NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2017] NZLCDT 10
LCDT 013/16

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE** Applicant
AND	**JEANNE DENHAM** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr S Grieve QC
Ms C Rowe
Ms S Sage
Mr W Smith

HEARING 9 February and 23 March 2017

HELD AT Auckland

DATE OF DECISION 25 May 2017

COUNSEL
Mr M Hodge for the Standards Committee
Ms T Aickin for the Practitioner

RESERVED DECISION OF THE TRIBUNAL

Introduction

[1] This is a troubling and somewhat unusual case involving a practitioner who only held a practising certificate for approximately nine months. Despite this, the period with which the evidence is concerned is more than six years.

[2] Because the conduct is personal rather than professional, that is, it does not involve the provision of regulated services, there is a higher threshold for finding misconduct. It must be such as to justify a finding that the lawyer is not a fit and proper person or is otherwise unsuitable to engage in practice as a lawyer.

Issues

(1) Is the practitioner's course of conduct in the period from October 2012 until 4 November 2014 when her practising certificate was issued (Period One) relevant to our assessment of the charge, which relates to Period Two (4 November 2014 to 18 August 2015), the period in which Ms Denham held a practising certificate?

(2) If "Yes", did the Period One conduct demonstrate a use of legal processes for improper purposes as charged, namely:

(a) Was there an intention to cause unnecessary distress and embarrassment to Mr Clague; and/or

(b) Was there an intention to cause unnecessary distress and embarrassment to Kristin School; and/or

(c) Was there an intention to place pressure on Mr Clague in his conduct of relationship property proceedings between him and the former practitioner, Ms Denham?

(3) If the answer to any of the questions posed in Issue 2 is "Yes", does one or more of these purposes have to be the predominant purpose for the conduct under consideration?

(4) In continuing her proceedings through to hearing, including the representations she made to the Court in her evidence, did Ms Denham have any of the improper purposes pleaded, namely as set out under (a), (b) and (c) of Issue 2?

(5) If so, does this conduct reach the threshold for misconduct under s 7(1)(b)(ii)?

Background

[3] The events under consideration occurred after the breakdown of Ms Denham's marriage with her former husband Mr Clague. They had been married in July 2010 and on 10 September 2010 were involved in a brief physical altercation. After they separated in late April 2012 there were negotiations between Ms Denham and Mr Clague concerning the resolution of relationship property issues. They had previously separated in the course of the de facto relationship which preceded their marriage and had divided their property at that time. When Ms Denham re-entered the relationship, she contributed a capital sum to the purchase of the family home and it was this sum she wished to retrieve urgently upon separation.

[4] Many of the negotiations between the parties are recorded in the email exchanges and in text messages which have been made available to the Tribunal through the evidence directly and also by means of the transcript of the evidence given at the District Court trial which occurred in 2015. These texts record an initial cooperative approach to the resolution and payment to Ms Denham but at some point broke down at the beginning of May 2012 at which point Mr Clague suggested that matters be dealt with through their lawyers.

[5] The response of Ms Denham was recorded in two text messages as "*I think you will really regret that move*" (1 May 2012, 21:51) and later the same night "*As I said, I think you will regret withholding my separate property and tying it up in legal process*". Ms Denham was demanding that the money be paid immediately and was impatient

with Mr Clague's efforts to obtain the finance to do so. On 3 May she texted "*I am utterly astounded at you, Peter. I think you really haven't thought through what you are doing and what the costs and consequences will be*".

[6] On 31 August 2012 Ms Denham filed a relationship property claim against Mr Clague. By early October following service of the proceedings and a response which indicated opposition by Mr Clague, having been conveyed to her by her first lawyer, Ms Denham decided to engage a new lawyer, Mr Patterson, in early October. They met on 16 October and discussed not only the relationship property matters but also a public relations strategy in relation to a complaint which Ms Denham had indicated she wished to make against Mr Clague in respect of the altercation in September 2010. Mr Patterson had suggested that this complaint simply be threatened rather than actually made but Ms Denham advised him that she proposed to go ahead with the complaint to the police and she did so on 18 October. Around this time it was clear that Ms Denham was equivocating over the idea of a media strategy and the links between a complaint of assault and the relationship property claim. She clarified this in an email to her counsel.

[7] Strangely, given the privacy of a police complaint, Ms Denham was advised, and eventually followed the advice to take a "proactive approach" by providing information to the media before Mr Clague could do so. Ms Denham's explanation in evidence as to why Mr Clague would in any way wish such a matter to be aired publicly was unsatisfactory. She indicated that she had been advised that it would be leaked by the police in any event, because of Mr Clague's high public profile as the Principal of Kristin School at the time.

[8] Ms Denham engaged the services of a public relations consultant, Mr Carrick Graham, who in turn provided press releases which were approved by Ms Denham, to the blogger Cameron Slater for the "Whaleoil" blog.

[9] Having equivocated and (she acknowledged in evidence before us) being concerned about the harm she was likely to do to her former husband, his reputation and the reputation of his employer Kristin School, Ms Denham determined in any event she ought to proceed with the media strategy.

[10] On 18 October 2012 she filed a complaint with the police regarding the alleged assault on 10 September 2010. The timing of this complaint was that it shortly followed the response (and opposition) by Mr Clague to her relationship property claim. Some six days after this complaint the first blog post on Whaleoil appeared stating that the head of Kristin School was being questioned by police regarding a charge of male assaults female.

[11] The blog also named the Chair of the Kristin School Board of Governors and stated that the school had known about the allegations and done nothing.

[12] On 25 October 2012 Ms Denham texted Mr Graham saying "*Carrick – Cameron's blog is starting to generate interest in the Kristin community. It'll spread like wildfire now!*" Two minutes later the response from Mr Graham read "*Excellent. We'll talk more tomorrow about what else we can run on there!*"

[13] On 28 October the second Whaleoil blog post appeared and purported to describe the reaction of the Chair of the Kristin Board of Governors, and parents generally. About two-thirds of the article relates to the school. In the text of the blog is the following comment: *"… the fool could have avoided a whole world of pain and trouble (not to mention public attention) by settling the issue when they separated. Digging in his heels is a sure sign of a failed strategy to deal with his ex*."

[14] The next day, 29 October, Ms Denham emailed Mr Graham:

> "Hi Carrick … Not sure if you've been in touch with Chris (Patterson), but Kristin board is very keen for relationship property matters to be sorted asap. We are trying to arrange a mediation or negotiation for later this week.
>
> I presume we'll put the next blog posting on hold to see if they can get Peter to come to the table. However, I'm still expecting to meet with Anna Marie (sic) on Thursday."

[15] Apparently the mediation did not proceed, because on 30 October the third Whaleoil blog appeared referring to steps taken by the Kristin School Board to reassure parents. The blog ended with the statement "*Remember, <u>It's Not OK</u>*". This statement parrots the slogan of a stopping domestic violence public information campaign. Ms Denham obviously read this as a tongue in cheek reference because she said in a text in response that it made her "laugh out loud".

[16] There appears to have been an attempt by Ms Denham to distance herself somewhat from the pressure being brought on Mr Clague, evidenced by an email to her lawyer on 1 November 2012 in which she stated her separate objectives: "*justice for a crime committed, reputation saving and an RP dispute*." Ms Denham relies heavily on this email.

[17] Throughout these events and various proceedings which have followed, including the current disciplinary proceedings, Ms Denham has maintained that her complaint to the police and subsequent private prosecution was in order to obtain justice in relation to an assault upon her. Somewhat later in her evidence she also said that she owed it to other victims of domestic violence to pursue the matter and that this also was one of the bases for her private prosecution.

[18] The intensity of the pressure on Mr Clague's employer, Kristin School was undoubtedly increased by the fourth Whaleoil blog on 3 November 2012. In this blog only the school was targeted and it concluded with a list of the members of the Board and their personal email addresses which Ms Denham had provided. It was signed off, once again as "*Remember, It's Not OK*".

[19] It would seem that by this stage, any doubts as to harm to the school or her husband had been set aside by Ms Denham who texted Mr Graham as follows:

> "Great stuff, Carrick – that should give them all a busy weekend! Loved the It's not ok reference at the end again – made me laugh out loud!"

[20] She had earlier thanked Mr Graham "… sooo(sic) much for making this happen".

[21] A further matter in which there was a text exchange that day related to Mr Clague's salary, which Ms Denham disclosed to Mr Graham, commenting that she had told another reporter the previous day. Ms Denham was also aware that the information about Mr Clague's salary would be conveyed to Cameron Slater for an article in "The Truth" and her response to that information was "*Oh, great!*". She went on to say "*I think Peter will lose a lot of support when people find that out. The Kristin parents will be furious!*" In cross-examination about this topic Ms Denham conceded that Mr Clague's salary had nothing to do with the alleged assault.

[22] On 4 November 2012 the media campaign continued with an article in the New Zealand Herald On Sunday "*Break up turns nasty as police called in*". In the course of text discussion about this article with Mr Graham, Ms Denham made the comment "*On the upside, though, it seems he must now be stood down!*", once again evidencing her clear understanding of the consequences of her actions.

[23] On 4 November the fifth Whaleoil blog appeared pointing out that they had broken the story first and repeating Mr Clague's salary as well as the fact there had been an injunction application to prevent publication of the Herald article, which had been unsuccessful. Ms Denham had been keen for the failed injunction proceeding to be publicised.

[24] On 5 November 2012 the police gave Mr Clague a formal written warning in relation to a Summary Offences Act common assault. This concluded the police investigation and made it clear they would not be seeking to lay any charge against Mr Clague. On 6 November there was a further Whaleoil blog targeting the Kristin School Board and its Chair.

[25] The next Whaleoil blog dealt with the police decision not to prosecute and appeared on 8 November 2012. It began "*Look's like it is OK*". It was in response to a media statement that had been issued by Mr Graham on behalf of Ms Denham whose outrage at the failure to charge Mr Clague was recorded. Towards the end of the media statement Ms Denham said "*I suffered severe bruising and a fracture injury …"* Ms Denham in evidence contended that she had been told by the first doctor who she saw that it was hard to diagnose fractures of the tailbone but said that it was referred to by the doctor as such. However, when her subsequent recovery (and X-rays) did not accord with the normal progression of a fracture, instead suggesting bruising had occurred, Ms Denham appeared not to change her description of the nature of the injury and continued to record it as a fracture, including in her private prosecution charge and Victim Impact Statement.

[26] In an email exchange with Ms Denham on 9 November Mr Graham summarised the effect of the media campaign as:

> "We have managed to generate media coverage and a raft of commentary. The School's Board has had to issue two letters to parents and it would be safe to say that Clague has had the blow-torch applied to him in terms of a much wider

> audience being aware of his actions**. In terms of reputational hits he is damaged goods."** (emphasis ours)

[27] From this time until March 2013 Ms Denham attempted to have the police review their decision not to prosecute. She did this by various means including approaches to politicians, and in seeking a review of the decision by the Independent Police Conduct Authority. She was unsuccessful in these efforts.

[28] The relationship property proceedings were still on foot and had not yet come to a hearing. On 21 March 2014 Ms Denham instituted a private prosecution against Mr Clague. The charge was framed as "male assaults female". The request for issue of a summons against Mr Clague went before a District Court Judge and was released shortly before 6 May 2014. In the meantime the Family Court had allocated a date of 28-30 May for the relationship property proceedings.

[29] On receiving the release of the summons which she issued on 6 May to Mr Clague, Ms Denham contacted Mr Carrick Graham again. She sought his help in the following terms:

> "I need your help again. I have been trying for the past 18 months to get the police to review their decision not to charge Peter and it appears that someone high up (above Inspector level) is silencing everyone. Consequently, I have had a private prosecution authorised. Today, Peter was charged and issued a summons for the week after next.
>
> I feel certain that he will again apply for name suppression/gagging and it will be so sad if he is found guilty and I can't clear my name or get the media to start asking the police some hard questions. So, would you be able to leak the story to Cam for publication first thing tomorrow? **It might be a race**." (emphasis ours)

[30] Mr Graham released the information as requested, with articles appearing in the New Zealand Herald on Sunday, on 11 May 2014 and on the same day on the Whaleoil blog. Both of these articles refer to the fact that Mr Clague had obtained a new job at a prestigious English school.

[31] These articles preceded the first call of this private prosecution in the District Court, as Ms Denham acknowledged she had intended (both in her emails and in her evidence). Therefore, Mr Clague was deliberately denied the opportunity to seek name suppression from the Court.

[32] It is the Standards Committee's contention that the private prosecution was brought as a foundation to continue the pressure upon Mr Clague, following the police decision not to prosecute. In that way, the Standards Committee allege that the launching of the private prosecution and its continuation is part of a continuing course of conduct whereby there was a foundation for continuation of the media campaign with the underlying purposes pleaded.

[33] Following this time, a further six articles were published in New Zealand and the United Kingdom, the last appearing on 31 August 2014 in The Telegraph. Ms Denham denies leaking the information to any United Kingdom publication.

[34] The private prosecution was heard in the District Court in July 2015. By this time Ms Denham, who recognised that she was an inexperienced practitioner with no background in criminal proceedings, had obtained the services of senior counsel, Ms Marie Dyhrberg QC.

[35] In the course of the prosecution there were interlocutory applications for discovery as well as an early application for the proceedings to be struck out for abuse of process. That first strike-out application was unsuccessful at pre-trial stage, but it would appear that counsel for Mr Clague was not in possession of all of the text and email material, because such had not been required to be disclosed by Ms Denham until a later discovery application was granted.

[36] The proceedings concluded on 6 July 2015 when His Honour Judge McNaughton dismissed the private prosecution as an abuse of process. His Honour stated:

> "[59] As to abuse of process I am satisfied beyond any doubt that this private prosecution has been brought for an ulterior motive by the complainant, that is, primarily to destroy his career and reputation and collaterally to damage Kristin School and at the same time to obtain an advantage in pressing the relationship property claim. On that basis alone the charges should be dismissed.
>
> [60] Further, I am satisfied on the complainant's own evidence that she knowingly and actively sought to subvert the operation of suppression orders with the assistance of Mr Graham and Cameron Slater and that in itself constitutes a serious abuse of process, along with material nondisclosure of the communications with Mr Graham which have revealed the complainant's underlying motives for all to see."

[37] His Honour's findings in this regard were further reflected in an award by him of indemnity costs against Ms Denham of almost $146,000.

[38] These costs were not paid by Ms Denham who has since declared herself bankrupt.

Issue 1 – Relevance of Period One

[39] Before considering this issue, we record that the onus of proof of the misconduct alleged rests with the Standards Committee. The standard of proof is on the balance of probabilities.[1] However, disciplinary proceedings are neither a criminal proceeding nor a strictly civil process, because of the public interest component, and the Tribunal has been described as operating on a quasi-inquisitorial basis.

[40] During Period One, prior to Ms Denham having obtained a practising certificate, she was a person who had previously been admitted to the Bar, that is, she was on the Roll of Barristers and Solicitors of the High Court of New Zealand. That is relevant, not because it provides any basis for disciplinary action against her under the Act,[2] but because, having completed the procedure to be admitted to the Roll she will have undertaken the steps necessary to establish that she was a fit and proper person to be admitted. Consequently she will have been aware that she held a status which was a privileged one and that she had an overriding duty to the Court as an Officer of the Court upon admission. This duty required for her not to abuse the processes of the Court.

[41] Even without holding a practising certificate, it would be expected that someone who has completed a law degree, and who has undertaken such a character assessment to join a privileged profession, would have thought carefully about the obligations that privilege carried with it.

[42] Mr Hodge argues that the relevance of this period is that it demonstrates intent and that that intent continued throughout Period Two. Ms Aickin conceded that this period was relevant but submitted, for reasons which are discussed later in the decision, that we should give the evidence concerning this period little weight.

[43] We accept the submission that Period One is relevant. Clearly the assessment of the practitioner's intentions is an integral element of the misconduct with which she

[1] Section 241 of the Act.
[2] The definition of lawyer in the Act is a person who holds or has previously held a practising certificate as a Barrister or Barrister and Solicitor.

is charged. Without full understanding of the background leading to Period Two and the context, including earlier statements made by the practitioner, the Tribunal would be disadvantaged in assessing such intent. Thus the answer to the question posed in this issue is: "Yes".

Issue 2 – Did Ms Denham Use Legal Processes for the Improper Purposes Pleaded, during Period One?

[44] The relevant rule is as follows:

> **Proper Purpose**
>
> "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 purposes of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests or occupation."[3]

[45] The Standards Committee contends that the threatening inference which could be taken from the text messages from Ms Denham in early May 2012 recorded in paragraph [5] of this decision, were borne out by her subsequent actions in a targeted public relations strategy and media campaign which were linked to her complaint to the police. It contends this was followed up by a revival of the campaign when her private prosecution was commenced in 2014.

[46] For her part, Ms Denham points to the two pieces of evidence to the contrary, namely her emails to her counsel of 23 October 2012 and 1 November 2012, where she made statements such as:

> "For me, this is not about guns and bullets … but about an urgent need to present my side of the story in a situation where I am up against a bit of a giant.
>
> Quite honestly, Chris (Patterson), I'm not thinking about the relationship property at all right now, I just don't want to go down without a final struggle. I thought laying the police complaint would do that, (I provided them with an affidavit from Peter admitting to at least grabbing and shaking me for goodness sake!), but for some reason? they haven't charged him yet.
>
> It is important to me more than ever now to only act in ways that positively support and don't tarnish my reputation in any way …"

[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[47] Ms Denham goes on to say that "employing Cameron (Slater)" didn't fit with that objective. She then went on to comment on the press release and noted that she needed to make some corrections.

[48] On 1 November Ms Denham clarified the position further with her counsel as follows:

> "For me, there are three issues here: justice for a crime committed, reputation saving and an RP dispute."

[49] She acknowledges that "*going to the main media was a bit of a risk* …" and later she said:

> "Yes, going to the main media was a bit of a risk, but I thought it would give me the opportunity to tell my story, counter this character assassination that [sic] been ongoing and to do something good for someone else (the DV cause). That may sound a bit weak to you, but I'm not usually someone who would stick their neck out this far and I have only justified it to myself, by committing to do something good for other people as part of it. The TVNZ journalist today said that I would be opening myself up to criticism as well as support and again, I am only prepared to do that because others might actually benefit from it."

[50] She goes on to point out that her former husband had committed a crime and that "*I did not make the complaint to coerce him into settling; I made it so that he could face justice and also so that he would stop bullying me*." In the same email however, somewhat confusingly, she talks about her husband being fearful of facing her because he had told lies about her and did not:

> "… want to be confronted with the real person. But, hey, let's **leverage off that fear and try and get a negotiated settlement instead.**
>
> No matter what happens with the police and the media now, Peter will not be able to stay at Kristin; a number of parents have written to the school asking for his resignation and … I doubt he will find it very easy to find another similar position to his current one and he will not be able to keep on both of the properties in that event. I believe, therefore, that **he will be knocking on our door wanting to settle** at some point in the next couple of months, so I am not fearful that this is our only opportunity to reach a settlement.
>
> **We are or will be soon in a position to call the shots**. …" (emphasis ours)

[51] Thus, even in the document on which Ms Denham places so much reliance to demonstrate a proper purpose for her actions (and hence subsequent use of the legal process), there emerge other ulterior purposes for applying the heat of the media campaign.

[52] The other pieces of evidence which suggest purposes more aligned with causing distress and embarrassment to Mr Clague and to Kristin School are as follows:

(1) Ms Denham's delight and enthusiasm about the content and consequences of the Whaleoil blogs. References were made to the "laugh out loud" text referred to in paragraph [15] of this decision. The text is quoted in paragraph [19].

(2) The heavy emphasis on the damaging information about the school, and implied criticisms of the Chairperson of the Board, which have little or no connection with the holding of Mr Clague accountable for any assault which may have been committed. An inspection of the 21 media articles demonstrates a very strong focus on Kristin School, its Chairperson and the Board in almost every article.

(3) The release of Mr Clague's salary details. This was clearly unconnected with any assault matter and when put together with the text correspondence with her media advisor referred to in paragraphs [21] and [22] is particularly compelling evidence. In addition when cross-examined on this subject Ms Denham was extremely evasive to the point of disingenuousness.

(4) Her evidence concerning her intentions about targeting the school was also disingenuous and unimpressive. The references to Mr Clague having to be stood down and not finding it easy to find another position are further indications of Ms Denham's mindset.

(5) The reference to "leveraging" which has been referred to in paragraph [50] above is a telling use of language, which also appears in the email to Carrick Graham suggesting holding the next blog posting to see if the Kristin Board "*can get Peter to come to the table*" and that they are "*very keen for relationship property matters to be sorted asap".*

(6) That Ms Denham was paying a public relations agent and in turn a blogger (Cameron Slater) to publicise what would otherwise be private matters (at least until aired in Court), is a clear indicator that *"justice for a crime*

committed" would not appear to be the dominant purpose. In examination about Mr Slater's involvement in her payment to him, both in the District Court criminal trial and before the Tribunal, her evidence was evasive and unsatisfactory. Furthermore she misled the Tribunal in her affidavit dated 30 November 2016 where she stated "I did not have any editorial input into the Whaleoil postings and did not have any real understanding of who "Cameron" was at the time or the true nature of his Whaleoil blog". Emails to Carrick Graham in late October 2012, in which she seems to have a clear view that her reputation might be tarnished by a connection with Mr Slater, and in which she certainly refers to editorial input to the press releases, if not the blog itself, discredit this assertion.

(7) A very clear intention to undermine the Court's power to grant suppression of Mr Clague's name in the private prosecution is demonstrated by her email to Carrick Graham on 6 May 2014. This email is quoted in paragraph [29].

We find therefore, that during Period One, Ms Denham did use legal processes for improper purposes.

Issue 3 – Multiple Purposes

[53] In addressing us on this issue, Mr Hodge referred us to a judgment of the High Court of Australia[4] which was concerned with abuse of process. That judgment, in turn referred to the leading New Zealand case on abuse of process, *Moevao*[5]. In considering whether to grant a permanent stay of proceedings on the basis of abuse of process, the Full Court of the High Court of Australia considered the issue of multiple purposes, particularly if there was a *prima facie* case. The Court considered whether, for abuse of process to be established, it was necessary that "….*the proceedings have been instituted not only for an improper purpose but also without reasonable grounds …".* The Court concluded:[6]

> "In our view, the power must extend to the prevention of an abuse of process resulting in oppression, even if the moving party has a *prima facie* case or must be assumed to have a prima facie case. Take, for example, a situation in which

[4] *Williams & Ors v Spautz* [1991-1992] 174 CLR 509.
[5] *Moevao v Department of Labour* [1980] 1 NZLR 464.
[6] At page 522.

> the moving party commences criminal proceedings. He or she can establish a *prima facie* case against the defendant but has no intention of prosecuting the proceedings to a conclusion because he or she wishes to use them only as a means of extorting a pecuniary benefit from the defendant. It would be extraordinary if the Court lacked power to prevent the abuse of process in these circumstances."

Mr Hodge submits that this supports his submission that:

> "If there is evidence showing an improper purpose, the fact that the proceedings could succeed does not mean that they were not brought for an improper purpose."

[54] The *Spautz* case is also relied upon by Mr Hodge to suggest that the correct current view, in establishing an abuse of process, is that the improper purpose need not be the *sole* purpose, but that it be the *predominant* purpose.[7]

[55] We understand the ordinary meaning of predominant to be "main", "primary" or "uppermost".

[56] We accept that the Standards Committee must establish such a purpose on Ms Denham's part.

Issue 4 – Conduct of the trial in the District Court - predominant purpose

[57] Mr Hodge submits, and we accept, that the "*fundamental nature of the duty in Rule 2.3 is such that it does not matter whether the practitioner is carrying out regulated services or not.*"

[58] Ms Denham has placed considerable reliance on the fact that, in continuing the proceedings to a hearing in Period Two, that she engaged senior counsel to appear on her behalf.

[59] What is clear from the evidence is that counsel, Ms Dyhrberg QC, adopted the view that the prosecution should be run on the basis of the admitted technical assault. Mr Clague had admitted grabbing Ms Denham by the shoulders to restrain her before (he says) slipping on a rug on a slippery surface falling into her and causing her to fall backwards onto the stairs.

---

[7] See footnote 5 at page 529.

[60] Ms Dyhrberg QC clearly did not consider it wise to conduct the prosecution on the basis of the much more serious and broader allegation of assault framed by Ms Denham. This is an important point in considering what Ms Denham must have known to be a likely outcome of the proceedings.

[61] We should note that the broader form of assault was, during the trial at the insistence of the Judge, a matter which required consideration by the jury because that had been the focus of Ms Denham's earlier evidence and complaint. His Honour considered the jury would need to decide whether there was an assault of the type admitted or the more serious type alleged by Ms Denham.

[62] Mr Hodge points out that His Honour Judge McNaughton found "… *the **admitted** assault was not of a nature which would ordinarily result in a prosecution rather than a warning for an out of time Summary Offences Act 1981 assault*." (emphasis ours). This is the position the police had also adopted.

[63] It is very important to recognise that, from the contents of her press releases right through to the manner in which she described her injuries in her Victim Impact Statement, Ms Denham was referring to what became the second alleged assault, that is, the more serious version. But it was not until the trial that the Judge focused on these matters. Her counsel had not intended to go there, which means that from late 2014 (from the time Ms Dyhrberg was engaged) the strategy was to run the private prosecution on the admitted portion only, in which case Ms Denham must have known the prosecution, even if it were successful, would not result in a finding of guilt on the matters about which she had been so public.

[64] Mr Hodge submits this is powerful evidence that the prosecution was a vehicle to create the distress and embarrassment pleaded, was not a vehicle to "*achieve justice*" for the injury and assault she complained of and was therefore prosecuted by her for improper purposes.

[65] In evidence before the Tribunal, for the first time Ms Denham articulated a further purpose, which was to have Mr Clague attend a Stopping Violence Programme. That has never been stated in any material over the past five years. Ms Denham also acknowledged she had received advice that a discharge without

conviction was the likely outcome but following completion of a Stopping Violence Programme.

[66] Ms Denham conceded that she had never instructed her lawyers that she was only seeking to have Mr Clague complete a Stopping Violence Programme, but said this was because she did not believe he would do it. We consider this evidence to be disingenuous and lacking in credibility, as were so many portions of Ms Denham's evidence.

[67] Ms Denham was cross-examined before us for more than a day and was at times evasive and lacking in credibility particularly when faced with very plain emails and text messages which had been written by her at the time in question. We have referred, in paragraph [52], to the specific pieces of evidence which undermine Ms Denham's contention that her primary purpose was to "obtain justice".

[68] We regarded the Stopping Violence Programme as an *ex post facto* rationalisation to justify her continuing with the prosecution, and as such we do not find it credible. As Mr Hodge pointed out, there was correspondence from Mr Clague's lawyers proposing settlement, in the time leading up to the jury trial, which correspondence indicated he was desperate to resolve everything and was under huge pressure. Even though Ms Denham's counsel regarded that settlement offer as improper, there was no suggestion at that stage that the intended outcome of the proceedings was that he attend a Stopping Violence Programme, nor any suggestion advanced by Ms Denham that he ought to do so.

[69] Finally, in his submissions Mr Hodge relies on the leading New Zealand textbook on ethics and professional responsibility[8] in which examples were given of the use of legal processes for improper purposes and referred to the following statement made by the learned authors:

> "A lawyer should never be involved in an action where the Courts are used unfairly for a purpose which is not connected with the outcome of the case, or as a collateral attack on an earlier decision of the Court.
>
> It will not be an absolute defence to a claim of abuse for a solicitor that he or she relied on a barrister's expertise. Such reliance may be warranted with the material is technical or the facts complex, but in most cases solicitors are

[8] *Ethics Professional Responsibility and the Lawyer* D Webb, K Dalziel, K Cook (3rd ed. Lexus Nexus 2016) at [14.6].

> expected to exercise independent judgment in light of their own skill as to whether the claim is well founded. In matters of law in legal practice, legal representatives may not, by relying on the advice of another, divest themselves of their responsibility to conduct litigation responsibly."

[70] We accept that is the position. The private prosecution proceedings were instigated by Ms Denham prior to the engagement of senior counsel and it was Ms Denham, not her counsel, who had authorised and approved of the media campaign which was revived by the criminal proceedings. Further, notwithstanding advice from counsel, it can only have been Ms Denham's decision to continue the prosecution.

Further Evidence – Findings of Judge McNaughton

[71] We had before us the findings of His Honour Judge McNaughton in dismissing the charges which had been brought by Ms Denham against Mr Clague on the grounds of abuse of the process. We also have His Honour's decision of 1 March 2016 where indemnity costs were awarded against Ms Denham on the basis of bad faith and abuse of process.

[72] We have reminded ourselves that the Tribunal cannot rely on these determinations as proof of facts in issue before us, and that we must make our own enquiries. We refer to the judgment of the Court of Appeal in *Deliu*:[9]

> "First, as Mr Morgan QC points out in his submissions for the Committee, the question whether judgments can be used as evidence in disciplinary hearings depends on the use the judgments are being put to in the particular case. It is of course well established that the Tribunal is not entitled to determine that facts in issue are proved by accepting without inquiry the findings of another court or Tribunal as to the existence of those facts. But, as Mr Morgan confirmed, that is not the purpose for which the Committee seeks to adduce the judgments in evidence in this case. Here the Committee simply seeks to produce them under s 239(1) of the Act as evidence that may assist the Tribunal to deal effectively with the matters before it."

[73] As already indicated, Ms Denham was cross-examined by Mr Hodge for more than one day before the Tribunal and was taken through many of the documents which had also been put to her during the criminal proceedings. The impressions formed by the Tribunal at the conclusion of the cross-examination were consistent with those expressed by His Honour. We refer to some specific issues raised by the evidence

[9] *Deliu v National Standards Committee of the New Zealand Law Society* [2015] NZCA 399, [34].

where we found our own conclusions accorded with those expressed by His Honour Judge McNaughton.

[74] For example,[10] at paragraphs [31-33] when discussing the Whaleoil blog that referred to "*the fool*" avoiding "*a whole world of pain and trouble (not to mention public attention) by settling the issue when they separated*". His Honour commented at [32]:

> "[32] It is difficult to interpret this as anything other than a blatant attempt to apply pressure to the defendant to settle the complainant's relationship property claim, given the timing of the posting, with the affidavits in reply on that claim due, given the complainant's acknowledgement that she was aware of the material which was going up on the Whale Oil site and given that she was paying Mr Slater for his services.
>
> [33] The complainant denied any input into these postings but against the overall background as I have set it out I find that impossible to accept."

[75] We have already commented on Ms Denham's denial of editorial input into the blog, which we considered to be sophistry, having regard to her editorial input into the press releases which formed the basis for the blog.

[76] Further at paragraph [35] of his decision His Honour Judge McNaughton comments:

> "The complainant denied any intention to damage the defendant's reputation or Kristin School but her text message exchanges with Mr Graham following a further Whale Oil item criticising the Kristin school board's handling of the police investigation gives the lie to that claim."

[77] His Honour Judge McNaughton also commented, as we have done, on the lack of connection between an alleged domestic assault and Mr Clague's income, details of which had been provided by Ms Denham to the media. His Honour combined that information together with the text exchanges with Mr Graham, about Mr Clague being stood down and losing a lot of support when people discovered his level of income, and expressed his view at [39], which accords with that of the Tribunal:

> "[39] All of these messages unequivocally demonstrate an orchestrated campaign initiated, controlled and paid for by the complainant in order to destroy the defendant's reputation and collaterally damage Kristin School."

[10] *Denham v Clague* [2015] NZDC 12703.

[78] The Tribunal has expressed deep concern at a qualified lawyer working to undermine the ability of the District Court to grant a suppression order pending trial. His Honour Judge McNaughton connected that with Ms Denham's purpose:

> "The defendant is a qualified lawyer and it is no defence to claim ignorance of the media public relations world. She has undertaken this exercise deliberately and repeatedly in a calculated and determined way which leaves no room for doubt as to her underlying purpose."[11]

[79] Finally, as to our overall impression, although we have already quoted His Honour's views at paragraph [36] of this decision, we repeat this excerpt, emphasising that it reflects our view of the matter:

> "[59] As to abuse of process I am satisfied beyond any doubt that this private prosecution has been brought for an ulterior motive by the complainant, that is, primarily to destroy his career and reputation and collaterally to damage Kristin School and at the same time to obtain an advantage in pressing the relationship property claim"

[80] Clearly this is the very issue which the Tribunal has to determine for itself and we cannot simply adopt this finding without full inquiry and without considering the evidence which Ms Denham gave before the Tribunal.

Coincidences of Timing

[81] The timing of the blog postings and media releases might, individually, be dismissed, but when seen in the round by examining a chronology of the relevant events and matching those publications with contemporaneous emails, they significantly undermine Ms Denham's credibility and strengthen the Standards Committee's case.

[82] His Honour Judge McNaughton also makes findings, referring to the coincidental timing of many of the media releases which accord with the views we formed:

> "Again, I do not accept the complainant's evidence on this point either. It is one more coincidence in a series of coincidences where damaging media releases mysteriously appeared at very inconvenient points for the defendant in October 2012 when the relationship property claim was on foot and the defendant was under pressure to attend mediation urgently and settle the claim, and in May 2014 when the summons was issued and the property claim set down for hearing at the month, (sic) and again in August, just before the defendant arrived

[11] At paragraph [45]

> in the UK to start a new job. I am satisfied it was an orchestrated campaign and it was for the purposes contended by the defence:
>
> (1) To inflict maximum damage on the defendant's reputation;
>
> (2) To damage Kristin School;
>
> (3) To bring pressure to bear on the defendant to settle the relationship property claim in the complainant's favour."[12]

Overall Assessment of Credibility

[83] Putting to one side the judgments of His Honour Judge McNaughton, and having considered all the other documentary material before us and having had the advantage of seeing and hearing Ms Denham give evidence, our impression of Ms Denham is that her evidence generally lacked credibility. In many instances her account of events in evidence was inconsistent with the facts evidenced by the documentary record of emails and texts sent at the time.

[84] We have referred to the large amount of documentary material on which the misconduct case is based. There were often occasions when Ms Denham attempted to deny the most obvious statements made by her or inferences to be drawn from text exchanges between her and her media advisors. The standard of proof, which on the balance of probabilities is a high one given the serious allegations made in this case, has been more than comfortably reached by the Standards Committee's evidence, which we have carefully assessed.

[85] It is undoubtedly true that Ms Denham had very different views of the nature of the assault from that reported by Mr Clague, (and presumably accepted by the police). We do not have difficulty in accepting that one of Ms Denham's purposes was to achieve justice, as she perceived it, and that, when the police declined to prosecute Mr Clague, she then embarked on the private prosecution partly for that reason.

[86] However, it is quite clear from the contemporaneous documentary evidence, rather than the sanitised version which Ms Denham now presents, that she was determined to keep the media pressure on both the school and Mr Clague in order to receive a better outcome in her relationship property proceedings and to cause

[12] At paragraph [50].

distress and embarrassment both to Mr Clague and the school. We consider the latter purposes to have demonstrably overwhelmed the "pursuit of justice" purpose.

[87] Our clear finding is that, in pursuing the private prosecution through to hearing, in presenting the matter to the District Court as she did (including providing a victim impact statement which went well beyond the initial agreed basis of the prosecution, and was not disclosed to the defence), and in the evidence that she provided to the District Court Judge and Jury, she continued the legal process for the improper purposes.

Issue 5 – Misconduct section 7(1)(b)(ii)

[88] In our introduction we noted that conduct carried out in a "private" context which does not constitute the provision of regulated services, must be examined having regard to the higher threshold imposed by the wording of the Act namely s 7(1)(b)(ii) as follows:

> "Conduct of the lawyer … which is unconnected with the provision of regulated services by the lawyer … but which would justify a finding that the lawyer … is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer …"

[89] Clearly, the requirement in s 7(1)(b)(ii) that the alleged conduct of the lawyer would justify a finding that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer, involves considerations which go beyond the types of behaviour contained in s 7(1)(a).

[90] The statute also requires the upholding of the standards of lawyers generally, in an ethical sense. The statute is also concerned to maintain the confidence of the public in lawyers. The public must be able to be clear that when a lawyer issues proceedings he or she would only do so for proper purposes and in a considered and ethical manner.

[91] We consider that this practitioner, Ms Denham, has fallen well below that standard and in doing so has tarnished the reputation of the profession. Moreover, in our view this behaviour cannot be categorised as a "brief rush of blood to the head" against the background of an acrimonious matrimonial breakup, which might warrant some level of understanding or tolerance. The behaviour continued for over three

years, including the nine months during which Ms Denham was practising as a lawyer. We accept Mr Hodge's submission that:

> "A practitioner who breaches their fundamental duty as an officer of the court, who makes the choice to use legal processes for their own improper purposes (a choice sustained over a long period of time in this case), is not a fit and proper person to be a lawyer; nor are they suited to engage in legal practice."

[92] Mr Hodge points out that:

> "Lawyers occupy a privileged position as officers of the court. That position must never be abused for the purpose of waging personal vendettas. A practitioner who does so, whether knowingly or with a complete lack of insight and judgement, is not a fit and proper person to be a lawyer.

[93] We accept those submissions and find the misconduct to be convincingly established.

Directions

(1) The Standards Committee is to file submissions on penalty within 14 days of the date of this decision.

(2) The practitioner has a further 14 days to file submissions in response.

(3) Counsel are to liaise with the Tribunal's case manager to fix a penalty hearing of two hours.

DATED at AUCKLAND this 25th day of May 2017

Judge D F Clarkson
Chair