IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

CIVIL APPEAL CASE NO. 2984 OF 2019

BETWEEN: ROBERT EDGAR SUGDEN
Appellant

AND: VANUATU LAW COUNCIL DISCIPLINARY COMMITTEE
Respondent

Coram: Justice Jeremy Doogue

Counsel: Mr. Mark Hurley for the Appellant
Mr. Garry Blake for the Respondent

Date of Hearing: 15th December 2020

Date of Decision: 11th January 2021

DECISION

Background

1. Mr Sugden (**the appellant**) appeals to this court against a decision of the Vanuatu Law Council Disciplinary Committee (**the Committee**) made against him following allegations that he had breached his obligations as counsel for one of the parties to a proceeding in the Supreme Court (***Chen* proceeding**).

2. The background to Mr Sugden having become involved in the proceeding was that he came into the matter at an advanced stage and not long before the scheduled hearing of the trial of the case in the Supreme Court. Another lawyer had been acting in the matter until December 2016. Mr Sugden was then consulted and gave advice prior to leaving Vanuatu in mid-December on holiday. In late January 2017, Mr Sugden, on his return to the Republic, accepted instructions to act and filed a Notice of Commencing to Act with the Supreme Court on 3 February 2017. He accepted instructions, knowing the matter was scheduled to be tried on 7th to 10th March 2017,

3. Mr Sugden then applied before Fatiaki J, who I understand was also to be the trial judge, for an adjournment of the scheduled trial and for leave to amend the defence and counter claim that had been previously filed on behalf of his client.

4. On 17 February 2017 Fatiaki J allowed the defendant/counter claimant to amend his defence and counterclaim but declined the application to adjourn the trial. There was no appeal against the Judge's order declining an adjournment of the trial.

5. On or about 7th March, 2017, Mr Sugden on behalf of the def then filed a new civil claim under Case No. 17/453. That claim effectively pleaded the same matters as

those which were the subject of the counterclaim in the proceeding. The Counterclaim in the Chen proceeding was ended by Mr Sugden filing a Notice of discontinuance. The claims forming the counterclaim were not therefore contested in the trial commencing 7th March. While Mr Sugden made it clear to the judge that his client would be discontinuing the counterclaim, he did not tell him, or the opposing party, that the claim on which the counterclaim was based would now be the subject of a new proceeding that had already been filed, but not served.

6. When the existence of the fresh proceeding, 453/2017, was subsequently revealed to the opposing party, an application was made to strike it out as an abuse of process and in due course it was struck out by Aru J. The order was made on the ground that bringing 453/2017 was, in the circumstances, an abuse of process having regard to the fact that the counterclaim in the original proceedings which was discontinued had raised the same issues that the new proceeding raised.

7. After the Supreme Court order had been made striking out the new proceeding, the claimant brought an appeal to the Court of Appeal.

8. The Court of Appeal in the course of its decision dismissing the appeal was critical of Mr Sugden's conduct. The court said that he had manipulated the court processes by undertaking the scheme which has just been described with the purpose of removing the counterclaim from the proceeding which was to go to trial on 7 March 2017 and establishing a fresh proceeding in which to bring the same issues. The purpose was to avoid having to run the counterclaim at the trial beginning in March 2017 trial and to get more time to prepare it. Eventually, the allegations which were the subject of the counterclaim would be dealt with as a separate claim at some more distant point in the future.

9. The Court of Appeal considered this to be misleading and unacceptable conduct, saying:

> [46] However, Mr Sugden is a senior practitioner who is well aware of the Civil Procedure Rules. In breach of his professional obligations, he improperly manipulated the Rules. In those circumstances we think it appropriate to refer this judgment to the Law Council.

10. A complaint against the appellant was made by the then Secretary of the Law Council on 24 April 2019. The complaint relied on the observations made by the Court of Appeal. The evidence which it filed in support of the charge was an affidavit to which was annexed a copy of the decision of the Court of Appeal.

11. The disciplinary charges were heard by a committee of three. The Chairman of the respondent, which is apparently a standing committee, was Andrée Wiltens J. He had also been a member of the Court of Appeal which gave a unanimous judgment in Chen's case.

12. The Committee issued its decision on the 30th October 2019. The decision recorded that the nub of the [Court of Appeal's] concerns are set out at paragraph [21] of its judgment where it said:

> What followed can only be described as a concerted and deliberate course of action by Mr Sugden, utilising the rules of civil procedure, to avoid the consequences of the Judge's decision in refusing the adjournment.

13. The Committee noted[1] that Mr Sugden had claimed that his client, on whose behalf he took the actions described, was entitled under the rules of court to discontinue the counterclaim and to file a fresh proceeding relying on the matters that had been in the counterclaim. Nor was there any obligation to disclose to the trial Judge managing the *Chen* litigation the fact that even though the counterclaim was being discontinued, another proceeding had been filed to take its place.

14. The Committee recorded that Mr Sugden had come to accept that his approach overlooked the fact that justice had to be fair to all parties and not only to Mr Sugden's client.[2]

15. Mr Sugden had also justified the steps he took on the basis that his client needed an adjournment in order to get the counterclaim into proper form and that the course of action he took was to avoid the consequences of the Judge's refusal to allow such an adjournment.

16. The Committee also noted another reason for Mr Sugden's actions was that he thought that it was clear from the circumstances that Fatiaki J had already made up his mind against the counterclaim before trial and that even if the counterclaim was brought at the pending trial it was likely to be dismissed.[3]

17. The Committee also recorded the views of the Court of Appeal that Mr Sugden had blatantly and cynically attempted to improperly manipulate the rules[4] to avoid the order that the trial Judge had made. They said it was hard to think of a more blatant abuse of the Court's processes.

18. In analysing the conduct of Mr Sugden, the Disciplinary Committee said that notwithstanding the justifications Mr Sugden had put forward the fundamental issue remained that:

> Even if permitted by the rules, Mr Sugden's steps of filing a new claim one day prior to filing a discontinuance of the counterclaim should have been accompanied by notice to the Court/Judge and all opposing counsel. Mr Sugden now accepts this.

19. The Committee recorded that while the literal wording used in the rules entitled his client to file a discontinuance at any time, Mr Sugden now accepted that it was not within the spirit of the rules and the wider law of procedure to not inform Fatiaki J. He conceded that he had "trespassed onto the role of the Judge". The Disciplinary Committee noted that Mr Sugden's conduct either amounted to a professional

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1 Paragraph [10].
2 Paragraph [10].
3 Paragraph [12].
4 Paragraph [13] Disciplinary Committee decision.

misconduct or unsatisfactory professional conduct with the latter being less serious than the former. The Committee also raised the question of how Mr Sugden considered his actions may be seen as consistent with his obligations in rules 73 and 74 of the Rules of Etiquette in Conduct of Legal Practitioner which were set out in the Disciplinary Committee decision. Rule 73 states the well-known principle that the overriding duty of a lawyer acting in litigation is to the Court concerned and that under rule 74 counsel have a duty of fidelity and honesty to the Court and must not mislead or deceive it.

20. The Committee recorded that[5] Mr Sugden accepted he was in breach of his obligations under rule 74. The Committee decided that because Mr Sugden's actions had been deliberate and calculated they could not be seen as the result of a mere mistake and that the fact remained that he had made a decision with full knowledge of the consequences to not properly advise the Court or counsel as to what was actually transpiring.[6] The Committee characterised the appellant's conduct as amounting to professional misconduct[7] and in its decision the appellant was found guilty of professional misconduct, suspended from legal practice in Vanuatu for four months and ordered to pay VT50,000 for the costs of the disciplinary hearing.

Factual basis for the decision in this case

21. It appeared from the oral submissions that Mr Hurley made on behalf of the appellant at the hearing of this appeal that the appellant may be taking a point to the effect that the Disciplinary Committee had not made its decision on a proper evidential basis establishing the various complaints made against Mr Sugden arising out of the way in which he conducted the Chen litigation. Counsel commented adversely on the fact that the only evidence in support of the charge before the Disciplinary Committee was an affidavit formerly annexing the decision of the Court of Appeal. If that was put forward as a serious ground of appeal it is rejected.

22. Mr Sugden did not dispute before the committee that the events which are described in the Court of Appeal judgement did not occur. In fact, he admitted that the events which are described occurred. The thrust of his case before the committee was that he had acted in his client's best interests when taking the course that he did as in the *Chen* litigation.

23. In his memorandum in advance of the hearing, the appellant, identified the issue that brought him before the LCDC in these terms:

> I am accused of improperly manipulating the Civil Procedure Rules and thereby being in breach of my professional obligations.
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> The Facts:

5 At paragraph [34].
6 Paragraph [35] Committee decision.
7 Paragraph [36] Disciplinary Committee decision.

1, On 17/02/2017 in Civil case No. 1335 of 2016, the Judge gave leave to my client (a defendant) to amend his defence and counterclaim but refused my client's application to adjourn the trial that was scheduled to begin on the 07th march, 2017 to allow more time for preparation in relation to the new issues raised in both the new defence and the new counterclaim.

2. My client, upon my advice decided to remove the Counterclaim from the trial by discontinuing it and starting a new claim that contained the Counterclaim. The Civil Procedure Rules required this to be done by first filing the new claim and after that had been done, filing the Notice discontinuing the counterclaim, On 02 march, 2017 the new claim was filed and on 03 march, the Notice discontinuing the counterclaim in the trial. due to begin on 07th march, 2017 was filed and served on the parties.

3, No attempt was made to serve the new claim containing the counterclaim until the trial ended and this was done in order to avoid the new claim being taken over by the Judge in the trial and being heard then as if the Counterclaim was still part of the trial o

4. The Court of Appeal has made observations about my personal role in this which I suggest are not correct. I was acting in the Appeal for my client and while, in the circumstances, my role came into question, my main focus was on conducting the appeal in my client's interests and not on defending myself, No real opportunity was available to produce evidence of what actually happened in the preparation of the Defendant's case for trial.

24. If I have correctly understood the point, the appellant contends that there was no proper evidential basis for the decision of the VLCDC. In my assessment, there is no basis for this claim and it is rejected. The events which were the basis of the decision of the committee were not disputed before the Court of Appeal. It is unthinkable that if they had never occurred, Mr Sugden would have permitted the judge hearing the strikeout application, Anu J, to proceed on the mistaken basis and then to do likewise when matters reached the Court of Appeal.

Appeal from the Disciplinary Committee

25. By section 10 of the Legal Practitioners Act [CAP 119] (the Act) a person found guilty of misconduct by the respondent may appeal against such finding to the Supreme Court.

26. The rules governing appeals are the Legal Practitioners (Disciplinary Appeals) Procedure Rules (the Appeal Rules). As Mr Hurley noted, the Appeal Rules are silent as to whether an appeal hearing proceeds de novo or as a re-hearing. It was his submission that the better view is that the appeal should proceed as a re-hearing,

albeit the presiding judge has power to order that evidence before the Committee be taken again[8]. Mr Blake for the Law Counsel did not disagree.

27. The New Zealand Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*[9], held that the appellate Court must come to its own view on the merits[10]. Elias CJ said, at [16]:

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate Court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.

28. I consider that the approach to be taken on appeal therefore is that this court is required to rehear the matter on the basis of the same evidence that was adduced before the LCDC.

Judicial review or appeal?

29. At an early stage in the life of this proceeding, the issue arose as to whether the procedural vehicle of an appeal was the appropriate means of bringing before the Court for determination complaints on the part of the appellant that the proper procedures had not been followed in the hearing by the Disciplinary Committee, including asserted "apparent bias" on the part of the Chair.

30. The appellant adopted the view that there was no need to consider judicial review proceedings. While the election on the part of the appellant may well be correct, a brief discussion of the difference between some aspects of the two procedures may cast some light on difficulties which stand in the way of the appellant in obtaining relief on this appeal. Two examples will make the point.

31. Part of the case of the appellant is that the chair improperly cross-examined the appellant. The respondent denies those allegations. However, apart from the handwritten note that the secretary made of the proceedings, there is no other evidential basis upon which the court on appeal can resolve the truth or otherwise of the assertions which the appellant makes.

32. A second situation which will be discussed is the question of whether the appellant waived any rights that he had to object to the disciplinary hearing proceeding when the chair had been involved in the earlier Court of Appeal decision in which the court expressed its view that the appellant had breached his ethical obligations. That of course was the very matter that the Disciplinary Committee was required to determine. The position that the respondent takes is that even if there were improprieties arising from the circumstance, the appellant waived any entitlement to

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[8] See rule 9

[9] *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141,(2007) 18 PRNZ 768 (SC)

[10] And see *McGechan on Procedure* at 20.18

rely upon them. The appellant has not given any evidence about how it came about that he agreed to the continuation of the Disciplinary Committee hearing. He has not for example deposed that he did not understand that he could have sought to have the Chair recuse himself which caused him to allow the point to go by default.

33. The only basis for this part of the grounds of appeal are assertions that are made by counsel for the appellant in his submissions. That is not an acceptable substitute for evidence on the point.

34. The opposing side is not required to accept the truth of factual assertions which are now under discussion just because they are part of counsel's submissions. The opposing party is entitled to require that matters be proved properly by evidence. The result is that some of the contentions that Mr Hurley put forward (for example about the Chair cross-examining the appellant) are not supported by evidence from the appellant and support for the contentions is limited to inferences which the appellant invited this court to draw from the handwritten notes of the Secretary of the Disciplinary Committee. I cannot agree that those notes support the point that counsel is making.

Contention that Chair ought not to have taken part in the Disciplinary Committee hearing

35. The central point that the facts of this case give rise to is the question of whether the Chair of the committee who, having been a member of the Court of Appeal which expressed views critical of the performance of the appellant as counsel, should have stood aside when the matter came before the Committee.

36. The following submission was made on behalf of the appellant in support of the proposition that Andrée Wiltens J ought to have disqualified himself:

> 27. This is particularly true because the Committee told the appellant that it would not be relying on the findings of the Court of Appeal [AB, tab F], however, the Committee changed its mind without informing the appellant and decided to rely on the Court of Appeal's findings. At that point Andrée Wiltens J should definitely have disqualified himself.

37. The Court of Appeal proceedings were not directly concerned with the alleged misconduct on the part of the appellant. His conduct was only part of the background. The object of the appellant's machinations was relevant to the question of whether the scheme to discontinue the counterclaim and bring the claim as a stand-alone proceeding amounted to an abuse of process. It is accepted, though, that the answer to that question engages different principles from those which inform the issue of whether a practitioner engaged in a given case mis- conducted himself.

38. But the central question in this proceeding is whether the chair, having allied himself with some robust criticisms that were made of the appellant by the Court of Appeal, could bring the required degree of neutrality and independence of view to subsequent disciplinary hearing proceedings that he became involved in. Counsel were agreed

that discussion of that point engaged the principle of apparent bias which will be considered next.

Apprehended Bias

39. It is central to the issue of apprehended bias that the Judge had been a member of the Court which had dealt with the Chen appeal in the course of which the court had come to a firm view that the conduct of the appellant when acting as counsel in the High Court on the proceeding had been in breach of the practitioner's obligations. These facts, it is argued, engage the principle of apprehended bias. It is not suggested that the case is one of actual bias.

40. The concept of apparent bias was considered by House of Lords in the decision of *Locabail (UK) Ltd v Bayfield Properties and Others* [11] . Two passages from the majority judgement consider key aspects of the subject of bias:

> 2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention on Human Rights, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice.

41. The majority also said:

> 16. In practice, the most effective guarantee of the fundamental right recognised at the outset of this judgment is afforded not (for reasons already given) by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias.

42. In a decision of the High Court of Australia, *Isbester v Knox City Council* [12] the High Court of Australia allowed an appeal where a member of an adjudicating body was subject to apparent bias.

43. The court held that the question that arises where issues of apparent bias arise is whether a fair-minded lay observer might reasonably apprehend a lack of impartiality. Such a decision is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made[13].

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[11] *Locabail (UK) Ltd v Bayfield Properties and others* [2000] EWCA Civ 3004
[12] *Isbester v Knox City Council* [2015] HCA 20
[13] At page 6 of the judgment.

44. The brief facts in *Isbester* were that Ms Isbester pleaded guilty in the Magistrates' Court of Victoria to a charge that her dog had attacked a person and caused 'serious injury'. She was convicted.

45. After that conviction, Knox City Council's Domestic Animals Act Committee considered whether the dog should be destroyed. The council officer responsible for investigating the original incident and prosecuting the charge in the Magistrates' Court was also involved in the committee's decision on the fate of the dog.

46. Ms Isbester appealed the committee's decision to the Supreme Court of Victoria on various bases including that, given the council officer, Ms Hughes, was involved in the Magistrates' Court hearing and also in the committee decision, there was a question of apprehended bias.

47. The High Court unanimously upheld the appeal. In upholding her complaint of apprehended bias, the High Court applied the reasoning in two earlier High Court of Australia judgments of *Dickason v Edwards* (1910) 10 CLR 243 and *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509.

48. Underlying the decision in *Isbester* is the view of the High Court that the main issue is whether the decision maker was impartial and seen to be so[14]. It did not matter that Ms Hughes might not have been described as the 'prosecutor' when it came to the panel deliberations: it was 'not realistic to view Ms Hughes' interest in the matter as coming to an end when the proceedings in the Magistrates' Court were completed' and she remained 'the moving force' in the panel's deliberations. Ms Hughes had, the plurality held, a personal interest not in the sense of receiving any material or other benefit but because she might be seen to have a 'view' of what Ms Isbester had done, which was personal to her.

<u>Application of the apprehended bias principles in the context of this case</u>

49. In this case, Andrée Wiltens J when sitting as a member of the Court of Appeal did not record any dissent from the statements critical of Mr Sugden which were made in the Court of Appeal judgment.

50. The initial approach that Mr Sugden took at the Disciplinary Committee was that he had not in fact breached his obligations to the court and that what he had done was acceptable and indeed required in order to protect the interests of his client. Given that it was his intention to present a case along these lines, the question has to be asked whether it seemed likely that one of the members of the Disciplinary Committee, the judge, would have an open mind on the subject of Mr Sugden's conduct, given that he, the judge, had previously allied himself with the Court of Appeal's expression of opinion on this point. Judging by the text of the Court of Appeal decision, that court had little doubt that doubt that Mr Sugden had been in breach of

[14] An informative commentary on that case and others dealing with the same subject can be found in an extra-curial address by Mortimer J (published in Australian Institute of Administration Forum 84, summarising a 2016 paper which the judge delivered to the Institute)

its obligations to the court when he contrived to discontinue the first counterclaim and replace it with a separate stand-alone proceeding which the case management judge, Fatiaki J, was not told about.

51. Concerns about the ability of the Disciplinary Committee to approach the disciplinary proceeding with an open mind would arise from the inherent circumstance that a member of the Disciplinary Committee had previously allied himself with the critical statements that the Court of Appeal had made.

52. Those doubts would be amplified by the fact, that the judge, had not just been a member of the Disciplinary Committee but the chair. It would be expected that he would lead discussion. As a respected member of the judiciary, it was quite likely that his views would be influential.

53. If on appeal it is considered that a reasonable observer could take the view that there was a substantial likelihood that the proceedings would not be fair because of apparent bias, then intervention is called for. As well the remarks[15] in *Locabail* provide practical guidance:

> In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case.

54. It is the view of this court that the proceedings before the Disciplinary Committee gdid in fact have the appearance of having been affected by the previous judgement of the Court of Appeal. The fact that the Chair a member of the appeal court and that he joined in the unanimous criticsms of the conduct of the appellant, gives rise to such an inference. As a result a reasonable observer would perceive a real risk or possibility that the proceedings of the Disciplinary Committee might have been conducted in a way which denied Mr Sugden a fair hearing on the question of whether he had breached the obligations that he owed as counsel to the court.

Waiver

55. Mr Blake for the respondent contended, though, that because Mr Sugden did not protest the presence of the judge as a member of the Disciplinary Committee, he could not now raise the question of apparent bias. That is, he had waived his right to rely on any apparent bias.

56. In *Locabail* to House of Lords concluded[16] that even though there might have been an entitlement to apply to the court to set aside the relevant decision on the grounds of bias:

> ... a party with an irresistible right to object to a judge hearing or continuing to hear a case may, as in other cases to which we refer

[15] At [25]
[16] At [15]

below, waive his right to object. It is however clear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not.

57. Mr Hurley referred the court to the following passage from the High Court of Australia decision of *Vakauta v Kelly* [17] In that case apprehended bias was alleged to have been based on statements that the judge made. The High Court said:

> "Where such comments which are likely to convey to a reasonable intelligent lay observer an impression of bias had been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such party has waived the right subsequently to object".

58. Mr Hurley pointed out that Mr Sugden had not been represented by counsel at the Disciplinary Committee hearing. Given that the High Court decision treated representation by counsel as being an element that must be present when waiver is to be relied upon, Mr Hurley submitted, that Mr Sugden cannot have effectively waived his rights to subsequently apply to set the Disciplinary Committee proceedings aside.

Conclusion on waiver

59. The first issue concerns the relevance, if any, of the fact that Mr Sugden did not have counsel representing at the hearing. In the circumstances can he waive any entitlements he had to challenge the validity of the hearing? It was the contention of Mr Blake, that Mr Sugden himself being experienced legal counsel, the absence of counsel acting for him would not matter.

60. Mr Sugden must have appreciated the nature of the hearing that he was required to attend. Mr Sugden would have known that Andrée Wiltens J was the chairman of the committee. He would also have known that Andrée Wiltens J had been a member of the Court of Appeal. Mr Sugden would also have known that the Chair had not dissented from the Court of Appeal decision which contained passages that were highly critical of him. He would have possessed this understanding in advance of the disciplinary hearing taking place. These were not matters that he would have been surprised by at the hearing.

61. Mr Blake for the respondent contended that the appellant must have known about apparent bias emerging as an issue even before he met with the Disciplinary Committee.

62. Mr Blake's apparently assiduous researches resulted in him submitting:

[17] *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568

> Indeed, in ***Jessop v Public Prosecutor*** *[2010] VUSC 134,* the Appellant, appearing on an appeal from the Magistrates Court in a criminal matter, ran an argument based on apprehended bias in the Magistrate. Another matter in which the Appellant pursued an appended bias argument was an appeal in ***Rad v Colmar*** *[2019] VUCA15* in which the Appellant had made an application for the Judge at first instance in that case to recuse himself for apprehended bias.

63. In my view, in the current context, it does not seem reasonable that Mr Sugden should now assert that even though he did not raise potential problems about Andrée Wiltens J chairing the disciplinary hearing prior to the hearing, that the court on his application should now overturn the decision which resulted from the hearing.

64. The following statement in the *Locabail*[18], even though applying to different grounds for waiver would seem in principle to apply in a case such as the present where knowledge on which the wave was said to be based is not come from disclosures by judge but from the applicant's knowledge of the circumstances.

> If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so.

65. I consider that Mr Sugden had adequate opportunity to raise with the Law Council in advance any concerns arising out of the judge's participation in the *Chen* appeal that he might have had and indeed at the hearing.

66. While he was not formally represented by counsel at the hearing before the Disciplinary Committee, because of his professional background he would have had a good understanding of the question of bias and its relevance to the hearing that he was engaged in. While he might not have had the details of the relevant law at his fingertips, he would know enough to at least raise the question and to ask the chair to consider stepping down from the position of chairman of the Disciplinary Committee for the currency of the hearing in which he was involved.

67. In the court's assessment, there is in any case no reason in principle why only persons who are represented by counsel ought to be able to waive irregularities by, as here, proceeding with hearing when they know that there may be reason for concern about the neutrality of the tribunal. One justification for such a policy might be that the concepts that underlie the doctrine of apparent bias are not straightforward and easy to understand without the assistance of legal counsel. However, waiver operates in other circumstances where the aggrieved party does not have counsel, such as where a party waives a breach of contract by disavowing the intention of taking action with regard to it. In the present case, there is no reason to doubt that the appellant would

[18] At [26]

have understood what his entitlements were and therefore there is no ground for reaching a conclusion that he did not appreciate what he was doing when he cooperated in the continuation of the disciplinary hearing.

68. This court is not constrained by authority to conclude that waiver can only take place in circumstances where the party waiving is represented by counsel. The *Locabail* decision does not limit the entitlement to rely upon a waiver can only arise in cases where the person allegedly waving is represented by counsel.

69. This court's ultimate conclusion on this point is that the appellant could have objected to the convocation of a Disciplinary Committee whose membership included a judge who had been part of the bench in the *Chen* appeal ; that he failed to take the point and thereby waived it leaving himself in a position where he cannot now appeal against the decision.

Breach of natural justice

70. The next part of the argument that the appellant puts forward is based upon the assertion that he was not informed by the Tribunal of the nature of the complaint against him. The most efficient way of introducing this ground is to set out in detail the passage of Mr Hurley's submission dealing with this point which was as follows:

> 35. The respondent submits that the Committee erred in law in failing to provide the appellant with a hearing that satisfied the requirements of the audi alterem partem rule of natural justice and proceeding contrary to the Disciplinary Committee Procedure Rules and Articles 5(1)(d) and 5(2) of the Constitution in that:
>
> (i) the appellant was not at any time until just prior the very end of the hearing advised of the charge against him, that is, the effect of Rule 74: penultimate page of the Secretary's handwritten notes of the Committee's hearing;
>
> (ii) the appellant before the hearing, asked in writing (letter dated 31 July 2019), for clarification of the nature and seriousness of the charges against him but the Committee did not provide clarification in its letter of 1 August 2019. Moreover, clarification was not provided in the manner that the Committee ultimately proceeded;
>
> (iii) the appellant was informed, upon enquiring that certain specified material would be relied upon in support of the charges and assured that certain specified materials would not be (see letter of 1 August 2019), but without warning to the appellant, the Committee proceeded, in deciding the case, to rely on the material (that is the Court of Appeal's findings which is apparent from paragraphs 2, 11 and 13 of the decision and also its reliance on paragraph 65 of Chen's case), it had said it would not rely on and to not refer to any other materials so that the appellant was completely misled as to what was to be used against him.

(iv) the Committee did not afford the appellant the reasonable opportunity required by natural justice, or any opportunity at all, to defend himself against the charge of which he was found guilty, that is Rule 74. It is clear from Agreed Facts numbered 4, 5 and 7 that it was only during the Committee's hearing that it sought, as described at paragraph 32 of the decision, "Mr Sugden's submissions as to how he considered his actions might be seen as consistent with his obligations in Rules 73 and 74..." The appellant submits that natural justice dictates that he should have been informed prior to the hearing that Rules 73 and 74 would be relied on to be given the opportunity to prepare his defence. If he had been given that opportunity, he would have informed the Committee that at the time he filed his notice of discontinuance of the counterclaim and commenced a new claim without informing Justice Fatiaki and counsel for the other parties that he had no intention of misleading or deceiving the court and that it was only after Chen's case was decided that he had the opportunity to reflect on matters;

71. Both rule 73 and 74 of the practising rules were referred to in the decision of the Disciplinary Committee. Those rules provide as follows:

> 73 **Officers of the Court**
>
> The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.
>
> 74 **Duty of fidelity to court**
>
> A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court."

72. The submission in my opinion ignores the background circumstances in which the appellant found himself as a result of the actions that he took in the Chen proceeding. That background includes the statements which were made by the Court Of Appeal in the judgement which were critical of the appellant. It was on the grounds of the matters stated in the Court of Appeal judgement that a complaint was made to the Disciplinary Committee in the first place.

73. The court of appeal decision included the following passages:

> [21] What followed can only be described as a concerted and deliberate course of action by Mr Sugden, utilising the rules of civil procedure, to avoid the consequence of the Judge's decision refusing the adjournment. Indeed, Mr Sugden admitted as much in papers he filed with this Court, and submitted that the overall justice to his client required such a course of action be taken.

.....

[58] What occurred here showed that the appellant blatantly and cynically attempted to utilise the CPR to avoid an order of the trial Judge (we note Mr Sugden's submission about what could have occurred under the old rules is totally irrelevant). Mr Sugden filed new proceedings that, once properly analysed, are essentially the same as the counterclaim.

.....

[63] We accept the use of the Court's inherent jurisdiction to strike out for abuse is discretionary, and used cautiously in exceptional cases. This is an exceptional case not least because Mr Sugden has been quite candid as to what he did. We are satisfied the conceded facts clearly establish abuse. We can do no better than reiterate the submission of Mr Malcolm at page 5.

The abuse in this case:

- was deliberate;
- by an experienced solicitor;
- to obtain a different judge;
- without notice to other counsel;
- it was deceptive in the extreme.

We would add to that list it was an attempt to judge shop.

[64] It is hard to think of a more blatant abuse of the Court's process although we acknowledge Mr Sugden's candour. In the circumstances, the Judge was right to strike out the Claim in its entirety. The appeal is dismissed.

74. **The requirement to provide notice of the case which the applicant has to meet has been summarised by Lord Mustill[19]**

> 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

<u>Procedures adopted at the Disciplinary Committee hearing</u>

75. **The appellant submits that if he had been informed prior to the disciplinary hearing that he was being charged with a breach of rule 74 he would have been given the**

[19] In R v Secretary of State for the Home Department, ex p. Doody [1993] UKHL 8

opportunity to make his position clear that he was not dishonest and did not intend to mislead the Court[20]. He says that he did not in fact behave dishonestly.

76. The extent of the duty to advise in advance of the hearing what is to take place depends upon the factual context. The appellant knew in advance of the hearing that it was concerned with matters that had arisen in the Court of Appeal decision in *Chen.* In the *Chen* case, as is made clear from excerpts set out earlier in this decision, the Court of Appeal had said amongst other things that the appellant blatantly and cynically attempted to utilise the CPR to avoid an order of the trial Judge and that the appellant had been dishonest[21].

77. The appellant is an experienced lawyer who has been admitted for many years. The concept of counsel being officers of the court and owing duties to the court is a pervasive one and must have been well known to him. It is not singularly limited to the legal profession in the Republic. The duty contained in rule 74 not to mislead the court can be described in the same terms.

78. Given that the Court of Appeal expressed the views that it had, there was no unfairness on the part of the Committee to not spell out to the appellant that these were matters that could engage the intention of the VLCDC. If the highest court in the Republic considered there was weighty material to suggest that the appellant had dishonestly, blatantly and cynically attempted to outflank an order made by the Case-Management Judge, then ensuing disciplinary proceedings brought against the practitioner on the reference of the Court of Appeal, could reasonably be expected to be concerned with those matters.

79. The appellant has said that if he had been given notice, he would have attempted to persuade the Tribunal that he was not acting dishonestly. But his counsel also accepted that the notes of the hearing show that the Chair raised with him whether the appellant had been candid in his dealings with Fatiaki J. This is not a case where the Committee based its decision on a matter which the appellant did not have a chance to comment about

80. At the same time, it might be the case that good practice requires a reasonably detailed list of the matters charged against practitioners to be prepared in advance of hearings and given to them to assist his preparation. But the fact that did not happen here, does not necessarily mean that there has been a breach of natural justice.

81. This ground of appeal is rejected.

Misconduct or unsatisfactory conduct

82. The Committee considered into what category of professional infraction the appellant's conduct fell. It said:

20 Rule 74 is set out above.

21 Paragraph 64 of decision

> 35. The Committee considered Mr Sugden's actions to be deliberate and calculated. The Committee did not consider his actions could be seen as a mere mistake. Regardless whether within the Rules or not, the fact remained that there was a decision deliberately made, with full knowledge of the consequences, to not properly advise the Court or counsel as to what was actually transpiring.
>
> 36. We equated that course of conduct with professional misconduct.

83. It was the appellant's contention that the Comm erred in doing so. His conduct, he contended, was at most, "unsatisfactory conduct".

84. Counsel both made reference to a discussion paper from the Australian Law Commission dealing with the concept of professional misconduct. While the discussion in the paper is largely concerned with the Australian statutory standards, there was some reference made to how conduct should be viewed at common law with the Commission stating:

> 4.95 professional misconduct at common law is conduct by a solicitor in their "professional capacity which would be reasonably regarded as disgraceful or dishonourable by [the lawyer's] professional brethren of good repute and competency.

85. The commission noted that while professional misconduct was also defined under relevant Australian legal profession regulation, the statutory concepts are "neither exhaustive nor intended to restrict the meaning and application of misconduct at common law".

86. Conduct of this type was to be contrasted with unsatisfactory professional conduct which the Commission noted was described in the relevant Australian statutory provision as:

> 4.97... Conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonable competent Australian legal practitioner

87. Those descriptions of the two different categories will be adopted as also describing the essence of the two categories of misconduct which are applicable in the Republic.

88. Mr Blake took the approach that wherever the line was drawn between the two types of conduct, the appellant had crossed it and this was evident from admissions that he had made at various stages of the Court of Appeal proceedings and at the hearing by the Disciplinary Committee.

89. Mr Blake submitted:

> 65. The combined effect of the admissions can be summarised as: -
>
> • I didn't want the counterclaim to be heard by Fatiaki J;

- By filing a fresh claim and then discontinuing the counterclaim I could keep the claim alive for another day despite the court having ruled that the counterclaim be heard as part of the trial of all matters in issue;

- I deliberately chose not to tell the judge or the parties that a new claim had been filed because I was concerned that it would be taken over by Fatiaki J.;

- My main focus in taking this course was my client's interests;

- My motives were misplaced;

- My actions amounted to a breach of my duties as counsel.

90. I would add that the appellant also attempted to justify his conduct (at least at the initial stages) by asserting that the tactic that he adopted would be more conducive to the interests of the parties than the case management directions that Fatiaki J proposed to make.

91. The question for this court is whether it takes the view that the appellant's conduct amounted to professional misconduct or whether it ought rightly to have been judged as belonging to the lesser category of unsatisfactory professional conduct.

92. The latter category is usually applicable to practitioners who through lack of knowledge, competence or judgement or some other quality that the successful practice of law requires, fell into error. Knowing and deliberate contravention of the law by practitioners would usually be seen as falling into the more serious category of misconduct.

93. Of course, in coming to a conclusion on this point, this court is required to come to its own independent view. While the Court of Appeal did not express an opinion about which category the misconduct fell into in their view, even if they had done so, this court would be required to come to its own conclusion on the matter.

94. There is no real controversy about the applicable facts which are to be taken into account in deciding this point on appeal. The issue is one of assessment of the degree of the egregiousness of the conduct of the appellant.

95. Respect for the law as at the heart of the obligations of practitioners when acting for their clients. The courts can only function properly if they are entitled to implicitly rely upon the honesty of the practitioners appearing before them. It is essential that the courts be able to accept that they are being given candid and complete disclosure of matters that are relevant to the proceedings. Unfortunately, the court must accept that in this case the appellant deliberately chose to take steps which had the effect of circumventing the case management orders that the judge made which were designed to bring all matters in dispute between the parties to a conclusion. The course of conduct which the appellant embarked upon included concealing from the judge matters that would frustrate the effect of his orders.

96. I agree with the submission that Mr Blake made that this case is one of professional misconduct so that it falls into a more serious category than what the act identifies as

"unprofessional conduct". This latter term seems to refer to what in other jurisdictions[22] is defined as "unsatisfactory conduct". Conduct of the former kind should, in general, attract heavier penalties than the latter.

97. No doubt the appellant acted in this way because he considered that it was in the best interests of his client. It is of course accepted that the appellant's actions were not designed to personally benefit himself. But while such matters may be relevant to the question of penalty, they are not relevant to the matter of whether he engaged in misconduct.

Penalty

98. The practitioner appeals against the sentence of four months' suspension together with the order that he pay VT$50,000 costs. In their sentencing remarks the Committee noted that the available sanctions set out in s 9(3) of the Legal Practitioners Act (CAP 119) include a reprimand, order of compensation, a fine, suspension or striking off.

99. The Committee regarded the breach of professional obligation in this case as being "a very serious matter". The Committee noted that the conduct did not benefit the appellant personally and that the appellant is nearing the end of a legal career. It further noted:

> "Our findings will result in a fall from grace for a well-respected, hardworking, senior member of the profession. We accept that his apology and noted his candour before the Court of Appeal and the Committee. We also accepted that he is remorseful for his conduct."

100. I would respectfully echo what the Committee said in the first part of the above quotation.

101. The Committee determined unanimously that the appellant should be suspended from practising law in Vanuatu for four months.

102. The appellant appeals against the sentence that the DC imposed on the grounds that it was "manifestly excessive". The submissions made in support of this part of the appeal included reference to the case of *Re: Timakata* [23] where a practitioner was prosecuted following the commission of acts which were not only in breach of his ethical obligations but were probably in breach of the criminal law as well. In that case, as part of the penalty, amongst other orders, the practitioner was suspended from practice for a period of three months. That, it will be observed, is less than the period of suspension in the present case. Mr Hurley submitted that the circumstances in that case were more serious. It was his contention that no suspension at all should have been applied in the case of the appellant.

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[22] Including, for example, New Zealand – see s 6 Lawyers and Conveyancers Act 2006

[23] *Re: Timakata*, [2018] VULCDC 3

103. For the respondent, Mr Blake submitted that the conduct in this case "risked undermining the very fabric of the system. He described the conduct of the appellant as being "contemptuous" of the judge.

104. It is the conclusion of the court that to the extent that it is relevant, the court should defer to the collective knowledge of the committee about any relevant background to practising law in Vanuatu. That aside, the court is required to apply its own judgement as to whether the penalty was appropriate. For the purposes of this decision, it is assumed that the Court dealing with the matter on appeal does so by way of rehearing and therefore may impose such penalty as seems appropriate to it.

105. That decision, involves considering what sentence would best further the objectives of the disciplinary scheme constituted by the legislation. It is assumed that the principal objective of the penalty to be imposed is to reinforce the importance of practitioners complying with their ethical obligations. Failure on the part of practitioners to comply with the rules, and particularly those dealing with their duties to the court in litigation, represent a risk to the rule of law. It is necessary for any penalty to serve the purposes of deterring the appellant from future breaches and also to deter other practitioners from conducting themselves as he did in the circumstances of this case.

106. At the same time, the interests of the practitioner are not to be ignored. Factors in mitigation including favourable aspects of his practising history are to be taken into account. Also, the effect of any penalty on him personally must be carefully considered so that he is not treated with undue harshness.

107. I consider that the background matters which the Committee took into account were properly factored into the penalty decision. Just as the Committee did, the Court takes account of the fact that the appellant has a long history of practise both in the Republic as a senior practitioner and previously in Australia. He has appeared before the Committee on one previous occasion in respect of matters which the Committee described as "much less serious".

108. The only difference is perhaps one of emphasis. That is in regard to the remark of the Committee that the matter was "very serious". While the Disciplinary Committee was correct in describing the conduct of the appellant as "serious", there is an additional judgement to be made about where on the spectrum of gravity the offending in this case fell, so that a penalty which is proportionate to the offending can be imposed.

109. This case does not rank with other more serious ones where, for example, practitioners have sought to personally advantage themselves dishonestly and at the expense of their clients. Nor those where they have stolen money for example.

110. In assessing the degree of gravity of the conduct though, it is reasonable to equate it with conduct in contempt of the Court.

111. Another factor that affected the gravity of the misconduct is that the appellant obviously gave thought to the scheme that he came up with. It was not a spur of the moment matter. As well, part of the scheme was to conceal its existence by concealing it from the judge. It was conduct that was evasive and devious.

112. Taking all these factors into account, it is the court's assessment that the misconduct in this case was of medium seriousness.

113. It is accepted that a purely financial penalty, that is a fine, would not provide sufficient sanction for the appellant's conduct. Neither, though, would the offending merit striking off. A suspension, though, was justified.

114. The punitive effect of a suspension is not limited to the stigma and loss of professional standing that would result from an order of suspension. As well, the suspension would inevitably have additional financial repercussions for the appellant. But there is a dearth of material upon which the Court can meaningfully assess his financial position. It is not easy to assess what detriment a suspension would cause him through the interruption to his income that a suspension would bring about.

115. It seems likely that some of the costs of maintaining a practice are likely to continue to be incurred; also, that suspension will result in the practitioner losing his sole source of funds for his personal support. It is not known what, if any, financial resources (if any) in the form of investments etc he has to tide him over. In general, a person in the position of the appellant cannot make up lost income by doing other types of work. In summary, any interruption (other than a trivial one) to the right to practise is likely to cause considerable practical hardship to the practitioner.

116. It is relevant to consideration of the reasonableness of the penalty to take account of any maximum ceiling on the powers of the Disciplinary Committee. Section 9 of the Legal Practitioners Act [Cap 119] (the "**Act**") provides that the Disciplinary Committee on a finding of misconduct can suspend the legal practitioner from practice for such period as it shall consider fit.

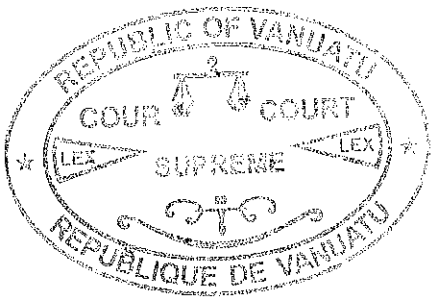
117. Approaching the matter on this basis the court will take into account the following matters. First, it is accepted that the appellant, perhaps belatedly, came to accept that his actions had been unacceptable and that they were not justified by a supposedly greater good in the form of achieving efficiency in disposing of the proceedings and thereby advancing his client's interests. Second, the appellant has been a practitioner in good standing for quite a number of years' experience. He was also characterised by the Committee as being hardworking. Third, he has not long left in practise according to the decision of the Disciplinary Tribunal. It is unlikely that he will reappear before the Disciplinary Committee. Fourth, any penalty should take account of the reality that a suspension order is going to cause considerable hardship to him. Fifth, there is a necessity to deter other practitioners as well as the appellant from flouting court orders or deliberately acting in ways that evade their effect.

118. Having regard to all those matters, the Court considers that while a suspension was justified, it is warranted in making a minor alteration to the penalty imposed by the Disciplinary Committee. The result will be that the suspension is reduced to three months from four. In all other respects, the orders of the Disciplinary Committee are confirmed.

119. Finally, the Court orders that the suspension from practise is to take effect commencing 21 days from the date of the issue of this judgment by the Registrar of the Supreme Court of Vanuatu.

DATED AT PORT VILA THIS 11TH DAY OF JANUARY, 2021

BY THE COURT



JEREMY DOOGUE

JUDGE