

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2014] NZLCDT 2
LCDT 003/13

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

AND

IN THE MATTER OF

CATHERINE MARJORIE CLARKSON,
Lawyer, formerly of Hastings, now of
Wellington

CHAIR

D J Mackenzie

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr A Lamont

Mr G Mckenzie

Mr W Smith

HEARING at Napier on 18 November 2013

REPRESENTATION

Mr T Gilbert, for the Standards Committee

Ms C Clarkson, Respondent in Person

RESERVED DECISION OF THE TRIBUNAL

Introduction

[1] Ms Clarkson faced four charges (one of the charges being an alternative) which were laid against her by the Hawke's Bay Standards Committee ("the SC"). The charges and the supporting facts and particulars alleged against Ms Clarkson are set out in the Charge Bundle at pages 2 – 11. All of the charges were denied.

[2] The Tribunal convened in Napier on 18 November 2013 to hear the charges. At the commencement of that hearing the SC sought to make some amendments to the third and fourth charges. Ms Clarkson opposed the amendments.

[3] In respect of the third charge, which was a charge of misconduct, the SC wished to add an alternative of unsatisfactory conduct.

[4] In respect of the fourth charge, which was what the SC described as a charge of "*common law misconduct*", the SC wished to expand the scope of misconduct alleged, beyond that common law approach. The SC proposed to amend this charge to include misconduct under the statutory definition of s 7(1)(b)(ii) Lawyers and Conveyancers Act 2006.¹ It also wanted to add unsatisfactory conduct as an alternative to this misconduct charge.

[5] The original charges had been formulated and laid in February 2013. The proposed amendments were first raised just a few weeks before the substantive hearing convened in November 2013.

[6] The Tribunal took the view that the amendments, so far as they proposed the addition of an alternative charge of unsatisfactory conduct to both of the third and fourth misconduct charges, were significant. Those changes could have resulted in some unfairness to Ms Clarkson, as they would have added completely new charges, involving a different threshold, to the charges Ms Clarkson originally faced.

¹ The relevant part of this section is set out at paragraph [28] below.

[7] In respect of the amendment expanding the basis of the misconduct alleged under the fourth charge, adding misconduct under s 7(1)(b)(ii) Lawyers and Conveyancers Act 2006 to the “common law misconduct” alleged, the Tribunal considered no amendment necessary. It took the view that if it found the facts of the charge proven it would not be precluded from making a finding of misconduct pursuant to that section under the charge as laid. That would be subject to the Tribunal also finding, in such case, that such statutory misconduct was possible given Ms Clarkson did not have a practising certificate at the time of her conduct.

[8] For these reasons the application to amend the charges was declined, and the Tribunal proceeded to hear the charges as originally laid by the SC.

[9] After the evidence for the SC was complete, Ms Clarkson advised the Tribunal that one of her defence witnesses in respect of the first misconduct charge, Ms Sutton, was not at the hearing. Ms Sutton’s affidavit (in a facsimile form) was available Ms Clarkson said. The Tribunal was not prepared to accept a facsimile of Ms Sutton’s affidavit, and neither was it prepared to accept her evidence in the absence of Ms Sutton attending and being available for cross-examination.

[10] The Tribunal adjourned while Ms Clarkson endeavoured to obtain the original affidavit and locate her witness. When the hearing resumed Ms Clarkson advised that the original affidavit would be obtained and filed in due course, and that Ms Sutton was not available to attend the hearing. Mr Gilbert, for the SC, indicated that he would wish to cross-examine Ms Sutton if she appeared.

[11] In an endeavour to assist Ms Clarkson, the Tribunal concluded its hearing with regard to all charges, apart from the first charge which it adjourned part heard. That first charge was the only charge to which Ms Sutton’s evidence related. Closing submissions were made by both the SC and Ms Clarkson on the other charges, and the Tribunal’s decision was reserved on those matters.

[12] The first charge was adjourned to a date to be arranged in January 2014, to give Ms Clarkson time to arrange for Ms Sutton’s original affidavit to be obtained, and to ensure that Ms Sutton would be available for cross-examination at the

hearing when it resumed. Ms Clarkson also intimated to the Tribunal that she had further documents she wished to file with the Tribunal.

[13] The original affidavit made by Ms Sutton was subsequently filed with the Tribunal, but no further documents were filed as Ms Clarkson had proposed. Ms Clarkson also subsequently advised the Tribunal that Ms Sutton would not make herself available for cross-examination at a reconvened hearing. As a consequence, Ms Clarkson made an application for Ms Sutton's evidence to be admitted "*as a hearsay statement*".²

[14] The Tribunal rejected this application, and again warned Ms Clarkson of the consequences if she was unable to have her witness available at the reconvened hearing.³

[15] The reconvened hearing of the first charge was set down to resume on 21 January 2014. Following Ms Clarkson's confirmation, shortly before that date that Ms Sutton would not attend, the hearing was vacated by consent. Each party was directed to lodge their closing submissions on the first charge in accordance with the timetable established by the Tribunal.⁴

[16] This determination now delivers the Tribunal's decision on all of the charges.

Background

[17] The background to this matter is that the trustees of an Ahu Whenua Trust constituted in respect of land at Porangahau and Mangamaire ("the PM Trust") decided in 2008 that they would make some farmland in which the trust had an interest available for grazing.

[18] The evidence was that the party intending to graze the PM Trust's land proposed to undertake grazing on a number of separately owned blocks, and did not wish to make different payments to each owner. It was proposed by Ms Clarkson,

² Submissions by Ms Clarkson filed on 3 December 2013.

³ Tribunal Minute of 18 December 2013.

⁴ Tribunal Minute of 20 January 2014.

who also had an interest in some land available for grazing, that an entity be established to receive the grazing fees for each block on which grazing was to be undertaken. From the amount received from the third party undertaking the grazing, this entity would then distribute the appropriate share of grazing fees to the owners of the various blocks concerned.

[19] The entity Ms Clarkson established for this purpose was New Zealand Cattle Raisers (“NZCR”) which was the trading name she had adopted to facilitate grazing arrangements.⁵

[20] The arrangements were put in place, and grazing fees were received by NZCR for the various blocks involved, including for the PM Trust’s land.

[21] The trustees of the PM Trust became concerned that they were not receiving from NZCR the amounts they considered was due to the PM Trust for grazing on its land. They asked Ms Clarkson for detail of revenue and expenses, so that they could reconcile what was paid to them. Apart from some general information, Ms Clarkson did not provide the detail sought, despite numerous requests. The trustees considered there was a significant shortfall in amounts paid by NZCR to the PM Trust having regard to grazing fees they understood to have been received by NZCR in respect of the PM Trust land.

[22] After further unsuccessful attempts to obtain the information sought, the trustees of the PM Trust commenced proceedings against Ms Clarkson in the Maori Land Court to recover money they considered outstanding from her, trading as NZCR. In April 2012 the Maori Land Court ordered Ms Clarkson to pay the PM Trust \$43,956.16 in respect of the net grazing fees it found were owed.

[23] In its determination of the grazing fees claim against Ms Clarkson by the PM Trust, the Maori Land Court commented adversely on Ms Clarkson’s conduct in the

⁵ See Ms Clarkson’s letter of 19 July 2012 to the SC in the Charge Bundle at page 38, paragraph 4. In her closing submissions Ms Clarkson denied that she had ever traded as New Zealand Cattle Grazers (NZCG), which had been referred to in the SC evidence. Whether her trading name was New Zealand Cattle Raisers (NZCR) or New Zealand Cattle Grazers (NZCG) is not a matter of consequence.

proceedings, and directed that the matter be drawn to the attention of the Law Society.

[24] The Law Society commenced an investigation following this and after a formal complaint had been lodged by the lawyer who was acting for the PM Trust. Ms Clarkson, in responding to enquiries and requests made by the SC in the course of its investigations, did not supply the information formally required by the SC under its investigatory powers.

[25] As a consequence of these matters, Ms Clarkson now faces the misconduct charges laid against her.

The Charges

[26] The detail of the charges, including the facts and matters relied on, are fully set out in the charges filed by the SC on 27 February 2013. In summary:

- (a) The first charge against Ms Clarkson alleged misconduct relating to a claim that she had misappropriated money and/or failed to account for money she had received in respect of grazing fees (“the Misappropriation/Failure to Account Charge”);
- (b) The second charge against Ms Clarkson alleged misconduct, or in the alternative unsatisfactory conduct, and related to matters arising in the course of Ms Clarkson providing regulated services in the Maori Land Court (“the Maori Land Court Charge”);
- (c) The third charge was an alternative to the second charge, and alleged misconduct related to Ms Clarkson’s appearance in the Maori Land Court, but did not allege that she was providing regulated services at the time (“the Maori Land Court Alternative Charge”); and,
- (d) The fourth charge alleged misconduct when Ms Clarkson failed to comply with a request for information relating to the complaints and

made under the provisions of the Lawyers and Conveyancers Act 2006 ("the Compliance Charge").

Discussion

[27] The Misappropriation/Failure to Account Charge arose from the grazing arrangements noted above.

[28] The charge alleged that Ms Clarkson's misappropriation of, or failure to account for, grazing fees due to the PM Trust was misconduct under s 7(1)(b)(ii) Lawyers and Conveyancers Act 2006. That section, so far as relevant, provides that misconduct is:

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

[29] The evidence was that Ms Clarkson had initially indicated receipt of grazing fees for the property owned by the PM Trust of an amount totalling in the vicinity of \$82,000, including GST. This was for grazing between 1 April 2008 and 31 March 2009. The amount paid to NZCR for those grazing fees, according to the grazier who paid the fees, was \$85,450.67, including GST, but the exact amount is not important for current purposes.

[30] Payments of grazing fees to the PM Trust, or to its manager, totalling \$25,000 had been made by Ms Clarkson. She had told the PM Trust that the balance of revenue from grazing fees had been used to meet expenses.

[31] The trustees of the PM Trust had sought from Ms Clarkson a reconciliation of grazing revenue received by her on their behalf, costs incurred, and the amount paid to or on account of the trustees. Ms Clarkson's response was to the effect that everything due had been paid, and that there had been additional costs such as PAYE, ACC levies and other expenses which accounted for the balance.

[32] When the trustees sought further and more detailed information, and requested a proper accounting of receipts and payments, Ms Clarkson failed to provide that information.

[33] Mr Collinge, a chartered accountant, acted as accountant for the PM Trust. He gave evidence⁶ that he had sought from Ms Clarkson a reconciliation of receipts and expenses relating to the grazing, and that Ms Clarkson had failed or refused to provide the information. He could not be exact in the absence of information about the expenses that Ms Clarkson said she had incurred, but he estimated that approximately \$44,000 was unaccounted for by NZCR to the PM Trust.

[34] Mr Hutcheson, who was a trustee of the PM Trust, also gave evidence.⁷ He confirmed the arrangement by which Ms Clarkson was to receive the grazing fees and was then to account to the various land owners for such receipts.

[35] He also confirmed the failure by Ms Clarkson to pay what the trustees considered was due to the PM Trust given Ms Clarkson's advice of amounts received, and the advice of payments made by the grazier concerned. He said that Ms Clarkson had failed or refused to provide proper information about what she had done with all the funds received, despite numerous requests.

[36] Ms Clarkson submitted that the evidence showed that the arrangements as described by the SC witnesses were incorrect. She claimed that she had agreed to pay \$30,000 per annum to graze cattle on the PM Trust land, not to receive grazing fees on behalf of the PM Trust and others and to pass through amounts received to the various owners entitled thereto, including the PM Trust as alleged. There was no evidence to support this position taken by Ms Clarkson, and the Tribunal notes that it is a position that does not sit well with Ms Clarkson's advice to the PM Trust regarding grazing revenue she had received and against which she had to offset certain expenses incurred.

⁶ As well as providing his affidavit of 12 February 2013, Mr Collinge reconfirmed the content of his affidavits of 13 July 2010 and 18 March 2011 filed in the Maori Land Court matter noted in respect of the second and third charges, which affidavits were before the Tribunal in evidence.

⁷ As well as providing his affidavit of 18 November 2013, Mr Hutcheson reconfirmed the content of his affidavit of 16 July 2010 filed in the Maori Land Court matter noted above, which affidavit was also before the Tribunal.

[37] The evidence of Mr Collinge and Mr Hutcheson is accepted by the Tribunal. There was no effective challenge to it in cross-examination by Ms Clarkson.

[38] The evidence of Mr Eriha, a witness for Ms Clarkson was not relevant and appeared to be nothing more than an attempt to undermine the creditability of Mr Hutcheson. The evidence relating to this charge from Ms Sutton, Ms Clarkson's second witness, was given no weight by the Tribunal, as Ms Sutton refused to appear and no cross-examination of her was possible.⁸ The Tribunal observes that her evidence would have been of little value in resolving the issues it had to determine in any event.

[39] The Maori Land Court Charge and the Maori Land Court Alternative Charge were expressed to be in the alternative, one charge being predicated on the provision of regulated services by Ms Clarkson at the relevant time, and the other charge not involving regulated services. The SC advised that the charges were laid in this way because it was not certain whether or not Ms Clarkson was providing regulated services at the time of her conduct the subject of complaint.

[40] "*Regulated services*" are services involving the carrying out of legal work by a person for another person.⁹ The evidence before the Tribunal regarding the Maori Land Court Charge and the Maori Land Court Alternative Charge was that Ms Clarkson was appearing on her own behalf as the person the subject of the matter being determined in that Court, which related to the grazing fees she was alleged to have received and for which she had not accounted.

[41] In those circumstances the Tribunal does not consider that Ms Clarkson could be said to be providing regulated services when she appeared in the Maori Land Court. Ms Clarkson was appearing as a self-represented person in that Court to answer the case against her personally. She was not carrying out legal work for another person, which is an essential element of regulated services.

⁸ Ms Clarkson was warned by the Tribunal that Ms Sutton's evidence would be given no weight in the event of such non-appearance, both at the time the hearing was adjourned part heard on 18 November 2013 and in the Tribunal's minute of 18 December 2013.

⁹ See the relevant provisions in s 6 Lawyers and Conveyancers Act 2006.

[42] Accordingly the Tribunal addresses the Maori Land Court Alternative Charge, rather than the Maori Land Court Charge, in this decision.

[43] It was alleged in the Maori Land Court Alternative Charge that Ms Clarkson's conduct in respect of the proceedings in the Maori Land Court amounted to misconduct under s 7(1)(b)(ii) Lawyers and Conveyancers Act 2006.¹⁰

[44] The evidence regarding this charge was that legal proceedings were commenced against Ms Clarkson by the PM Trustees. The proceedings were to assist the trustees in obtaining payment from Ms Clarkson of the grazing fees she had received from the third party grazier in respect of the PM Trust's block.

[45] The proceedings were commenced in July 2010. Ms Clarkson represented herself, and after two adjournments granted at her request, she appeared in the Maori Land Court on 2 December 2010. At that hearing she asked for a further adjournment to give her time to provide some more material to the Court.

[46] The matter was adjourned and eventually set down for hearing on 29 March 2011. At the conclusion of that hearing on 29 March 2011, the Court directed Ms Clarkson to provide relevant bank statements, evidence of wage PAYE, and ACC expenses, receipts for other expenses, and evidence that GST had been paid, all relating to the grazing arrangements on the PM Trust block. Ms Clarkson did not comply with those directions of the Court.

[47] The proceedings were reconvened on 23 June 2011. Ms Clarkson failed to attend at Court on 23 June 2011. The Court noted at that hearing Ms Clarkson had not provided the material required by the Court's direction.

[48] In a Minute of the Court issued in respect of that hearing on 23 June 2013, His Honour Judge Coxhead was critical of what he described as Ms Clarkson's "*wilful disregard*" of the Court's directions, and her failure to do what she had said

¹⁰ This relevant part of this section is set out at paragraph [28] above.

she would do, which he said misled the Court. His Honour then issued a summons, requiring Ms Clarkson to appear and to produce the documentation.¹¹

[49] Ms Clarkson did not appear as required on 6 September 2011 pursuant to that summons, or produce documents as required. Ms Clarkson claimed that she had a back injury which prevented her attendance. At the time (by email to the Court Registry on the morning of 6 September 2011) she said this was supported by medical evidence. The Court asked for the medical evidence to be provided, but Ms Clarkson failed to do so.

[50] In addition to the statements of Judge Coxhead which were before the Tribunal¹², Mr Lunn, a lawyer who had represented the PM Trust in the case against Ms Clarkson in the Maori Land Court, gave evidence to the Tribunal regarding his observations of her conduct.

[51] Mr Lunn said that Ms Clarkson had delayed the Court processes, had obfuscated regarding issues that had to be addressed, and had shown disrespect for the Court and its processes. Mr Lunn's evidence also noted that he had the same view as Judge Coxhead, when His Honour said in his decision that Ms Clarkson's conduct in the course of the proceedings had been "*nothing short of atrocious*".¹³

[52] Mr Collinge, the PM Trust's accountant, gave evidence about his attendance at various hearings of the matter before the Maori Land Court. He said he observed that Ms Clarkson did not comply with various requirements of the Court, and that the proceedings became a drawn out and frustrating exercise as a result.

[53] Ms Matheson, a Legal Standards Solicitor providing investigative and legal support to the SC, produced various decisions and minutes of the Maori Land Court as part of her evidence.¹⁴ The factual statements made by the Court regarding Ms

¹¹ See the affidavit of Shonagh Ann Matheson dated 11 February 2013, Exhibit "P", at page 165 of the Charge Bundle.

¹² In the affidavit of Shonagh Ann Matheson dated 11 February 2013, Exhibits "P", "T", "W", and "Y" in the Charge Bundle at pages 163, 170, 179, and 187 respectively.

¹³ Ibid, Exhibit "Y", at page 195 paragraph [57].

¹⁴ Above, n 12.

Clarkson's failure to comply with directions and requirements of the Court speak for themselves, and were not challenged by Ms Clarkson.

[54] The Compliance Charge arose as a result of Ms Clarkson failing or refusing to produce information when required to do so by the SC in the course of its investigations into complaints that resulted in the other charges.

[55] The evidence showed that on 24 July 2012 the SC wrote to Ms Clarkson seeking documentation regarding the PM Trust grazing arrangements and a response to His Honour Judge Coxhead's comments in his judgment regarding her failure to comply with various Court requirements. Ms Clarkson did not provide the required information to the SC.

[56] The SC wrote again on 9 August 2012, to remind Ms Clarkson of the need to provide the information, but it was not provided by Ms Clarkson, and she gave no reason for her non-compliance.

Determination

[57] In reaching a view on the charges the Tribunal must consider whether Ms Clarkson's conduct has been proven having regard to the balance of probabilities.¹⁵ The Tribunal must also consider whether Ms Clarkson's proven conduct amounts to misconduct.

[58] The Tribunal finds the Misappropriation/Failure to Account Charge proven. The evidence of Mr Hutcheson and Mr Collinge allowed the Tribunal to make similar factual findings to those of the Maori Land Court regarding the failure of Ms Clarkson to account for grazing fees to the PM Trust. The Tribunal of course, in making its findings on that charge had to rely on the evidence before it, not on the decision of the Maori Land Court.¹⁶

¹⁵ Section 241 Lawyers and Conveyancers Act 2006 and see also *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

¹⁶ Section 50 Evidence Act 2006, although the Tribunal can rely on evidence of matters raised by the Maori Land Court relevant to the Maori Land Court Alternative Charge as those are not matters relating to facts in issue in the Maori Land Court proceedings.

[59] The Tribunal is satisfied that Ms Clarkson's failure to account to the PM Trust for money she received for grazing fees paid for grazing on the PM Trust land constituted misconduct. While there is an adverse inference to be drawn from Ms Clarkson's failure to account, and from her refusal or failure to provide information reconciling the funds received with amounts paid, the Tribunal does not consider there is sufficient evidence to allow it to find that Ms Clarkson has actually misappropriated that money.

[60] The largely unchallenged evidence from the SC was that Ms Clarkson had received the grazing fees on behalf of the PM Trust, in accordance with arrangements made, and had failed to account for a large proportion of the fees due to the PM Trust. Despite repeated requests for information regarding use of the money received, and a court action to recover amounts unpaid, Ms Clarkson consistently failed to provide the information sought or to pay amounts received on behalf of the PM Trust to that trust. That is sufficient to enable the Tribunal to find a failure to account, but it is not sufficient to allow a finding of actual misappropriation of money by Ms Clarkson.

[61] Failure to account is itself a serious matter. It represents a significant failure of probity. Ms Clarkson was given ample opportunity to respond, but chose not to properly explain and account for the use of the money she had received on behalf of the PM Trust. Questions of integrity are raised by her behaviour regarding this money.

[62] Ms Clarkson's failure to account for monies received and due to the PM Trust is conduct that is unacceptable from a practitioner. While Ms Clarkson may not have been providing regulated services at the time, she was a practitioner at the time and her conduct was such that it demonstrates that she is not suited to engage in practice as a lawyer. Her conduct raises issues of probity and integrity that must put her right to practise in doubt.

[63] In her closing submissions Ms Clarkson referred to misappropriation and its essential elements as they appear in the Crimes Act. She considered that as a

result of the required elements she could not be guilty of the misconduct charge alleging misappropriation and failure to account on the basis before the Tribunal.

[64] The misconduct charge relating to misappropriation and/or failure to account does not amount to an accusation that there has been a criminal offence by Ms Clarkson. It is a reference to conduct by a practitioner involving dishonesty and/or not properly accounting for the receipt and disposition of funds, which is to be assessed in a professional context. Whether the conduct amounts to criminal offending is a matter for another forum.

[65] The Tribunal's focus has been whether the conduct involves actual dishonesty, or a lack of probity or integrity, and whether it indicates there has been a failure to observe accepted standards of conduct expected from a lawyer. Findings on those matters enabled the Tribunal to determine that Ms Clarkson by reason of her conduct was unsuited to engage in practice as a lawyer. The Tribunal is not deciding whether there has been a criminal offence. It has found Ms Clarkson guilty of professional misconduct in her failure to account, for the reasons noted.

[66] The Tribunal finds the Maori Land Court Alternative Charge proven. Ms Clarkson's conduct in the Maori Land Court reflects poorly on her. The evidence showed that she failed to comply with the Court's directions, failed to attend Court when required, and failed to respond to enquiries and requirements of the Court. Her conduct was such that it would have misled the Court, and indeed the Court said it had been misled by her conduct.¹⁷ Her conduct also undermined the Court's processes and dignity, with the Court's requirements being ignored, and Ms Clarkson failing to attend without substantiating the basis of her non attendance as required by the Court.

[67] While Ms Clarkson was not providing regulated services at the time she was representing herself before the Maori Land Court, she was a lawyer. In the view of

¹⁷ Affidavit of Shonagh Ann Matheson dated 11 February 2011, Exhibit "P" at page 165 of the Charge Bundle.

the Tribunal she did not act appropriately, particularly given her status as an officer of the Court.¹⁸

[68] As the SC put it in its submissions, which the Tribunal considers encapsulates the issue well;

“If lawyers acting for themselves could breach these basic standards with impunity, how could any Court be expected to rely on the practitioner in the future? It would fundamentally erode the confidence necessary between the judiciary and Officers of the Court.”

[69] The Tribunal is of the view that Ms Clarkson’s conduct in respect of the Maori Land Court was misconduct. It is conduct that would justify a finding that Ms Clarkson is unsuited to engage in practice as a lawyer.

[70] The Tribunal finds the facts of the Compliance Charge proven, but also finds that it does not constitute misconduct.

[71] The SC lawfully required information to be provided to it by Ms Clarkson during its investigation of her conduct the subject of complaint, and Ms Clarkson did not comply with the request made. Ms Clarkson was clearly in breach of s 147 Lawyers and Conveyancers Act 2006, which provides that lawyers or former lawyers must provide information requested by a Standards Committee or its investigator regarding matters the subject of a complaint or inquiry. The SC alleged that failure was misconduct.

[72] Misconduct, and its scope, is defined in s 6 Lawyers and Conveyancers Act 2006 and the various sections referred to in that section. The SC had laid the Compliance Charge on the basis that Ms Clarkson’s conduct may not have fallen within any statutory definition of misconduct, and it proposed to rely on “common law misconduct.” For the reasons we shall discuss later, the Tribunal does not consider that there is a form of misconduct outside the Act which is available to it to apply if statutory misconduct is inapplicable.

¹⁸ See *National Standards Committee v Orlov* [2013] NZLCDT 45, at [85] where the Tribunal noted as an officer of the court a practitioner has responsibilities concomitant with that office whether providing regulated services or not at the relevant time.

[73] The SC had sought to amend the Compliance Charge at the commencement of the hearing by adding a reference to the Compliance Charge that the conduct also constituted misconduct under s 7(1)(b)(ii) Lawyers and Conveyancers Act 2006. It had proposed the amendment on the basis it considered that section could apply in the circumstances, and that its reliance on only “common law” misconduct was not necessary. As noted, the Tribunal took the view that it could find misconduct under section 7 (1)(b)(ii), if it was applicable, on the basis of the charge as originally laid, and the amendment was not necessary.

[74] In its submissions the SC properly raised the issue of whether the misconduct alleged was affected by the statutory definition of misconduct in s 7 Lawyers and Conveyancers Act 2006. The statutory definitions of misconduct in that section refer to the conduct “*of a lawyer*”.

[75] Ms Clarkson’s practising certificate had expired a few weeks prior to the SC request to her for information under s 147. As the Lawyers and Conveyancers Act, in its interpretation section, describes a lawyer as a person who holds a current practising certificate¹⁹ that raised the question of whether Ms Clarkson’s conduct could be statutory misconduct under the relevant section. Without a current practising certificate she was not “*a lawyer*” at the time of her conduct.

[76] The SC noted that s 6 Lawyers and Conveyancers Act commenced with the words - “*In this Act, unless the context otherwise requires.....*”. It submitted that as a consequence the reference to misconduct arising from the conduct of a lawyer²⁰ could be read as including the conduct of a former lawyer in the case of a breach of s 147 by a former lawyer.

[77] The SC went on to say that prior to an amendment²¹ to the Lawyers and Conveyancers Act 2006, there was a similar difficulty relating to whether the Tribunal could make certain orders it was entitled to make against a lawyer, when the person concerned no longer had a practising certificate and was no longer “*a lawyer*” under the definition in s 6 of the Act. Prior to that amendment “*former*

¹⁹ Section 6 Lawyers and Conveyancers Act 2006.

²⁰ In s 7 Lawyers and Conveyancers Act 2006.

²¹ Lawyers and Conveyancers Amendment Act 2012.

lawyer” had been read in to the relevant section when necessary for the purposes of making an order affecting “a lawyer”, the SC noted.

[78] The difference to the current situation is that “former lawyer” was read in by the Tribunal when required to facilitate the making of an order in respect of a person who was a lawyer at the time of the conduct in respect of which the order was to be made. Ms Clarkson was not a lawyer at the time of her conduct, and that is an important difference.

[79] The Lawyers and Conveyancers Act gives the Tribunal jurisdiction over misconduct by lawyers, incorporated law firms, conveyancing practitioners, incorporated conveyancing firms, and employees of practitioners or incorporated firms.²² It does not give the Tribunal misconduct jurisdiction in respect of the conduct of a former lawyer where that person was not a lawyer at the time of the conduct concerned. To read into s 7, which defines misconduct by a lawyer, that it extends to persons who were not lawyers at the time of their conduct is not permissible in our view. It would be an unauthorised extension to our jurisdiction.

[80] Under the Law Practitioners Act 1982, a practitioner’s failure to comply with the requirements of the regulatory body undertaking an investigation into a complaint, without justification or excuse, was a form of misconduct specifically provided for by that Act.²³

[81] Under the Lawyers and Conveyancers Act 2006, a failure to comply with the requirements of the regulatory body under s 147, whether by a practitioner or former practitioner is an offence,²⁴ but it is not specifically noted as a matter of misconduct as it was for the similar requirement under the Law Practitioners Act.

[82] A failure to comply with the requirements of the regulatory body under s 147 Lawyers and Conveyancers Act 2006 would be misconduct if it was a failure by a practitioner, because it would be conduct of “a lawyer” and thus caught by the provisions of s 7 regarding misconduct. We are satisfied that Ms Clarkson’s failure

²² See the scope of the definition of “misconduct” in s 6 Lawyers and Conveyancers Act 2006.

²³ Section 101(6) Law Practitioners Act 1982.

²⁴ Section 262 Lawyers and Conveyancers Act 2006.

to comply with s 147 would constitute misconduct if she had been a lawyer at the time. Where the failure to comply is by a person who is a former lawyer, who is also subject to the provisions of s 147, any failure to comply with s 147 cannot be the conduct of “a lawyer”. Misconduct under s 7 only arises with regard to conduct by a lawyer. In the case of a non lawyer the only sanction appears to be prosecution for an offence against the Act.

[83] We agree this does seem an incongruous situation. Section 147 expressly provides that it applies to both practitioners and former practitioners. As a consequence it applies to Ms Clarkson notwithstanding that she had no current practising certificate. It is an offence to fail to comply with s 147. While Ms Clarkson was not prosecuted for an offence under s 147, it seems a strange result that she could be liable to such prosecution, but is outside the scope of a professional misconduct charge for the same breach. Notwithstanding the incongruity, we do not consider we can extend our jurisdiction as noted above.

[84] The Tribunal takes the view that it is precluded from finding there is misconduct arising from Ms Clarkson’s failure to comply with s 147, a section clearly applicable to her, under either “common law” as suggested by the SC, or under s 7(1)(b)(ii) Lawyers and Conveyancers Act 2006.

[85] We do not consider there is some concept of “common law” misconduct outside the Lawyers and Conveyancers Act 2006 which would allow the Tribunal to overcome this limitation. The Act provides the Tribunal with jurisdiction over the conduct of certain persons, but not over someone who is not a practitioner at the time of the conduct (apart from a special provision regarding an employee of a practitioner). We see no basis by which we could extend our jurisdiction to govern conduct by a person who was not a lawyer at the time of the conduct concerned.

[86] So far as whether there is “common law” misconduct, we note that s 7(1)(a)(i) of the Act itself reflects common law misconduct, in that it imports the common law tests which Courts have relied on when considering if conduct amounts to

misconduct.²⁵ Common law misconduct has become part of the Act, and does not separately subsist as a separate matter outside the Act creating an extended jurisdiction.

[87] Misconduct in this charge was pleaded by the SC as involving “common law” misconduct from the outset, on the basis that the Lawyers and Conveyancers Act did not proscribe the Tribunal’s ability, in appropriate cases, to find such misconduct. It said that Ms Clarkson’s conduct in failing to provide information as required under s 147 was a matter of misconduct. It was a failure to observe the duty which all practitioners, and former practitioners, have to respond adequately to lawful inquiries and requirements of the regulatory body responsible for professional discipline.²⁶

[88] We agree with that, but take the view that the Tribunal is empowered only to deal with misconduct as specified by the Lawyers and Conveyancers Act 2006. That Act specifies the categories of person to whom misconduct may be applied. The Tribunal has no ability to extend its jurisdiction beyond those categories, and Ms Clarkson was not within any category over which the Tribunal has jurisdiction at the time of her conduct. She was not a lawyer at the time of her conduct. The time of the subject conduct is quite a different matter to the time proceedings may be issued (against a former lawyer) or the time of making an order arising from that conduct (against a former lawyer), which has been the basis of the Tribunal’s approach prior to the amendment of the Lawyers and Conveyancers Act noted above.

[89] It is a technicality, but a technicality which prevents us from finding Ms Clarkson’s failure to comply with s 147 constitutes misconduct. Her conduct was not the conduct of a lawyer. We do not consider there is a separate category of common law misconduct other than as imported into the Act. So far as statutory

²⁵ See *Myers v Elman* [1940] AC 282, at 288, and later developments regarding the assessment of serious breaches of probity and accepted standards – *Re A (A Barrister and Solicitor)* [2002] NZAR 452 approving *Pillai v Messiter (No.2)* 16 NSWLR 197. See also *Complaints Committee No.1 of the Auckland District Law Society v C* [2008] 3 NZLR 105.

²⁶ Above, n 18, and see also the purposes of the Lawyers and Conveyancers Act 2006 set out at s 3 which effectively mandate a proper professional response by practitioners the subject of investigation or inquiries under the regulatory regime established by the Act.

misconduct is concerned we cannot extend our jurisdictional reach beyond the categories of person referred to in the Lawyers and Conveyancers Act.

[90] A former lawyer who fails to comply with s 147, while not guilty of misconduct that can be pursued under the Lawyers and Conveyancers Act 2006, does face other sanctions. The answer to Ms Clarkson's failure would have been a prosecution for the offence of failing to comply as a former lawyer with the requirement under s 147, but not a prosecution for a professional disciplinary offence by a lawyer for her conduct at a time when she was not a lawyer.

Determination

[91] For the reasons we have traversed above, we find Ms Clarkson is guilty of misconduct under s 7(1)(b)(ii) Lawyers and Conveyancers Act 2006 for her failure to account, and for her conduct in the course of the Maori Land Court proceedings. Her conduct in each case was such that she is unsuited to engage in practice as a lawyer. For the reasons discussed above, we are unable to find her guilty of misconduct in relation to her breach of s 147 Lawyers and Conveyancers Act 2006.

[92] The Misappropriation/Failure to Account Charge and the Maori Land Court Alternative Charge (in place of the Maori Land Court Charge) are proven, and a finding of misconduct is entered in respect of both charges. The Compliance Charge is dismissed.

Directions

[93] The Case Manager is to liaise with the parties and establish a penalty hearing date, for a hearing within the next two months. Once such a date is established the SC is to file and serve its submissions on penalty not less than 14 days prior to that penalty hearing date. Ms Clarkson is to file and serve her submissions on penalty not less than 7 days prior to the penalty hearing date.

Costs

[94] Costs will be dealt with at the penalty hearing. The Tribunal notes that costs under s 257 Lawyers and Conveyancers Act 2006 amount to \$11,100 at the date of this determination. Final costs under this section will be certified at the penalty hearing.

DATED at AUCKLAND this 31st day of January 2014

D J Mackenzie
Chair