NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 1

LCDT 015/11

IN THE MATTER of the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982

AND

IN THE MATTER OF **DONNA MARIE TAI TOKERAU DURIE HALL** of Wellington, Solicitor

CHAIR
Mr D Mackenzie

MEMBERS OF TRIBUNAL
Mr W Chapman
Mr S Maling
Mr W Smith
Ms P Walker

HEARING at Wellington 5, 6, 7 November 2013

APPEARANCES
Mr G Turkington for the Standards Committee
Ms H Cull QC for the Practitioner

REASONS FOR DECLINING AN APPLICATION FOR STAY
REASONS FOR ALLOWING AN APPLICATION TO AMEND THE CHARGE
RESERVED DECISION ON THE SUBSTANTIVE CHARGE

Contents/Index

Introduction

[1] In August 2011, after Wellington Standards Committee No 2 ("the SC") had investigated and enquired into allegations that Ms Hall had conducted herself improperly in relation to a land transaction, a professional disciplinary charge was laid against Ms Hall by the SC.

[2] The charge alleged that between 1 November 2006 and 16 July 2007 Ms Hall had been negligent or incompetent in her professional capacity, and that her negligence or incompetence had been of such a degree as to reflect on her fitness to practise or as to bring her profession into disrepute.

[3] Ms Hall was alleged to have acted for multiple parties (the vendor, the purchaser, and a lender) involved in a land transaction:

(a) without the prior informed consent of each party; and/or,

(b) without advising each of the parties concerned of areas of conflict or potential conflict; and/or without advising the purchaser and lender that they should each take independent advice (and she did not arrange any such advice); and/or, without declining to act further for the purchaser and lender where acting for them would be likely to disadvantage one or both of them.

[4] As is normal, the SC filed evidential affidavits in support of the charge at the time the charge was laid.

[5] Ms Hall was obliged to respond to the charge once laid, stating which of the facts alleged in the charge were admitted and which were denied, and if the charge itself was admitted or denied.[1] By her response dated 18 October 2011, Ms Hall denied the charge and the factual particulars alleged.

[1] Rule 7 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008.

[6] Ms Hall subsequently filed a series of evidential affidavits from a number of defence witnesses, addressing the charge and providing some further background. Ms Hall did not herself provide an affidavit in her defence of the charge laid.

Background

[7] There is some history in the process followed in respect of the charge which is relevant, and which we now set out.

[8] The Tribunal sits in two divisions, and the charge was originally heard by the other division of the Tribunal, chaired by Judge D Clarkson, on 2 and 3 April 2012. At the conclusion of the case for the prosecution at that hearing, Ms Hall, by her counsel Ms H Cull QC, made a submission that there was no case to answer.

[9] After hearing submissions on no case to answer and retiring to consider the matter, the division of the Tribunal originally hearing the charge ruled that there was evidence which prima facie could support the charge. It declined to dismiss the charge as it considered there was a case to answer.

[10] The hearing did not proceed further on that day because of Ms Hall's wish to understand the detailed reasoning for the decision to disallow her no case to answer submission before continuing. Full reasons for the Tribunal's decision were provided in writing after the hearing.[2]

[11] Subsequently, after receiving those full reasons, Ms Hall appealed the Tribunal's decision on her submission of no case to answer. The appeal was heard by the High Court on 11 and 12 February 2013.

[12] In a decision of 18 April 2013[3] Woodhouse J allowed Ms Hall's appeal on the basis that the division of the Tribunal originally hearing the charge had applied an incorrect test when deciding whether there was a case to answer. His Honour set aside the Tribunal's decision and directed that the proceedings be referred to a freshly constituted Tribunal.

---

[2] *Wellington Standards Committee No 2 v Hall* [2012] NZLCDT 7.
[3] *Hall v Wellington Standards Committee (No. 2) and Anor* [2013] NZHC 798.

[13] As a consequence this division of the Tribunal proposed to hear the matter as soon as it could arrange a suitable hearing date. In the meantime Ms Hall applied for a stay of proceedings, and the SC applied to amend the charge. The Application for Stay was heard by this division on 5 November 2013. The application was refused, and at the commencement of the substantive hearing on 6 November 2013 the Tribunal heard the application to amend the charge. That application was allowed, and the substantive hearing proceeded that day, and continued into the next, 7 November 2013.

[14] This determination arises from those hearings. It provides, in Part I, full reasons for declining to grant the permanent stay which Ms Hall sought. It also provides, in Part II, full reasons for allowing the amendment to the charge sought by the SC, and it delivers the Tribunal's reserved decision on the substantive charge, in Part III.

PART I: APPLICATION FOR STAY

The Application for Stay

[15] At a pre hearing telephone conference on 15 August 2013 counsel for Ms Hall confirmed that her client intended to seek a permanent stay of proceedings.

[16] By notice dated 11 September 2013, an Application for Stay of Proceedings was lodged by Ms Hall. The grounds advanced were that it would amount to an abuse of process and/or that it would be oppressive and unreasonable to:

(a) Continue the hearing of the charge in circumstances where Ms Hall had already "*sought a determination on a no-case submission in three hearings to date"* that remained unanswered;

(b) Continue the disciplinary process when "*…circumstances do not give rise to the charge of negligence*";

(c) Entertain an amendment to the charge sought by the SC "*from a charge under the Lawyers and Conveyancers Act 2006 to a charge under the*

Law Practitioners Act 1982, when a different statutory process has been undertaken in the first hearing and on appeal";

(d) Commence a rehearing of the charge.

[17] In support of her application for stay, it was submitted by Ms Cull QC, for Ms Hall, that Ms Hall had accepted the jurisdiction of the Lawyers and Conveyancers Act 2006 ("LCA") and had responded to the charge on that basis. In the course of responding to the charge she had formally denied it, filed affidavits in support of her position, and had made a no case to answer submission at the completion of the case for the SC at the first hearing before the other division of the Tribunal in April 2012.

[18] After Ms Hall's submission on no case to answer had failed at the first hearing before the Tribunal, Ms Hall had appealed against that decision under the provisions of LCA. She had sought, as part of that appeal, a definitive answer on the merits of the charge from the High Court. The SC had sought, unsuccessfully, to strike-out her appeal. When her appeal was eventually heard, the High Court declined to address the substantive issue of the merits of the charge, and it referred the matter back to the Tribunal for reconsideration.

[19] Ms Hall was also concerned about the propriety of the SC seeking "*to belatedly amend the charge, which was improperly laid in the first place.*" As well as saying that the amendment changed the threshold test for assessing the seriousness of any negligence found, it was submitted that the process could not be moved from LCA to the Law Practitioners Act 1982, particularly after procedural and jurisdictional steps had been taken by both the SC and Ms Hall under LCA. Ms Hall claimed that as a consequence the SC was estopped from amending the charge.

[20] It was also suggested for Ms Hall that as the matter now before the Tribunal was not a rehearing, but simply a referral back for reconsideration of the no case to answer submission, the proposed amendment to the charge was not permissible.

[21] Cumulative delay "*from 1 November 2006 to the present"* was said to make it unfair to require Ms Hall to continue to face the charge having regard to the history of

the proceedings. It was also submitted for Ms Hall that the opportunity to obtain further relevant evidence from a witness who had died was lost and evidential efficacy had been prejudiced by delay. Other prejudice noted for Ms Hall was continuing adverse publicity in the absence of a suppression order, and the costs attendant on drawn out proceedings.

[22] For the SC, Mr Turkington submitted that the proposed amendment to the charge did not involve any threshold change to the test for serious negligence, and that it involved a simple clarification rather than a jurisdictional and process change between the two Acts, LCA and the Law Practitioners Act 1982. He said that there was no issue of estoppel in the disciplinary context of this case, particularly having regard to the Tribunal's decision in *Wellington Standards Committee No. 2 v Logan.*[4] Mr Turkington also made the point that the matter before the Tribunal was in fact a rehearing in the normal sense, where all matters would be heard afresh.[5] The hearing was not limited to just determining any submission that may be made for Ms Hall that there was no case to answer he submitted.

[23] So far as evidential prejudice was concerned, the SC's position was that all evidence intended to be relied on was already before the Tribunal. No cross-examination of the witnesses was proposed by either party. In those circumstances, it said, there could be no issue of prejudice regarding witnesses and their evidence as claimed.

[24] So far as delay was concerned, it was noted for the SC: that the issue of delay had not been raised at the previous (April 2012) hearing before the other division of the Tribunal; that some delay had arisen as a result of the way Ms Hall had decided to run her case and steps she had taken; and that the chronology of events relating to the course of the proceedings did not show any undue delay of a nature likely to cause prejudice.

[4] *Wellington Standards Committee No. 2 v Logan* [2012] NZLCDT 38.
[5] Both counsel had confirmed to the Tribunal that no further evidence was proposed, and that the evidence to be relied on would be the material previously before the Tribunal when it first heard the matter in April 2012.

Record of decision declining Application for Stay

[25] After considering the submissions from the parties, the Tribunal declined the Application for Stay.

[26] The delay suffered was not so extensive as to enable the Tribunal to identify such an extreme case as to indicate an abuse of process that would make it unreasonable to proceed. Neither did the Tribunal consider that the practitioner's ability to respond to the charges had been prejudiced by the delay which had occurred.

[27] The Tribunal also said that it did not consider that costs, adverse publicity, death of a witness after all evidence was in and no cross-examination was proposed, constituted specific prejudice of such a degree as to warrant a permanent stay. It also noted that the amendment proposed to the charge did not support a stay, as the amendment was not significant, there was no jurisdictional change, and estoppel did not arise.

[28] The Tribunal noted that in its view the ultimate issue was whether the practitioner could receive a fair hearing despite delay. There was no evidence sufficient to support a claim of general prejudice warranting a stay, and the Tribunal took the view that similarly there was not sufficient evidence to support any specific prejudice which warranted a stay.

[29] Weighing up all matters and having regard to its protective jurisdiction, the Tribunal found that a case had not been made out which justified the charge being stayed, and declined the application. The Tribunal noted that it would provide full reasons in due course, which are now set out.

Reasons for declining Application for Stay

[30] It was common ground between counsel that the Tribunal had jurisdiction to permanently stay proceedings in appropriate cases, as confirmed by the Court of Appeal in *Chow v Canterbury District Law Society.*[6]

[31] The Tribunal accepted that there may be rare occasions where a "*situation in which any continuation of the proceedings would, of itself, be so unfairly and unjustifiably oppressive that it would constitute an abuse of the court's process".*[7]

[32] That was the case in *New Zealand Law Society (Nelson Section 356 Committee) v Gilbert,*[8] where the Tribunal reviewed the law relating to stay, and subsequently used its powers to stay charges against Mr Gilbert. In *Gilbert* there had been extensive delay, and the context of that delay was an important feature. It was a case where the delay and particular issues in the various processes and procedures of the proceedings were so unsatisfactory as to demonstrate a situation where, after weighing up all matters and giving due consideration to professional disciplinary purposes, it would have been unacceptable to continue.

[33] The outcome of an application for stay is dependent on its own particular facts and the circumstances of each case, so care has to be taken in comparing cases,[9] but *Gilbert* was in a different category to the current matter. *Gilbert* involved an extensive delay in determining some charges, involving a period of seven years from the time the complaint was made. This delay was further compounded by the fact that the complaint itself had not been made for a period of some seven years after the events complained of had occurred, despite those events being known.

[34] The delay suffered once the complaint had been made in *Gilbert* included an investigation of the complaint which itself took over four years before a decision was made to prosecute disciplinary charges. There was also a largely inexplicable (particularly so, given that the matter had been the subject of an investigation which had continued for four years) lapse of one year, from the time the determination was

---

[6] *Chow v Canterbury District Law Society* [2006] NZAR 160.
[7] Per Deane J. in *Jago v District Court of New South Wales* (1989) 168 CLR 23, at [5], and see also *Walton v Gardiner* (1993) 177 CLR 378, at 392.
[8] *New Zealand Law Society (Nelson Section 356 Committee) v Gilbert* [2012] NZLCDT 24.
[9] For example see the comment of Gallen J. to that effect in *Faris v Medical Practitioners Disciplinary Proceedings Committee* [1993] 1 NZLR 60 (HC) at 73.

made to lay charges until the actual laying of charges. Then, when the charges finally came before the Tribunal, the hearing had to be abandoned on its third day, as a result of certain steps taken by the Tribunal, without fault of Mr Gilbert.

[35] As noted, these matters are always highly fact specific, but the Tribunal's assessment in the proceedings involving Ms Hall was that what had occurred was not of such a nature as to take the case into the category referred to by Deane J in *Jago*[10], or to require the same approach as the Tribunal took in *Gilbert.*[11] The delay in Ms Hall's case was not as extensive as in *Gilbert*, nor was it of the nature of *Gilbert* and nor did it occur in the context that required the response applied in *Gilbert.* The delay that occurred in Ms Hall's case was explainable having regard to the various steps and processes undertaken by each of the parties in the course of the investigation and subsequent proceedings, and those steps were all unremarkable.

[36] Ms Hall also submitted that the SC seeking an amendment to the charge was oppressive and unreasonable. She claimed that was so because the amendment sought to have the proceedings dealt with under the Law Practitioners Act 1982, whereas it had been commenced under LCA, and she had appealed against the decision of the other division of the Tribunal under LCA provisions. It was also suggested that the amendment involved a change to the elements of the charge.

[37] The amendment to the charge involved a very minor technical correction, which did not affect process or substantive issues. It was largely administrative. Neither did the amendment alter the applicable jurisdiction, from LCA to the Law Practitioners Act 1982 as suggested.

[38] We will set out in more detail issues that address these particular submissions regarding the amendment in our reasons for allowing that amendment in Part II of this determination, but for current purposes, note that it was our view that the application to amend the charge did not provide support for the Application for Stay. That was because of its *de minimis* nature, the fact that it did not involve jurisdictional change (the proceedings remained as proceedings under LCA) and the fact that nothing Ms Hall faced in the charge would be affected by that amendment.

---

[10] Above, n 7.
[11] Above, n 8.

[39] There had been some delay in the proceedings, but the timeline involved, while extended more than usual in this case, was not so extended as to support a stay.

[40] The complaints against Ms Hall were made in early 2009, investigated during that year, and a hearing by the SC pursuant to ss 152(1) and 153 LCA was scheduled for November 2009.

[41] That hearing did not proceed in November as Ms Hall sought a review by the Legal Complaints Review Officer ("the LCRO"). The application was declined on jurisdictional grounds.

[42] After further submissions and material were provided to the SC by the complainants and Ms Hall, the SC conducted its hearing in May 2010. Following that hearing a determination to lay charges with the Tribunal was made by the SC. The practitioner sought a further review by the LCRO, which declined Ms Hall's application in December 2010.

[43] The charge against Ms Hall was then prepared and laid in August 2011, and heard by the originally assigned division of the Tribunal in April 2012.

[44] That Tribunal ruled against Ms Hall in respect of her submission that there was no case to answer, but the hearing did not proceed beyond that point as Ms Hall wanted first to receive the Tribunal's full reasons for its decision.

[45] When those reasons were delivered, Ms Hall successfully appealed against the decision (after she had also successfully opposed an application by the SC to strike out her appeal), and the proceedings were referred back to a freshly constituted Tribunal by the High Court in April 2013.

[46] Following that the matter was set down for hearing by the Tribunal in November 2013. Ms Hall's Application for Stay was lodged in September 2013.

[47] The time involved had not been shown to impair Ms Hall's ability to defend the charge, and the Tribunal did not consider the time to have involved an unreasonable period in the circumstances.

[48] For Ms Hall it was also submitted that the context of the delay was a factor to be taken into account. Specific factors raised by Ms Hall in support of her application in this regard were the fact that she had sought a determination on her no case to answer submission on three occasions, that the SC was seeking an amendment to the charge at a late stage, and her view that the circumstances of her conduct did not give rise to negligence.

[49] While we understood Ms Hall's desire to obtain some finality regarding her submission of no case to answer, she appealed the Tribunal decision on that point, and for the reasons noted in its determination[12] the High Court did not decide the matter, instead referring the proceedings to a freshly constituted Tribunal. That process did not itself support an application for stay in our view. It was a normal process and it was a process that naturally followed as a result of steps taken.

[50] The fact that Ms Hall had made her submission of no case to answer on a number of occasions without receiving a determination on that submission did not represent a factor supporting stay. She did obtain a determination before the other division of the Tribunal, albeit overturned on appeal, and the High Court gave its reasons as to why it would not finally determine the issue. Those matters did not impact on Ms Hall's ability to defend the charges, nor did it represent a situation that should be assessed as so oppressive or unreasonable as to require a stay.

[51] Ms Hall submitted that as she had appealed a decision made in respect of a particular matter, and the matter had been referred back to the Tribunal, it was only her no case to answer submission on the charge that was to be reconsidered. It was not a rehearing with all matters to be considered afresh. Consequently, to seek an amendment of the charge contributed to the oppression and unreasonableness Ms Hall suffered, it was submitted.

[12] Above, n 3, at paragraphs [30] – [34].

[52] In our view the direction of the High Court requiring a freshly constituted Tribunal to hear the proceedings after Ms Hall was successful with her appeal was a referral back for a rehearing. There was nothing in the High Court decision to limit the position as suggested for Ms Hall, and in fact there was a contrary indication.

[53] All issues that may be argued on a rehearing were clearly left open, with Woodhouse J noting that it would be for the newly constituted Tribunal to determine all matters of procedure, in particular "*if Ms Hall again submits that there is no case to answer".*[13] That clearly contemplates the possibility that the proceedings may or may not involve such an application, supporting a view that the hearing was not to be limited in the narrow way suggested for Ms Hall.

[54] The Tribunal considered that whether it was unreasonable and oppressive to proceed with the charge on the basis that Ms Hall's conduct did not warrant the charge of negligence or incompetence was a matter for consideration when the substantive charge was considered. While the merits of the charge can be relevant to the overall assessment of whether a stay should be granted, we could not assess the merits in the required detail prior to the substantive hearing in this particular case, so it was not a matter to which we gave much weight. Ms Cull QC did not pursue this ground to any great extent in her submissions, which we thought appropriate.

[55] In summary, the Tribunal considered that there was nothing in the circumstances of this case against Ms Hall which placed it in the rare category where to continue would have been, of itself, so unfair and unjustifiably oppressive as to constitute an abuse of process. There was no evidence of general prejudice sufficient to support a stay.

[56] Similarly we did not consider the specific prejudice claimed justified a stay. The death of a witness in this case did not give rise to any prejudice. All the evidence was in (in affidavit form in accordance with the Tribunal's normal process) and no party proposed any cross-examination. Prejudice arising from adverse publicity and cost did not support an application for stay. They were both matters that may be

[13] Above, n 3 at [43].

anticipated as a consequence of professional disciplinary charges particularly where suppression is not granted and the proceedings have some complexity.

[57] For the reasons we have noted the application for stay by Ms Hall was declined.

Part II: Application to Amend Charge

The Application to Amend the Charge

[58] The SC applied to make an amendment to the charge. The SC wished to make the amendment, because while the matter fell under the transitional provisions of LCA and was to be prosecuted under that Act following the repeal of the Law Practitioners Act 1982, the conduct should have been referenced to conduct proscribed by the Law Practitioners Act 1982,[14] not conduct proscribed by LCA.[15] This arose because the conduct alleged had occurred prior to 1 August 2008.[16]

[59] Ms Hall opposed the application, saying that the amendment lowered the relevant negligence threshold as a consequence of the addition of the words "*tend to*" proposed to be added. Those words had appeared in the section of the Law Practitioners Act 1982 which described certain negligent or incompetent conduct occurring pre 1 August 2008, but did not appear in the equivalent section in LCA.[17]

[60] Ms Hall also submitted that as she had faced the charge under LCA, and followed an appeal procedure based on LCA rather than the Law Practitioners Act, the proceedings should not be allowed at this stage to revert back to the Law Practitioners Act 1982. Her view was that the reference of the proceedings back to the Tribunal by the High Court following her appeal required only a reconsideration of her no case to answer submission, and not a rehearing. In that circumstance no amendment could be made to the charge it was said, as there was a specific issue in the existing charge which had been referred back for resolution by the Tribunal.

---

[14] Section 112(1)(c).
[15] Section 241(c).
[16] The date on which the Law Practitioners Act 1982 was repealed and the Lawyers and Conveyancers Act 2006 came into force.
[17] Above, n 14 and 15.

[61] The amendment was granted pursuant to the Tribunal's powers under r 24 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008, with the Tribunal advising it would give full reasons for its decision in due course.

Record of decision allowing Amendment Application

[62] As the Tribunal noted when it gave its ruling on the amendment application, the transitional provisions of LCA require that conduct occurring prior to 1 August 2008, but the subject of proceedings commenced after that date, be prosecuted using the processes and institutions of LCA. Such pre 1 August 2008 conduct must be conduct in respect of which disciplinary proceedings could have been commenced under the Law Practitioners Act 1982, which governed the profession pre 1 August 2008.[18]

[63] The procedures of the LCA transitional provisions require conduct occurring pre 1 August 2008 to be described in the terms of the conduct proscribed pre that date.

[64] The Tribunal considered that the addition of the words *"tend to*" to the charge against Ms Hall, so that the conduct was as proscribed by the Law Practitioner Act rather than as proscribed by LCA, made no difference to the negligence threshold she faced. The Tribunal also said that it considered the appeal procedures Ms Hall had previously followed were not relevant, in that they were the required procedures, unaffected by the amendment. The Tribunal also considered it was dealing with a rehearing of all matters following reference from the High Court, so Ms Hall's position that this limited any amendment was not accepted.

[65] Ms Hall did not seek an adjournment based on the fact the amendment was allowed, and the Tribunal noted that even if there had been such an application it did not consider that the amendment took Ms Hall by surprise (it had been well signalled some twelve months previously) and nor did it consider that it would prejudice the conduct of the case (the amendment was of a *de minimis* nature, being in the nature of a minor technical correction).

[18] Section 351 Lawyers and Conveyancers Act 2006.

[66] The charge was amended and the substantive hearing continued. The Tribunal's reasons are now more fully set out.

Reasons for allowing the Amendment Application

[67] The Tribunal examined the various issues around the transitional provisions of LCA in *Wellington Standards Committee No. 2 v Logan.*[19] The analysis in that case concluded that s 351 LCA provided a transitional scheme that was different from normally expected legislative provisions involving matters occurring pre repeal of an Act, but to be prosecuted post repeal of such Act.

[68] The LCA transitional provisions required any pre 1 August 2008 conduct complained of after that date to be investigated and charged using the processes and institutions of LCA, but referencing the conduct to the pre LCA legislation, the Law Practitioners Act 1982.

[69] In prescribing that the processes and institutions of LCA are to be used for dealing with pre 1 August 2008 conduct, the LCA transitional scheme does not require that pre 1 August 2008 conduct be converted to LCA terms and charged accordingly. Indeed, there are situations where that is not possible, as we will discuss shortly. What it does require is that the pre 1 August 2008 conduct be described in terms applicable to that conduct under the Law Practitioners Act 1982.

[70] The original form of the charge laid against Ms Hall was as follows:

> "The Wellington Standards Committee No 2 of the New Zealand Law Society charges **DONNA MARIE TAI TOKERAU DURIE HALL** of Lower Hutt, Solicitor, with negligence or incompetence in her professional capacity, and that the negligence or incompetence has been of such a degree as to reflect on her fitness to practise or as to bring her profession into disrepute in that:
>
> 1. on or about 1 November 2006 until on or about 16 July 2007 she acted for a vendor, Hikuwai Hapu Lands Trust, on the one hand, and a purchaser,

[19] Above, n 4 at paragraphs [9] – [60].

Tauhara Middle 15 Trust, and lender, Tauhara Middle 4A2A Trust, on the other, without the prior informed consent of each party; and/or

2. she failed to advise each party of the areas of conflict or potential conflict and/or

3. she failed to advise the purchaser and lender that each should take independent advice and arrange such advice and/or;

4. she failed to decline to act further for the purchaser and lender where acting would or would be likely to disadvantage one or both of them.

(s 241(c) of the Lawyers and Conveyancers Act 2006 and previous R 1.04 and R 1.07 of the Rules of Professional Conduct for Barristers and Solicitors 2006)."

[71] As a consequence of the amendment proposed the charge was to be amended to the following:

"The Wellington Standards Committee No 2 of the New Zealand Law Society charges Donna Marie Tai Tokerau Durie Hall of Lower Hutt, Solicitor with negligence or incompetence in her professional capacity in that the negligence or incompetence has been of such a degree as to reflect on her fitness to practise or as to tend to bring the profession into disrepute in that:

1. on or about 1 November 2006 until on or about 16 July 2007 she acted for a vendor, Hikuwai Hapu Lands Trust, on the one hand, and a purchaser, Tauhara Middle 15 Trust, and lender, Tauhara Middle 4A2A Trust, on the other, without the prior informed consent of each party; and/or

2. she failed to advise each party of the areas of conflict or potential conflict and/or;

3. she failed to advise the purchaser and lender that each should take independent advice and arrange such advice and/or;

4. she failed to decline to act further for the purchaser and lender where acting would or would be likely to disadvantage one or both of them.

(s 351 of the Lawyers and Conveyancers Act 2006 and s 112(1)(c) of the Law Practitioners Act 1982; r 1.04 and r 1.07 of the Rules of Professional Conduct for Barristers and Solicitors 2006)."

[72] As will be observed, the charge remains largely as it was following amendment. It is supported by the same particulars and refers to the same rules of professional conduct said to have been breached. The section references have been amended to reflect sections applicable to the transitional provisions of LCA, and the words "*tend to*" have been added before the phrase referring to the profession being brought into disrepute.

[73] Ms Hall's conduct was alleged to have occurred between 1 November 2006 and 16 July 2007, at a time when the Law Practitioners Act 1982 was in force. The complaint about that conduct was made in 2009, by which time that Act had been repealed and replaced by LCA.

[74] Section 351 LCA requires that such a complaint be initiated under LCA. This is subject to some conditions set out in that section, to the effect that a complaint cannot relate to conduct that predates LCA by more than six years, that it must not be a complaint that has been disposed of under the Law Practitioners Act 1982, and that the conduct must be conduct "*in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982".*[20]

[75] The charge originally described the conduct the subject of the charge as that conduct is described in s 241(c) LCA. That section refers to conduct comprising negligence or incompetence occurring on or after 1 August 2008. Section 241(c) refers to a practitioner being found to have:

> "…… been guilty of negligence or incompetence in his or her professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute;"

[20] Section 351(1) Lawyers and Conveyancers Act 2006.

[76] The amendment to the charge sought to record that the matter was a proceeding under the transitional provisions of LCA, and that the conduct should have been described on the basis that it was negligence or incompetence that had occurred pre 1 August 2008. That conduct is described in s 112(1)(c) Law Practitioners Act 1982, and refers to a practitioner being found to have:

> "……. been guilty of negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute;"

[77] The only material difference in the description of negligent or incompetent conduct between the two sections is that under the Law Practitioners Act 1982 the words "*tend to*" appear before the phrase "*bring the profession into disrepute*".

[78] For Ms Hall it was suggested that this changed the threshold, in that "tending to bring the profession into disrepute" was a different concept from "bringing the profession into disrepute". In the Tribunal's view, in assessing negligence or incompetence in terms of the profession's reputation there is no practical distinction that suggests a lower threshold in the case of "tending to bring into disrepute" as against "bringing into disrepute".

[79] Whether conduct tended to bring the profession into disrepute was a matter discussed in *Complaints Committee of the Canterbury District Law Society v W.*[21] In that case a Full Bench of the High Court, in discussing whether the particular negligence being examined in that case tended to bring the profession into disrepute,[22] noted that what this meant was that the negligence had to be of a degree that tended to affect the good reputation and standing of the legal profession generally, in the eyes of reasonable and responsible members of the public. It would involve conduct which members of the public would regard as below the standards required of a law practitioner, and that the nature of the conduct would be accepted as such by responsible members of the profession the Court said.[23]

---

[21] *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514.
[22] The Court was dealing with conduct as described in s 106(3)(c) Law Practitioners Act 1982, but it is identical to the conduct described in s 112(1)(c) Law Practitioners Act 1982 the section referred to in the amendment application in Ms Hall's case.
[23] Ibid, *W* at [91].

[80] Whether Ms Hall's conduct is conduct which brings the profession into disrepute or tends to bring the profession into disrepute is a matter relating to the measure of seriousness of her alleged negligence or incompetence. It is a measure based on the reasonably expected view of the conduct by both the public and the profession. Whether the words "*tend to*" are present or not, that objective assessment measure is unaffected.

[81] We do not accept that use of the words "*tend to*" implies a different threshold for measuring the seriousness of the conduct. Use of the words "*tend to*" adds nothing to the degree of seriousness of the conduct, nor would it require a change in the way members of the public or the profession may view the conduct, which is to be objectively assessed.

[82] We note also that "*tend*" has a standard dictionary definition of: "*To show a natural likelihood or inclination to act in a particular way or produce a particular effect*." That reinforces our view that the inclusion or exclusion of the words "*tend to* " in the present case is of no moment so far as the likelihood of formation of an adverse view of the conduct by the public or the profession is concerned.

[83] No change was made to the description of Ms Hall's conduct in the particulars of charge, but at the end of the charge the relevant transitional provision of LCA was noted.[24] In place of the reference to s 241(c) LCA in the original charge, a reference was included showing the section of the Law Practitioners Act 1982[25] which described the conduct, which was alleged to have occurred when that Act was in force.

[84] This reference to s 112(1)(c) Law Practitioners Act 1982 records the statutory proscription applicable at the time of the conduct. It also demonstrates that the charge to be prosecuted using LCA processes meets the requirements of the transitional provisions contained in s 351 LCA, which was also added as a reference.

[85] The transitional provisions of LCA do not require that such a charge be formulated under a specific section of LCA. Indeed some charges in respect of pre 1

[24] Section 351.
[25] Section 112(1)(c).

August 2008 conduct are not the same under LCA, so if to be prosecuted have to be referenced to the conduct as described by the Law Practitioners Act 1982.[26] In the Tribunal's view the charge only need describe the conduct in the terms used in the Law Practitioners Act 1982 to show that it was conduct proscribed at the time it occurred that was capable of prosecution under that Act, and it remains a charge to be heard and determined using the institutions, processes and procedures of LCA, as set out more fully in *Logan.*[27]

[86] Given our view that all the amendment did was follow the approach required by the transitional provisions of LCA as noted by the Tribunal in *Logan,* and more importantly that there was no change to the nature of the conduct charged, including its test for seriousness, and no change to the particulars relied on in respect of the conduct alleged, the Tribunal allowed the amendment.

[87] So far as Ms Hall's claim that she had followed LCA processes and procedures and had relied on the reference to s 241(c) LCA as confirming the charge was under that Act, we note that Ms Hall was correct to treat the charge as being a proceeding under LCA. The amendment sought is not to take the charge back under the Law Practitioners Act 1982, indeed LCA makes it clear that is not possible, as discussed in *Logan.*

[88] The charge remains under LCA, but the conduct is described in terms that would have been applicable if prosecuted under the Law Practitioners Act 1982. The description of the conduct is virtually identical, apart from the use of the words "*tend to*", as discussed above, which words we consider of no consequence for the reasons stated.

[89] The remaining argument touching on the amendment issue was Ms Hall's submission that as the hearing was not a rehearing, but just a reconsideration of the no case to answer submission referred back to the Tribunal, an amendment to the charge was not permissible.

---

[26] For example see the discussion on conduct unbecoming in *Logan (*above, n 4) at paragraphs [45] – [48].
[27] Ibid at paragraphs [9] – [60].

[90] For the reason we noted earlier[28] the Tribunal considered it was to deal with the full substantive matter at a rehearing, and that its process was not limited to the narrow issue of determining Ms Hall's no case to answer submission. As a consequence this particular issue was not a factor of any weight in deciding whether or not to allow the amendment to the charge.

[91] For the reasons noted, the amendment to the charge was allowed. No adjournment was pursued as a result of the amendment, nor was it necessary in the Tribunal's view. There was no surprise (the amendment had been well signalled many months prior) and the *de minimis* nature of the amendment meant that there was no prejudice to the conduct of the case.[29]

PART III: RESERVED DECISION ON CHARGE

Issues arising from the allegations

[92] The SC alleged that Ms Hall had been negligent or incompetent in her professional capacity and that the negligence or incompetence was of such a degree as to reflect on her fitness to practise or as to tend to bring the profession into disrepute.

[93] The alleged negligence or incompetence was said to have arisen when Ms Hall acted for various parties involved in a land transaction, between 1 November 2006 and 16 July 2007.

[94] It was said that Ms Hall had acted for the vendor, the purchaser, and the lender in the transaction without first obtaining their informed consent. It was also alleged that Ms Hall had not advised each party about conflict or potential conflict, had not advised the purchaser and the lender that each should take independent advice or arranged such advice, and had not declined to act further for the purchaser and lender where acting for them would be likely to disadvantage one or both of them.

[28] Above at paragraph [53].
[29] Regulation 24 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008.

[95] This conduct was said to breach r 1.04 and r 1.07 of the Rules of Professional Conduct for Barristers and Solicitors 2006, the rules of professional conduct applicable at the time. That breach was considered to constitute serious negligence or incompetence, being conduct of the nature described by s 112(1)(c) Law Practitioners Act 1982, and thus chargeable under the transitional provisions of LCA[30] following the repeal of the Law Practitioners Act as at 1 August 2008.

[96] Rule 1.04, which requires a practitioner to obtain consent when acting for more than one party in the same transaction, states:

> "A practitioner shall not act for more than one party in the same transaction without the prior informed consent of all parties."

[97] Rule 1.07, which sets out the steps to be taken when a practitioner identifies a conflict of interest, including withdrawal when the conflict is such that continuation would likely disadvantage a client, states (so far as relevant for current purposes):

> "In the event of a conflict or likely conflict of interest among clients, a practitioner shall forthwith take the following steps:
>
> (i) advise all clients involved of the areas of conflict or potential conflict;
>
> (ii) advise the clients involved that they should take independent legal advice, and arrange such advice if required;
>
> (iii) decline to act further for any party in the matter where so acting would be likely to disadvantage any of the clients involved.

[98] These requirements of r 1.04 and r 1.07 are reflected by the particulars of charge Ms Hall faced.

[99] The issue under r 1.04 is whether Ms Hall was acting for different parties engaged in the same transaction as alleged and, if she was, whether she had sought and obtained their informed consent when she began acting for more than one party to the transaction. Informed consent requires that conflict of interest be recognised

[30] Sections 350 – 352 Lawyers and Conveyancers Act 2006 are applicable in this case.

and explained to the client in a way that ensures the client has a proper understanding of the implications before giving any consent.[31]

[100] If she was acting for more than one party to the transaction, and the interests of those parties were in conflict or likely to be in conflict, then the requirements of r 1.07 also applied to Ms Hall.

[101] The requirements of r 1.04 are straightforward. Prior informed consent is to be obtained if acting for more than one party in the same transaction. Seeking informed consent does not allow r 1.07 to be ignored if a conflict is likely to disadvantage a client. In that case advising on areas of conflict or potential conflict, and advising that independent advice should be obtained still apply. These things are really part of ensuring consent is informed in such case. If there is an insurmountable conflict situation, such that continuing to act as required by a client would be likely to disadvantage a client,[32] withdrawal is required under r 1.07.

[102] Whether the charge is proven, having regard to Ms Hall's conduct in the prevailing circumstances requires consideration of her required role in the transaction in question. If she had a role as legal adviser to the parties, then an examination of the duties she thus owed to each client has to be undertaken. From that it can be ascertained whether in respect of any duties she owed there was an actual or likely conflict between the interests of the different parties that might have affected Ms Hall's ability to fulfil her respective duties to all the parties involved.[33]

[103] Failure by a practitioner to obtain informed consent, or to recognise a conflict of interest and to act appropriately to deal with that conflict constitutes negligent or incompetent conduct. Rule 1.04, relating to the obtaining of informed consent, and r 1.07, relating to actions in the case of likely conflict, clearly note a practitioner's duties in such situations. Practitioners are required to observe those duties.

---

[31] See *Taylor v Schofield Peterson* [1999] 3 NZLR 434 (HC) at 440, lines 28 – 34.
[32] As in a situation of the type described by Richardson J in *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, at 90 where he said – "*There will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both.*"
[33] See *W* (above n 21) at [53], [54], and [56], where the High Court took this approach when considering whether a conflict of interest existed in a case involving r 1.07.

[104] The standard of care expected of a practitioner faced with a conflict situation is to recognise that situation, advise the parties concerned of the conflict or potential conflict, advise regarding the obtaining of independent advice and to assist in obtaining that advice, and to decline to act further if to continue would disadvantage a client.[34]

[105] If the negligence or incompetence alleged is proved against Ms Hall, the next question would be whether it was of sufficient seriousness as to tend to bring the profession into disrepute. That is, whether the negligence or incompetence falls below what is expected of the legal profession, and as a consequence the public would think less of the profession if the particular conduct constituting the negligence or incompetence was viewed as acceptable.[35]

[106] To answer these issues we have to consider whether the evidence shows[36] that Ms Hall was acting as legal adviser to multiple parties as alleged in respect of the transaction concerned. If she was so acting, we have to consider whether she has been negligent or incompetent in failing to recognise any duties imposed on her by r 1.04 and r 1.07. This will involve an examination of the transaction and its parties, the role Ms Hall undertook, and whether that role required her to obtain informed consent which she obtained. It also requires an examination of the duties she owed to each of her clients in carrying out her role and whether her ability to perform those duties was adversely affected by the different interests of each of her respective clients. Finally, if there has been such a failure to observe her duties to her clients which constitutes negligence or incompetence, we have to consider whether it is sufficiently serious to affect the view the public may have of the profession.

The transaction concerned

[107] The transaction in which Ms Hall is alleged to have been involved as legal adviser to multiple parties (the vendor, the purchaser, and the lender) relates to a land acquisition proposal involving Landcorp Farming Limited ("Landcorp") and

[34] *W* (above n 21) at [63], and r 1.07 Rules of Professional Conduct for Barristers and Solicitors set out at paragraph [97] above.
[35] *W* (above n 21) at [91].
[36] To the required standard, the balance of probabilities – s 241 Lawyers and Conveyancers Act 2006 and see also *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

certain Maori interests. The proposal had some unique features which affected the way the transaction evolved, the parties who would participate, and the status and role of the various participating parties.

[108] In 2006 Landcorp proposed to dispose of certain of its landholdings in the Taupo catchment area. The area was substantial, involving some 7041 hectares. There was a desire among some Maori leaders to ensure that this land was returned to Maori interests, and not offered for general sale by Landcorp. All avenues to achieve this return of land were to be explored.

[109] It had been assumed that resumption of the land by Maori interests would occur through Treaty of Waitangi settlement processes, but there was some uncertainty about the outcome of that process, and its timing. Landcorp had indicated disposal plans for the land and it was thought that some early initiative by Maori interests would assist in obtaining certainty. This was proposed to mitigate the risk of the land being taken up by other than Maori interests.

[110] It was decided by Maori leadership that if the Landcorp sales of the land could not be stopped in any other way, then a commercial process should be commenced by which various Maori interests could acquire parts of the land proposed to be disposed of by Landcorp and in which they had an interest.

[111] The hapu considerably affected by Landcorp's initial plans to offer the land for sale on the open market was the Hikuwai hapu. The Landcorp land to be offered constituted an important part of their ancestral land, which could be lost to them if sold to third parties.

[112] Maori leaders driving the proposal that the land be acquired for Maori interests felt that a facilitating group was required "*to co-ordinate the various land trusts of Te Hikuwai Maori into a cohesive, ordered group, capable of meeting the onerous terms imposed by Landcorp (size of package and valuations*)."[37] Landcorp had preferred not to deal with multiple buyers representing various Maori interests, instead proposing to offer the land in one parcel for Maori interests to take up via an acquisition vehicle, in such parts as they wished.

[37] Affidavit of Dr George Habib dated 22 December 2011 at paragraph [13].

[113] As a consequence Hikuwai Hapu Lands Trust ("HHLT") was formed, to act as the buying vehicle for Maori interests seeking to acquire an interest in various parts of the Landcorp land.[38]

[114] The land was to be acquired by HHLT as one parcel from Landcorp, and it was proposed that on-sale of various parts to interests such as hapu land trusts, Maori incorporations and businesses would follow. In discharging its facilitative role HHLT was to meet with various Maori interests to establish their interest and possible means and modes of acquisition of those parts of the land in which such ultimate acquirers had an interest.

[115] Landcorp agreed with HHLT in October 2006 that HHLT would embark on consultation with relevant hapu regarding the land acquisition and terms and conditions of sale. It was proposed that this consultation and acquisition detail would be finalised by 15 December 2006. By that December date, if consultation had been completed and the merits of the proposed transactions approved, a formal sale and purchase agreement was to be signed between HHLT and Landcorp.

[116] HHLT was to be the acquisition vehicle for the various Maori interests consulted and wishing to acquire an interest in various parts of the land. This avoided Landcorp being required to enter multiple contracts, covering different parts of the land, with various Maori interests.

[117] These arrangements were set out in a Memorandum of Understanding entered into between HHLT and Landcorp on or about 19 October 2006 ("MoU").[39]

[118] Under the MoU, HHLT was obligated to keep Landcorp advised regarding its consultation with various Maori interests who planned to ultimately acquire an interest in the land. Landcorp agreed to use its reasonable endeavours to assist consultation by attendance at meetings, the provision of information and other assistance to facilitate the consultation and assessment of the merits of the proposed sale of its Taupo land.

---

[38] An initial working group set up by Maori interests to progress the land acquisition scheme formally established the terms of trust by Deed dated 6 November 2006 - the Bundle Volume 1 pages 97-110.
[39] The Bundle Volume 1 pages 51-58.

[119] Negotiations by HHLT with Landcorp continued as its consultation with the various Maori interests progressed, and the transaction reached a point where HHLT was ready to commit a Heads of Agreement with Landcorp,[40] under which it would acquire the land. Once that was signed HHLT moved towards settlement with Landcorp as the acquisition vehicle for a number of different Maori interests.

[120] Following HHLT settling the land acquisition with Landcorp, it arranged to pass on an interest in some of the land wanted by a Maori Trust, Tauhara Middle 15 Trust ("TM15") and Opepe Farm Trust who were buying jointly.[41]

[121] Settlement with HHLT by TM15 of its land interest acquisition was completed by a firm of solicitors based in Taupo on 16 July 2007, once HHLT had acquired the land from Landcorp. A report on the settlement, including detail of the application of various monies, was provided to Ms Hall as TM15's legal adviser, on 19 July 2007.[42]

The nature of Ms Hall's activities

[122] Ms Hall had acted for HHLT from the outset. As the transaction approached the point where the Heads of Agreement was to be signed between Landcorp and HHLT she became informally involved with TM15, and eventually she would be appointed legal adviser to TM15 in place of Mr Jensen.

[123] In late November 2006, TM15 trustees were approached by HHLT as part of a number of approaches being made to various Maori interests who were to participate in the land acquisition scheme as end acquirers, to facilitate HHLT paying Landcorp the required deposit. That deposit had to be paid, at that stage, by 15 December 2006. This deposit represented an amount due by HHLT on the signing of the Heads of Agreement to acquire the land from Landcorp, following the completion of consultation pursuant to the MoU. HHLT indicated that it would give those who assisted it with the deposit requirement preferential purchase rights over parts of the

[40] Bundle Volume I at pages 155 – 178.
[41] The relevant Agreement for Sale and Purchase is in the Bundle Volume I at page 225.
[42] Bundle Volume I at pages 255 – 258.

Landcorp land. These matters were set out in a letter from Ms Hall on behalf of HHLT dated 22 November 2006.[43]

[124] At a meeting of TM15 trustees a few days later, on 28 November 2006, Ms Hall addressed the trustees regarding HHLT's need for contributions towards the deposit required by Landcorp, and outlined the process and some of the issues for Maori interests as she saw them.

[125] There was some support for the proposal at the TM15 trustee meeting, but it was felt that the trust "owners" (the beneficiaries) should be given the opportunity to give their views. The trustees considered that the trust could fund its contribution to the deposit needed by borrowing against its assets. They proposed that the matter be put to an owners' meeting and that the trust's solicitor (a Mr T Jensen) be asked to comment on the proposal and attend the meeting. Ms Hall was also to attend to explain HHLT's deposit requirement and to make a presentation on the land acquisition scheme.

[126] Mr Jensen provided his written advice on the proposal that TM15 provide funding towards the deposit, on 30 November 2006.[44] In his advice Mr Jensen said that the trust should decline the request. He was concerned that there was no direct benefit for trust beneficiaries in making a loan to HHLT to fund the deposit, and he considered the trust's major asset, its land (which was to be mortgaged to raise funds), would be placed at serious risk. Mr Jensen also noted in his advice that commercially the proposal had undue risk so far as he could ascertain from the material he had been provided, which included the letter from Ms Hall dated 22 November 2006 written by her on behalf of HHLT to TM15 trustees.

[127] In a letter dated 1 December 2006[45] Ms Hall provided further detail about funding the deposit HHLT was required to pay Landcorp on 15 December 2006 if proceeding with its plan to acquire land ex Landcorp for the benefit of certain Maori interests. It was noted in this letter that the land would be on-sold to such interests by HHLT at acquisition price plus 3% to cover costs. Ms Hall acknowledged in that letter

[43] Bundle Volume 1 at pages 111 – 112.
[44] Ibid, at pages 121 – 122.
[45] Ibid, at pages 125 – 127.

that the deposit would be at risk and could be lost if purchases of land from Landcorp were not completed by 30 June 2007 to a value of at least $40m.

[128] This letter was provided to Mr Jensen, who, as legal adviser to TM15, confirmed that nothing in the letter changed his previously expressed advice (in his letter of 30 November 2006) that the trustees should not participate by providing a contribution to the deposit payable to Landcorp by HHLT. He gave that advice based on his assessment of the risk of loss of deposit which would occur if HHLT could not arrange to acquire land from Landcorp to a minimum take-up level of at least $40m (ie there was insufficient interest from potential acquirers to which on-sale could be made for HHLT to commit to such a level of acquisition from Landcorp).

[129] Meanwhile, HHLT had renegotiated the deposit arrangements with Landcorp. That included a provision whereby HHLT was to proceed on the basis that deposit money would not be lost if land purchases to a certain value were not made by 30 June 2007. Instead, the deposit was able to be applied against specific land if necessary, and the condition that had previously put the deposit at risk if there was insufficient take-up of Landcorp land was said to no longer apply.

[130] Ms Hall indicated at the time that she considered this addressed the majority of the concerns expressed by Mr Jensen in his advice to TM15. She asked that TM15 trustees request Mr Jensen to reconsider his earlier advice, or that the trustees consider whether his earlier advice should be read out at the proposed owners' meeting of the trust, as the advice was redundant as a result of what she described as a changed deal with Landcorp. Ms Hall also questioned whether trustees who were conflicted by membership of both HHLT and TM15 should be excluded from voting as trustees where there was an owners' vote approving the proposals.

[131] Mr Jensen responded to this letter on 8 December 2006, confirming his advice that he did not consider, on legal grounds, that the trust should be involved in lending HHLT the deposit funds sought. He also confirmed that his position from a commercial perspective remained unaltered, there being too much risk and uncertainty in the proposal. Mr Jensen also expressed concern about Ms Hall suggesting that his advice not be read out at the meeting of owners and noted that it

was inappropriate for Ms Hall, in her position as "*a promoter*" of the scheme to acquire Landcorp land for Maori interests, to make comments regarding the accuracy of his advice to his client, TM15.[46]

[132] The meeting of TM15 owners/beneficiaries to consider these matters was held on 10 December 2006. All trustees, apart from a Mr Karaitiana, were present, as was Ms Hall, representing HHLT.

[133] Ms Hall made a presentation to the owners covering the proposed land acquisition from Landcorp, how it was proceeding, who was involved and which lands were included in the scheme. She also answered questions covering such matters as risk, benefit, and arrangements regarding other participants. She expressed the view that the issue of trustee conflict should not hold up approval of the proposal to fund the required Landcorp deposit, noting that where owners have given their approval that would effectively be a mandate for the trustees who could recognise that collective support.

[134] Following Ms Hall's presentation, the trust secretary, Mr Allan, gave a presentation on the proposal, including conveying the adverse views of the trust's legal adviser, Mr Jensen, who did not attend the meeting. Mr Allan himself also advised against the proposal to contribute to HHLT's deposit obligation to Landcorp. Mr Allan noted that from an accounting perspective the proposed loan to HHLT did not comply with good investment and commercial principles. Not only would the cost of borrowing be less than interest received on the loan made to HHLT, but it was unsecured he said in response to some questions. He said that if funds were to be provided the maximum amount that could be lent and covered from a cash-flow perspective was $450,000.

[135] After hearing from Ms Hall (representing HHLT) and Mr Allan (the trust secretary and an independent accountant), and after having had conveyed to them the advice of the trust's solicitor, Mr Jensen, then, following further questions and discussion, the owners approved a loan of $500,000 to HHLT for deposit purposes. The trustees were also given the right to approve lending HHLT up to a further

[46] Bundle Volume I page 131.

$1,000,000 at their discretion. Ms Hall assisted the meeting by drafting the formal resolutions the meeting was to pass and to record the decisions the meeting had made.

[136] Three days later, on 13 December 2006, those trustees who were available met at Mr Allan's offices in Taupo where arrangements regarding the BNZ loan necessary to fund the deposit were discussed. Mr Allan reconfirmed his concern and suggested that the trustees get an independent legal opinion before continuing with the BNZ loan arrangements.

[137] At a further meeting at Mr Allan's offices on 19 December 2006, the trustees discussed a change to the proposal which HHLT had negotiated, whereby TM15 would take a proportionate interest in certain land being acquired from Landcorp (the balance of the land being acquired by other Maori interests) as part of a "*cluster*" of interests. The trustees agreed to the revised proposal and said they would make $240,000 available immediately from cash reserves. The balance required remained to be obtained via a loan from BNZ.[47] Ms Hall was not present at this meeting.

[138] HHLT and TM15 trustees signed a deed on 22 December 2006, said to be a "Deed of Loan and Understanding and Grant of Right to Purchase".[48] Under this deed TM15 would lend $1m to HHLT which was to use it as part of an overall deposit of $5m due to Landcorp regarding various land acquisitions under the scheme being facilitated by HHLT. The deed had been prepared in Woodward Law Office (the name of Ms Hall's legal practice), and Ms Hall attended on execution of the deed by the trustees of HHLT and TM15.

[139] The deed noted various commercial risk factors and recorded non-recourse against HHLT if repayment could not be made[49]. The deed also noted that each party had been given the opportunity to receive independent advice regarding the effects and implications of the deed prior to signing.[50]

[47] Bundle Volume 1, pages 142 -143.
[48] Ibid page 144.
[49] Ibid page 149 paragraph [10.1] and [10.2].
[50] Ibid page 149 paragraph [11.1].

[140] TM15 did not have cash resources available to put towards the $1m deposit requirement other than the $240,000 it had been prepared to advance immediately and which was made available on 22 December 2006. The balance was to be borrowed from BNZ.

[141] One of the TM15 trustees had advised that he would not sign the BNZ mortgage documentation, as he had accepted Mr Jensen's advice and disagreed with TM15 making an advance to HHLT to fund the Landcorp deposit. Ms Hall, acting for the other trustees, wrote to that trustee seeking his cooperation in signing the documentation, in default of which an order was to be sought seeking his removal as a trustee. In February 2007, on the instructions of Ms Hall acting for TM15 trustees in respect of this matter, a barrister applied to the Maori Land Court for approval to have the mortgage executed by a majority of trustees.[51]

[142] On 5 March 2007 Ms Hall was formally appointed as solicitor to the TM15. She is recorded by the minutes of a meeting of TM15 trustees and Contact Energy Ltd[52] as attending the meeting in that capacity on 21 March 2007.

[143] At a meeting of TM15 owners on 13 April 2007, Ms Hall gave a PowerPoint presentation[53] about the purchase from Landcorp by HHLT and the on-sale proposal. That presentation covered the expected timing of a report affecting the lands from the Waitangi Tribunal, an update on the proposal for TM15 to acquire (together with Opepe Farm Trust) the Tauhara North Farm Block from HHLT (once HHLT had acquired it from Landcorp), some commentary on geothermal opportunities available to TM15, and progress on arrangements approved by owners at the December 2006 meeting. The presentation concluded with a list of the approvals sought from the meeting to formalise settlement, including support for removal of the dissenting TM15 trustee and utilisation of the $260,000[54] lent to HHLT to be used as part of its deposit to Landcorp and to be treated as part of the TM15 contribution towards the acquisition of Tauhara North Farm Block.

---

[51] In June 2007, in response to this application (which had been adjourned initially), the Maori Land Court approved execution of the mortgage by a majority of TM15 trustees.
[52] The Bundle Volume I at page 196.
[53] Ibid at pages 209 – 219.
[54] While the presentation refers to $260,000, it is likely that this was an error and the reference should have been to $240,000, being the sum made available from TM15 cash resources in December 2006.

[144] At this meeting the minutes also record Ms Hall advising that the conflict in some TM15 trustees also being HHLT trustees could be waived by the owners, as recorded previously at the owners' meeting of 10 December 2006. The minutes also note Ms Hall advising on risk in relation to funds made available by TM15, the joint ownership of the block being acquired[55] and what that could mean in terms of control, and commercial advantages she perceived regarding geothermal generation. In response to a question she also confirmed to the meeting that while the resolutions passed at the December 2006 meeting were not obsolete, they needed to be updated.

[145] Two resolutions were then passed at the meeting:

(a) current loan funds provided to HHLT (noted as $260,000, but were actually $240,000) were to become part of the $1,000,000 required to secure a 20% share in the Tauhara North Farm Block; and,

(b) the owners supported the removal of the dissenting trustee who would not sign BNZ loan documentation because of his concerns about the HHLT loan proposal.

[146] At a TM15 trustees' meeting of 7 June 2007, the minutes recording the business of the meeting[56] recorded that Ms Hall was present as the trust's legal adviser. The minutes note that the acquisition of the Tauhara North Farm Block, to be acquired by TM15 in conjunction with Opepe Farm Trust, was discussed. It was resolved that $310,000 would be made available as a loan to TM15 (which in turn would pay it to HHLT as part of the deposit on the Tauhara North Farm Block) from another Maori trust, Tauhara Middle 4A2A ("the Mountain Trust"),[57] as the BNZ would not lend TM15 more than $450,000.

[147] Crediting the original deposit of $240,000 lent to HHLT by TM15 towards the acquisition price of the Tauhara North Farm Block, when added to the BNZ loan

[55] TM15 was to take a 20% share and the balance of 80% was to be held by Opepe Farm Trust.
[56] The Bundle Volume 1 pages 220 – 224.
[57] TM15 and the Mountain Trust had common trustees, and appeared to combine governance of the two trusts. See the affidavits of Peter Tukiterangi Clarke dated 16 December 2011 (paragraphs 18 – 23); Emily Rameka dated 16 December 2011 (paragraphs 3 and 4); and Dr George Habib dated 22 December 2011 (paragraphs 30 – 34).

($450,000) and the Mountain Trust loan ($310,000), would provide the $1,000,000 required for TM15 to complete its share of the purchase.

[148] It was also agreed at this meeting that the settlement of the transaction (in particular the documentation, transfer of funds, and registration of the trust's interest on the title) would be undertaken by a local solicitor.

[149] Ms Hall noted at the meeting that if the dissenting TM15 trustee agreed to sign the BNZ mortgage (to be prepared and provided by the solicitor undertaking the documentation and settlement of the acquisition from HHLT for TM15), matters would be relatively straightforward, but if he continued to object then the application to the Maori Land Court would need to proceed. In anticipation of the dissenting trustee not agreeing to sign Ms Hall then discussed the basis of such an application with the trustees. It was hoped that because the objection to signing had previously been based on the funds being on-lent to HHLT on an unsecured basis, the fact that it was now proposed to use the funds as part of the purchase price to obtain TM15's 20% interest in the Tauhara North Farm Block in conjunction with Opepe Farm Trust which was taking 80%, may mean that the trustee concerned would take a different approach.

[150] On 28 June 2007, HHLT signed a contract with Opepe Farm Trust and TM15 for the purchase of Tauhara North Farm Block, with settlement to be completed shortly thereafter, as soon as HHLT had settled the acquisition of this land with Landcorp.

[151] At about the same time, by a reserved judgment dated 29 June 2007, the Maori Land Court authorised the execution of transaction documents required under the Land Transfer Act, which included the BNZ mortgage, by a majority of trustees of TM15. The Court made it clear that it was merely facilitating execution of documents, and was not reaching a view on the transaction and its various arrangements. The Court also sounded a warning that if the TM15 trustees intended to proceed with the

transaction then they should do so with appropriate advice and knowing they were acting prudently and in accordance with their duties.[58]

[152] In the meantime, the firm of solicitors instructed to complete final documentation and settle the transaction, and presumably before receiving a copy of the Maori Land Court decision, wrote to the trustees of TM15 advising that matters could not proceed until matters before the Maori Land Court had been resolved. A week later those solicitors advised that notwithstanding that a majority of trustees would be competent to sign documents binding the trust following the decision of the Maori Land Court, it was their advice that the purchase should not proceed until questions noted by the Maori Land Court in its decision had been answered (ie was there a possible breach of trust regarding the $240,000 loan, were the trustees conflicted, how did owners' resolutions affect trustee decision making, had there been compliance with duties of prudence and law, and what agreement on joint ownership existed with Opepe Farm Trust?).

[153] The reaction of the trustees was to appoint another firm of solicitors to complete documentation and settlement of the transaction, and that firm then completed the transaction for TM15. That other firm was instructed by Ms Hall, as the legal adviser to TM15. In due course it reported to TM15 that the transaction had been settled.[59]

Ms Hall's role for the parties involved

[154] The position of the SC was that there was clear evidence that Ms Hall had instructions to act for each of the parties to the transaction: HHLT as seller, TM15 as buyer (and lender), and the Mountain Trust as a lender. It said that the interests of the parties were in conflict, and that Ms Hall could not have properly acted for all of them in the transaction.

[155] It was accepted by all parties that Ms Hall was acting for HHLT, but Ms Hall denied that she had acted as legal adviser to TM15 or the Mountain Trust on the transaction.

---

[58] *Wall and others v Karaitiana* [2007] NZMLC 17 at [18] – [20]. See also Bundle Volume 1 at page 243.
[59] In its reporting letter in the Bundle Volume 1 at pages 257 – 258 the solicitors set out the detail of settlement and some background matters.

[156] The SC noted, so far as TM15 was concerned, that in Ms Hall's own submissions to the investigation undertaken by the Law Society she had acknowledged that she had been appointed legal adviser to TM15 to replace Mr Jensen. While in that role she had acted for both HHLT and TM15 on the proposed transaction and had claimed that both HHTL and TM15 had *"requested and agreed to my acting in such a role"*[60], the SC noted.

[157] The fact that Ms Hall became the legal adviser to TM15 in March 2007, replacing Mr Jensen, was also confirmed by Mr Peter Clarke, a trustee of both HHTL and TM15 who swore two affidavits in support of Ms Hall. In his first affidavit, sworn to place certain facts before the SC at the investigatory stage of the proceedings, Mr Clarke said:

> "TM15 used the legal services of Mr Tony Jensen, Solicitor, of Taupo, until March 2007 when the Trustees replaced Mr Jensen with Donna Hall."[61]

and

> "In the month of March 2007 the Trustees dispensed with the professional services of Mr Jensen and instructed Donna Hall to act for TM15 in finalising the joint acquisition transaction authorised on 10 December 2006."[62]

[158] In respect of TM15, Ms Hall said, in her written submissions to the Law Society during the investigatory stage of proceedings, that the "*essence of the transaction had been agreed by TM15 and the tasks were subsequently primarily matters of detail".* [63] Ms Hall considered her role to be "*more an administrative one, than actually advising on the merits of the transaction".*[64]

[159] Ms Hall also said that she had not acted for TM15 on its actual purchase of the Tauhara North Farm Block. Other solicitors had acted for TM15 on the settlement of its acquisition of its share of that property.

[160] Ms Hall agreed that she had drafted the deed concerning the initial agreement between HHLT and TM15 for the loan by TM15 to HHLT, which she said secured a

---

[60] Affidavit of Ann Marie Rice dated 2 August 2011 Exhibit I at paragraph [37].
[61] Affidavit of Peter Tukiterangi Clarke dated 22 January 2010 (annexed to Exhibit "Q" attached to the affidavit of Ann Marie Rice supra) at paragraph [5].
[62] Affidavit of Peter Tukiterangi Clarke supra, at paragraph [18].
[63] Affidavit of Ann Marie Rice supra Exhibit I at paragraph [38].
[64] Ibid at paragraph [42].

right to purchase the land concerned. Ms Hall also accepted that she was solicitor on the record for TM15 trustees regarding the application to the Maori Land Court for approval to execute the BNZ mortgage by majority and to remove the dissenting trustee. These two matters were said by Ms Hall not to involve her acting for both parties in the way alleged by the charge and that her conduct in relation to these matters did not involve a breach of either r 1.04 or r 1.07.

[161] It was also noted for Ms Hall the TM15 trustees had received independent advice from their own legal adviser, Mr Jensen, as the transaction was being developed and agreed, and they had elected to ignore that advice and proceed with the transaction, prior to Ms Hall's appointment as TM15 legal adviser.

[162] So far as the Mountain Trust and its loan to TM15 were concerned, Ms Hall said she had no role. She said:

> "Ultimately, the trustees worked with their accountant Mr Allan to organise this money from the Mountain Trust. I was not instructed to draft a loan document or to consider the position for the Mountain Trust in any way."[65]

Discussion

[163] At the completion of the case for the SC, Ms Hall submitted that there was no case to answer, saying she had not acted for all three parties in the transaction as alleged. She had not been legal adviser to the Mountain Trust she said, and any advice she gave TM15 was with its informed consent and was not of a nature that could be affected by any question that she was disabled from giving advice to TM15 because of conflicting interests of the participants. Ms Hall noted that the interests of HHLT and TM15 were not opposed because HHLT was acting for the benefit of TM15 as part of the scheme approved by all involved to protect Maori interest in the Landcorp land. It was also submitted that TM15 had been independently advised before deciding it would proceed.

[164] The issue for the Tribunal is not simply the question of whether Ms Hall was acting as legal adviser to the different parties in the transaction. It is the role she

[65] Ibid, Exhibit I at paragraph 59.

played in the transaction, whether informed consent was obtained, and whether her ability to observe duties placed on her as a result of her engagement was impeded by any conflicting interests of her clients, which are relevant.

[165] While we accept that there was evidence that Ms Hall acted as legal adviser to TM15 at the same time as she was acting as legal adviser to HHLT, there was no direct evidence that Ms Hall acted for the Mountain Trust regarding its loan to TM15. On that basis we consider that in deciding the merits of the allegations our focus should be on issues that may have existed as between the interests of HHLT and TM15.

[166] In respect of the allegation that Ms Hall acted as legal adviser in the transaction for both HHLT and TM15, there are two distinct periods to consider in deciding whether she did so act and if she did, the nature and character of her role.

[167] The first period is that which occurred prior to her formal appointment as TM15 legal adviser on 5 March 2007. The second period is that period post 5 March 2007, once she had been appointed to act as legal adviser, and Mr Jensen was no longer involved for TM15.

[168] While the evidence showed that Ms Hall attended meetings of TM15 owners and trustees prior to 5 March 2007, and discussed issues regarding the transaction, it was not (subject to what we say about two matters which we will deal with below) in a capacity that involved her giving legal advice to TM15 as her client in the transaction.

[169] We consider the evidence shows that prior to 5 March 2007 Ms Hall was engaging with TM15 trustees and owners on the transaction as a promoter representing HHLT, reflecting the initiative undertaken via HHLT for the benefit of Maori interests such as TM15. We note also that TM15 continually reverted to its own legal adviser, Mr Jensen, through most of this period, to obtain his advice on various propositions being advanced by HHLT.

[170] The two matters we refer to above which occurred prior to 5 March 2007 relate to Ms Hall attending on execution of the “Deed of Loan and Understanding and Grant

of Right to Purchase",[66] and giving advice concerning the issue of a dissenting trustee.

[171] With regard to the deed, it was drafted in Ms Hall's office, it contained provisions relating to risk and recourse, and all signatories to the deed (trustees of both HHLT and TM15) had their signatures witnessed by Ms Hall. The deed was said by Ms Hall to reflect arrangements that had their genesis in the earlier approvals by owners and trustees, particularly the TM15 meeting of 10 December 2006.

[172] With regard to the issue of the dissenting trustee, Ms Hall advised TM15 trustees on ways to address that matter. She recommended seeking Maori Land Court approval for majority execution, and removal of the dissenting trustee if necessary. She instructed counsel to lodge applications with the Maori Land Court in this regard.

[173] The issue for the Tribunal is whether these two instances of pre 5 March 2007 involvement by Ms Hall in the transaction (attendance on execution of the deed and advice on actions to take regarding the dissenting trustee) amount to a breach of either of the rules forming the basis of the charge. As we have noted above, we do not consider that any of the other attendances by Ms Hall prior to 5 March 2007 involved her giving legal advice to TM15.

[174] Rule 1.04 states that a practitioner must not act for more than one party in a transaction without the prior informed consent of both of the parties.

[175] When Ms Hall attended on execution of the deed she took the trustees through the deed, and witnessed their signatures. TM15 trustees (who in some cases held office in HHLT as well) understood the position that Ms Hall acted for HHLT, and that the TM15 trustees had been taking advice from their own legal adviser Mr Jensen. While it does not appear from the evidence that Mr Jensen saw this deed and advised on its specific terms prior to its execution, it was part of the transaction arrangements relating to lending HHLT part of the deposit required for Landcorp, an issue about which he had advised TM15 previously.

[66] Bundle Volume 1 pages 144 – 154.

[176] Mr Clarke gave evidence that at the meeting where the deed was signed Ms Hall went through the deed. Mr Clarke said that the TM15 trustees considered that they "*had taken sufficient advice and elected to enter into that loan agreement."* He also noted that the TM15 trustees "*were very plainly aware of Mr Jensen's advice, and that would not have changed our thinking."*[67]

[177] The TM15 trustees were fully aware of Mr Jensen's concerns and his advice and view that they should not participate in the arrangements regarding proposed loans to HHLT for Landcorp deposit purposes. Notwithstanding that, the TM15 trustees had decided to disregard the advice they had received, and to participate in the scheme whereby various Maori interests (including TM15) would obtain the return of some land they considered important. Making this loan was, in their view, an integral step in the process to secure part of the Landcorp land for TM15 and they were prepared to assist the scheme's success by lending HHLT the deposit required by Landcorp.

[178] All signatories to the deed (HHLT trustees and TM15 trustees) acknowledged the issue of independent advice at the time the deed was signed. This is clear from the provisions of clause 11.1 of the deed.[68] As noted, Mr Clarke said in his affidavit that so far as the TM15 trustees were concerned they had made up their minds that they would sign in any event, notwithstanding Mr Jensen's advice not to lend deposit money to HHLT.

[179] In these circumstances we consider that either TM15 trustees did not instruct nor expect any advice from Ms Hall on the deed, as their legal adviser, or that if she was giving them legal advice they consented to her providing that advice despite knowing she acted for HHLT.

[180] In the former case TM15 trustees were not clients of Ms Hall, and, if the latter case applied, we do not consider that it could be fairly said that the trustees' consent (in respect of both HHLT and TM15 trustees) to Ms Hall advising on the deed was not informed consent. The deed expressly referred to the issue of independent advice. In addition, the TM15 trustees were well aware that their own legal adviser

[67] Affidavit of Peter Tukiterangi Clarke dated 16 December 2011 at paragraph 28.
[68] Bundle Volume 1 at page149.

had already counselled against the arrangements, and they understood the reason he had adopted that approach. We do not consider that this attendance by Ms Hall breached r 1.04.

[181] Nor do we consider that in the particular circumstance relating to the execution of the deed Ms Hall breached r 1.07. To have breached that rule it would be necessary to show that she was in fact acting as legal adviser to TM15 on this deed and that is not certain as noted above. Importantly, it could not be said that the trustees were not aware of the issues regarding the interest of HHLT as borrower/acquirer relative to the position of TM15 as lender/ultimate acquirer, or that they were not aware that they could take independent advice. The deed specifically referred to independent advice and there had been much prior discussion on the different interests of HHLT and TM15. For TM15 trustees the loan arrangements had been the subject of independent advice from Mr Jensen as well as from Mr Allan, an accountant whose firm acted as secretary and accountants to TM15.

[182] If Ms Hall did act as legal adviser to TM15 on the deed, there is also the issue under r 1.07 of whether there was any conflict affecting Ms Hall. Conflict is assessed by considering the interests of each of HHLT and TM15. That is necessary to ascertain if those organisations have different interests which would preclude Ms Hall from being able to properly discharge her duty to both in advising on the deed.

[183] HHLT was undertaking the acquisition for the benefit of TM15, among other Maori interests, on the basis described earlier. There is a mutuality of interest in those circumstances that makes it unlikely that acting for both HHLT and TM15 would disadvantage either, which is the principal issue when considering r 1.07. Additionally, all but one of the TM15 trustees were adamant that they would sign the deed, after having received their own independent advice, and after taking into account the true nature of the transaction which involved HHLT effectively taking steps in the transaction on behalf of and for the benefit of TM15 (among other Maori interests).

[184] If Ms Hall was actually providing advice on the deed as TM15's legal adviser, we do not consider that Ms Hall's attendance on the execution of the deed could be

fairly said to cause disadvantage to either trust. In the situation prevailing we do not see how her duty to each trust in respect of the deed was impeded. The clients had mutual interests given the special nature of the transaction, the trustees had full knowledge regarding Ms Hall's role in the transaction and had agreed to her acting, the TM15 trustees had received independent advice on the issue previously, and they had decided to proceed notwithstanding that advice.

[185] With regard to advice from Ms Hall concerning the dissenting trustee, and her appointment of counsel to deal with the matter, all parties clearly consented to her involvement. This was a discrete issue, on the periphery of the transaction.

[186] Advising TM15 on its options for overcoming this process issue, which, unresolved, might have resulted in an inability to sign the BNZ mortgage documentation, does not seem to us to be a matter involving a disadvantage to either party within the intended scope of the rules. That is something that would arise where Ms Hall could not discharge her duty to each of the parties as a result of them having a conflicted position, and for the reasons noted above we do not consider that such an element of conflict existed.

[187] Post 5 March 2007 we accept that the evidence shows Ms Hall was providing legal advice to TM15. Again, we do not see a situation in so acting that breaches either of the rules as alleged. Ms Hall's advice related to arrangements regarding the transaction which were generally in place and agreed prior to her involvement. TM15 trustees had also previously received, and discounted, advice on transaction issues before committing to proceed. There is also the mutuality issue we have noted.

[188] For Ms Hall it was also noted that as the transaction progressed she had instructed other solicitors to complete the transaction documentation, obtain funds, and complete settlement. Ms Hall said that in all the circumstances any role she had as legal adviser did not involve matters where the transaction participants needed to be advised again regarding informed consent, independent advice, or in respect of a situation where they may have had different interests that gave rise to a conflict situation affecting her duties to them.

[189] The SC suggested that because of TM15's particular legal capacity under its trust empowering provisions, Ms Hall should have recognised that its ability to engage in the transaction was limited, and that the TM15 trustees engaging in the way they did in the transaction was imprudent and possibly unlawful. It said that as a consequence Ms Hall's advice to TM15, including regarding the deed and the dissenting trustee, could be seen as helping the trustees press on with transaction arrangements that compromised TM15 because of its trust limitations, and that disadvantaged TM15.

[190] This issue of TM15 not having the legal capacity to take the steps it proposed in relation to the transaction was said to be evident from the Maori Land Court decision of 2008, which was said to show that the trustees had acted imprudently or unlawfully in the transaction. It followed, the SC submitted, that TM15 had been disadvantaged by Ms Hall's involvement, as she had been motivated to ensure the transaction proceeded and had advised TM15 to continue notwithstanding legal issues first identified by Mr Jensen.

[191] We accept that there was evidence that some questions were raised by the Maori Land Court regarding TM15 trustee actions in respect of the transaction, a short time before settlement of the transaction in mid July 2007. They were questions only, and no definitive view was taken by the Court at that point. It would be nearly a year later before the Court reached a view on these matters after hearing specific evidence and submissions.[69] By that time the transaction had long been completed, so it is not a relevant consideration in assessing Ms Hall's conduct at the time of the transaction.

[192] The SC also submitted that the transaction was detrimental to TM15 because of different incentives said to be operating. The suggestion was that Ms Hall (and some of the trustees), as a result of involvement with HHLT, had some financial incentive that motivated them to press ahead regardless of possible TM15 legal capacity issues signalled by both Mr Jensen and the Maori Land Court. TM15 trustees who were also trustees of HHLT, and who were thereby conflicted, stood to

[69] That final view reached by the Maori Land Court is not something we would rely on even if it was relevant to our current consideration – s 50 Evidence Act 2006. It was a matter not decided until a year after the transaction, so Ms Hall could not be criticised for not taking account of that position at the time of the transaction.

gain substantial governance fees if the transaction went through, the SC said. Also, it noted that Ms Hall was to receive significant fee income from HHLT, which was funded from an amount added to the price HHLT had paid Landcorp, and was thus payable by the ultimate purchasers (which included TM15).

[193] The SC also submitted that for various reasons the transaction had little commercial justification, and said that supported its claim that Ms Hall was motivated by personal gain. The benefits of a transaction were a matter of commercial judgment for the parties, and the majority of TM15 trustees concluded (together with the trust owners/beneficiaries) that there were very good reasons that the land should be acquired from Landcorp via HHLT at the time and in the manner proposed.

[194] It was suggested that Ms Hall may have refrained from giving advice on capacity issues, or commercial risks, because of a personal financial interest in the transaction proceeding. As well as overlooking that HHLT was set up by Maori leadership to act as an acquisition vehicle for the benefit of various interested Maori organisations, there was no evidence to show that Ms Hall, as a consequence of being motivated by personal financial advantage, failed to properly advise TM15.

[195] The Maori Land Court had raised some questions shortly before the settlement of the transaction, but it gave no definitive view on the matter, and acknowledged that it could not answer the questions at that time. We do not consider that the evidence supported the SC submission that Ms Hall proceeded to act for TM15 as well as HHLT motivated by personal interest.

[196] If Ms Hall was ultimately shown to have been wrong about some legal issues that is a different matter from deliberately refraining from giving certain advice because she wanted to see the transaction completed to obtain some financial benefit. As well as not considering there was evidence that supported such a proposition, we note again that the TM15 trustees had already made their decision to commit to the transaction, after receiving advice to the contrary from their own legal adviser, and that they were unmoved by the possibilities raised by the Maori Land Court.

[197] While some of the TM15 trustee decisions may have been criticised having regard to legal capacity and prudence, they were decisions effectively made when TM15 was advised by another solicitor, Mr Jensen, whose advice the majority of trustees declined to follow.

[198] We do not accept that simply because there might or might not have been an issue regarding capacity and prudential decision making by the TM15 trustees, that of itself meant that TM15 had a different interest in the transaction which would have impeded Ms Hall's ability to advise both parties.

[199] In assessing the operation of the rules Ms Hall is said to have breached, we doubt they were breached in the particular circumstances applying, and where the TM15 trustees had already decided to ignore their previous legal adviser's advice and were proceeding with the transaction before Ms Hall commenced acting for TM15.

[200] At the time the transaction was being formulated, and commitments were being sought and made, Ms Hall was not acting as legal adviser to TM15. She was a promoter of the scheme, representing HHLT. At the time TM15 was deciding whether to participate and commercial terms were being initially established, Mr Jensen was providing advice to TM15. By the time Ms Hall became legal adviser to TM15 the transaction was largely in place and TM15 had some time previously committed to participate, against all the independent advice it had received.

[201] It should also not be overlooked that what Ms Hall was doing was for the benefit of the ultimate acquirer, TM15, and HHLT was effectively a trustee for the various acquirers to which land would be on-sold. In particular, we note that the MoU contained a number of provisions relating to consultation, demonstrating the nature of HHLT as a trustee for various Maori interests which were then yet to formally commit to take parts of the land to be acquired from Landcorp. There was a coincidence of interest between HHLT and those to whom it would on-sell the land it had acquired as the vehicle established to effect the acquisition of the land for the benefit of those persons.

[202] HHLT undertook consultation because it was not acting on its own behalf in acquiring the land, but as facilitator for the various Maori interests planning to take some of the land after HHLT had secured it from Landcorp.

[203] The extent and nature of Landcorp's participation in the scheme (also evidenced by the MoU, as well as by the negotiations in which it participated as the transaction evolved) to allow Maori interests to obtain land of special significance to certain hapu under the scheme reinforces the nature of the role HHLT played. The HHLT trust deed[70] also shows the purpose and required role of HHLT in the transaction.

[204] In the particular circumstances of this transaction, including issues of informed consent, the receipt of independent advice, the parties involved and their actual roles, the coincidence of interests reflecting the mutual nature of the transaction, and the duties Ms Hall owed to each of TM15 and HHLT, we do not consider that Ms Hall has breached either of the rules alleged in the charge.

[205] In summary:

(a) There was no sufficient evidence that allowed us to find that Ms Hall had advised the Mountain Trust on its loan of $310,000 to TM15.

(b) There was no sufficient evidence that Ms Hall had advised TM15 regarding the loan of $310,000 made by TM15 to HHLT.

(c) The loan of $240,000 agreed to be made by TM15 to HHLT was made by the trustees after they had received their own independent advice (which they decided to ignore) and there was no evidence that Ms Hall gave advice as legal adviser to TM15 on this particular issue.

(d) The settlement and documentation of the land purchase, involving BNZ funding ($450,000), and the application of the two loans owed by HHLT to TM15 ($240,000 and $310,000) towards the purchase price of the land acquired by HHLT for TM15's benefit under the scheme, was

[70] Bundle Volume I at pages 97 – 110.

undertaken by a firm of solicitors instructed on behalf of TM15 by Ms Hall. She did not herself advise on these settlement matters.

(e) Ms Hall was acting as a promoter for HHLT, not legal adviser to TM15 prior to her appointment as such legal adviser on 5 March 2007.

(f) TM15 took its own independent advice up to 5 March 2007, at the time when the transaction was being negotiated and substantially agreed. The two instances during that pre 5 March 2007 period, where Ms Hall did have some involvement, (the execution of the deed and advice on issues regarding the dissenting trustee) did not amount to a breach of the rules for the reasons traversed.

(g) Post 5 March 2007, once Ms Hall was the legal adviser to TM15, there was nothing in what she did that involved two clients with opposing interests which affected her ability to participate in the way she did at that time. The transaction was well advanced by that stage and TM15 had committed to proceed, notwithstanding independent legal advice which it had some time previously decided it would not accept.

(h) Importantly, it cannot be overlooked when considering whether any client was likely to be disadvantaged by Ms Hall acting for both HHLT and TM15, that there was a particular mutuality of interest between the transaction participants. HHLT was established as the vehicle to serve TM15's (among others) land acquisition aspirations. We doubt that a conflict between the interest of HHLT and TM15 leading to breaches of the rules as alleged could be said to arise in those particular circumstances.

(i) Nor do we consider that there was evidence of Ms Hall pressing on with a transaction, failing to give legal advice about the transaction because of a personal financial motive that operated to disadvantage a client.

Determination

[206] Ms Hall submitted that there was no case to answer. That was an unusual submission given that she had filed some eight defence affidavits in support and her defence evidence was complete.[71] Ms Cull QC, counsel for Ms Hall, referred on a number of occasions during her submissions to matters evidenced by those affidavits. In a strict sense, Ms Hall had actually embarked on answering the case against her, relying at least in part on defence material filed, as distinct from relying on a view of the adequacy of the prosecution case.

[207] The usual position in assessing a submission that there is no case to answer is whether, at the close of the prosecution case, there is some evidence (not inherently incredible) which, if accepted as accurate, would establish the essential elements of the charge. It is a matter of the Tribunal distinguishing between the adequacy of prosecution evidence on the hypothesis of its acceptance, and proof of the charge on the basis of its actual acceptance at a later stage, after receiving defence evidence.[72]

[208] In our view it could not be said that there was insufficient evidence following the close of the prosecution's case that required an initial finding of no case to answer. There was evidence of some legal advice being given by Ms Hall to different participants in the same transaction. The key issue was its use by her clients, and its timing and context were also important having regard to Ms Hall's role and consequently her duties to her clients. Matters of mutuality and whether there was a conflict between her clients' interests that affected her obligations to different clients were also important, and defence evidence assisted the Tribunal in this regard.

[209] A limited requirement for advice from Ms Hall, a clear understanding of the respective positions and interests of HHLT and TM15, and non acceptance of the independent advice by TM15 trustees are relevant to our assessment of whether Ms Hall's conduct breached the rules alleged, as is mutuality of interest. HHLT effectively acted on behalf of interests such as TM15 in the transaction. The evidence of Dr

[71] Each counsel stated that they did not require the other's witnesses for cross-examination on their affidavits, and Ms Hall advised the Tribunal prior to commencement of the hearing (and confirmed it again at the hearing) that she did not wish to provide any further evidence whether successful with her no case to answer submission or not.
[72] See comments in *Haw Tua Tau v Public Prosecutor and other appeals* [1983] 3 All WER 14, 20; and *R v Flygler* [2001] 2 NZLR 721 at [16] [22] and [23].

Habib and Mr Clarke referring to matters of mutuality of interest, the need for and attitude to independent advice that had been provided to TM15, and commentary on Ms Hall's role and instructions, provided the Tribunal with some evidence that it has applied in determining this matter.

[210] While we consider there was a case to answer at the close of the prosecution case, having received and considered all the defence evidence we consider the charge against Ms Hall should be dismissed for the various reasons we have traversed. The investigation and resulting charge were justified on their face, and while some of Ms Hall's conduct in terms of her relationship with other lawyers such as Mr Jensen might be capable of criticism, she has not been shown to breach the relevant rules referred to in the charge. We find that Ms Hall was not negligent or incompetent in that there was no breach of the rule that she must obtain informed consent, nor was there a breach of the rule requiring certain actions where there is a conflict which would be likely to disadvantage a party. The charge is dismissed.

Costs

[211] Section 257 costs are certified at $43,750.

[212] The Tribunal will receive memoranda on costs, which are to be filed by each party no later than 12 February 2014. If either party wishes to reply to the other's submissions on costs, any such reply is to be lodged by 19 February 2014. The Tribunal will deal with the question of costs on the papers.

DATED at AUCKLAND this 29th day of January 2014

D J Mackenzie
Chair