct.[8] The Court concluded:

> [106] We consider the Act's definitions continue to maintain the distinction between professional and personal misconduct. The latter involves moral obloquy. It is conduct unconnected to being a lawyer which nevertheless by its nature, despite being unrelated to the practitioner's job, is so inconsistent with the standards required of membership of the profession that it requires a conclusion that the practitioner is no longer a fit and proper person to practice law.
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> [107] The test of "fit and proper" person remains the touchstone for whether a lawyer is to be struck off. It is the assessment that is to be undertaken following a finding of professional misconduct under s 7(1)(a)(i). In other words it is recognised that misconduct in the performance of professional duties may lead to a conclusion of unfitness, but not necessarily. By contrast, with personal misconduct, the fit and proper person inquiry is an element of the actual offence. This in effect recognises that personal conduct unrelated to work must be of a nature which in itself justifies a conclusion that the practitioner is not a fit and proper person. We think this structure supports giving a broad scope to professional misconduct with a consequent limiting of personal misconduct to situations clearly outside the work environment.
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> [108] In a Disciplinary Tribunal decision determined under the previous Act, the Disciplinary Tribunal quoted from the previous edition of the *Laws*

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7 *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606.

8 Law Practitioners Act 1955; Law Practitioners Amendment Act 1962; Law Practitioners Act 1982.

> *of New Zealand* chapter on Law Practitioners. We consider the examples cited therein generally illustrate the traditional scope of the personal misconduct option and the current scope of s 7(1)(b)(ii):
>
> > The following instances have been held to constitute conduct unbecoming a barrister or solicitor and as such jurisdiction existed for the Tribunal to enquire into the disciplinary charges: misconduct of a sexual nature with a babysitter; insulting behaviour where there have been previous convictions for indecent assault; association with the business of bookmaking; importuning for immoral purposes; corruption in public office; issue of valueless cheques; obscene and threatening language in a public place and fraudulent conversion of small amounts of clients' monies; consorting with criminals; and allowing the house rented by a tenant to be used as a brothel.

[53] Against that background the Court had little doubt that all of Mr Orlov's actions should be seen as being connected to the provisions of legal services. He should have been charged and assessed under s 7(1)(a). The Court then noted the Tribunal had carried out an analysis of s 6 (the same as Mr Carruthers has advanced in this case) before concluding:

> [112] However, it is necessary to return to the proposition that the two definitions in ss 7(1)(a)(i) and 7(1)(b)(i) cover the entire field. Mr Orlov's conduct will come under ss 7(1)(b)(i) only if it is not the provision of regulated services (which it is not) and if it is unconnected with the provision of legal services. It is this aspect of the definitions that we consider is crucial. Whilst not regulated services, the conduct is very much connected with the provision of such services and therefore comes within the s 7(1)(a)(i) limb of professional misconduct.[9]

[54] Mr Carruthers submitted that the proposition in [112] of *Orlov* cannot be correct. He submitted that the better analysis of *Orlov* is that Mr Orlov's conduct was so connected with the regulated services for which he was engaged that at the time of conduct he was providing regulated services. He submitted the conclusion of the Court in [112] offends the language of the relevant subsections and was unnecessary to the conclusion the Court reached.

[55] Mr Carruthers argued that if s 7(1)(b)(ii) applied there was no suggestion that the appellant was not a fit and proper person so there was never any basis for an adverse finding of misconduct against him under s 7(1)(b)(ii). He referred to the

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[9] The reference to s 7(1)(b)(i) is incorrect, it should be s 7(1)(b)(ii).

decision of *Lander v Counsel of the Law Society of Australian Capital Territory*[10] as an example of personal conduct that was not misconduct.

[56] The issue arises because of the wording of s 7(1)(a). Read literally it requires the conduct to occur while the lawyer is providing regulated services. Mr Carruthers' argument would read into that provision the requirement that the regulated services be provided to the particular client.

[57] Despite Mr Carruthers' submissions, I prefer to follow the reasoning of the full Court in *Orlov* and consider that it applies in this case to the actions of the appellant. Section 7 of the Act deals with a lawyer's conduct in two aspects, first their professional conduct and second, their personal conduct. All conduct must either be in the course of one or the other. There can be no gap or lacuna.

[58] This point was well made by Dr Webb in the following extracts quoted by the Tribunal in *National Standards Committee v Orlov*:[11]

> [43] This issue was the subject of consideration by the Legal Complaints Review Officer in a decision *Morpeth v Ramsay* LCRO 110/2009 . At paragraphs 15 onwards Dr Webb, LCRO, talks about the relationship of the two subsections relating to undertaking of regulated services or unconnected with the provision of regulated services. At paragraph 15 he has this to say:
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> > "On the plain English meaning of the words there is some space between conduct of a lawyer which is 'unconnected with the provision of regulated services' and conduct 'that occurs at a time when [the lawyer] is providing regulated services'. However, I consider that those two phrases must be interpreted as covering all possible instances of conduct - there can be no intermediate category of conduct.
> >
> > [16]In undertaking this interpretative task it is proper to look at both the text of the legislation and its purpose (s 5 Interpretation Act 1999). A central purpose of the Lawyers and Conveyancers Act 2006 is to protect the consumers of legal services and conveyancing services (s 3). In seeking to attain that purpose s 3(2) proceeds to state that it intends to provide a more responsive regulatory regime in relation to lawyers and conveyancers. … One of the purposes outlined in s 120(2)(b) is that complaints 'may be processed and resolved expeditiously … ' The Act in s 4 also affirms the fundamental obligation of a lawyer to act in accordance with all fiduciary duties and duties of care owed to clients. It is therefore appropriate to interpret the respective provisions in a way which is consistent with

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10 *Lander v Counsel of the Law Society of Australian Capital Territory* (2009) 231 FLR 399.
11 *National Standards Committee v Orlov* [2013] NZLCDT 45 at [43].

> the protection of consumers of legal services, and the provision of a responsive and expeditious complaints process."

[59] Further the New Zealand legislation is based largely on the Australian legislation. The High Court of Australia has endorsed the concept of conduct that is so connected to practice and the provision of regulated services as to constitute professional misconduct:

> [47] We agree but we hesitate to draw firm lines around just when one or other of the relevant subsections is to apply given the protective purpose and the objectives stated under the LCA. In an Australian decision which considered this issue, the Court had this to say:[12]
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> > " … The dividing line between personal misconduct and professional misconduct is often unclear. Professional misconduct does not simply mean misconduct by a professional person. At the same time, even though conduct is not engaged indirectly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct. Furthermore, even where it does not involve professional misconduct, a person's behaviour may demonstrate qualities of a kind that require a conclusion that a person is not a fit and proper person to practice. … "

[60] There is a further point. While s 7(1)(a) refers to conduct "that occurs at a time when the lawyer is providing regulated services" it does not require there to be a subsisting lawyer/client relationship with a particular client. It could also obviously relate to the practitioner's actions in seeking the recovery of a fee after the services have been terminated. Mr Carruthers accepted that a practitioner's attempts to recover fees for regulated services could come within s 7(1)(a) even if the attempts followed the termination of the services. That must be correct. Strictly the regulated services have ended, but the recovery of the fee is in connection with regulated services. It will be sufficient if at the material time the lawyer is engaged in the provision of legal services and the conduct complained of is connected to those services.

[61] The emphasis in s 7(1)(b)(ii) is on conduct which is unconnected with regulated services. It cannot be said that the appellant's conduct in this case, which was directed at obtaining payment for the legal (and other) work he had done for Mr G and J was unconnected with the provision by him of legal services. Even if the relationship with Mr G and J had been terminated in that the appellant was no longer

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

instructed by them, Ms Davenport submitted the appellant's conduct in this case arose out of the lawyer/client relationship with Mr G and J. Further, he was still engaged in the provision of regulated services to others, even if not to Mr G and J.

[62] I am satisfied that the conduct referred to in the charges before the Tribunal falls to be considered under s 7(1)(a) as connected to, and arising out of the provision of regulated services.

Charge 1

[63] I turn to the consideration of the first charge, the wrongful issue of the statutory demand against J. The appellant's conduct was held to breach r 2.3 LCCR:

> 2.3 A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

[64] Mr Carruthers submitted that the appellant believed, and had good reason to believe, the quantum of the debt owing to the appellant had been settled following a meeting in mid March 2012 at which Mr G and J agreed to pay him $150,000. A binding settlement agreement in a definite sum would have supported the issue of the statutory demand. But the appellant was not present at the meeting. There was no written agreement to confirm the settlement relied on.

[65] Further, Mr G had sent an email on 10 April 2012, in which he stated amongst other things:

> If in fact your text is a request for money, please advise what money you think is owed to you and when you think it is due and by whom.

That does not support the appellant's case of a settlement in March. Mr Carruthers sought to explain that by suggesting the email was a reference to a second option where the appellant was to obtain a further 10 per cent shareholding if his fundraising endeavours were correct. That seems unlikely given the context the email was sent in.

[66] Further, the appellant says in an affidavit the settlement agreement was concluded mid March by Mr Hayes. That is not supported by an email Mr Hayes sent Mr G on 28 March 2012 when Mr Hayes said:

> I have worked with [the appellant] to get a proposed solution for his issues …
>
> … there is a way forward.

[67] That does not support the appellant's case a binding settlement had previously been negotiated in mid March.

[68] In any event, the statutory demand does not refer to the claim being based on a settlement agreement. It demands payment for legal services:

> … for services performed in preparing for and appearing at the Court of Appeal on 22 & 23 November 2009; preparing an opinion for distribution to prospective funders in 2010/2011; and other preparatory and investigative work in relation to assistance with funding arrangements for the plaintiffs in EM H v TEC […] …

[69] There are further issues associated with the demand itself. As the Tribunal noted, no invoice had been issued to J by the appellant. It is no answer to submit, as Mr Carruthers did, that the appellant as a barrister could not sue for his fees. That only exacerbates the position and makes the issue of the statutory demand more objectionable. Next, in cross-examination the appellant acknowledged the demand did not properly reflect the basis for his claim for payment and that it was poorly worded. Finally, while he was aware an application might be made to set the statutory demand aside the appellant had prepared a draft affidavit to respond.

[70] I agree with the Tribunal's conclusion that the appellant used the statutory demand procedure improperly. The demand would inevitably have been set aside. However, the conduct does not amount to disgraceful or dishonourable conduct under s 7(1)(a)(i) and, while it was a contravention of r 2.3, that was mitigated by the appellant's withdrawal of the demand after seven days. The conduct is properly categorised as unsatisfactory conduct, being unprofessional conduct under s 12(b)(ii) of the Act.

Charge 2 – threatening to issue proceedings – including inflammatory accusations in a draft affidavit

[71] Following the withdrawal of the statutory demand, the appellant then proposed to issue proceedings in the High Court against J and Mr G. Prior to doing so, he sent an email to Buddle Findlay attaching a draft of the proposed proceedings (including the affidavit) in issue.

[72] The draft affidavit contained offensive and scurrilous remarks about Mr G. They were irrelevant to the issue that might properly have been before the Court. The issue is whether the conduct was a breach of r 2.7:

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

[73] Mr Carruthers submitted that sending the proceedings on a draft, without prejudice, basis could not be constituted as a threat. It was standard commercial practice. The content could not be in issue as the pejorative remarks contained in the draft were withdrawn before the affidavit was sworn and filed. He submitted that what the appellant was trying to achieve was analogous to the conduct discussed in Dal Pont.[13] He also referred to the case of *Council of the Law Society of the ACT v Legal Practitioner "D2"*.[14]

[74] The text of Dal Pont referred to by Mr Carruthers does not assist the appellant. The Dal Pont passages referred to suggest that a threat [limited to notice of intention to seek a costs order] will not be a breach of professional standards provided the lawyer making it has material that would suggest the proceeding must fail, has his or her client's instructions to make the threat, and makes the evidentiary basis supporting the threat known to the other practitioner.

[75] Here the purpose of the threat was to achieve payment of the appellant's fees. The implicit threat was made that, if not paid, the appellant would commence

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13 G E Dal Pont *Lawyers Professional Responsibilities* (5th ed, Thomson Reuters, Sydney, 2013) at 707–711.

14 *Council of the Law Society of the ACT v Legal Practitioner "D2"* [2014] ACAT 6.

proceedings attaching the affidavit in support. The affidavit contained personal references to Mr G's conduct and character which were irrelevant to the claim for fees. It falls well outside the type of situation discussed in Dal Pont.

[76] The case of *Council of the Law Society of the ACT v Legal Practitioner "D2"* does not assist either. The charges dismissed in that case related to the conduct of a practitioner, effectively acting on his own behalf, who took advantage of appeal rights – a quite different concept.

[77] The objectionable conduct is not the fact of sending the proceedings on a without prejudice basis but the implicit threat that the draft affidavit containing the inflammatory comments would be filed so that the proceedings issued would include the irrelevant and scurrilous material. The nature of the appellant's correspondence at the time reinforces that this was an improper threat. The appellant's email annexing the affidavit was sent on 26 September and stated:

> I am now forced to issue proceedings, unless an accommodation can be reached by 5pm Thursday 27 September 2012.

[78] Further, in his cross-examination during the course of the hearing the appellant accepted it was a threat:

> Q. … you were making a threat weren't you?
>
> A. Yeah, yeah, yeah. It's a threat, I acknowledge that and it should not have been made, …

[79] The Tribunal was quite correct to find that in context the appellant's conduct was in breach of r 2.7. As the Tribunal noted, the inclusion of such material in the affidavit and the threat to use it was reprehensible. It was conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable and as such constituted misconduct under 7(1)(a)(i) of the Act.

Charge 4 – correspondence

[80] There were six letters sent by the appellant which the Tribunal relied on as particulars in relation to this charge.

[81] Charge 4 engaged r 10:

> A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.
>
> **Respect and courtesy**
>
> 10.1 A lawyer must treat other lawyers with respect and courtesy.

[82] The Tribunal also considered that r 2.7 was engaged by the letters/emails sent on 13 November to Mr Forbes QC and the letter/email of 30 November to Buddle Findlay.

[83] The first letter is the draft letter of 6 March the appellant sent to Ms M. It was purportedly prepared for the instructing solicitors WM to file with the Court to advise the appellant was no longer engaged as counsel. The letter contained scurrilous personal references about Mr G.

[84] The appellant submitted the letter was written "tongue-in-cheek" and that it was never intended the letter would be finalised in that form. He sent it in that draft form to Ms M, (who was Mr G's partner), in response to a draft letter she had prepared for WM to issue relating to the termination of the appellant's retainer. It was submitted the Tribunal wrongly assumed that it was to be sent to the Court and other counsel.

[85] Such a letter, even in draft form did not promote proper standards of professionalism. Also, the draft must be read in the context of the previous communication between the appellant and Ms M of 29 February 2012 when the appellant said he would file his own proceedings. After referring to the need to have his name removed from all Court documents the appellant said:

> … I am to be copied in with the notifying documents. Otherwise I will file my own memorandum or affidavit annexing T's emails to R & I when we requested payment/participation in mid 2011 …that will pretty much be the end of T's participation, let me assure you.

[86] While it was proper for the appellant to seek to be removed from the proceedings as he considered he had not been paid, it was not acceptable for him to

send the draft letter in the form he did, albeit Ms M may have a relationship with Mr G. It was a breach of r 10.

[87] In the course of the hearing before the Tribunal the appellant conceded the letter was not an appropriate one:

> Q. … it isn't an appropriate letter, even tongue and cheek is it, for sending counsel to do?
>
> A. No, but you know as I as I say, I misread the relationships there. I agree with you though and can see that point.

[88] Next, the letter of 8 March 2012 to Ms Paterson at Buddle Findlay. The letter concluded with a copy of s 237 of the Crimes Act. In relation to that Mr Carruthers submitted it was no more than a warning not to transgress s 237 of the Crimes Act 1961 in the future. However, in his cross-examination the appellant had accepted the letter was unacceptable:

> Q. [Was this] a reasonable and appropriate response to Ms [Paterson's] letter?
>
> A. No, I don't, and I regret sending it.
>
> … Certainly my advice from senior people is that I lost my perspective over this and so I'd really rather – you may be right.

[89] Next, the letter of 13 November 2012 to senior counsel Mr Forbes QC. The letter attached an excerpt from an affidavit filed in the Court suggesting that Mr Forbes had an obligation as an officer of the Court to disclose the affidavit to the Court of Appeal. The Tribunal found the correspondence to be in breach of r 10 and a threat under r 2.7.

[90] Read in context I agree the email to Mr Forbes was an improper threat that unless the appellant's demands for payment were met then disclosures would follow which could prejudice the plaintiff's interests.

[91] In his written submissions the appellant maintains that this letter could not be regarded as discourteous and that Mr Forbes was under an obligation to disclose the false complaints to the Court of Appeal. The point is not what obligation Mr Forbes

may have had. That was a matter for Mr Forbes. The point is that the letter was a threat. Again the appellant acknowledged as much in cross-examination:

> I was you know applying leverage to get a settlement, yes sure.

[92] The email of 13 November was both in breach of r 10 and an improper threat under r 2.7.

[93] Next, the email of 30 November to Ms Paterson at Buddle Findlay. The email attached a copy of the call over list for the District Court, making the point that a number of counsel representing the parties in the litigation were to appear at the call over. The letter was entirely inappropriate. Again it contained a threat towards Buddle Findlay, a fellow practitioner that they should notify their insurers and stating they were in breach of a duty to clients because of the risk of disclosure of confidential information regarding Mr G and J. Again the appellant sought to argue the comments in the letter were correct and that Buddle Findlay should have sought suppression prior to the call-over or not allowed the matter to be called. To that extent the appellant remains unrepentant on this issue. It was a breach of r 10 and, to the extent it was a direct threat to Buddle Findlay and an implicit threat regarding the effect on the complainants, it was in breach of r 2.7.

[94] There then followed the appellant's letter of 5 December addressed to the senior partner at Buddle Findlay. The appellant argues that the letter points out the risks to Buddle Findlay and again submits the allegations of self interest in generating fees did not reach the requisite standards or cross the threshold for disciplinary action any more than the comparable accusation of bias against Harrison J in *Orlov* did.

[95] The submission is itself contrary to the concession the appellant made in the course of cross-examination:

> Q. … the totality of this letter is completely unacceptable isn't it?
>
> A. Yes and I would never write this letter if I was acting for a client.

[96] The letter of 5 December is at the least a discourteous letter which a responsible practitioner should not have authored and sent. It was in breach of r 10.

[97] The further letter to Buddle Findlay of 28 March 2013 falls into the same category. Again the appellant argues that it was written in response to threats from Buddle Findlay towards him. However, to the extent the letter contained allegations of improper motives and threatening conduct by Buddle Findlay it was entirely improper.

[98] The content of the letters is such as to amount to misconduct as being wilfully or recklessly in breach of r 10.[15] Further, I accept the letters of 13 and 30 November amounted to inappropriate threats in breach of r 2.7. I accept the Tribunal's conclusion on charge four that this conduct viewed as a whole "is at a level of contravention which constitutes misconduct."[16]

[99] The conduct, particularly in relation to the emails of 13 and 30 November is sufficient to support a finding of misconduct. I note that in the case of *Deobhakta v Waikato Bay of Plenty Standards Committee No 2 of the New Zealand Law Society*[17] Faire J accepted that in that case a number of separate particulars of misconduct collectively were misconduct and were properly described as disgraceful and dishonourable. In the present case while some of the correspondence may not have been as objectionable as other items of correspondence, as noted the charge would be made out on the basis of either of the letters of 13 or 30 November alone. The balance of the objectionable correspondence simply aggravates the offending.

Charge 3 – the subject of the cross appeal

[100] The Tribunal dismissed charge 3. It related to the disclosure of confidential information in the affidavit in the proceedings the appellant had issued against J and Mr G in the District Court to recover his fees for services. The affidavit contained confidential information obtained by him from the complainants while he had been acting for them. The respondent cross appeals the decision of the Tribunal to dismiss the charge.

[101] The conduct was alleged to be a breach of r 8, 8.1 and 8.7:

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15 Lawyers and Conveyancers Act 2006, s 7(1)(a)(ii).
16 *Canterbury Standards Committee v Mr A*, above n 1 at [87].
17 *Deobhakta v Waikato Bay of Plenty Standards Committee No 2 of the New Zealand Law Society* [2015] NZHC 965.

> 8. A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.[9]
>
> **Duration of duty of confidence**
>
> 8.1 A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.
>
> 8.1.1 Following the death of a client or former client, the right to confidentiality passes to the client's personal representatives.
>
> 8.1.2 Where an incorporated client goes into receivership, liquidation, or voluntary administration, the duty of confidentiality owed to the corporation under the direction of the receiver, liquidator, or administrator remains but confidentiality relating to the business and affairs of shareholders and directors of the client (if the lawyer acted for those parties) remains with those individuals.
>
> …
>
> **Use of confidential information prohibited**
>
> 8.7 A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer.

[102] The appellant argues the information was not obtained by him as a lawyer, but rather as a shareholder or option holder of J. However there was sufficient evidence before the Tribunal to determine that the information was obtained "in the course of the professional relationship". For instance, the Tribunal cited an affidavit sworn by the appellant in support of his application for property preservation orders in the District Court. In that affidavit the appellant deposed:[18]

> In October 2009 I was briefed by the second defendant J to appeal on its behalf and on behalf of the representative plaintiffs in the primary litigation sub nom TEC […] v EM H in the Court of Appeal.

[103] That affidavit was one of three where the appellant swore to the fact that J and Mr G were his clients.[19]

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18 *Canterbury Standards Committee v Mr A,* above n 1 at [58] citing Affidavit 12.11.12 at [7]; cited above at [44].

19 *Canterbury Standards Committee v Mr A,* above n 1 at [60].

[104] The Tribunal was however prepared to accept that the only parties to whom the information was disclosed were those to whom the duty was said to be owed (and who obviously possessed the information) and the Court. Distribution further could be protected, as it was ultimately by suppression orders.

[105] The Tribunal considered that the protection afforded by r 8.4(f) applied by analogy. Rule 8.4(f) permits disclosure:

> [necessary] for the effective operation of the lawyer's practice including arranging insurance cover or collection of professional fees;

On that basis they did not consider the charge made out.

[106] Ms Davenport submitted that the Tribunal took too narrow a view of the appellant's conduct and failed to assess it in the light of the sensitive nature of the lengthy litigation that Mr G and J had been involved in. However, that sensitivity of the confidential information does not affect the application of the principle applying to r 8.4(f).

[107] Ms Davenport also submitted the Tribunal failed to take in terms of account the threats of disclosure and the very real danger that if the proceedings were made public then previously confidential information he had received would be disclosed. But to the extent that the issue of threats is relevant it is dealt with by the other charges.

[108] Ms Davenport next argued that the suppression orders were not immediately agreed to by the appellant leaving the confidential information potentially available. During the time it was potentially available the appellant continually implied he would either disclose the information or that it was at risk. Again those issues are or could have been dealt with by way of separate charges.

[109] Ms Davenport then submitted that r 8.4(f) could not apply as the appellant was not entitled to sue for fees. However, if the instructing solicitor was suing to recover the barrister's fees the rule would be engaged. In principle it seems unreasonable to treat the claim by the appellant differently particularly when, as the

Tribunal acknowledged, his claim extended beyond recovery of his professional fees. The rationale for the exception behind r 8.4(f) was engaged.

[110] The cross-appeal in relation to the dismissal of count 3 is itself dismissed.

Penalty

[111] That leaves the issue of penalty.

[112] Mr Morris noted that the appellant had been admitted for 30 years, and had not offended before. At the time he acted in the way complained of he was facing extraordinary pressure in relation to his personal situation. The provocation by Mr G and J was immense. There was no risk of such conduct in the future. The appellant was remorseful and had effectively apologised at several stages during the course of the hearing. In the circumstances it was out of proportion for him to be censured and ordered to pay costs which totalled approximately $50,000.

[113] In response Ms Davenport submitted that the conduct justified suspension and argued that was the appropriate order.

[114] Having considered the submissions of counsel I reject Ms Davenport's submission that suspension was required. While the appellant's conduct is properly categorised variously as misconduct and unsatisfactory, given it is the first example of such conduct, and given the provocation by the rude and intemperate correspondence from Mr G I am satisfied that censure and an order for payment of costs is a sufficient penalty.

[115] It follows I am not able to accept Mr Morris' submission that censure and the costs were excessive in this case.

[116] The conduct complained of carried on over an extended period of time for over six months, from August 2012 to March 2013. It was wilful, and directed towards advancing the appellant's personal financial situation. I also consider the submission the appellant is remorseful is somewhat overstated. While at times during the course of cross-examination the appellant expressed remorse and said that

he wished to apologise that is somewhat inconsistent with the way he has pursued the same explanation and justification for his actions in the written submissions on appeal to this Court.

[117] Section 257 requires the NZLS to reimburse the Crown for the hearing. The prosecution was successful. The costs were at the level they were because of the length of the hearing. They were properly awarded against the appellant. The profession through the NZLS should not have to bear the costs payable to the Crown.

[118] Looked at broadly, the respondent succeeded with one half of the charges. It was reasonable for the Tribunal to award 50 per cent of the respondent's actual costs of representation before it.

Suppression

[119] The appellant seeks permanent suppression of his name. Suppression is provided for by s 240(1) of the Act:

> **240 Restrictions on publication**
>
> (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:
>
> (a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:
>
> (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:
>
> (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.

[120] The Tribunal had affidavit evidence from the appellant and his brother before it. The evidence emphasised the uniqueness of the surname and the effect on other members of the appellant's family. The appellant also made the point that the prosecution had cost him a considerable sum to defend. The Tribunal considered that, while the appellant's reputation might suffer if his name was published, the public and profession had the right to be informed about his conduct. Further, the

affidavit evidence fell significantly short of establishing "incalculable hurt" to other family members.

[121] The reference to "incalculable hurt" is a reference to the use of that phrase by the Court of Appeal in *B (CA860/10) v R.*[20] In that case B had been convicted of a number of charges of being in possession of an objectionable publication. He sought but was declined name suppression in the District Court. The plea for name suppression was advanced on the basis that publication would impact adversely on family members, including his former wife, his children and elderly parents. Particular weight was placed on the impact on family members who were employed in Court administration.

[122] The Court acknowledged that Mr B's surname was unusual and that his former wife and oldest daughter worked for the Courts. The Court came to the view that publication of Mr B's name would plainly cause incalculable hurt to the individual family members and the extended family as a group. The Court was of the view it would undoubtedly compromise the ability of Mrs B and her daughters to do their jobs. The Court considered that the Judge had not fully considered the position of family members and appropriately weighed those against the public interest in identifying the offender. It appears from that decision that the Court acknowledged that embarrassment itself, even acute embarrassment, would not necessarily be sufficient.

[123] The appellant seeks to adduce further affidavit evidence on this issue. The application is opposed. The further affidavit evidence provides additional details of the appellant's family's situation. Most of the additional material could have been provided earlier by the appellant or his brother, although aspects of it might perhaps be regarded in the nature of updating evidence.

[124] The most recent affidavit of the appellant's brother provides further evidence as to the achievements and attributes of one of the appellant's nieces. The affidavit also contains the statement that she and her brother both have a reputation as having high standards of integrity and behaviour. Both have part-time employment in

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[20] *B (CA860/10) v R* [2011] NZCA 331.

positions of responsibility. The brother then goes on to state that his and the appellant's father has expressed the opinion that the proceedings are in no small part responsible for his deteriorating health. Their father is presently undergoing treatment for a number of conditions, the most serious of which is an undiagnosed heart condition. Reference is then made to the circumstances of other members of the more extended family.

[125] The appellant refers to his father having heart issues that presently defy precise analysis. The appellant says that his father has expressed to him that he has been greatly distressed by the ongoing series of complaints.

[126] The appellant says that publication would be unfair as it would:

(a) cause embarrassment and distress to six close family members who held the same surname;

(b) cause disproportionate damage to the appellant's practice. It has already cost him approximately $15,000 as he had to decline a directorship. Publication of his name will cause him ongoing economic harm.

[127] Even if the new evidence is admitted, it can make no difference to the decision on suppression. The principal argument for the appellant is the uniqueness of his family name and the effect on other family members particularly, but not limited to, his father. There is no principled reason for other family members to be affected by the publication of the appellant's name other than a sense of embarrassment by association with the appellant. A person's integrity is individual to them. The conduct in issue is purely personal to the appellant.

[128] While there is some general reference to the effect publication of the appellant's name would have on his father, and general reference to his father's health, there is no affidavit or direct evidence from the appellant's father to support the application for suppression nor, for that matter, is there any detailed evidence of his medical condition. The additional material in the further affidavit of the

appellant and his brother does not advance matters. The financial consequences the appellant refers to do not tip the balance in his favour. He is not suspended and will be able to continue to practice.

[129] The decision of the Tribunal not to order permanent name suppression was a decision open to it. The appellant cannot point to any error in law or principle. The Tribunal did not take into account irrelevant matters. In focusing its discussion on the consequences to the appellant and his extended family, it clearly took into account relevant issues. While the appellant has practised for 30 years without appearing before the Tribunal, his conduct in the present case is properly regarded as misconduct warranting censure. Further, while it arose out of the breakdown in relationship with Mr G and J and in an attempt to recover his fees, it was ongoing over a number of months.

Result

[130] I make the following orders:

(a) The appeal against the Tribunal's decision finding the appellant guilty of misconduct (charges 2 and 4) and unsatisfactory conduct (charge 1) is dismissed.

(b) The cross-appeal against dismissal of count 3 is itself dismissed.

(c) The appeal against penalty is dismissed.

(d) The appeal against the Tribunal's refusal to grant permanent name suppression is dismissed.

[131] The appellant has indicated that if unsuccessful he will wish to take the matter further. For that reason only there will be an interim order for a further period of 28 days from the date of this decision to enable the appellant to seek leave to

appeal on a question of law and to obtain an interim order in the Court of Appeal pending determination of that application in the Court of Appeal.[21]

Costs

[132] The appellant's appeal has been unsuccessful. The cross-appeal has also failed. However in substance the respondent has succeeded. The respondent is to have costs on the appeal. If counsel are unable to agree I will receive memoranda.

Venning J

[21] Lawyers and Conveyancers Act 2006, s 254.

APPENDIX

Particulars

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

The particulars of the charge are that:

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

> *As at 1 August 2012 you owe the appellant, the sum of $150,000 for services performed, preparing for and appearing at the Court of Appeal on 22 and 23 November 2009, preparing opinion for distribution to prospective funders in 2010/2011 and other preparatory and investigative work in relation to assistance with funding arrangements for the plaintiffs in EM H and TEC [...] CA 842/2011.*

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

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

4. Further, the appellant knew that the sum sought was disputed by J.

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

> *2.3 A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.*

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

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

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

3. The purpose of sending these documents to Buddle Findlay was to threaten to disclose or use this information unless Mr G or J paid the sum claimed to the appellant.

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

> R 2.7 *A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.*
>
> R 8 *A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.*[9]
>
> R 8.1 *A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.*
>
> R 10 *A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.*

CHARGE THREE: Disclosure of confidential and Privileged Information

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

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

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

> R 8 *A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.*[9]
>
> 8.1 *A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.*
>
> 8.7 *A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer.*

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

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

2. Mr Forbes was under no obligation to draw the Court of Appeal's attention to any internal dispute in J.

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

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

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

6. On 5 December 2012 the appellant wrote to Buddle Findlay and suggested that:

    (i) The class action was at risk because of their actions in not settling.

    (ii) Buddle Findlay had a conflict of interest because of the fact they were defending the action.

    (iii) Buddle Findlay had probably incurred a $160 million contingent liability.

    (iv) That Buddle Findlay were defending the action to make fees.

    (v) The letter also set out further aspects of Mr G's behaviour.

7. These letters/emails were sent as Buddle Findlay/Mr G had not settled the claim with the appellant and were a further attempt to threaten J and Mr G to promote the settlement of the appellant's claim.

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

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

CHARGE FIVE: Failure to Consent to Suppression Orders

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

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

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

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

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

CHARGE SIX: Communication with Solicitors

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

    a. A draft letter sent by the appellant on 6 March 2012 to WM and/or Buddle Findlay advising the High Court that he no longer acted in the litigation.

b. The appellant's letter on 8 March 2012 to Buddle Findlay in which (inter alia) he accuses the solicitor at Buddle Findlay of blackmail and demands a written apology from her.

c. On 30 November 2012 the appellant wrote to Buddle Findlay and asserted that Buddle Findlay were behaving improperly and advised that they were incurring a potential insurance liability.

d. On 5 December 2012 the appellant wrote to Buddle Findlay and asserted they were behaving improperly and suggested this was to generate fees.

(v) On 28 March 2013 the appellant accused Buddle Findlay of threatening conduct and demanded a retraction and an apology from Buddle Findlay and Mr Reid QC.

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

> R 2.7 *A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.*
>
> R 10 *A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.*