THERE IS AN ORDER MADE PURSUANT TO S 240 LAWYERS AND CONVEYANCERS ACT 2006 FOR THE PERMANENT SUPPRESSION OF NAME AND IDENTIFYING DETAILS.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 9

LCDT 012/17

UNDER	The Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**NAME SUPPRESSED** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS

Ms A Callinan

Ms C Rowe

Mr W Smith

Mr I Williams

HEARING 27 March 2018

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 16 April 2018

COUNSEL

Mr E McCaughan for the Standards Committee

Mr R Pidgeon for the Practitioner

REASONS FOR DECISION AS TO LIABILITY

[1] This case concerns the standard of conduct required of a practitioner, who is lawfully requested to provide information to his or her professional body.

[2] In April 2016 a complaint was made about the practitioner by a close family member. When notified, the practitioner was hurt and furious, and did not believe it was a bona fide complaint.

[3] Her response was to tell the NZLS,[1] politely, that it was none of their business because she had acted in the transactions concerned, as a family member, not a lawyer.

[4] In July 2016 the Standards Committee informed the practitioner that it had resolved to inquire into the complaint.[2] It gave her formal notice of the information and documents requested from her.

[5] The practitioner's response, in late August, to that was that she had taken legal advice which confirmed her view that "this is not a Law Society matter". Further, she required proof of the complaint having been made by the family member in question, because she challenged the handwriting.

[6] When she was notified that a hearing had been allocated, the practitioner was also given a formal s 147[3] Notice.

[7] Her response remained obdurate:

> "I do not accept this is an issue for the Law Society."

[8] Even after further information was provided by the Law Society as to the validity of the complaint, and setting out clearly, her statutory obligation to comply with s 147, and the consequences of failing to do so, the practitioner refused to reconsider her position.

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[1] New Zealand Law Society.
[2] Section 137(1)(a) of the Lawyers and Conveyancers Act 2006 (LCA).
[3] LCA Notice, to provide the same information that had previously been requested.

[9] The matter was referred for prosecution to the Tribunal.

[10] The practitioner engaged counsel and formally challenged jurisdiction. A preliminary hearing was held in early November 2017, part way through which, the practitioner and her counsel conceded the challenge was misconceived and withdrew the protest to jurisdiction.

[11] The practitioner was then given a further month to locate and produce the file and documents she had been requested to produce in July 2016.

[12] While she provided some of the material in December 2017, she sought further time to locate the file, and associated documents, because she had been hampered by an unexpected house move. The practitioner had still not provided all of the materials sought by January 2018 and the matter was set down for hearing.

[13] The practitioner has had a number of challenges over the past few years, she has at times been the sole income earner for the family and is now a bankrupt. She pointed out that the year leading up to this complaint was a very difficult one for her, with the death of her mother, the loss of her home and had resulted in her having to relocate many of her possessions, including historical files into storage facilities, and in a garage which subsequently flooded.

Issues

1. Does the alleged failure fall within professional conduct or personal conduct within the definitions of s 7 of the LCA?

2. The facts having been conceded, what is the level of culpability represented by the practitioner's failure to comply with the s 147 Notice?

Issue 1 – Personal or Professional Conduct?

[14] It is now settled law that all conduct of a lawyer which comes to be considered under the Act must fit within one of these categories. There is no gap. The High Court in *Orlov* affirmed:[4]

> "[102] We first accept the conclusion drawn by the Disciplinary Tribunal that the two paragraphs together must cover all conduct. There cannot be a gap."

[15] And further:

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

[16] The full Court also referred to the type of conduct covered by the personal conduct limb:

> "[106] We consider the Act's definitions continue to maintain the distinction between professional and personal misconduct. The latter involves moral obloquy. It is conduct unconnected to being a lawyer which nevertheless by its nature, despite being unrelated to the practitioner's job, is so inconsistent with the standards required of membership of the profession that it requires a conclusion that the practitioner is no longer a fit and proper person to practice law."

[17] Later in the decision the Court gives instances of the type of personal conduct generally considered to be within the scope of s 7(1)(b)(ii):

> "[107] …We think this structure supports giving a broad scope to professional misconduct with a consequent limiting of personal misconduct to situations clearly outside the work environment."

[18] In this instance, the conduct concerned is the practitioner's response to her professional body when it requests information from her. It is not necessary in relation to the current charge to go behind that to determine whether she was providing legal services about which the complaint is concerned.

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[4] *Orlov v NZLCDT* [2015] 2 NZLR 606, [112] and [113].

[19] As a member of a profession there are responsibilities upon which membership of that body depends. In other words, merely by being a lawyer, she falls within the scope of its disciplinary regime both as to personal and professional conduct. It was the recognition of this fact that caused the practitioner to withdraw her protest to jurisdiction.

[20] The Courts have been very clear that:

> "[108] … Legal practitioners owe a duty to their fellow practitioners and to the persons involved in administering the Act's disciplinary provisions (whether as members of a Standards Committee or employees of the New Zealand Law Society) to comply with any lawful requirements made under the Act. There must also be a duty to act in a professional, candid and straightforward way in dealing with the Society and its representatives …"[5]

[21] His Honour Cooper J went on to say:

> "[109] The duties to which I have referred do not exist to protect the sensibilities of those involved in administering the Act's disciplinary provisions. While courtesy is a normal aspect of professional behaviour expected of a practitioner, it is not an end in itself. The purpose of the disciplinary procedures is to protect the public and ensure that there is confidence in the standards and probity met by members of the legal profession. It is therefore axiomatic that practitioners must co-operate with those tasked with dealing with complaints made, even if practitioners consider that the complaints are without justification …"

[22] We consider it is an incident of being a practitioner that the practitioner was expected to cooperate with the requests being made of her, and that her failure to do so cannot be said to be unconnected with the provision of legal services since she would be unable to provide legal services without membership of the profession and the obligations we have found that that carries.

[23] Thus, the answer to Issue 1 is that the conduct concerned falls within the "professional" conduct provisions of the Act.

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[5] *Parlane v NZLS (Waikato/Bay of Plenty Standards Committee 2)* High Court Hamilton, CIV-2010-419-1209, December 2010, Cooper J.

Issue 2 – Level of Culpability

[24] The higher Courts have also given guidance as to the seriousness with which a refusal to cooperate in the manner set out above will be treated. In *Hart*[6] one of the charges in respect of which Mr Hart had been struck off by the Tribunal related to a refusal to disclose a former client's file despite repeated requests and over a lengthy period (almost four years). The full Court stated:

> "[108] Furthermore, we consider any refusal to comply with a lawful requirement made by an investigating committee to be a potentially serious matter..."

[25] Because of the length of time that Mr Hart had failed to provide the file and the consequent prevention of a proper investigation by the Committee of the complaint to which that file related, as a consequence, the Full Court had this to say:

> "[208] These factors persuade us that the Tribunal was correct to regard the failure as a reasonably serious form of misconduct. Any deliberate refusal by a practitioner to comply with a lawful requirement made by a Standards Committee tasked with investigating a complaint must be regarded as serious. It indicates a lack of candour that may be significant when considering the fitness of a practitioner to remain in the legal profession."

[26] It is axiomatic that if practitioners were permitted to make their own judgment about whether a complaint is worthy of response or investigation, the entire independent disciplinary process would break down.

[27] Counsel for the Standards Committee submits that the level of culpability is ought properly to be held as misconduct, either as "disgraceful and dishonourable" conduct, or because it constituted a wilful or reckless contravention of s 4 of the LCA and Rule 2 of the Client Care and Conduct Rules.

[28] Rule 2 states:

> "2 A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.
>
> 2.1 The overriding duty of a lawyer is as an officer of the court.
>
> 2.2 A lawyer must not attempt to obstruct, prevent, pervert, or defeat the course of justice."

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[6] *Hart v The Auckland Standards Committee 1* [2013] 3 NZLR 103.

[29] Mr Pidgeon submits, on behalf of the practitioner, that the Tribunal ought to have regard to the practitioner's "lack of intention or wilfulness in the failure to respond to s 147". We consider that this overlooks the practitioner's own evidence that she made a deliberate decision not to comply.

[30] We note that the practitioner is working only part-time currently. However, in the Tribunal's view, she has not prioritised the finding of the outstanding documents, having had four months since her abandonment of the jurisdictional argument and the Tribunal's further Direction.

[31] She has referred to information being available through Inland Revenue and also through Westpac Bank. However, she has not taken the steps required to obtain that information from either of those institutions.

[32] In considering the issue of recklessness and wilfulness we include the following factors as relevant:

1. The casual nature of the legal advice that she had purported to obtain (and the lack of evidence in relation to that advice). The practitioner said that she had approached some colleagues, including a QC and at least one partner in a law firm and explained the situation to them and they had supported her view. She did not retain counsel to act for her in a formal sense and she did not obtain any written legal advice. Given that, we do not know precisely what she told those from whom she sought advice. Therefore, it is not possible to comment on whether she could reasonably rely on that advice.

2. After her claim of lack of jurisdiction to the NZLS, she was repeatedly advised by them that her understanding was incorrect and was referred to the relevant statutory provisions. Ms Louw of the Society advised her as follows:

> "(a) We refer you to s 132 of the LCA, which provides that any person may complain to the appropriate complaints service about the conduct of a practitioner."
>
> "(b) A valid complaint form has been received, which has been accepted by the NZLS Lawyers Complaints Service. The

> Standards Committee is looking at the conduct complained of, irrespective of who the complaint is from."
>
> "(c) … There is a statutory obligation on you to comply with a s 147 notice. We also refer you to s 262 of the Act, which provides that wilful non-compliance with a s 147 notice is an offence under the Act."

The practitioner must have known that the legal standards officer who was writing to her, did nothing but deal with standards and disciplinary matters, every day, and one would have thought her views would have been accorded with some respect. Enough respect at least for the practitioner to make the effort of checking the statutory provisions and ascertaining that, for example personal and professional conduct could be investigated by the Complaints Service.

Rather, the practitioner repeatedly ignored the information the Society was providing to her.

3. We consider that the practitioner was motivated and influenced in her approach by her emotional response to the complaint. Indeed, we consider that this to be more of a causative factor in her failure to properly respond, than the "legal advice", which was suggested by her counsel as being the principal motivating factor. In this way, we consider she was 'wilfully blind' as to her own judgment and conduct.

4. A further factor which weighs with the Tribunal, is that the practitioner took no formal steps to review the decision or direction of the Standards Committee, as she was entitled to. She would have understood her rights, had she referred to the review provisions under the Act. The Legal Complaints Review Officer has specific jurisdiction in this regard. Indeed, the letter containing the final determination, to refer the matter for prosecution, spelled out this right of review to the practitioner.

5. Finally, in evidence, the practitioner acknowledged that she had made a deliberate decision not to comply with the request.

[33] We consider that the combination of these factors led inevitably to the view that her conduct was wilful. If we are incorrect in this assessment, it must be said that she was at least reckless in her disregard for the rules and failure to properly check the legislation to ensure she was acting properly in respect of her obligations to her professional body. A reckless disregard is also sufficient to constitute a finding of misconduct which we now make.

[34] Having reached that conclusion we do not consider it necessary to consider whether her behaviour was disgraceful or dishonourable or whether it is proper that a lesser charge of contravention of the rule *simpliciter,* leading to a finding of unsatisfactory conduct, is necessary.

Decision

[35] As indicated to the practitioner orally, after deliberating at the conclusion of the hearing, the Tribunal finds her guilty of misconduct.

Directions

1. A penalty hearing is to be convened at the earliest convenience.

2. Counsel for the Standards Committee is to file submissions as to penalty seven days in advance of the nominated hearing date.

3. Counsel for the practitioner may file submissions in response in relation to penalty three days in advance of the nominated hearing date.

DATED at AUCKLAND this 16th day of April 2018

Judge D F Clarkson
Chair