Final Exam Notes

Contents

Kenneth

Duncan Webb: "Why Should Poor People Get Free Lawyers?"

- Starting point of no-one should be denied access to a lawyer due to poverty.
    - But, if they can't afford it, then they should only get the service they deserve and can pay for. If they can't afford a lawyer, then they shouldn't get one.
- It is fairly difficult to argue that poor people should not get a lawyer just because they can't afford it. Therefore the key question becomes who should bear the cost of the legal services.
    - Lawyers are the only people who can provide the service.
    - Therefore there are only two options; either the lawyers do the work for free, or the Crown provides the service through legal aid.

The 'Crown Pays' Model

- Society carries the burden of upholding the poorest members, and that includes providing them with legal fees.
- This is the theory behind the current model.
- In reality, economic implications mean that there has been significant cost cutting to the legal aid system.
    - Although criminal legal aid is still largely available, civil legal aid has all but disappeared.
    - Question is what to do about the gap between those who do not qualify for legal aid, but cannot afford lawyers.

The Pro Bono Model

- Argument for lawyers to fill the gap.
- **Webb's thesis**: The profession has a moral obligation to fill the gap, and should work for free. Lawyers are a part of society, and the legal system, they therefore have a duty to uphold the system.

Objections to Webb's Thesis

- Lawyers act in their own clients, not for the intention of the public good.
    - True, but they are still a part of society. There is also no inconsistency between acting for both a commercial client and a pro bono client.
- Lawyers could use this as an opportunity to further their own political agendas by cherry picking the cases and client they want to represent, or for promotional purposes.
    - Ultimately not a positive ethical outcome. Webb takes a rather Kantian view of this sense of a lawyer's duty. This is not necessarily an ethical decision as it's stem is not from the believe that all are entitled to representation and is instead based off self interest.
    - The 'cab-rank' rule also goes some of the way to preventing this from happening. This rule still applies to pro-bono cases, preventing lawyers from heavily cherry picking their pro-bono cases (in theory).
- A criminal vagrant shouldn't be represented. They've rejected the societal social contract, which means they're no longer entitled to its protection.
    - Lawyers are upholding the system, not protecting the individual.
- Lawyers could pick and choose according to the merits of the case.
    - Cab rank rule still applies.
- The transition from a profession to a commercial structure has made pro-bono work more difficult.
    - True. But law is still a profession. There is still self-regulation, fiduciary obligations etc. Although firms are now run like a business, these factors still make the law a profession.
- Webb disagrees with the current formation of the NZ Law Society.

    - It currently runs as a regulatory body, regulating those engaging in forbidden behaviour. Webb would like it to to be aspirational, encouraging people to engage in the positive aspects of the profession.
        - But would be very difficult to establish and run.

So Should the Poor Get Free Lawyers?

- One of the aims of the legal system is to allow the weaker members of society the ability to enforce their rights against the more powerful.
- There are processes and formalities which the court system requires. These systems need a lawyer to navigate.
- These are **illusory rights** unless the plaintiff can get the representation and support required to enforce their rights.
- **Unequal contest**: If one side can afford a lawyer and the other cannot, then the representation is seriously unbalanced.
    - The adversarial system exists on the assumption that each side is able to highlight the flaws in the others argument. But if one side is heavily overpowered, then there is no justice.
    - The lawyer is a 'guide, tactician, and friend'. They educate and guide their clients.
    - Still an imbalance if one side gets a legal aid lawyer, and the other has a firm and a QC behind them. However this is a reality of the system.
- Also a public interest. The common law system depends on precedent. For the proper precedent to be developed, it's necessary for all cases to be argued correctly.
- It is in the public interest that people are represented. Precedent, judicial wisdom, and developing the law all depend on equal representation.

Am I My Brother's Keeper?

- Lawyers are not the keeper of each individual who requires a lawyer. However, they are keepers of the system as a whole.
- Maximum possible level of access to the system must be ensured.
- Pro bono work is not work done for the relief of poverty or the poor, it's work done for the continued benefit of the legal system as a whole.
    - Utilitarian argument that it is impossible to administer proper justice to the poor at the same level, due to the inherent disadvantages of poverty.

Can the Lawyer ask if the Case is Deserving?

- Could look at factors such as degree of poverty, merits of the claim, likelihood of winning, and the nature of the work involved.
- Problems with these definitions:
    - Poverty is illusory; varying degrees of need.
    - The political view of the lawyer should not be relevant. Lawyers should provide aid simply due to their moral obligation to the system.
    - Some pro bono work may be mundane, but it's of the utmost concern to the people involved.

Duties to the Court

- A lawyer's fundamental duty is to uphold the rule of law in NZ.
- The overarching responsibility is to act honestly and properly both in our professional lives and otherwise.

Part 13

- Deals with the duties of lawyers acting in litigation.
- Acting in litigation simply means appearing before the Court representing a client in any matter.
- If there a question on these provisions, look them up.

- 13: Overriding duty of a lawyer is to the court.
- 13.1: The lawyer has an absolute duty of honesty.
- 13.2: The lawyer must not act in a way which undermines the process of the court or the dignity of the judiciary.
    - 13.2.2: Must not discuss the case with any judicial officer outside of the courtroom, where such discussion is against procedure, or without the other party's knowledge.
    - 13.2.3: The lawyer must not contact jurors before, during, or after the verdict is reached.
    - 13.2.4: A lawyer should not engage in a relationship with a witness.
        - Inevitable, but always keep it professional.
- 13.3: Subject to duties to the Court, the lawyer must act in accordance with client's instructions.
- 13.4: A lawyer assisting a client in a dispute must keep the client informed of reasonable alternatives to litigation.
- 13.5: A lawyer engaged in litigation must maintain their independence at all times.
    - 13.5.1: A lawyer must not act if they would be required to give evidence in any form.
- 13.6: Lawyers who are members of the same practise must not act in dispute for 2 or more parties whose interests are not the same.
- 13.7: Where a lawyer is a witness, they must comply with the orders of the Courts as must as privilege allows them.
- 13.8 A lawyer should not attack a person's reputation without good cause.
- 13.9: A lawyer should ensure that obligations under discovery are fully complied with, and the rules of evidence are adhered to.
- 13.10: A lawyer cannot adduce evidence knowing it to be false.
    - 13.10.1: If a witness gives material evidence which is false, the lawyer must refuse to examine the witness further, and if the witness is the lawyer's client, they must cease acting for that client immediately.
    - 13.10.8: A lawyer must not suggest to a witness that false or misleading evidence should be given or that evidence should be supressed.
- 13.11: A lawyer should put all relevant information before the court. This includes cases which does not support the client.
- 13.12: A Crown prosecutor must act fairly and impartially at all times.
    - Duty to correct any mistake of the defence.
- 13.13: This duty to correct does not extend to the defence, who do not have to correct the defence's mistake.

Chua v ANZ

Facts

- The applicant applied ex-parte for an interim injunction to halt a mortgagee sale by ANZ.
- ANZ cross-applied to rescind the injunction.
- Counsel informed the Court that settlement between the buyer and ANZ was to be later that day.
- In fact, Counsel knew that the settlement has taken place the previous day.

- Arguments put forward in support of the injunction were clearly inadequate.
- Respondent applied for award of costs against both Mr Middleton and the firm.

Held
- In an ex-parte application, there is an absolute duty for a lawyer to disclose all relevant information, both for and against the client.
- Hammond J held that Mr Middleton actively misled the Court.
- Removes the injunction.
- Orders that all of Chou's lawyers are jointly responsible for costs associated with the matter.
- Forwarded the judgement to the District Law Society Standards Committee.
- Violation of rule 13.1.

Gazley v WDLS

Facts
- There had been an error whereby a document had been left out of a High Court trial.
- It was a proceeding in the HC where Gazley acted of defence counsel in a criminal matter.
- There was an appeal against the decision.
- The CA delivered the results of the hearing for leave to appeal in open Court.
- The CA delivered the decision on a basic point which had been advanced by Gazley, but the page on which this part of the judgement was was not in the judgment handed out.
- Gazley did not accept the later distribution of the missing page.
- Gazley claimed damages against the bench of the CA.
    - Claimed the entire bench had wilfully, maliciously, or negligently failed to discharge their duties.
- Launched proceedings against the entire bench.

Held
- This was a violation of Rule 13.8, and 13.8.1.
- Attacking the reputation of the Court of Appeal and attacking the honesty and integrity of the individuals who make up the bench without just cause.
- As part of the duty not to mislead the Court, a lawyer cannot put forward allegations for which there is an insufficient basis.
- Mr Gazley was reported to the WDLS, found guilty of misconduct. He was fined and censured.
- He appealed the WDLS' decision, as wrong in both fact and law.
- The HC held that Gazley did not have the proper basis for his allegations, and he therefore violated rules 10, 11, 12, 13.8, and 13.8.1.

R v Taffs

Facts
- The client was involved in an alleged mugging.
- Taffs represented the defendant.
- Taffs called the complainant's mother saying he would crucify her son on the stand and expose him as a liar and homosexual if he gave evidence.
- Suggested that his mother should tell her son to withdraw his evidence.

Held
- Taffs was charged with perverting the course of justice.
- The Court did not take the extra step of recommending discipline, Taffs had already lost a lot of work and money.
- You have an obligation to fight hard for your client, but Taffs went much too far.

- Issues of fact are determined by the Court, defence counsel can content them, but cannot try to avoid them being introduced.
- Violation of several rules;
    - 2.1: Overriding duty to facilitate the administration of justice.
    - 13.8: Cannot attack another's reputation without good cause.

Vernon v Bosley

Facts

- A nanny is responsible for the death of two daughters. The nanny negligently drove the car into a river.
- The plaintiff witnessed multiple unsuccessful attempts to rescue the girls.
- Claimed that the nanny's actions ruined his life, causing him unbearable mental strain, causing a nervous breakdown.
    - He also claimed that this mental shock caused his business to fail, and attempted to claim damages for that.
- The trial judge accepted this claim, and the plaintiff was awarded a total of 2m.
    - The claim for the lost business was not accepted, as it was too remote.
- The nanny appealed.
- However, before the judgement on the appeal was delivered, the nanny's lawyer recieved information relating to Vernon's mental state.
    - At the Family Court proceeding, evidence had been introduced suggesting that Vernon had substantially recovered from the condition.
    - He was found to be a fit guardian by the same expert witness as gave evidence in the negligence trial.
- Nanny's lawyer argued that the plaintiff concealed this information, and in doing so, misled the court.

Held - Majority

- The Court of Appeal allowed the evidence to be admitted.
- There was a breach of duty, the information was not privileged and should have been disclosed.
    - No introducing this information was a breach of the process of discovery, the plaintiff's counsel should have discovered the information.
- If the information is not disclosed, it's equivalent to misleading the court.
- If it transpires after the event that evidence has been called which turns out to be inaccurate, you have to reconsider the case and ask what should be done.
- The CA allowed the appeal and reduced the damages ordered.
- The duty to disclose continues right up to the point where the judgement is delivered. It does not end just because the hearing ends.
- Applicable rules: 13.9, 13.11, 13.10.9, 11, 2.1.

Dissent - Evans LJ

- Thinks the duty to disclose ends at the close of evidence.
- At the time of the FC proceeding, the situation had changed.
- There is no obligation on the plaintiff to inform either the HC or CA of the FC evidence.
- It would be different if the witness lied, or had given dishonest evidence. However, here the witness was fully honest, the situation simply changed between the two proceedings.
- Foundation of the case is that there must be an end to litigation, and that end must be at the termination of giving evidence.

Ken's View: Agrees with the majority. There does need to be an end to litigation, but no reason this can't be when the judgement is given.

Fit and Proper Person

The Fit and Proper Person

- Pervasive concept throughout the literature.
- Lawyers and Conveyancers Act;
    - Section 55: Definition of a fit and proper person.
    - Gives a list of characteristics which may suggest a person is not fit and proper;
        - All the usual conditions you'd expect, good character, charges or charges pending overseas etc etc.

Duncan Webb: The Duty of Respect and Courtesy

- Webb states that the lawyer owes a duty to be respectful and courteous to everyone, all third parties.
- This duty applies to all into whom the lawyer comes into contact.
- Courtesy does not necessarily mean being nice.
- These rules exist for a number of reasons;
    - Honour of the profession.
    - Upholding the standards and reputation of the profession.
    - Being the best lawyer you can be means getting the best result possible for your client. Often, winning with kindness and getting your way is the best way to do it, win with respect and courtesy.
- Bluntness can be required. Firm and direct language does not amount to a breach, as long as the bluntness is respectful.
- **Test: What objective measure of strength was needed in the communication? It should be assessed based on whether the conduct would be considered by other lawyers or the general public as being acceptable.**

Auckland Standards Committee v Johnston [2013] (NZLCDT)

Facts

- Johnston had previously offended in 1990, involved the misuse of advances paid to a trust.
- Had been acting for family and friends, advised clients to invest in companies owned by him without following due process. Misused funds for other purposes etc.
- The charge was disgraceful and dishonourable conduct.
- Accepted guilt, and the tribunal found the case was proven.
- Johnston was an undischarged bankrupt, and therefore had no way of paying the money back.
- Johnston attempted to hide the full extent of the matter. Was attempting to settle with the complainants out of court.

Held

- The tribunal reiterated the point that the least onerous/punitive sentence applicable should be imposed - the purpose of a tribunal sanction is public protection, not punishment.
- A strike off the roll was in order to protect the public.
- There was repeated evidence of a failure to understand the requirements of being a lawyer;
    - Failed to obtain proper independent advice, advise on risks, or provide proper documentation.
    - Even when there is no contest as a plea, the tribunal must prove the charge and make sure the penalty is appropriate.
- There is an absolute obligation of candor in any proceeding before the tribunal. Not putting everything before the Court is, in and of itself, an offence (*Hart*).

- Clients must be able to trust lawyers to the 'ends of the earth (*Bolton*).
- No ability to trust, therefore a strike off is in order.
- Breached rule 5.1, 5.3, 5.4.2, 5.4.3, 5.4.4, 7, and 11.1.
    - All offences of misleading the client.
    - Fundamentally dishonest, which is the key problem.

L v Canterbury District Law Society

Facts

- L guilty of 92 charges.
- All related to offences generally around the lending of money.
- Offences involved fraud, deceit, general misconduct.
- Allowed to practise under supervision, but could not practise on own account.
- Application for readmission, dishonest in application.

Held

- Appeal refused, but name suppression continued.
- L was unable to demonstrate that the dishonest aspects of his personality no longer existed.
    - The onus rests of the applicant to show they've changed.
- **Test: Does the reason for imposing the sanction in the first place still apply? Applicant must show they are fit and proper.**
- *Bolton* cited; public must have faith in the profession.
- This case shows there is a high standard to get struck off entirely, as L was still allowed to practice in a limited capacity.
    - To get fully struck off, criminal actions are usually required.

Y v M

Facts

- Family Court proceedings.
- Mother submitted an affidavit in FC proceedings which contained direct accusations of detailed sexual abuse by the father against the child.
- The mother was successful in the FC and the father had no contact/access for two years.
- Father sues the lawyer, claiming the lawyer told the wife to file the false affidavit.
- A psychologist expressed an opinion supporting the allegation.
- Father argued that this was a breach of the rule which states that a practitioner must not be a party to the filing of an allegation of reprehensible conduct unless the practitioner has first satisfied himself or herself that such an allegation can be properly justified on the facts.
- Mother's solicitors argued that the mother's allegations were upheld at the first instance and the psychologist expressed an opinion supporting the allegations.
- Awards of costs are rarely made in the FC.

Held

- This was not a serious dereliction of duty, no costs are awarded.\
- This is only a case of mistake/error of judgement/mere negligence, not gross dereliction of duty.
- A solicitor must not mislead the court, this applies in FC proceedings.
- The solicitor gave an opinion on the area of psychology, where the solicitor was not an expert. It is an error of judgement brought about by a too ready acceptance of what a client said. It did not (quite) reach the serious dereliction level of misconduct.
- The costs of the proceeding must lie where they fall.
- Both parties were legally aided.

- The father claimed that his heavy expenses would not have been incurred had it not been for mother's solicitors making allegations of abuse, and therefore asked for an order for them to pay his costs.
- The paramount concern in the FC is the wellbeing of the child.
- The Judge issued a caution to lawyers; be careful when drafting an affidavit in a contentious matter because people will sometimes try to extricate themselves from a lie by implicating their solicitor.
- Lawyer expressed a less than legal opinion which they should have kept to themselves.

***National Standards Committee v Poananga* [2012] (NZLCDT)**

Facts
- Ms Poananga was working for a Chambers in Auckland, practicing out of Gisborne.
- Represented a number of Maori groups.
- Only had a supervised practising certificate.
    - She was not under supervision and had minimal experience.
- She was dealing with upward of 350 claims, all which were running to a strict deadline on making historical treaty claims.
- She forged client's signatures on a number of legal aid applications.
- Accepted charges of misrepresenting the status of client's instructions, forging signatures, and being party to misleading statutory declarations.

Held
- P argued that it was a mitigating factor that she was acting in the best interests of her client, and that should be treated as a mitigating factor.
    - Counsel argued that cultural factors should be seen as a mitigating factor.
    - Tikanga required her to meet her clients face to face, they would not come to her.
    - They also consented to her forging their signatures.
- Argued the least restrictive penalty reasonably available should be applied (she should not be struck off). Cited *Daniels v Complaints Committee* as authority (accepted authority).
- The Board had her submit to medical tests to assess whether a medical condition caused her dishonesty. Ms P tried to skew the results such that they would show she had a condition. This was seen as further evidence of her dishonesty.
- The better course of action for her would have been for her to admit responsibility immediately and argue mitigating factors upon sentencing.
- Striking off is the outcome of last resort, where the individual is found to not be a fit and proper person.
- The primary purpose of these proceedings is not to punish.
- This was a clear case of dishonesty that reflects on Ms P's moral character and her ability to practice.
- It is not in the power of clients to legitimise forgery or wrongdoing, consent is no defence.
- Ms P's conduct was seen as the most serious cases of dishonesty, and she was struck off.
- It was arguably possible that the Court could have seen the relevant cultural factors as mitigating factors and thus seen fit to apply a less severe sanction.
    - They could have determined this was only misconduct.
    - Or only suspended her rather than striking her off.
- Breach of rules 2.1 and 13.1: Overarching duty to the Court, and duty of absolute honesty.

***Pou v Waikato/Bay of Plenty District Law Society* [2005] (HC)**

Facts
- Pou misused around $2 of University funds to access porn online.

- When filling out his application to the bar, he wrote that he had not been convicted of any offence and had nothing to disclose.
- Tribunal refused to give him a fit to practice certificate.
- He produced character witnesses, but they were not given much weight as they didn't address the conduct in question.
- One witness said he would have given the same reference regardless of the conviction.

Held
- The case was troubling.
- The issue was whether Pou had changed in character since his dishonest conduct. The onus lay on him to show he had changed and was now of fit and proper character.
- He gave conflicting accounts as to why he didn't disclose the conviction in his application. He alleged that he both forgot about it, and didn't think it was relevant. Court saw this as potential further evidence of his dishonesty.
- Court made the point that the sum of money was irrelevant, as it was the principle of dishonesty at stake.
- Reference made to *Bolton* and the reason for having such high standards; public protection at state.
- The Court found that the case was finely balanced, however there was significant affidavit evidence regarding Pou's good character. Made a factual finding that non-disclosure was an oversight, not a deliberate attempt to deceive the law society.
    - Seems odd given the conclusion that it was an oversight, seems clear the he was of good character.
- Issued a certificate of good character.

***Re Owen* [2004] (HC)**

Facts
- Mr Owen had had a troubled upbringing, and had been convicted of multiple offences, the more serious being two burglary convictions at 25 and 27. Acquitted of arson, convicted of drug and driving offences as old as 29.
- At 30 he put his past behind him and studied law at Otago.
- He had sound character references in his favour.
- On the basis of his prior convictions, the law society initially declined his application to the bar.
- He applied to the HC.
- He was off drugs and alcohol, had his LLB and was working as an employment advocate.

Held
- The Court had some difficulty in concluding that he was of fit and proper character.
- However they found that the crimes were of historical significance only and were not relevant to his character looking forward.
- The onus was on the applicant to prove that he was now of good and sound character. He had to prove that his past offending was no longer relevant on his character.
- The test is whether a reasonable member of the public would conclude that Mr Owen was of such integrity, probity, and trustworthiness that he is fit to be admitted.
- It was found that his offending was a result of troubled youth, and that Mr Owen had truly turned his life around.
- Put significant weight on Mr Owen's mentors, community conduct, and positive character references.
- The Court was satisfied that Mr Owens had completely turned his life around and was thus of sufficient good character as to be admitted.

***Re Potter* [2006] (HC)**

Facts

- Mr Potter had a long history of convictions, in total there were more than 50 offences.
- Some were serious, including burglary.
- Mr Potter had not been convicted since he turned 21 in 1987.
- Since then he obtained two university degrees.
- The WPOBDLS considered whether or not he should be admitted as a matter which the Court should decide. They declined Mr Potter's application, but adopted a neutral stance regarding the High Court proceeding.

Held

- The offending was of historical importance only.
- Academics in prominent positions of Waikato law school swore affidavits affirming Mr Potter's character and strongly supported his admission.
- As in *Re Owen*, Potter's offending was viewed as entirely historical and the Court considered he had completely turned his life around.
- Cooper J commended Potter's ability to turn his life around, and commented that few people live a blameless life.
- Held, as in *Re Owen*, that viewed from the outside, the public would likely conclude Potter was not fit. However, upon consideration of all relevant material, Potter would uphold the requisite standards of the profession and was thus of proper character.
- Certificate of good character was granted.

***Singh v Auckland District Law Society* [2002] (HC)**

Facts

- Mr Singh was admitted to the bar in India.
- He sought admission in New Zealand.
- He had been acting as an advocate for the Refugee Status Appeals Authority.
- There were objections over him manufacturing evidence and being grossly incompetent.
    - He had failed to turn up at hearings, his daughter sometimes appeared instead of him, he failed to tell clients of his success rate etc.
- Mr Singh acknowledged that some evidence had been fabricated, but blamed this on corroboration between the appellants over their affidavits.

Held

- There is a difference between being of good character and being fit to practice. They are discrete qualifications which cannot be lumped together.
- Findings on an individual's character does not change readily. There is significant evidence of Mr Singh being of insufficiently good character.
- He lied about the fabricated evidence, did in fact fabricate evidence, omitted to pay taxes, and lied about completing profs courses. These actions all suggest he is not of good character.
- Being a fit and proper person to practice involves being able to provide a client with a good service.
- The applicant must also satisfy the Court of this requirement.
- Here, Mr Singh's fabrication of evidence, success rate of 3.6%, charging people without informing them of the remote charge of success, allowing his daughter in law to advise clients etc all point to a lack of fitness to practice.
- Application denied.

***Wellington District Law Society v Cummins* [1998] (HC)**

Facts

- Mr Cummins was a practitioner who was convicted in 1996 of fraud and misappropriation of money.
- He was suspended for three years by the Disciplinary Tribunal, split 3:2 decision regarding whether he should be struck off, in favour of suspension..
- The District Law Society appeals the Tribunal's decision and submits that Mr Cummins should be struck off.

Held

- The Court has a power under s 118(3) of the Law Practitioners Act 1982 to modify a sentence. This allows the Court to impose a more severe sanction than the tribunal.
- The Court reheard the same evidence as presented to the tribunal.
- Confirmed the obiter in *Singh* that you can look at past crimes as evidence of current unfitness of character.
- Had to be balanced against mitigating factors.
- Overall an objective inquiry.
- The purpose of holding lawyers to a standard of a fit and proper person is to ensure that the public has faith in their lawyer to trust them to the ends of the earth.
- The Court concluded that Cummins' criminal activity was such that his conduct evidenced he was not a fit and proper person to practice law.
- He was struck off.

***Orlov v NZ Lawyers and Conveyancers Disciplinary Tribunal* [2014] (HC)**

Facts

- Mr Orlov had a history of clashes with Harrison J.
- He accused Harrison J of personally attacking him, of being biased against him and his cases, and of being incompetent as a judge deciding cases incorrectly against Mr Orlov's cases. He accused Harrison J of having a dislike of and prejudice against foreign lawyers.
- Mr Orlov was charged with professional misconduct. He was found guilty and struck off.
- He appeals that decision, as well as bringing judicial review proceedings for a number of his cases before Harrison J.

Held

- Mr Orlov had a right to criticise a judge and the decisions of a judge, but has to maintain honour in the profession in doing so.
- Mr Orlov's conduct crossed that line. In accusing Harrison J of prejudice, and implying that that prejudice against him caused Harrison J to decide cases differently than he would have otherwise. Mr Orlov went too far.
- Mr Orlov conducted himself very poorly before the disciplinary committee, comparing them to the Spanish Inquisition and a Stalin show trial.
- Mr Orlov's allegations are so extreme in their language or so unsubstantiated as to demonstrate that Mr Orlov lost all perspective and was unable to control the manner or tone of his complaints, nor recognise the absurdity in the links he was drawing.
- Lawyers in good standing would regard the nature and language of the allegations levelled towards Harrison J as disgraceful and dishonourable conduct.
- In order to find misconduct, something more than extravagant phrasing of complaints is required. Unfounded allegations can constitute misconduct.
- Mr Orlov's remarks were misguided, aggravated, and inappropriate however they were made genuinely, not dishonestly.

- The Court commented on the right to free speech, albeit free speech that went too far in this case.
- His conduct does not involve the mistreatment of a client's faith or money.
- He was found guilty of misconduct due to his allegations being baseless, but it was found that striking him off was disproportionate.

***NZ Law Society v Deliu* [2014] (HC)**

Facts

- The NZLS attempted to bring a motion to strike Mr Deliu from the roll directly to the High Court without going through the Law Society/Disciplinary Tribunal processes.
- Mr Deliu alleged that the High Court did not have jurisdiction to hear the case or, in the alternative, that the Law Society first has to go through the disciplinary procedures before the case can be brought to the High Court.

Held

- The High Court has inherent jurisdiction to hear cases regarding any lawyer who may appear before it.
- The High Court has a power to suspend a lawyer from practise.
- However, only rare and exceptional cases should be held before the High Court.
- The Law Society processes is generally the better jurisdiction to hear disciplinary matters, as they are the specialists in that area.
- The Disciplinary Tribunal has a wider array of penalties available, the High Court can only either strike off or suspend a practitioner.
- Overall the Law Society disciplinary procedure is better suited to hear this case.
- Case dismissed from the High Court.

Barristers' Duties

- All rules in the rules of conduct and client care apply to barristers and solicitors.
- Rule 14 outlines additional rules which apply specifically to barristers.

Chapter 14

- Rule 14: Barrister's work may be undertaken by practitioners who hold practising certificates as barristers and solicitors, and those who hold practising certificates only as barristers.
- Rule 14.1: A lawyer who holds a practising certificate as a barrister and solicitor must not hold themselves out as practicing as a barrister sole.
    - Odd rule, unclear what the purpose is.
- Rule 14.2: A lawyer who holds a practicing certificate as a barrister sole must not;
    - Negatively defines a barrister.
    - (f) Speaks to keeping the barrister independent from firm business, allowing them to follow the cab rank rule.
    - Barrister can be used to even the playing field between a big firm and a small firm etc. They need to retain an extra degree of independence.
- Rule 14.3: A barrister sole may practise from a set of rooms or chambers and join with other barrister sole in sharing secretarial and support services for the practices, including the employment of another lawyer who holds a practising certificate as a barrister sole.
    - They cannot share chambers with a solicitor, nor can they form a partnership.
- Rule 14.4: Intervention rule: Subject to rule 14.5, a barrister sole must not accept instructions to act for another person other than from an instructing lawyer.
    - This rule is quite controversial.
    - Traditional explanation for this rule was that a layman's solicitor/general advisor was better placed to decide whether a barrister should be instructed, which barrister would be best, and also facilitated a 'proper distance' between the lay client and the barrister allowing the barrister to give truly independent advice.
    - The solicitor would know better about which arguments should or shouldn't be advanced at trial.
    - The most conservative view is that a barrister can only ever accept instructions from a solicitor. Most barristers would in fact have a general chat with a lay person, then recommend a solicitor for them.
    - However this system/rule may cause a number of problems;
        - More obviously appropriate in an English system where solicitors did not have a right of audience in Court.
        - Adds a significant level of cost, as the client must engage both a solicitor and barrister (although the increase in efficiency may offset this).
        - In minor matters, consulting a solicitor may not actually add much.
        - The rule assumes laymen are not sophisticated and cannot make a good judgement over which barrister to instruct themselves.
- Rule 14.5: Exceptions to the independence rule. A barrister sole can accept instructions from a person who is not an instructing lawyer if the barrister sole is;
    - 14.5.1: Instructed or appointed by a range of other people and bodies.
    - 14.5.2: Instructed to act or acting in any of the following capacities or matters;
        - (a) - (f) are old exceptions to the rule, (f) - (h) are new exceptions.
        - These exceptions present additional obligations on barristers to accept instructions.
- Rule 14.6: Catch all provision empowering the Law Society to include any other bodies under 14.5.1(h), together with any rules or restrictions they deem appropriate.
    - Unclear if this has ever been done.

- Rule 14.8: A barrister sole must not accept direct instructions if he or she considers that, in all the circumstances, it would be in the best interests of the client or in the best interests of justice for an instructing lawyer to be retained.
- 14.9: The barrister must not continue to act if he or she has accepted direct instructions but later considers it would be in the best interests of the client or justice for an instructing lawyer to be retained.
- Rule 14.10: Where a barrister sole accepts direct instructions, money for fees must be paid in advance into a trust fund which must meet conditions outlined in a number of circumstances.
    - Usually the money get pays into a solicitor's trust account.
- Rule 14.11: Barrister sole are under no obligation to accept direct instructions.
- Rule 14.12: The Law Society can, at any time, review the intervention rules (14.4 - 14.11).

***R v Kiliva* [2008] (CA)**

Facts
- Sexual assault criminal case.
- The defendants called no evidence and were convicted.
- They appealed, citing the competence of their counsel.
- Alleged that their counsel had not followed instructions and had not called either defendant to give evidence despite being told to.
- Counsel alleged that their clients never wanted to give evidence and understood the ramifications.
- There are written documents signed by the defendant's saying that they don't want to give evidence.

Held
- The case was conducted on affidavits and cross examination.
- Both defendant's affidavits were similar. The Court considered that they may have been drafted specifically for the appeal.
- The court held that counsels' conduct was normal and unexceptional. They gave advice which was standard in such a proceeding which was followed.
- The advice counsel gave was standard, and did not override the autonomy of the defendants.
- The appeal was of little merit, it was poorly construed.
- Appeal dismissed.
- Lesson: Ensure that all advice is written down, make a file note on your advice around whether or not a defendant should give evidence.

***R v McLoughlin* [1984] (CA)**

Facts
- Defendants were convicted of rape.
- Barrister was instructed to call two alibi witnesses.
- Barrister thought the evidence from the witnesses was unreliable and sought to rely on a defence of consent and called no evidence.
- He consulted his client, who firmly refused to agree, and instructed the barrister to run the alibi defence.
- The barrister refused and called no evidence.

Held
- Counsel has no right to disregard instructions, regardless of counsel's opinion on them.
- It is a fundamental principle of law that an accused be able to put forward evidence of his innocence to the jury.

- If a barrister is unable to follow instructions (should they violate his primary duty to the court etc) he should inform the client that unless the instructions are changed he will be unable to act further. He should then inform the judge and seek leave to withdraw.
- Counsel cannot take it upon themselves to act as they see fit.
- Breach of rule 13.3: Obligation to follow a client's instructions.
- Appeals upheld, retrials ordered.

***Waikato Bay of Plenty District Law Society v Baledrokadroka* [2001] (NZLPDT)**

Facts

- Mr B (barrister) received money and used it for private purposes, acted as a barrister without a practicing certificate, and a number of alcohol and driving related offences.
- NZ Law Practitioners Disciplinary Tribunal applied for Mr B to be struck off.

Held

- To strike off a practitioner, the professional misconduct, the fault must be of sufficient gravity to be terms 'reprehensible, inexcusable, disgraceful, deplorable, or dishonourable'.
- Misconduct does not necessarily have to be related to actions in the lawyer's professional capacity, however not every breach of law is a disciplinary offence. The tribunal can look at conduct 'in the round'.
- A barrister can receive money in a trust account for costs. However he cannot use that money until the work is done and must put the money in a trust account.
- Practising without a certificate is deplorable and reprehensible conduct. It does not have to be proven beyond a reasonable doubt.
- The purpose of discipline is to punish, protect the public from the barrister's actions, and protect the reputation of the profession.
- Here the barrister committed a number of offences in quick succession, did not abide by Court orders to pay fines and not drive, could not be relied upon to practice with a licence (fundamental requirement), acted illegally in a number of ways.
- This conduct is reprehensible, Mr B was struck off.

Litigation Ethics

- The rules represent the fundamental obligations of lawyers.
- If you are suspicious of a document, as long as you think it's genuine on the balance of probabilities, you can submit it.
- Where a document is forged but dropped from evidence, you should file a complete admission of the claim to avoid your client going to jail.

Conflicts of Interest

Concept

- A conflict exists where a client's interests are inconsistent with a lawyer's interest.
- It prevents the lawyer from discharging his/her responsibility to the client.
- There is a danger - assumption that most lawyers cannot put client's interests first where there is an inconsistency.

Rule 5

- Rule 5: A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.
    - Compromising influences would be anything that orbs the lawyer of his/her independence.
- Rule 5.1 - 5.3: Deal with relationship between lawyer and client.
    - 5.1: The relationship is one of trust and confidence that must never be abused.
    - 5.2: The professional judgement of a lawyer must at all times act within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.
    - 5.3: The lawyer must at all times exercise independent professional judgement on a client's behalf. The advice must be objective based on the lawyer's understanding of the law.
- Rule 5.4: **Prohibitions on when a lawyer cannot act**. The lawyer must not continue to act if there is a conflict or a risk of a conflict between the interests of the client and the lawyer.
    - 5.4.1: When a lawyer has an interest which touches on the matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client irrespective of whether conflict exists.
    - 5.4.2: Lawyer must not act for client in any transaction in which the lawyer has an interest unless the matter is not contentious and the interests of the lawyer and the client correspond in all respects.
    - 5.4.3: Lawyer must not enter into any financial, business, or property transaction or relationship with client if there is a possibility of the relationship of confidence and trust between lawyer and client being compromised.
    - 5.4.4: Lawyer who enters into any financial, business, or property transaction or relationship with client must advise client of the right to receive independent advice and explain to client that should a conflict of interest arise the lawyer must cease to act on the matter, and without client's informed consent, on any other matters.
        - 5.4.4 does not apply where;
        - (a) The client and lawyer have a close personal relationship; or
        - (b) The transaction is a contract for the supply by the client of goods or services in the normal course of the client's business; or
        - (c) A lawyer subscribes for or otherwise acquires shares in a listed company for which the lawyer's practice acts.
    - 5.4.5: Lawyer deemed to be party to a transaction if transaction is between entities that are related to the lawyer by control (directorship etc) or ownership (inc shareholding), or between parties with whom the lawyer or client has a close personal relationship.
- Rule 5.5: **Conflicting business interests**: Lawyer must not engage in business or professional activity other than the practice of law where the business or professional activity would or could reasonably be expected to compromise the discharge of the lawyer's obligation.
    - 5.5.1: Where lawyer provides any other services other than law, the services must;
        - (a) be associated with the provision of regulated services; and
        - (b) be provided by the lawyer or the lawyer's practice or by an entity in which the lawyer or the lawyer's practice has a controlling interests.

- Rule 5.6: **Third party conflicts of interest**: A lawyer must ensure that the existence of a close personal relationship with a third party does not compromise the discharge of the duties owed to a client.
    - A number of more specific sub grounds are set out.
- Rule 5.7: **Personal relationships**: Lawyer must not enter into intimate personal relationship with a client where to do so would or could be inconsistent with the trust and confidence reposed by the client.
    - 5.7.1: Lawyer must not enter into intimate personal relationship with client while lawyer is representing client in domestic relations matters.
- Rule 5.8: **Gifts**: A lawyer must not accept gifts from client where there is a possibility of the gift being or appearing to be inconsistent with trust and confidence reposed by client.
    - 5.8.1: Where lawyer would accept gift of significant value, the lawyer may only accept if the client has taken independent advice on the matter.
    - 5.8.2: This rule extends to any person with whom the lawyer has a close personal relationship or to any member of the lawyer's practice.
- Rule 5.9: **Collateral rewards**: A lawyer must not directly or indirectly offer or receive any reward or inducement from a third party in respect of any work done for a client.
- Rule 5.10: **Drafting instruments**: A lawyer must not draft or assist in drafting provision of will or other instrument where lawyer may take a benefit other than benefit normally attached to acting in professional capacity, unless person executing instrument has taken independent advice.
- Rule 5.11: **Claims against lawyer**: When lawyer becomes aware that a client may have a claim against him, lawyer must immediately advise client to seek independent advice and inform client they may no longer act, unless the client receives independent advice and consents.

***Armitage v Paynter Construction* [1998] (CA)**

Facts
- A joint venture formed between Leisuretime and Paynter Construction to market timeshares.
- Mr Walker was a solicitor for Leisuretime, he was also a director and shareholder.
- Paynter granted Walker power of attorney to conclude contracts and accept payments on its behalf.
- Walker paid only one payment to Paynter, all others went to Leisuretime.
- Leisuretime then bought out Paynter and tended post-dated cheques.
- Leuisuretime then advised it was in financial difficulty and would not be able to honour the cheques.
- Paynter claims against Walker, alleging a breach of fiduciary duty causing significant losses.

Held
- Walker was under a duty of loyalty and good faith to both partners in the joint venture.
- A solicitor with two such duties could not advance one party's interests against another, so once Walker knew Leisuretime was in financial difficulty he could not continue to act for both parties.
- He was placed in a position of actual conflict, and thus should have stopped acting.
- His fiduciary duty prevented him acting in the interests of one party to the prejudice of the other.
- A fiduciary duty is a spectrum, which can include a range of different duties.
- Damages were reduced due to the contributory fault of Paynter.
    - Issue of causation, if another lawyer came in Paynter would still have been in financial strife.
    - However CA still attached blame to Walker and held him partially responsible.

- Lesson: If acting in a joint venture, ensure your clients both understand that your obligations of fidelity are to the parties collectively, you will act on collective instructions. If there's any divergence in interest it will preclude you from acting at all.
- You must treat both parties as equal.

Solicitor General v Miss Alice

Facts
- Same case as above.

Held
- If you recieve a document within the course of litigation, it is for the purpose of the litigation only.
- When you get an order for discovery, it can only be examined in the context of the litigation.

***Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] (HC)**

Facts
- Daniels charged with professional misconduct after it was alleged he has sexual intercourse with a client in circumstances which were inconsistent with, or an abuse of, the relationship of trust and confidence between practitioner and client.
- His client was vulnerable and impoverished.
- At the tribunal meeting he attempted to blame the client.
- Tribunal found him guilty of professional misconduct, censured him, suspended him for 3 years, and ordered him to pay compensation and costs of $40k. Refused to suppress his name.
- Daniels appealed to HC challenging the penalties and refusing name suppression.

Held
- The appellate court can only interfere with the exercise of the Tribunal's discretion if it was wrong in principle or penalty manifestly excessive.
- The penalties imposed by the tribunal were not manifestly excessive, inappropriate, or unnecessarily severe, especially given the lack of guilt or remorse.
- The general deterrence factors (need to maintain public confidence in the legal profession and its disciplinary proceedings) supported imposition of a suspension.
- While members of professional bodies must expect to bear some costs, the burden on members should not be too large where a practitioner was shown to be guilty of serious misconduct.
- The award by the tribunal was not manifestly excessive.
- There is a balancing test when applying name suppression. The public interests in open justice and the maintenance of confidence in the professional disciplinary process must be balanced with the private interests of other persons including the practitioner and family. Harm to reputation is not a basis for suppression in and of itself.
- The tribunal did not err in principle in denying name suppression.
- All orders upheld, appeal dismissed (Court later suppressed some of the more intimate details of the misconduct).

***Rawleigh v Tait* [2008] (CA)**

Facts
- Prior to 1997, Mrs Rawleigh had been running a family company in which her and husband held equal shares. The company did well.
- Mr and Mrs Rawleigh had a domestic dispute, Mr Rawleigh was abusive and had an affair.

- The intended to divorce. Mr Rawleigh formulated a plan to remove relationship property assets of the country.
- Planned to buy computers, creating a large debt to IBM, and siphon money to Vanuatu.
- Required Mrs Rawleigh giving IBM an unlimited personal guarantee on the transaction.
- Mr Rawleigh visited Mr Tait (solicitor). Mr Tait was acting for Mr Rawleigh in other matters.
- Both Rawleigh's visited Mr Tait.
- He advised them together and individually not to sign the guarantee due to its unlimited nature.
- Mrs Rawleigh signed anyway. Also signed a disclaimer stating Tait advised them not to sign and they did anyway.
- Mrs Rawleigh then became liable for over $1m to IBM.
- Sued Tait alleging that Tait shouldn't have allowed her to sign, and in allowing her to do so, breached his fiduciary duty and caused her loss.
- HC found for Mr Tait. Mrs Rawleigh appeals.

Held

- Mr Rawleigh had obviously exercised undue influence over Mr Tait would could be seen as detrimental to Mrs Rawleigh.
- However there was nothing about her demeanour, the events at the office, or the transaction itself to give rise to suspicion.
- The wife argued that a breach of the fiduciary obligations not to act where there was a conflict was causative of her loss because it allowed her husband to exercise undue influence.
- However he argued that his actions did not cause the loss as Mrs Rawleigh would have signed anyway, as evidenced in the document she signed.
- HC found in fact that Mrs Rawleigh would have signed anyway.
    - Conflicting case law on this point, as *Farrington v Rowe* held that causation is not relevant if there is a breach of a fiduciary duty.
- If Tait had been charged in a disciplinary context causation would be irrelevant, as he breached his duty. However it is unlikely the full amount of damages would have been awarded.
- *Etridge* held that a bank/solicitor does not have an obligation to ensure that the wife is giving consent of her own free will, they only have to be reasonably satisfied that there is no undue influence on the behaviour before them.
- Mrs Rawleigh was suffering under her husband's undue influence, but there was nothing to give Mr Tait suspicion that this was the case.
- No breach of fiduciary duty for not prying into whether Mrs Rawleigh was under undue influence.
- However Tait did breach his fiduciary duties for not disclosing to her that he was acting for her husband.
- Before agreeing to advise her, Tait should have explained the nature, effect, and implications of the conflict of interests. Explanation would have included that he was advising Mr Rawleigh, and Mr Rawleigh would benefit from her signature, and that she would suffer detriment and receive no benefit from the transaction.
- CA viewed the case from a purely commercial perspective. Agrees that Mrs Rawleigh would have signed anyway, thus there is no causation.
- Obligation of a solicitor in such circumstances are in two stages;
    - A fiduciary duty to avoid conflicts of interests which have not been explained and accepted by the client.
    - Professional duty of care, owed in contract and tort.

***Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] (CA)**

Facts

- The Wellington office of RMac had been engaged in 1995 to work for the Tower Corporation in a tax dispute with the IRD.
- In 1996 the Auckland office was approached by GPG.
- GPG was planning a hostile takeover of Tower, and therefore Tower could not be consulted of RMac acting for GPG.
- The Auckland partner consulted the Wellington partner, who advised that the work he was doing for Tower was narrow and there was no reason Auckland couldn't act for GPG.
- The tax dispute was resolved in April 1997.
- In September 1997, GPG proposed the takeover to Tower and Tower learned RMac were also working for GPG.
- Tower applied to the High Court claiming that RMac had access to knowledge of Tower's management culture, negotiating style, and method of operation.
- High Court held that no information had been revealed, but that the tst was whether a reasonable member of the public, in possession of the full facts, would perceive a risk of information becoming available to members or employees of the firm.
- Found that that test was met and disqualified RMac from acting. RMac appealed.

Held (Majority)

- The basis of the claim was the existence of concurrent retainers from parties with conflicting interests, but at this time RMac was no longer acting for Tower, therefore the conflict had ceased to exist.
- There is no conflict of interest between Tower and GPG in terms of the work RMac is doing. RMac is working on a tax matter for Tower and a different matter for GPG. A conflict would turn on this case of whether there is a risk of disclosing confidential information.
- Moral and ethical obligations do not necessarily equate to legal or fiduciary principles.
- Clients have a right to choose which counsel they would like to instruct and solicitors have a right to generally offer their services.
- Three stage test in assessing whether the Court should intervene;
    - 1. Is confidential information being held which, if disclosed, was likely to affect the interests of the client or former client?
    - 2. Is there a real or appreciable risk that the information would be disclosed?
    - 3. Recognising the significance and importance of the fiduciary relationship, whether a duty of discretion arose for which the Court's power of discretionary disqualification should be exercise.
- Calls it a 'common sense' approach, assessing on the facts of the matter.
- The nature of the insights into how Tower ran its business, structured its management, and conducted negotiations etc is not sufficiently confidential to warrant disqualification.
- RMac erected a Chinese wall and there was little real or appreciable risk that the information would in fact be disclosed.
- New Zealand is small, and the Court should not unduly restrict access to expert advice by imposing controls or sanctions not required in the overall interests of justice.
- Overall there is insufficient evidence that RMac had confidential information which would be of use to GPG. There is minimal risk, and effective Chinese wall, and overwhelming practical grounds for allowing bigger expert firms to continue to practice in circumstances such as this.
- Appeal allowed.

Dissent (Thomas J)

- RMac was under a recognised duty to disclose all material information to Tower, and it failed to do so.
- RMac was under an onus to refute the presumption that the confidential information in their position would be disclosed.

- Solicitors bear a duty to show there is no risk of the information being disclosed.
- There is 'unacceptable arrogance' in lawyers deciding whether a conflict exists or not, it is for the client to decide after being advised.
- Lawyers owe a duty of absolutely and fidelity to their client. It demands nothing less than full and open disclosure of all matters germane to the client and his or her affairs.
- Clients must feel free to disclose all information to their legal advisers with no concern that they may be used against them on behalf of a competing entity.
- A Chinese wall was insufficient. It does not stop a conflict or breach of fiduciary duty, it just exists to protect a client in the case of successive instructions.
- The information was valuable, and RMac should not have been allowed to act.

- This case was decided in 1998, where there was a drive to take a more corporate minded approach to the law. Likely that they'd be a different outcome today.
- Outlandish decision.

***Taylor v Schofield Peterson* [1999] (HC)**

Facts

- Mrs Earl was a solicitor at Schofield Peterson.
- She had been Taylor's family solicitor for some years and was his prior business partner.
- Taylor wanted to sell his share of the business.
- Mrs Earl was acting for both partners in the splitting of the business.
- The partners agree that Mr Taylor would leave his capital in the business and other partner would repay with interest.
- Earl told partner that was buying the share that he could get independent advice but he chose not to.
- Partner became bankrupt and owes money to Taylor. Taylor sues Earl for a breach of fiduciary duty.
- Earl argues she has no conflict of interest, all she did was write up the document according to the partner's' instructions.
- District Court held that the partners already had a clear idea of what the agreement would be. Mrs Early discharged her duty by saying Taylor could seek independent advice. It was not her duty to advise on the wisdom of a transaction.

Held

- It is possible, but difficult, for a solicitor to act for two parties.
- However, where they do so, the solicitor has the onus of showing they;
    - 1. Recognised a conflict of interest or a real possibility of one.
    - 2. Fully explains the conflict to the parties.
    - 3. Further explain the potential ramifications of the conflict.
    - 4. Ensure the client has a proper appreciation of the conflict and its implications.
    - 5. Obtain the client's informed consent.
    - Follows *Clark Boyce v Mouat*.
- Prior to the meeting with Mrs Earl, the partners had a general understanding of what they wanted to do with the business.
- There was a clear conflict of interest between the parties which Mrs Earl should have realised and fulfilled the conflict rules but she did not.
- There is significant difference between being told one should seek independent advice and one could. 'Should' may well offset a duty, 'could' is not enough.
- If Mrs Earl had fully informed Mr Taylor, he would have sought independent advice and that advice would have been that he should do more to protect his position, and get security for his debt.

    - This is a long cause of causation, based off a series of assumptions. However it appears reasonable.
- Therefore Taylor suffered a loss.
- Because a reasonable solicitor would have advised Taylor to get security, Mrs Earl's advice caused the loss. However it is a long chain of causation.
- Apportionment of damages can be done for a breach of fiduciary duty (*Day v Mead*).
- 20% reduction in damages was made to recognise Mr Taylor's naiviety and own contribution to his loss.

***Wells v Wellington District Law Society* [1996] (CA)**

Facts
- Mr Gazley (solicitor) acted for Mrs Wells in a matrimonial property dispute.
- Mrs Wells fired him, Mr Gazley then begun working for Mr Wells in the same dispute.
- Mrs Wells complained to the Wellington District Law Society.
- Mr Gazley brings action against the WDLS claiming that they are interfering with contractual relations. He cites a client's right to choose their lawyer and that the cab-rank rule means he must act.
- HC held that Mr Gazley could not act. Mr Wells (on his behalf) appeals that decision.

Held
- The cab rank rule cannot be viewed in isolation. It is a general rule which is subject to the more specific provision detailing 'good cause' not to act. It is not, and could not, be an absolute rule.
- Where there is a conflict of interest you cannot act and must decline to act.
- The Law Society is entitled to interfere by requiring lawyers to abide with professional standards.
- Here Mr Gazley had a conflict due to his acting for the previous client which precluded him from acting for Mr Wells. The Law Society was fully within their rights to intervene.

***Mike Pero Mortgages Ltd v Mike Pero* [2014] (HC)**

Facts
- Buddle Findlay acted for Mike Pero (the person), Mike Pero Mortgages Ltd, and Mike Pero Marketing Ltd.
- Scott Barker specifically acted on most matters.
- Marketing issued proceeding against mortgages.
- Buddle Findlay is acting for Mortgages Ltd against Mr Pero.
- In essence Buddle is acting against one of its own clients.
- Mr Pero seeks an order restraining Buddle from acting.

Held
- *Black v Taylor* holds that justice should be seen to be done.
- Disqualification is a tool to ensure protection for the parties and the wider interests of justice.
- Where the integrity of the judicial process is seen to be at risk from the proposed or continuing representation of one party by a particular counsel, disqualification is often the only appropriate remedy.
- A principal is entitled to single minded loyalty of a fiduciary.
- The SC of Canada held the bright line test is an irrebuttable bright line rule. It only applies where the immediate interests of the client are directly adverse to the matters on which the lawyer is acting (*CNRC v McKercher*).

- The interests of Mr Pero and MP Marketing are directly adverse to the matters on which Buddle is acting.
- The Court adopted the bright line test of *Black v Taylor*.
    - Whether a fair minded, reasonably informed member of the public would conclude that the proper administration of justice required the removal of the solicitor.
    - This is a wholly contextual question.
- Holds that *Russell McVeagh* only applies to commercial transactions, not litigation.
    - Limits that case hugely.
    - Does not explicitly say it is wrong, but this is implied.
- The right to choose counsel is not absolute, it is only one factor to be considered.
- The integrity of the judicial process is as risk in the eyes of the public if Buddle was allowed to continue to act.
- Duty of absolute loyalty to an existing client is breached by acting against the client. The knowledge of their personality and practices present obvious conflict. Controlling the risk of the passing of confidential information is not material as to whether a duty has been breached.
- Buddle fails the *Black v Taylor* test and are thus disqualified from acting.
- It may have been a relevant factor that Mike Pero's companies were small and tight knit. There may not be the same expectation of loyalty to a government department or a larger company.
    - However no rule is made on this issue.

The Saxmere Cases

Facts

- Justice Wilson was presiding over a case between two parties.
- There was litigation between Saxmere and the Wool Board.
- Mr Cooke QC acted for Saxmere, Mr Galbraith QC acted for the Wool Board.
- The High Court dismissed Saxmere's claim.
- Justice Wilson was sitting on the Court of Appeal and was due to hear this case.
- Justice Wilson and Mr Galbraith were close personal friends, contemporaries at the bar, and had joint business interests in partial ownership of a stud farm.
- Justice Wilson thought this could be an issue. He rang Mr Cooke QC and disclosed that he had a close personal relationship with opposing counsel without going into particular detail.
- Cooke QC ran this past his client, who had no objection.
- Saxmere lost the case.
- They then discovered the true extent of the relationship and raised an objection.

Held (Court of Appeal)

- Wilson J was trying to do the right thing, but created uncertainty by not going through the proper channels or fully disclosing the relationship.
- He should have put the potential conflict before the registrar so the parties could make their own decisions.
- A vague conversation with one counsel was insufficient.
- However the Judge was not beholden to anyone.

Supreme Court (*Saxmere No. 1*)

- The test is whether the fair-minded lay observer might reasonably apprehend that there was a real and not remote possibility that the judge might not be impartial (*Ebner*).
    - Objective test.
    - Can assume the lay observer has a decent amount of knowledge about the legal profession, but not too much.
- In New Zealand, the legal profession is quite small, especially in the upper echelons. It is not unusual nor undesirable for judges and senior counsel to have close personal friendships.
- Wilson J and Mr Galbraith's business relationship added nothing to the suggestion that Wilson J was, in any way, beholden to Galbraith.
- No cogent or rational link between the identified friendship and business interests and its capacity to influence a decision in the *Saxmere* case.
- The judge should have disclosed the nature of his business interests more fully, however this is not sufficient that the reasonable lay-observer would have considered that there is an apprehension of bias.

Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No. 2) **[2007] (SC)**

Facts

- New information had arisen which show that Wilson J was indebted to Galbraith J for around $37k.
- Applied for a recall of the SC judgement on the basis of new evidence.

Held

- The debt of the company made Wilson J beholden to Mr Galbraith.
- The debt may unconsciously affect the impartiality of the Judge's mind.
- The reasonable lay observer would likely conclude that the judge may be unconsciously affected by the business relationship.
- Judgement recalled. A new proceeding was ordered for *Saxmere*.
- Wilson J ultimately resigned over this saga.

Ata

Legal Professional Privilege

What is LPP?

- A fundamental condition on which the administration of justice as a whole rests (*B v ADLS*).
- The beneficiary of the privilege is the client. It is designed to protect them.
    - The client can disclose whatever they want to anyone. LPP binds the lawyer.
- It exists to enable frank and free discussion between lawyer and client.
- Privilege continues in perpetuity.
    - Doesn't stop even if the client dies.
- Only a client can waive privilege.
- It is not a breach of privilege to seek advice in house.
- Covers oral and written communication alike.

Rule 8

- Deals with LPP.
- 8.1: Provides for the duration of the duty of confidence.
    - In perpetuity.
- 8.2: Provides for when disclosure is required (no discretion).
    - Disclosure must be done under any of the circumstances under rule 8.2.
    - 8.2(c) states that disclosure is required under the circumstances of rule 2.8.
        - Rule 2.8 provides for disclosure when a lawyer has reasonable grounds to suspect that a previous lawyer is guilty of misconduct.
- 8.3: Limits the scope of disclosure under 8.2 to only appropriate people.
- 8.4: Gives the situations where disclosure is permitted (discretionary).
    - (e) Not a breach to seek advice from another lawyer, provided all identifying details are omitted.
- 8.5: Limits disclosure under 8.4 to only appropriate people/entities.
- 8.6: Extends 8.4 to include former clients.
- 8.7: Provides for the use of confidential information.
    - 8.7.1: Provides a list of situations where a lawyer must not act for a client.
    - 8.7.2: States rule 8.7.1 is not breached when there is an effective information barrier.
    - 8.7.3: Defines an EIB.
    - 8.7.4: Must inform a former client of the details of the EIB prior to beginning to act for the new client.
    - 8.7.5: Provides that any information held by a firm or previous firm, the information is presumed to be held by the lawyer.
- 8.8: Provides for other confidential information.

Rule 13

- Deals with discovery and privilege.
- 13.9: Discovery and privilege.
- 13.9.1: Lawyer must ensure the client is aware of the full obligations and scope of discovery.
- 13.9.2: A lawyer must not claim privilege on behalf of a client unless there are proper grounds for doing so.
- 13.9.4: If a lawyer becomes aware of an inadvertent leak of privileged information, the lawyer must not disclose the contents of the documents to their client, must inform the other lawyer, and must return the documents.
- The overriding duty is to the court, and confidentiality is a crucial part of the court process.

Rule 6

- Deals with client interests.
- 6.1: A lawyer cannot work for more than 1 client on a matter where there is more than a negligible risk that the lawyer may be unable to discharge their obligations.

    - 6.1.1: This rule is waived where informed prior consent from all parties is obtained.
    - 6.1.2: Despite rule 6.1.1, if it becomes aware the lawyer will not be able to discharge all their obligations, they must immediately inform all clients involved and terminate the relationship.
    - 6.1.3: Despite rule 6.1.2, a lawyer may continue to work for one of the clients concerned, if all other parties give their informed consent after having received independent legal advice.
- 6.2: 6.1 applies to multiple lawyers at the same firm.
- 6.3: An EIB does not affect 6.1 or 6.2.

B v Auckland District Law Society

Facts
- A complaint of misconduct was made against Russell McVeagh.
- For the purpose of the investigation, the lawyer in charge of the investigation requested privileged documents.
- RMac gave them to the investigating lawyer on the conditions that only Mr Ennor QC saw them.
    - Given for a limited time, for an express purpose, on conditions.
- Mr Judd QC took over the investigation.
    - He was unaware of the nature of the agreement, and showed the documents to the ADLS.
- Russell McVeagh becomes aware of this, requests the return of the documents.

Held (PC)
- The House of Lords took an extremely dim view of the ADLS's conduct.
- LPP was more than an ordinary rule of evidence. It was a fundamental condition on which the administration of justice as a whole rested.
- A grant of documents for a limited time and express purpose does not generally waive all privilege.
- A limited waiver does not constitute a complete waiver, it does not remove privilege, it only suspends it.
- There is no balancing test between public interest in the documents against the private interests of the parties.
    - Privilege is sacred in the law.
    - Any balancing test is always heavily weighted in favour of retaining privilege.
- A necessary implication in a statutory provision was one which necessarily followed from the express provisions of the statute construed in their context.
    - Need extremely clear evidence of Parliamentary intent.
    - If Parliament intended there to be a public/private balancing test, they would need to make a specific provision detailing this test.
- Section 127 of the Lawyers and Practitioners Act 1982 preserved privilege absolutely.
- Absolutely no inroad made.
    - Heavy policy reasons as well as legal lie behind this decision.
    - It is necessary to ensure that clients have complete faith in their lawyers. Privilege needs to be protected as much as possible.

Nicholson v Icepak

Facts
- Mr Chatwin was a lawyer represents State Insurance.
- Slate insured Icepak, so by implication, Mr Chatwin represents Icepak.

- Icepak damaged some pears in transit, cost a significant amount of money.
- In damaging the pears, Icepak breached their insurance policy. Therefore they would not be covered by their policy with State.
- Icepak disclosed confidential information to Mr Chatwin, and Mr Chatwin told State.

Held

- Evidence from the conversation between Chatwin and Icepak was inadmissible, because Chatwin telling state was a breach of LPP.
- Information given was privileged, because it was given for the purpose of getting advice in the context of the litigation.
- Chatwin should have stepped away from the litigation as soon as he was aware of the breach of the insurance policy. He could not represent either party given his knowledge.
- Chatwin also should not have spoken directly to Icepak. He should have addressed all communication through Icepak's counsel.
- The public policy considerations of LPP outweigh the detriment to State of barring this evidence.
- Violations of rules 6 (conflict of interest, 8 (confidentiality), and 7 (disclosure).

Duties to Third Parties

- A third party is anyone other than the lawyer and their client.

Rule 12

- Rule 12: A lawyer must conduct dealings with integrity, respect, and courtesy.
- 12.1: A lawyer should inform a self-represented party of their right to legal advice.
    - Cannot, under any circumstances, provide legal advice to that third party. That would be a huge conflict of interest.
- 12.2: A lawyer is personally responsible for the payment of a third party's fees, costs, and expenses, where the lawyer instructs a third party of the behalf of their client.
    - Usually this is billed back to the client.

Gartside v Sheffield, Young, and Ellis

Facts

- Winnifred Herrold, testatrix, (89) had a fall in a retirement home, and injured herself.
- Notified her solicitors that she wanted to make a new will.
- Changed the beneficiary of her estate to be Gartside.
- Dies seven days later.
- The lawyers did not execute the will prior to her death, she didn't sign it.
- The solicitor knew of her vulnerable physical state.
- Probate granted to her previous will, where Gartside got very little.
- Gartside sues the lawyers for negligence, claiming the amount he missed out on.

High Court

- No duty of care is owed to Gartside, therefore there is no negligence. The duty was owed to the testatrix, who is now dead.

Held (CA)

- A solicitor who has accepted instructions to prepare a will for a client owes a reasonable duty of care to the beneficiary under the proposed will. The solicitor must carry out instructions with due diligence and present the will for execution within a reasonable time.
- A lawyer accepting instructions to draw up a Will must;
    - Appreciate that a careless failure may deprive a third party of an intended benefit, especially where matters of health etc require urgency.
    - Proximity between the parties is not strengthened by actual reliance by the plaintiff on the solicitor following his instructions.
    - The duty extends to foreseeable economic loss.
- The lawyer owes the duty to the intended beneficiary, as they are the one who causes the loss.
    - No reason to restrict the duty of care only to those who have claims to the estate under statute (family etc) - Richardson J.
    - Once it is held that a solicitor owes a duty of care to the beneficiaries, the loss is directly caused by the solicitor's breach of that duty.
- Public policy; people would expect a lawyer to be liable if they don't deliver what they promised. People rely on having effective wills.
- The duty is owed because the negligent solicitor engaged in the activity.
- Only applies in limited circumstances, and the loss needs to be reasonably foreseeable.
- People cannot sue lawyers in negligence all the time, there needs to be a situation where an intended beneficiary is left without recourse.
- Issue of confidentiality.
    - Court held that confidentiality was waived in this case, because to continue it would validate the negligence of the lawyer.
    - Under rule 8.2, disclosure was permitted.

Litigation Immunity

Definition

- It is protection for solicitors and barristers from being sued for negligence by former clients.
- Aimed to stop clients coming after the lawyer if they lost, allowing lawyers to take cases even if the chances of success where low.
- A necessity of going after a lawyer through another firm would be waiving all privilege. The full facts of the matter would need to be disclosed to allow the former client to sue.

Arthur J S Hall & Co v Simons **[2000] (HL)**

Facts

- Three clients brought separate claims of negligence against their former solicitors at the firm of Arthur J S Hall & Co.
- Solicitors applied for the case to be struck out on the basis of litigation immunity.
- Trial judge found that immunity applied and struck the claims out.
- Court of Appeal (UK) said this matter fell outside the scope of immunity.
- Solicitors appealed to the HL on the question of whether litigation immunity should be abolished or justified on public interest grounds.

Held

- Immunity is not required to deal with attacks on collateral attacks on civil and criminal decision.
- The fundamental principles of a lawyer's duty to the Court would protect lawyers from frivolous claims. If the lawyer upheld their duty to the Court, a lawsuit against them could not succeed.
- Private law principles of res judicata, issue estoppel, and abuse of process should be adequate to cope with collateral decisions.
- Other professions (doctors etc) face similar ethical tensions in their professions but do not require immunity from negligence.
- A remedy should be available for clients who were genuinely wronged by their lawyer.
- Abolishing litigation immunity would end an odd exception.
    - Canada abolished litigation immunity and no marked increase in negligence suits followed. Unreasonable to uphold immunity on a floodgates argument.
- The Court acknowledged that if a barrister upheld their duties to the Court they would not be liable.
    - Acknowledged that the Court would take into account difficult situations faced by barristers.
    - Courts could be trusted to differentiate between errors of judgement and true negligence.
- Abolishment of negligence could strengthen the legal system by exposing isolated acts of incompetence by the bar.
- Good for public faith in the system. If advocates were immune from liability it would decrease public faith in the system.
- Abolished litigation immunity for both criminal and civil jurisdictions.

Lai v Chamberlains **[2007] (NZSC)**

Facts

- The Lais are suing Chamberlains (firm) for $700k, claiming professional negligence.
- The Lai's company (S and L Lai Ltd) was being sued in the High Court for more than $700k.

- The judge asked whether Mr and Mrs Lai would personally guarantee the judgement if their company lost in court.
- Chamberlains advised the Lais to agree to personally guarantee the company, and they agreed to do so.
- The company lost. The judgement was entered against both the company and the Lais.
- The Lais issued proceedings in the HC against Chamberlains.
    - They claimed in negligence, and alternative claims based on contract and breach of fiduciary duty.
- Chamberlains denied the breach of their duty and raised the defence of immunity.
- HC: Application to strike out the defence of immunity was denied.

Court of Appeal

- Held by majority that there was no longer sufficient justification to retain immunity for barristers for negligence (left aside negligence in criminal proceedings for another day).
- Issue was whether the public interest requires the retention of immunity for litigation and work closely associated with it.
- Also considered whether change in immunity should be left as a matter for Parliament.
- Overall held there was insufficient justification for it to continue.
- Anderson P dissented and considered that immunity was necessary for the due administration of justice.
    - Held that immunity was 'as necessary for the due administration of justice for the public benefit, and for the advancement of our other democratic protections, as it ever was'. Immunity was a privilege of barristers within s 61 of the Law Practitioners Act 1982.
    - Cited *Rondel v Worsley*: Discussed four ways that immunity was grounded in public interest of the administration of justice.

Held (SC)

- Same issues as in the CA: Whether public interest requires retention of immunity and whether any change should be left to Parliament.

Elias CJ (Majority)

- Immunity from legal suit is exceptional. It needs to be justified on public policy grounds, but public policy is fluid and changing.
- No other professional group is immune from liability for breach of duties of care they owe to those they advise, treat, or represent.
- The immunity as it existed was not clearly established in NZ until *Rees v Sinclair* in 1973.
- Modern immunity was confined to advocacy in Court. Sought to protect the public interest for the four reasons above in *Rondel v Worsley*.
- Deciding whether immunity included activities outside litigation, it was asked whether those activities shared an 'intimate connection'. This test is arbitrary and uncertain.
- Finds that substantive doctrine preventing litigation and enabling strike out proceedings for abuse of process are sufficient protection against re-litigation, therefore ensuring finality.
- A lawyer's duty to the Court would remain paramount and striking out immunity would not put undue stress on the client.
- Section 61 does not constitute a legislative endorsement of immunity, reconsideration is not exclusively a matter for Parliament.
    - It uses the word 'responsibilities' instead of 'rights'.
- Res judicata: A matter that has been adjudicated by a competent court may not be pursued further by the same parties.
- "Immunity for advocates is not required in order to meet the public interest in finality of proceedings or the integrity of the judicial process. Other public interests in the integrity of the criminal justice system may not be exhausted by prevention of abusive collateral challenge alone, but are more appropriately addressed in application of the principles

governing liability. Immunity is the wrong response. No compelling public policy requires retention of an anomalous immunity for one occupational group [80]."

- Abolished immunity in both civil and criminal litigation.

Tipping J (Dissenting in part)

- Holds that a better approach in the civil arena is to maintain immunity, and have a number of exceptions to it.
- Prima facie it would be an abuse of process to commence civil proceedings against your lawyer to collaterally challenge the final outcome of an earlier civil case.
- Held that there should be absolute immunity in criminal proceedings. A conviction should be valid unless it is set aside on appeal.

Thomas J

- Agrees with the majority.
- Holds that an absolute rule solicits injustice, removing immunity creates a more flexible and just system.

Responses to *Rondel v Worsley* Reasons for Immunity

1. By preventing the fear of subsequent litigation from eroding the barrister's independent duties to the court (in the cause of conflict with the interests of the client) and from promoting defensive defensive lawyering which is wasteful of time and resources;
    a. *Saif* (Lord Diplock): To say that a barrister owes a duty to the Court or to justice seems a pompous way of saying that they have to follow the rules, which is not distinct to the law.
        i. A lawyer's duties to the court can never conflict with the duty to the client because the duties to the court are the rules by which litigation must be conducted. Other professions have similar ethical obligations [54]. By avoiding effective re-litigation, otherwise than on appeal of controversies already resolved by court decisions, unsettling public confidence in outcomes and prolonging litigation.
2. By avoiding effective re-litigation, otherwise than on appeal of controversies already resolved by court decisions, unsettling public confidence in outcomes and prolonging litigation.

. Relitigation in respect of civil proceedings was held to be adequately deterred by the rules of res judicata and issue estoppel and by the power of the court to prevent abuse of its process [27].

a. *Hunter* - Lord Hoffman: Re-litigation was no reason to give lawyers immunity against all actions for negligence in the conduct of litigation. Such response was disproportionate [31].

3. By recognising that barristers, in application of the 'cab-rank obligation', cannot pick and choose their clients to minimise risk of future recrimination and that it is in the interests of justice that barristers continue to agree to represent anyone who needs representation, however difficult the person or distasteful the cause;

. The cab-rank principle is an important ethical obligation imposed on legal practitioners, but its practical importance in the administration of justice in New Zealand should not be exaggerated. The obligation to provide services to all is an ethic shared with other professions, which enjoy no immunity [54].

4. As an essential part of a wider scheme of immunity which applied to judges, jurors, and witnesses in court proceedings.

. The immunities of other participants in court proceedings are not analogous because witnesses and the judge do not assume duties of care to a party. The case of the advocate who assumes the conduct of litigation on behalf of a client to whom he owes duties of care (often as a matter of contractual undertaking) is entirely different [54].

- In Australia litigation immunity has been retained on policy grounds above.
- Different states look at is slightly differently.

- Key part of Australian decision is that there are other avenues to seek redress, such as complaints to the Law Society.
    - However the law society cannot make awards of damages, fines are usually quite small. Not the same as a civil remedy.
    - Complaints process similar to that outlined under rule 3.8.

Duties to Former Clients

Rule 8

- 8.1: A lawyer is bound to keep a client/former client's information confidential **in perpetuity.**
- 8.7.2: A firm can put up an effective information barrier between the lawyer who holds the confidential information of the former client and the lawyer who proposes to act for the new client, as long as there's no more than a negligible risk that the former client's information can be disclosed.

Black v Taylor **[1993] (CA)**

Facts

- Mr Gazley, a family lawyer, had acted for various members of a family for some time, including the plaintiff and the deceased.
- Plaintiff brings proceedings against the estate of the deceased alleging a breach of agreement.
- Gazley proceeds to act for the family estate against the plaintiff.
- The former client contends that Mr Gazley knows too much about the family, applied for an injunction to restrain Gazley from acting based on conflict of interest.
- High Court declared Gazley should not act further.
- Gazley appealed.
- Plaintiff cross-appealed for costs (costs denied at HC).

Held

- The court normally relies on barristers and solicitors to realise when there is a conflict and cease acting, but failing that the court will step in. The court has inherent jurisdiction.
- It was not suggested that Gazley would deliberately or consciously act in breach of the confidence obligation, rather that he had received information in confidence which may affect his conduct.
    - This is arguably a breach of rule 8.7.1.
- The barrister does not have an absolute and independent right to determine whether he or she would act in any proceedings subject only to breach of confidence obligations.
- The Court has a power to restrain a barrister from acting where the interests of justice require it.
- The important feature is that justice is seen to be done.
- Courts are entitled to promote the proper administration of justice.
- There was no charge of misconduct as Gazley was following his instructions as required under the lawyer-client relationship.
- Broad test: The proper administration of justice warrants refusing to allow a lawyer who has acted for family members over a long period of time to take sides and act as counsel for only one family member.
- The cab-rank rule does apply, but when it appears to be unfair, if justice is not being seen to be done, the Court will step in.
- The appellants were ordered to pay costs of $4000 for the appeal.
- The Court noted that a breach of fiduciary could occur if the lawyer continued to act against former clients.
    - The lawyer would know about the affairs of the other party, including their weaknesses, fears, and personalities. This could allow the lawyer to exploit that party unfairly.
- Cooke J: Focus lay on confidentiality. Gazley knew the relationships and personalities between the parties, he knew how they thought thus presenting a conflict.

- Richardson and McKay JJ: The focus was on the administration, justice must be seen to be done. A lawyer should withdraw without the need of court interference where there is a potential conflict and a likelihood of perceived conflict in the view of the former client.
- Fundamental principle is that justice must be seen to be done.

***Bolkiah v KPMG* [1999] (HL)**

Facts
- Prince Bolkiah of Brunei had a number of business ventures.
- KPMG had acted for Bolkiah in a business and personal capacity.
- The Brunei government is investigating Bolkiah's businesses.
- They retain KPMG, who accept because it had been two months since they'd worked with Bolkiah and they put in place a Chinese wall.
- Bolkiah sued claiming that KPMG were acting out of accordance with their duties to him.

Held
- KPMG did not discharge their burden of showing that there was a negligible risk that confidential information would not be disclosed to the new client.
- Around 260 people worked for KPMG in the office which was involved in work for the prince.
- The duty between accountant and client is similar to lawyer/client. But the standard for a lawyer is 'no negligible risk', the standard for an accountant is 'no risk'.
- Therefore the information barrier was not sufficient such that there was no risk of the confidential information being communicated.
    - Rule 8.7.2 and 8.7.3.
- If the Court cannot be satisfied that there is no risk, you must cease to act.

Hana v Stephens

Facts
- Ms Kato and Mr Stephens (solicitor) were in a relationship, and set up a flower company (Hana) together.
- Stephens left his previous employer to work for Hana. His previous employer sued him for breach of a restraint of trade agreement.
- Hana's lawyer had acted for Mr Stephens in that proceeding, although Hana had paid the fees.
- Hana is now suing Stephens for breach of fiduciary duty and negligence in his role in the business.
- Mr Stephens applied for an order that Hana's counsel should not be allowed to act due to a conflict of interest.
    - Alleged that during prior litigation Counsel would have acquired a detailed knowledge of Hana's operations and Stephens' role in it.
    - Counsel for Hana asserted he has no recollection of Mr Stephens' affairs from that matter.

Held
- *Black v Taylor* was applied.
- Held that lawyers should not act against former clients.
- Stephens and Kato were in a relationship akin to a husband and wife.
- Although the lawyer claims he can't remember, the importance is not on what the client may actually know or remember, but instead on what the (former) client would reasonably expect him to know.

    - The test is whether the objective reasonable person in the shoes of the client would perceive a conflict of interest/breach of duty.
- Justice needs to be seen to be done.
- Stephens could reasonably expect that the information counsel knew about him could be used against him.
- Justice would not seem to be done if counsel was allowed to be instructed on this case. Therefore Hana's counsel was forbidden from being able to act.

Undertakings

- Solicitors undertakings are promises to do or not do something in legal practice
- Undertakings must be clear, precise, and capable of being performed.
- They must be understood by all parties to mean the same thing.
- They are enforceable. If they cannot be performed compensation can be considered.
- You can apply to the court to be released from an undertaking.
- They are used to obtain some action or forbearance from the party to whom the undertaking is given.
- They can be given to essentially anyone including the Court, clients, other practitioners or third parties.
- As the lawyer is an officer of the Court, the court has the power to enforce performance of the undertaking if necessary.
- A solicitor cannot plead that to honour an undertaking would breach a duty owed to a client.
- Typically undertakings come from partners as they hold the indemnity insurance.
- Undertakings can be given to get people closer to the resolution.
    - Commonly used with transferring money into a trust account in conveyancing.

Rules
10.3: The lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practise.
10.3.1: This rule applies whether the undertaking is given by the lawyer personally or by any other member of the lawyer's practice. This rule applies unless the lawyer giving the undertaking makes it clear that the undertaking is given on behalf of a client and that the lawyer is not personally responsible for its performance.

Auckland Standards Committee 3 of New Zealand Law Society (ASC3) v W [2011] (HC)

Facts
- Dispute between clients.
- W (solicitor) acted for a developer.
- He undertook to hold $91k in his trust account whilst there was a mediation between the developer and the contractor to solve an issue.
- W gave an undertaking that his client had paid the amount in dispute into a trust account, and W undertook to hold the money 'pending satisfactory resolution of this matter'.
- The undertaking was included in a lengthy letter which was provided to the other party prior to mediation.
- The parties met, no agreement was met. The matter proceeded to Court.
- After the mediation failed, W consulted colleagues in his firm and released the funds from the trust account.
- When the judgement creditor sought to enforce W's undertaking, he responded that it had long since expired.
- W conceded that the undertaking was imprecise and expressed more broadly than intended.
- NZLCT dismissed two charges of misconduct and negligence or incompetence bringing the profession into disrepute under the Law Practitioners Act 1982.
- NZLS appealed to the HC.

Held
- The court held that the Complaint Tribunal did not identify the legal principles which were applied in reaching its conclusions.
    - *R v Awatere* and *Lewis v Wilson* both held that Courts and tribunals should give reasons for their decision in order to assess whether the decision is correct and to guard against wrong or arbitrary decisions.

- Professional misconduct is wider than only intentional wrongdoing. A range of conduct may amount to professional misconduct, ranging from actual dishonesty through to serious negligence evidencing indifference to or abuse of privileges as a lawyer.
- 'However a mere error of judgment or negligence simpliciter does not constitute professional misconduct' [35].
- Test: Look at the conduct and consider whether it falls below what is to be expected of the legal professional and whether the public would think less of the profession if the particular conduct was viewed as acceptable.
    - Objective inquiry.
- Professional misconduct is not made out.
    - Duffy J acknowledge that breach of an undertaking will usually amount to professional misconduct, but there are enough unusual features that make this case an exception to the rule.
- A finding of misconduct is determined by the nature of the conduct, not the consequences. Reasons for the solicitor's actions go the penalty, not the finding.
- Drafting an undertaking as imprecisely as was here constitutes negligence or incompetence. The public would expect practitioners to draft undertakings accurate.
    - Practitioners should not be able to say 'I do not have to honour this undertaking because, although I wrote it, it does not say what I intended it to say.'
    - This would diminish the standing of the profession in the eyes of the public.
- Mitigating factors: The undertaking was provided gratuitously, the recipient didn't rely on it at the time, W genuinely believed it was finite, he sought advice from other lawyers whether he should release the funds or not.
    - W did what was reasonable. He consulted his superiors as to what to do with the trust money.
    - That is what is expected from junior lawyers.
- Undertakings should be clear and unambiguous, thus it was read without the context of the rest of the email.
- Accepted that W committed an honest mistake under difficult and pressing circumstances. However objectively his error was negligence and incompetence such that it brings the profession into disrepute.
- If you ever give two conflicting undertakings, appropriate course of action is to notify seniors and tell your client, who will likely fire you.

***Commissioner of Inland Revenue (CIR) v Bhanabhai* [2007] (CA)**

Facts

- Bhanabhai is a lawyer at the firm Dyer Whitechurch.
- Acted for two clients in a development; Nautilus Developments Ltd and Golden Gate Holdings Ltd.
- Golden Gate were in arrears for GST.
- Mr B was the solicitor for the developers, director of one of them, investor in the company, and was a guarantor for UDC (primary financier).
    - Already potential breach of rule 5.4.2, prohibiting acting for clients where the lawyer has a personal stake in the outcome.
- In April 1997 Mr B wrote (on firm letterhead) to the CIR, including an undertaking to pay the outstanding GST when the remaining units for sale have been settled.
- He meant to make the undertaking on behalf of the company, but wrote 'we'.
- The loan facility expired and the remains had to be paid to the bank, he was unable to pay the GST.
- IRD sought an order forcing B to honour the undertaking.
- Due to B's positions, the question was whether B gave the undertaking as a solicitor or as a developer.
- HC ordered Mr B to pay $300k plus interest. Mr B appealed.

Held

- The undertaking was a personal one, not given on behalf of the company.
- Normally undertakings are not presumed where the matters are beyond the control of the solicitor, but taking into account the commercial context of the transaction and Mr B's position as a director, it is appropriate to see the undertaking as personal.
    - He was the director of one of the companies and knew about the financial details. He did not clearly stipulate the undertaking was from his client
- No reading of an undertaking to be conditional on it being possible to fulfil it.
- The Court has jurisdiction to award compensation for breach of an undertaking where performance is impossible.
- If the letter was read to not be an undertaking, there would be no purpose to it.
- The undertaking was unconditional.
- A claim on an undertaking is not like other civil proceedings where technicalities could defeat it. It invokes the disciplinary role of the Court over solicitors.
- Mr B place himself in a position where his personal interests conflicted with his duties.
- The undertaking was relied upon by the CIR.

***Solicitor-General v Miss Alice* [2007] (HC)**

Facts

- Mr and Mrs Berryman request the NZ Army to build a bridge. They sign an agreement stating they will maintain the bridge.
- The erection of the bridge was to be a training exercise.
- The bridge later collapsed when Mr Richards drove across it, he died.
- Coronial inquest found the collapse was due to Berryman's failure to maintain the bridge.
- The Army and Richards were free from responsibility.
- However an Army report (Butcher Report) stated the army used the wrong timber when they built the bridge.
- Berryman provides the documents to solicitors on limited terms (including no public disclosure).
- Miss Alice is instructed by the Berryman's. He gives an undertaking to receive the documents on the same conditions.
- Miss Alice goes to court and open discovery is rejected by Wild J.
- Alice releases the report to the NZ media.
- The solicitor general applies for Miss Alice to be held in contempt of court and for orders that he be suspended from legal practice.

Held

- Miss Alice put his zeal for his clients before his duties to the Court.
- Equally, the Army is lacking in disclosure by misleading the Coroner's Court.
- The Army's actions opened them to appropriate sanctions and Miss Alice was aware of the appropriate legal remedies, but the Berrymans had been put to significant costs already and felt tired. He did not want to put his clients through further stress and cost.
- Where legal remedies are available, they should be pursued before there is any tolerance for whistleblowing or any other remedy of self-help.
- Two kinds of undertakings are breached;
    - Express: Undertaking to use the documents on the terms provided.
    - Imputed: Comply with Court orders.
- Miss Alice was in breach of his undertaking and in contempt of court.
- He was nearly struck off the roll. He intentionally breached his undertaking, had been arrogant and high handed, and should have asked the Court to be released from his

undertaking. However he did reasonably believe that the information needed to be disclosed to the public.
    - Was acting in what he believed were the best interests of his client.
    - He did not have instructions from his clients.
- Suspended for 3 months and fined $5,000.
- Breached rule 2: Overriding duty to the Court.
- Breached rule 10.3: Must honour any undertakings.
- Breached rules 13.1/13.2: Duty of absolute honesty to the court and must not act in a way that undermines court processes.

Tikanga Maori and Legal Ethics

What is Tikanga?

- There is no set definition of tikanga Maori.
- Broadly, can be framed as Maori customary concepts, rules, and law.
- In law, tikanga requires things such as;
    - Meeting clients kanohi ki te kanohi (face to face).
    - Attend hui on Marae.
    - Go to clients, rather than have clients come to you.
- Underlying values of;
    - Kaitiakitanga (guardianship).
    - Whanaungatanga.
    - Manaakitanga (mutual compassion and understanding),
    - Mana (power and social standing/prestige).
- Provided for in a number of statutes;
    - Resource Management Act 1991 s 7(a); All persons exercising functions and powers under it shall have particular regard to kaitiakitanga.
    - Environmental Protection Authority Act 2011 s 9(3); The Minister must appoint at least one member who has knowledge and experience relating to the Treaty of Waitangi and tikanga Maori.
- Case law:
    - *Takamore v Clarke and others* [2012] (NZSC).
        - Body snatching case.
        - Tikanga Maori was held as a relevant consideration in the rights of the executor.
    - *R v Mason* [2012] (HC)
        - Tikanga methods of sentencing and dispute resolution were held not to apply.
        - Tikanga Maori was accepted as a living part of Maori culture and thus New Zealand culture however it did not apply in this context.

Tikanga and the Rules

- Rule 4
    - 'Cab-rank' rule.
    - Rule 4.1: Require 'good cause' to refuse to accept instructions.
    - Examples of good cause in the rules include a lack of expertise, lack of capacity, instructions requiring a lawyer to breach a professional obligation etc.
    - Does not seem to entertain a clash of cultural values with the instructions as a reason to refuse.
    - Rule 4.1.1: The following are not good cause to refuse instructions:
        - (b) personal attributes of the prospective client. This could include racism or lack of respect for tikanga, and is not a good reason to refuse.
- Rule 5
    - Conflicts of interest.
    - 5.4: A lawyer must not act if there is… a risk of conflict between the interests of the lawyer and the client.
    - 5.4.1: What constitutes 'an interest that touches upon the matter'?
        - Seems intended to include business interests.
        - An iwi member could have a conflict in acting against the interests of their Post-Settlement Government Entity.
        - But unlikely that a cultural clash can constitute a conflict of interest in the absence of a conflicting business interest.
- Rule 6
    - Rules around client interests.

    - In acting for a client, the lawyer must protect and promote the interests of the client to the exclusion of the interests of third parties.
    - You must act in the best interests of your client subject to the duty of the court.
    - Question over whether cultural values would amount to something which prevents you acting in your client's best interests.
- Rule 13
    - Subject to the duty to the Court, a lawyer has an overriding duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.
- Overall, it seems unlikely that there is anything in the rules allowing the lawyer to refuse to act for personal, cultural, or religious reasons.
- However, there is a strong argument that there should be. It seems unfair to make someone act against their own values.
- However it would also be an unwise client to engage someone who vehemently disagrees with what you're asking them to do.
- The purpose of the rules is to prevent lawyers being able to cherry pick cases and allowing everyone access to legal representation. This has to be balanced with rights to have your culture and beliefs respected, however it is questionable whether it needs to be incorporated into the rules.

***National Standards Committee v Poananga* [2012] (NZLCDT)**

Facts
- Ms Poananga was working for a Chambers in Auckland, practicing out of Gisbourne.
- Represented a number of Maori groups.
- Only had a supervised practising certificate.
    - She was not under supervision and had minimal experience.
- She was dealing with upward of 350 claims, all which were running to a strict deadline on making historical treaty claims.
- She forged client's signatures on a number of legal aid applications.
- Accepted charges of misrepresenting the status of client's instructions, forging signatures, and being party to misleading statutory declarations.

Held
- P argued that it was a mitigating factor that she was acting in the best interests of her client, and that should be treated as a mitigating factor.
    - Counsel argued that cultural factors should be seen as a mitigating factor.
    - Tikanga required her to meet her clients face to face, they would not come to her.
    - They also consented to her forging their signatures.
- Argued the least restrictive penalty reasonably available should be applied (she should not be struck off). Cited *Daniels v Complaints Committee* as authority (accepted authority).
- The Board had her submit to medical tests to assess whether a medical condition caused her dishonesty. Ms P tried to skew the results such that they would show she had a condition. This was seen as further evidence of her dishonesty.
- The better course of action for her would have been for her to admit responsibility immediately and argue mitigating factors upon sentencing.
- Striking off is the outcome of last resort, where the individual is found to not be a fit and proper person.
- The primary purpose of these proceedings is not to punish.
- This was a clear case of dishonesty that reflects on Ms P's moral character and her ability to practice.
- It is not in the power of clients to legitimise forgery or wrongdoing, consent is no defence.
- Ms P's conduct was seen as the most serious cases of dishonesty, and she was struck off.

- It was arguably possible that the Court could have seen the relevant cultural factors as mitigating factors and thus seen fit to apply a less severe sanction.
    - They could have determined this was only misconduct.
    - Or only suspended her rather than striking her off.
- This case potentially makes room for the consideration of cultural factors. However it does not accept in this case that any such factors are mitigating in a case of dishonesty.