

**NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2010] NZLCDT 14

LCDT 025/09

**IN THE MATTER**

of the Lawyers and Conveyancers  
Act 2006

**BETWEEN**

**WAIKATO BAY OF PLENTY  
STANDARDS COMMITTEE No.2**

Applicant

**AND**

**XXXX**

Respondent

**CHAIR**

Mr D J Mackenzie

**MEMBERS OF TRIBUNAL**

Mr G Craig

Ms A de Ridder

Ms S Ineson

Mr O Vaughan

**HEARING** at HAMILTON on 28 April 2010

**APPEARANCES**

Mr E J Hudson for the Waikato Bay of Plenty Standards Committee No 2

Mr P F Gorringe for Mr XXXX

## **DECISION OF THE TRIBUNAL**

### ***Introduction and background***

[1] Mr XXXX faces a charge of unsatisfactory conduct laid under the Lawyers and Conveyancers Act 2006 following a complaint made about him in April 2009. The charge is based on conduct said to have occurred in July 2002 and in May 2004, at a time when Mr XXXX was employed by a law firm as a legal executive. At the time of the conduct the subject of complaint, the Law Practitioners Act 1982 was in force for disciplinary issues involving those persons working in the legal profession.

[2] The Law Practitioners Act 1982 was repealed as at 1 August 2008, and was replaced on that date by the Lawyers and Conveyancers Act 2006. Where, as in this case, the conduct complained of occurred at a time when the Law Practitioners Act was in force, but the complaint was not made until after the repeal of that Act, any disciplinary process is subject to transitional provisions contained in the Lawyers and Conveyancers Act 2006.

[3] Under those transitional provisions certain conditions are applied, which affect both jurisdiction and penalty in such cases. The provisions reflect well established principles that newly created offences should not apply retrospectively, and that any sanction imposed reflects a penalty available at the time the conduct complained of occurred, rather than at the time any charge is brought or proven.

[4] In the context of the charge against Mr XXXX, we have to consider these transitional provisions. Section 351 Lawyers and Conveyancers Act 2006 raises some preliminary jurisdictional issues. First, we have to be satisfied that Mr XXXX's conduct occurred within the time limit prescribed for bringing a charge in respect of that conduct, and second, we have to be satisfied that his conduct could have been the subject of disciplinary proceedings against him under the Law Practitioners Act if the complaint had been made under that Act.

## Section 351

[5] Section 351 Lawyers and Conveyancers Act provides (so far as relevant):

- (1) *“ If a ... former employee of a lawyer is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the complaints service established under section 121(1) by the New Zealand Law Society.”*
- (2) *“Despite subsection (1), no person is entitled to make under this Act –*
  - (a) *.....*
  - (b) *a complaint in respect of –*
    - (i) *conduct that occurred more than 6 years before the commencement of this section;”*

[6] The provisions of s.351 are intended to ensure that no person is charged under the Lawyers and Conveyancers Act in respect of conduct occurring prior to the repeal of the Law Practitioners Act where that conduct could not have been the subject of proceedings under the Law Practitioners Act, or where the conduct is too historical.

[7] We note at this point that the jurisdictional issues raised by s.351 are referenced to the ability of a person to make a complaint. Section 351(1) states that *“a complaint about that conduct may be made”* if the conduct could have been the subject of proceedings under the Law Practitioners Act. Section 351(2)(b)(i) refers to a person not being *“entitled to make.....a complaint”* where the conduct occurred more than 6 years prior to the commencement of s.351, which was 1 August 2008.

[8] The jurisdictional tests to be applied under s.351 are whether the conduct could have been the subject of disciplinary proceedings if the complaint had been made under the Law Practitioners Act, and whether the conduct complained of occurred within the prescribed time limit. If the conclusion is, after applying those tests, that there is no jurisdiction, the complaint cannot be the subject of further process.

[9] The effect of s. 351 is to ensure that the complaint made will have no standing for the ongoing process of proceeding with a charge if an initial investigation finds there is a jurisdictional issue. It does not prevent an actual complaint being lodged and the required jurisdictional enquiry being made. There has to be, of course, an actual complaint to start the process that will enable a conclusion to be reached on jurisdictional issues under s.351. The reference in s.351 to the circumstances in which a complaint may be made is a proxy for the jurisdiction issues noted in that section, not a bar to an actual complaint being made and an enquiry being initiated.

[10] For Mr XXXX it was submitted that his conduct could not have been the subject of charges commenced against him under the Law Practitioners Act, and that one instance of his conduct was outside the allowed period of six years prior to 1 August 2008. As a consequence, it was claimed that there was no jurisdiction for this Tribunal to hear the charge or to consider particulars that were out of time.

[11] To reach a view on whether Mr XXXX could have faced a charge under the Law Practitioners Act, we have to consider whether Mr XXXX's conduct was of a nature that could have been the subject of proceedings under the Law Practitioners Act 1982. If it could not have been the subject of such proceedings, then s.351 Lawyers and Conveyancers Act would operate to deny jurisdiction.

[12] We note that there was very limited provision in the Law Practitioners Act for dealing with non-practitioner employees. For such a person to have faced proceedings under that Act, the conduct complained of had to fall within the very narrow scope of the disciplinary provisions in that Act applicable to non-practitioners.

[13] The extensive list of powers given to a tribunal under the Law Practitioners Act in relation to a practitioner facing charges was not replicated in respect of non-practitioner employees.<sup>1</sup> For non-practitioner employees, powers and available scope of action were extremely restricted, as shown by the limited powers and orders that may have been made, encapsulated in s.114. That was the only section in the Act specifically addressing non-practitioner employee conduct, in marked contrast to the extensive provisions applicable to practitioners.

---

<sup>1</sup> See the extensive list of powers and scope of action in Ss. 106 and 112 Law Practitioners Act 1982 for dealing with practitioners.

[14] Section 114 is directed to a serious misconduct charge, which, if involving a practitioner, would have made that person liable to be struck-off. No other type of charge for non-practitioner employees is addressed by the Law Practitioners Act. The gravity of offending required for such a non-practitioner employee is also reflected in the limited, but severe, sanctions affecting continued employment where found to have been guilty of such offending.<sup>2</sup> The Law Practitioners Act makes no provision for any other penalties which a tribunal may have imposed in respect of a non-practitioner employee, again indicated limited scope for dealing with non-practitioner employees and in marked contrast to the wide range of penalties specified for dealing with practitioners.

[15] Given the extent of prescription for practitioner disciplinary matters contained in the Law Practitioners Act, we do not consider there was any inherent jurisdiction bestowed on a tribunal by that Act which would have allowed a tribunal more flexibility in dealing with non-practitioner employees than is provided by s.114.

[16] To the contrary, we consider that the Law Practitioners Act 1982 purposely limits control of and sanctions against non-practitioner employees to serious matters only. Presumably this was for policy reasons related to the way professional regulatory controls should affect non-practitioners considered appropriate 30 years ago, although not now, given the manner in which the Lawyers and Conveyancers Act 2006 deals with employee discipline.

[17] In summary, under the Law Practitioners Act there were limited powers and scope of action in respect of non-practitioners given to those charged with regulating professional conduct. For a complaint about a non-practitioner's conduct to have resulted in proceedings being commenced under the Law Practitioners Act, that conduct had to fall within the framework provided by s.114. There was no other provision in the Act, or inherent jurisdiction, available to a tribunal regarding non-practitioners.

[18] The test in s.351 Lawyers and Conveyancers Act is whether "*proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act*" for

---

<sup>2</sup> See s.114(2) Law Practitioners Act 1982

the conduct the subject of the complaint. In applying that test we have considered both the determination of the Standards Committee (which we shall refer to later), and the processes and procedures that would have been followed by a complaints committee under the Law Practitioners Act if the complaint about Mr XXXX's conduct had been made under that Act.

[19] The process under the Law Practitioners Act, following a complaint by a member of the public about the conduct of a non-practitioner employee, would normally have involved a complaints committee of the relevant District Law Society undertaking an initial inquiry into the allegations. The complaints committee would have investigated the matter and formed an opinion as to whether the conduct complained of was of "*sufficient gravity to warrant the making of a charge...*"<sup>3</sup>

[20] Where the complaints committee reached such a conclusion, it would then have made a charge against the person concerned before the New Zealand Disciplinary Tribunal. Any charge against a non-practitioner employee could only be made before the New Zealand Disciplinary Tribunal.<sup>4</sup>

[21] This requirement, to make the charge before the New Zealand Disciplinary Tribunal, reflects the limited nature of the disciplinary provisions of the Law Practitioners Act applicable to non-practitioner employees. So far as such employees were concerned, only serious matters were subject to the auspices of the Law Society under the Law Practitioners Act, as noted in s.114, which deals with non-practitioner employee conduct.

[22] That section required that a charge against an employee must relate to conduct "*...that would in the case of a practitioner render him liable to have his name struck off the roll...*", and indeed, the New Zealand Disciplinary Tribunal was specifically empowered to inquire into such a charge on that basis.<sup>5</sup> Without such serious misconduct, there was no other type of charge available under the Law Practitioners Act, nor any penalty regime, other than as contained in s.114, which has significant penalties appropriate only to serious misconduct.

---

<sup>3</sup> Section 101(1) and (2) Law Practitioners Act 1982

<sup>4</sup> Section 101(2)(b) Law Practitioners Act 1982

<sup>5</sup> Section 114(1) Law Practitioners Act 1982

[23] We have also considered what is meant by “*proceedings*” being “*commenced*” in Section 351 Lawyers and Conveyancers Act. In our view, reference to the commencement of proceedings in s.351 must refer to dealing with a complaint, after completing the initial investigation under s.101(1) Law Practitioners Act, by resolving to lay charges, or the actual laying of charges.

[24] Proceedings are not commenced for the purposes of s.351 by a complaints committee simply undertaking the preliminary investigation necessary to allow the formation of an opinion as to whether charges would be laid. If that was not the case, s.351 would be ineffectual, as that would suggest proceedings were effectively considered commenced as soon as a complaint had been made and an investigation begun as to whether the complaint had any substance and should be the subject of an appropriate charge.

[25] To give effect to the principles on which s.351 is based, commencement of proceedings under the Law Practitioners Act, in the context of that section, must mean the decision to lay, or the actual laying of a charge. Whether it is the determination to lay the charge, or the actual laying of charge, is not critical to the analysis. The pivotal issue is that proceedings are not commenced until after the required initial investigation by the complaints committee has been completed and a view reached by that committee to proceed with charges.<sup>6</sup>

### ***Mr XXXX's situation and Section 351***

[26] In Mr XXXX's case the specific questions to be asked regarding s.351 jurisdictional issues are;

[a] Did Mr XXXX's conduct occur more than 6 years prior to 1 August 2008?<sup>7</sup>

[b] Could Mr XXXX's conduct have resulted in proceedings being commenced against him under the Law Practitioners Act?<sup>8</sup>

---

<sup>6</sup> We note also that s. 19(2) Interpretation Act 1999 makes a clear distinction between undertaking an investigation and commencing proceedings in the context of offences or breaches of a repealed enactment.

<sup>7</sup> Section 351(2)(b)(i) Lawyers and Conveyancers Act 2006

<sup>8</sup> Section 351(1) Lawyers and Conveyancers Act 2006

[27] We would have expected these questions to have been resolved by the Standards Committee, as part of its investigation responding to the complaints made. For the reasons we note, these matters remain at large, and as part of Mr XXXX's response to the charge laid against him he has raised these jurisdictional issues. Submissions relating to jurisdiction were made at the commencement of the hearing. In respect of those submissions the Tribunal reserved its position, and elected to hear the evidence. We now address the jurisdictional issues.

[28] The charge against Mr XXXX relies on two particulars, detailing conduct in July 2002 and conduct in May 2004. He has been charged with unsatisfactory conduct in respect of those particulars. The first particular relates to conduct said to have occurred in July 2002, and the second particular relates to conduct said to have occurred in May 2004. Both particulars relate to Mr XXXX signing mortgage documents as a witness, on the basis that he was present at the time and saw the mortgagors sign those documents, when in fact he was not present, and did not see the documents signed on either occasion.

[29] The mortgagors, who were clients of Mr XXXX, were the same people on each occasion, and by arrangement with them Mr XXXX had posted the mortgage documents to them, asked them to sign, and had then witnessed the documents when they were sent back to him by his clients after they had signed. While Mr XXXX has acknowledged that he did not see the mortgagors sign the mortgage documents in question, he says that not only should the charge fail on its merits, but also that it has not been properly brought and the Tribunal has no jurisdiction to hear and determine the charge.

[30] In respect of his July 2002 conduct, Mr XXXX said that any complaint in respect of that conduct was statute-barred. This was, he said, as a result of the passage of time, and those particulars could not be considered when determining the charge because of s.351(2)(b)(i) Lawyers and Conveyancers Act. The July 2002 conduct complained of was more than 6 years prior to 1 August 2008, the date s.351 commenced.

[31] In respect of his May 2004 conduct, Mr XXXX claimed that his conduct could not have been the subject of proceedings of a disciplinary nature under the Law



Practitioners Act 1982. It was contended for Mr XXXX that the complaint could not have resulted in a charge under the Law Practitioners Act in the particular circumstances of his conduct. Accordingly, he submitted, no hearing and determination was possible under the Lawyers and Conveyancers Act as a result of the operation of s.351(1) of that Act.

[32] So far as the complaint relating to Mr XXXX's July 2002 conduct is concerned, this discussion can be brief. Any complaint about pre 1 August 2008 conduct, which is made after that date, must be made within the time limit prescribed by s.351(2)(b)(i) Lawyers and Conveyancers Act. That is, conduct which occurred more than 6 years prior to 1 August 2008 (the date Lawyers and Conveyancers Act came into force) may not be the subject of a complaint under that Act. Nor may it be the subject of a complaint under the Law Practitioners Act.<sup>9</sup> Consequently the Standards Committee had no jurisdiction to process the complaint by laying a charge so far as it related to Mr XXXX's July 2002 conduct.

[33] The reason for the complainant's delay in making the complaint about Mr XXXX signing the mortgage as a witness in July 2002, when Mr XXXX was not actually present to see her sign the mortgage, is not clear. Whatever the reason, a significant period of time has elapsed since the event, without any complaint being made. The particulars referred to in the complaint cannot now be considered as part of the determination of the charge laid, because of the statutory time limit that applies.

[34] Accordingly, we agree that the Tribunal may not consider Mr XXXX's July 2002 conduct when considering the charge of unsatisfactory conduct against him. We record that counsel for the Standards Committee properly conceded that s.351 Lawyers and Conveyancers Act precluded this conduct being included as a particular of the charge.

[35] So far as Mr XXXX's May 2004 conduct is concerned, the issue of the conduct complained of being out of time does not arise, but Mr XXXX says that proceedings of a disciplinary nature could not have been commenced against him under the Law Practitioners Act 1982 in respect of the conduct the subject of complaint.

---

<sup>9</sup> Section 350 Lawyers and Conveyancers Act 2006

[36] There are two parts to Mr XXXX's argument on this point. First, Mr XXXX says that he could not have been charged under the Law Practitioners Act because the only sanction against a non-practitioner in that Act required his conduct to be such that if he had been a practitioner he would have been liable to be struck-off. In his submission, his conduct was not at that level. Second, Mr XXXX says that as a former employee of a practitioner he could not have been the subject of a complaint under the Law Practitioners Act, he had to be a current employee. We will address this second part of his argument first.

*Not an employee at the time of complaint*

[37] Mr XXXX submitted that at the time the complaint was made, and continuing up to the date of the hearing before us, he no longer worked as a legal executive. He said his status was one of a former employee, and that under the relevant sections in the Law Practitioners Act 1982, a complaint could only be made against "*an employee of a practitioner*",<sup>10</sup> and a complaints committee could only make a charge if the complaint was against "*a person employed by a practitioner*".<sup>11</sup> His suggestion was that the wording of the relevant sections meant that he had to be employed as a legal executive at the time the complaint was made, and in fact he was not so employed at that time.

[38] He compared the construct of these sections in the Law Practitioners Act with similar sections in the Lawyers and Conveyancers Act 2006, which specifically refer to the use of the complaints procedure in that Act in respect of the conduct of a non-practitioner, who is an employee, or a former employee, of a practitioner.<sup>12</sup> As we understood this line of argument, the fact that the Law Practitioners Act 1982 referred to complaints and charges made against an "*employee of a practitioner*", and the Lawyers and Conveyancers Act 2006 referred to complaints and charges against both "*employees*" and "*former employees*", indicated that persons who were no longer employees at the time of a complaint under the Law Practitioners Act could not be the subject of a complaint, and charged under that Act.

---

<sup>10</sup> Section 98 Law Practitioners Act 1982

<sup>11</sup> Section 101(2)(b) Law Practitioners Act 1982

<sup>12</sup> Section 132 Lawyers and Conveyancers Act 2006, and see also Disciplinary Tribunal functions, charges that may be brought, and orders that may be made under s.227(a), S241, and s.242(1)(h) respectively, of that Act

[39] The wording of the Law Practitioners Act, it was submitted, indicated that it only applied to complaints about persons who were employees at the time of the complaint. The suggestion was that the expansion of the provisions to former employees in the Lawyers and Conveyancers Act 2006 was deliberate, to ensure the disciplinary provisions caught those former employees, as well as current employees.

[40] We do not accept this submission. If it reflected a correct statement of the application of the Law Practitioners Act, the simple act of resignation by an alleged wrongdoer prior to any formal complaint would bring to an end any right to pursue that person for conduct that was deserving of sanction under the disciplinary provisions of the Act. That would be quite contrary to the purpose and intention of the Law Practitioners Act. It also overlooks specific references in the Act which indicate that the jurisdictional test is whether the person concerned was an employee of a practitioner at the time of the conduct, not at the time of the complaint.<sup>13</sup>

[41] In respect of complaints under s.98 Law Practitioners Act, which refers to complaints about the conduct “*of an employee of a practitioner*”, as distinct from own motion matters under s.99, which refers to conduct “*while employed by*” a practitioner, we see no basis for treating conduct complained of under s.98 differently from conduct to be investigated under s.99 of the Act. Such an approach would suggest that there was a dual jurisdictional standard for identical conduct, depending on the originator of the investigation.

[42] We do not uphold the submission that the Law Practitioners Act 1982 required Mr XXXX to have been an employee at the time of the complaint. We find that the requirement is no more than that Mr XXXX must have been an employee of a practitioner at the time of the conduct complained of, as he clearly was at the relevant time. Accordingly this part of Mr XXXX’s argument in support of his submission that the charge could not have been commenced under the Law Practitioners Act is dismissed. We find that the test for jurisdiction on this point is that Mr XXXX had to be an employee at the time of the conduct, not at the time of the complaint, and that test was met.

---

<sup>13</sup> See s.99(b) and s.114(1) which both refer to conduct “*while employed by (a practitioner)*”.

*Not liable to be struck-off*

[43] That leaves us to consider the first part of the argument advanced for Mr XXXX in support of his submission that proceedings for his conduct could not have been commenced against him under the Law Practitioners Act 1982.

[44] In effect, he contended that under the Law Practitioners Act a disciplinary charge against a non-practitioner employee was limited to a charge of serious misconduct of the nature referred to in s.114. Mr XXXX's position was based on the premise that his conduct was not sufficiently serious that if found guilty he would have been liable to be struck-off, if he had been a practitioner, as required by s.114. Consequently, he said, proceedings could not have been commenced against him under the Law Practitioners Act for his conduct in this instance.

[45] Mr XXXX noted that any striking-off of a practitioner under the Law Practitioners Act 1982 required that, by reason of the conduct concerned, at least five members of the tribunal hearing the charge were of the opinion that the practitioner concerned was not a fit and proper person to practise as a barrister and solicitor.<sup>14</sup> Mr XXXX claimed that supported his submission that there was a very high threshold for misconduct resulting in striking-off, which his conduct did not meet.

[46] He also referred to *Bolton v Law Society*,<sup>15</sup> which is accepted as a leading precedent regarding the nature of conduct likely to lead to striking-off. Mr XXXX submitted that applying the principles of that case, his actions were not at a level that would have justifying the ultimate professional sanction if he had been a practitioner.

[47] Mr XXXX submitted that he could not have been charged under the Law Practitioners Act, as his conduct did not reach the threshold of the serious misconduct needed for striking-off, and that was the only type of conduct that could be the subject of a charge against a non-practitioner. As a consequence the

---

<sup>14</sup> Section 113 Law Practitioners Act 1982

<sup>15</sup> [1994] 2 All ER 486

precondition that proceedings could have been commenced against him under the Law Practitioners Act for his conduct, contained in s.351 Lawyers and Conveyancers Act 2006, was not met.

[48] The Standards Committee submitted that the specific requirement of s.351 is only that it would have been possible to bring disciplinary proceedings against Mr XXXX under the Law Practitioners Act for his conduct. The issue of whether misconduct existed was a conclusion on the outcome of a charge, and was not relevant to the issue of whether it was possible to lay charges in the first instance.

[49] The Standards Committee said that the complaint made about Mr XXXX related to conduct that could have been the subject of a complaint made under s.98 Law Practitioners Act. It said that in such a case the relevant complaints committee would have been entitled to inquire into the allegation under s.101 of that Act, and following its inquiry that committee would have been entitled to form such opinion as it considered appropriate about the complaint. That could have included an opinion that the case was of sufficient gravity to warrant the making of a charge, and a charge could have been laid under s.114 before the New Zealand Disciplinary Tribunal, the Standards Committee submitted.

[50] The Standards Committee's position was that an assessment of the likely outcome of any such proceedings did not have to be made in this case, simply that the proceedings could have been commenced, and that satisfied the s.351 jurisdictional issue. In saying this, the Standards Committee submitted that it was not a matter of concluding that a complaints committee would have reached a view that there was misconduct which should be the subject of a charge, to judge whether the jurisdictional threshold established by s.351 was met, but that a complaints committee could have reached that view.

[51] In our view, a complaints committee under the Law Practitioners Act, if faced with the complaints made against Mr XXXX, would have had to consider and follow the specific provisions of both s.101 and s.114 Law Practitioners Act as part of its investigation and determination. This would have required the complaints committee to reach a view on the seriousness of the conduct complained of, and, effectively, to determine that the conduct was such that it was a matter that could have resulted in

striking-off if proven against a practitioner. It would have had to have formed an opinion that the case was of sufficient gravity to warrant the making of a charge before the New Zealand Disciplinary Tribunal.<sup>16</sup>

[52] Section 101(2) Law Practitioners Act provided, so far as relevant, that after a complaints committee has inquired into a complaint against a non-practitioner employee;

*“If in the opinion of the ... committee the case is of sufficient gravity to warrant the making of a charge the ... committee shall... where the complaint is against a person employed by a practitioner, make a charge against him before the New Zealand Disciplinary Tribunal.”*

and s.114 provided, so far as relevant;

*“Where a charge has been made by ... a complaints committee against any person that he, while employed by a practitioner, has been guilty of conduct that would in the case of a practitioner render him liable to have his name struck off the role, the New Zealand Disciplinary Tribunal shall have power to inquire into the charge.”*

[53] In exercising its prosecutorial discretion under s.101 of the Act, a complaints committee could not have ignored the specific requirement of s.114 Law Practitioners Act, the only disciplinary provision applicable to a non-practitioner employee. Section 114 requires that in the case of a charge arising out of a complaint about non-practitioner employee conduct, the conduct complained of must be of such a serious nature that striking-off would have been possible if the employee had in fact been a practitioner. That is the only type of charge a complaints committee could lay against an employee under s.101 Law Practitioners Act, as the Act had limited and restrictive provisions regarding non-practitioner employees, in marked contrast to the provisions regarding practitioners.<sup>17</sup>

---

<sup>16</sup> Section 101(2) Law Practitioners Act 1982

<sup>17</sup> See the discussion at paragraphs 12 – 17 regarding the narrow scope of application against non-practitioners.

[54] The Standards Committee submitted that ss.101 and 114 should not be conflated. We consider that the import of the two sections requires that they be conflated, to the extent that in reaching an opinion on making a charge of the nature noted in s.114, the only type of charge available for non-practitioner employee disciplinary matters, the requirements of s.114 must coincide with the rationale for the opinion formed under s.101. The content of s.114 cannot be ignored at the time a complaints committee is required to decide and formulate a charge against a non-practitioner employee.

[55] The Standards Committee noted that the exercise it went through following the complaint against Mr XXXX enabled it to form an opinion that the matter should be the subject of a charge. It said that the conclusion a complaints committee may have reached if dealing with the complaint under the Law Practitioners Act could never be sure, but the conclusion of the Standards Committee to commence proceedings against Mr XXXX in this case was not unreasonable. It submitted that this outcome was an indicator that proceedings could have been brought under the Law Practitioners Act by a complaints committee in similar circumstances.

[56] We consider the true test as to whether proceedings could have been brought against Mr XXXX under the Law Practitioners Act was whether his conduct warranted a charge of serious misconduct of a nature that would have made a practitioner liable to be struck-off.

[57] The Standards Committee said that the charge against Mr XXXX resulted from conduct that could have attracted a charge of the type anticipated by s.114 Law Practitioners Act. It said that whether the New Zealand Disciplinary Tribunal considered it was empowered to hear a charge made under s.114 (relating to whether there was a striking-off issue) would have been something for that tribunal to consider under s.114 before commencing its inquiry into the charge laid by the complaints committee. That would have occurred after the charge which commenced the proceedings had been laid, not as a precursor to commencement of those proceedings, so s.351 would be satisfied in that regard, it said.

[58] In our view, for proceedings to have been commenced by the laying of a charge (or perhaps by the determination to lay a charge), the complaints committee

concerned would have had to have reached a view that the conduct was of sufficient gravity to warrant a charge encapsulating those matters, as required by s.101(2)(b) of the Law Practitioners Act. Intrinsic to the formation of that view would have been an opinion that the conduct concerned was of a character that reflected the nature of the misconduct dealt with by s.114 Law Practitioners Act.

[59] We note that the Standards Committee in this case has determined to charge Mr XXXX with an offence less than misconduct. It acknowledged in its submissions that unsatisfactory conduct was something less than misconduct.<sup>18</sup> That approach to the charge against Mr XXXX by the Standards Committee leaves us in something of a quandary, as it is our view that for Mr XXXX to have faced a charge under the Law Practitioners Act, serious misconduct was required as an essential element of his conduct and the charge.

[60] The Standards Committee has determined there is no misconduct, and has charged Mr XXXX with unsatisfactory conduct. As a consequence we need to consider ourselves, as a threshold matter under s.351, whether Mr XXXX's conduct indicates serious misconduct which could have been the subject of proceedings under the Law Practitioners Act.

[61] On the facts of this case, we do not see any evidence of serious misconduct. We consider the position of the Standards Committee in reaching a view that there was no serious misconduct by Mr XXXX, and not charging him with misconduct, to be correct. In our view, no reasonable committee could have come to the view that Mr XXXX's conduct came near the serious misconduct threshold necessary for striking-off, if a practitioner had been involved.

[62] There is no doubt that conduct of this type can have serious consequences. *Frazer v Walker*<sup>19</sup> is a prime example, and we note also the rationale for the need for absolute integrity in the witnessing of Land Transfer documents as contained in the submissions of the Standards Committee. There is no question that Mr XXXX's conduct was inappropriate, but it is not misconduct of the type referred to in s.114 Law Practitioners Act 1982.

---

<sup>18</sup> Paragraph 4.3 of Standard Committee's submissions, and compare also s.241(a) with 241(b) Lawyers and Conveyancers Act 2006.

<sup>19</sup> [1966] NZLR 337



[63] As we understand the Standards Committee submissions, it considers that to take account of s.351 Lawyers and Conveyancers Act 2006 the simple enquiry to be made is;

*“Could proceedings of a disciplinary nature have been commenced against Mr XXXX, under the Law Practitioners Act, in respect of the conduct complained of and said to have occurred in July 2004?”*

[64] While that enquiry reflects the wording of s.351 Lawyers and Conveyancers Act, we think that the enquiry has to involve more than the simple proposition that proceedings of a disciplinary nature *“could”* have been commenced, in that it would have been possible to commence them, irrespective of whether well-founded or not. The policy and purpose of the provision must be to ensure that a person does not face proceedings under the Lawyers and Conveyancers Act for conduct which would not have resulted in proceedings being commenced under the Law Practitioners Act. It is not a matter of finally determining a charge in coming to this view, but considering whether conduct occurring at a time when the Law Practitioners Act was in force could properly have been the subject of a charge under that Act.

[65] The fact of the matter is that if these proceedings were under the Law Practitioners Act, Mr XXXX would not have faced a charge, as it would have had to have been based on the type of conduct referred to in s.114. His conduct complained of does not reach the threshold of serious misconduct where striking-off becomes realistic, and he has not been charged with such conduct. There was no lesser sanction provided by the Law Practitioners Act, under which proceedings could have been commenced. Proceedings could only have been commenced against Mr XXXX for serious misconduct. Neither the facts, nor the view of the Standards Committee itself, indicate there was serious misconduct of the level required to properly commence proceedings against a non-practitioner employee under the Law Practitioners Act.

[66] In summary, while an investigation would no doubt have occurred under s.101 Law Practitioners Act following a complaint, any reasonable committee investigating the complaint at that time would have appreciated that for it to lay a charge with the

New Zealand Disciplinary Tribunal it had to consider that such a charge was warranted because of its gravity. That was the statutory requirement.<sup>20</sup> The conduct concerned was required to be of such a nature as to render a non-practitioner employee liable to be struck off, if a practitioner. That arises as a consequence of the type of charge that would follow having regard to s.114. The tribunal under the Law Practitioners Act was specifically empowered to deal with non-practitioners where that was the nature of the charge before it.

[67] The report on the complaint about Mr XXXX considered by the Standards Committee noted that under the Law Practitioners Act 1982 the sanctions available in respect of an employee who was not a practitioner were very limited. It recorded that the Law Practitioners Act dealt only with serious misconduct of employees, and that this had a linkage to the need for employee matters to be of sufficient gravity to warrant a charge to the New Zealand Disciplinary Tribunal.

[68] Section 114 is the only section dealing with disciplinary matters for non-practitioner employee conduct under the Law Practitioners Act, unlike the range of charges and sanctions available under that Act for dealing with practitioner conduct. As a consequence we consider that a complaints committee, in the circumstances surrounding a complaint about conduct of the nature of Mr XXXX's conduct, could not have properly found that the making of a charge of the nature referred to in s.114 was warranted by that conduct.

[69] As we have already noted, when the Standards Committee considered the complaint against Mr XXXX initially, it had a view that the offence was not one that would have involved a practitioner in being liable to be struck off if guilty of the conduct complained about. It laid a charge of unsatisfactory conduct rather than misconduct. Our own view of the facts is that they did not indicate serious misconduct of the type that could have resulted in a practitioner being struck off, being the nature of the conduct required in s.114.

[70] The regime to deal with employees under the Law Practitioners Act required a charge of serious misconduct. For there to be any possibility that the matter could have been the subject of proceedings under the Law Practitioners Act, the charge

---

<sup>20</sup> Section 101(2) Law Practitioners Act 1982

against Mr XXXX would have had to have been misconduct. Neither the charge laid by the Standards Committee, nor the particulars relied on, address the serious misconduct required by the Law Practitioners Act.

[71] There is also support for the view we take regarding s.351 denying jurisdiction in this case in other parts of the Lawyers and Conveyancers Act;

- [a] If the charge against Mr XXXX had been the subject of a complaint before the repeal of the Law Practitioners Act, and had not been disposed of at the time of such repeal, this Tribunal may have been required to hear the charge under the transitional provisions contained in ss.353 and 358 Lawyers and Conveyancers Act. Under those provisions this Tribunal has the same duties and powers as the New Zealand Disciplinary Tribunal had under the Law Practitioners Act, and any charges heard are to be continued and completed as if the Law Practitioners Act had not been repealed.
- [b] Because the charge made against Mr XXXX is less than serious misconduct, this Tribunal would not have had jurisdiction to deal with the charge in place of the former tribunal because of the limits to the former tribunal's powers to inquire into employee conduct, as indicated by s.114(1) Law Practitioners Act.<sup>21</sup> It would be a perverse result if we could not deal with the charge in place of the former tribunal under ss.353 and 358 Lawyers and Conveyancers Act, but s.351 did not prevent us dealing with the charge where the complaint was delayed until after 1 August 2008.
- [c] Under s.352 Lawyers and Conveyancers Act, this Tribunal may only impose a penalty in respect of Mr XXXX's conduct which could have been imposed on him in respect of his conduct at the time it occurred. Normally there would not be an issue arising from this requirement, where it was a practitioner charged under the Lawyers and Conveyancers Act with

---

<sup>21</sup> Section 114(1) specifically empowers the tribunal to enquire into the serious misconduct required under the section. While that is empowering, its corollary is that in the absence of serious misconduct the tribunal would not have jurisdiction over non-practitioner conduct, especially in the absence of any other provisions in the Law Practitioners Act dealing with non-practitioner discipline.

conduct occurring prior to 1 August 2008. That is because where a practitioner is the subject of a charge, the relevant tribunal had wide powers under the Law Practitioners Act to hear and determine a range of matters,<sup>22</sup> and it also had available a large range of orders it could make after inquiring into a charge.<sup>23</sup>

[d] In Mr XXXX's case, where the charge relates to non-practitioner employee conduct, there is only one type of charge available,<sup>24</sup> and the sanctions that may be applied by the tribunal in respect of a charge against a non-practitioner employee are limited to those applicable to the employee equivalent of striking-off; banning employment by a practitioner, either absolutely or subject to special conditions.<sup>25</sup> None of those would be appropriate to address the conduct complained of in this case, nor the charge which was laid against him, unsatisfactory conduct.

[72] In our view Mr XXXX is facing a charge that would not have arisen from his conduct under the Law Practitioners Act. The only charge available to deal with non-practitioner disciplinary matters under that Act is one of serious misconduct. In the absence of conduct at that level there is no sanction in the Law Practitioners Act against a non-practitioner. There is an acceptance by the Standards Committee itself that serious misconduct was not involved.

[73] In the absence of an opinion of the Standards Committee that there was serious misconduct by Mr XXXX, and a consequential determination to lay a misconduct charge, we have considered what a reasonable complaints committee could have determined if the complaint had been under the Law Practitioners Act. We consider a complaints committee could not have properly found the conduct complained of to be of such a serious nature (involving liability to be struck-off if a practitioner) that it would have allowed a charge under the Law Practitioners Act. Such a finding could not have been properly made in respect of the conduct the subject of complaint. We are satisfied that no charge would have been commenced, as the conduct did not

---

<sup>22</sup> See Ss.106(1) and (3) and 112(1) Law Practitioners Act 1982

<sup>23</sup> See Ss 106(4) and 112(2) Law Practitioners Act 1982

<sup>24</sup> Serious misconduct of a nature that would have rendered the employee liable to be struck-off if a practitioner – s.114(1) Law Practitioners Act 1982

<sup>25</sup> Section 114(2) Law Practitioners Act 1982.

reach the required level of serious misconduct to allow the disciplinary provisions against non-practitioners under the Law Practitioners Act to operate.

### ***Other Matters***

[74] A charge of unsatisfactory conduct did not exist under the Law Practitioners Act 1982, and the appropriateness of bringing such a charge under the new Act is questionable having regard to the tenor of s.351 Lawyers and Conveyancers Act 2006. We note also that such a situation raises a question of principle under the Bill of Rights Act,<sup>26</sup> to similar effect.

[75] The Standards Committee has found Mr XXXX guilty of unsatisfactory conduct, and it has then referred the matter to this Tribunal by laying a charge for our consideration. A finding of unsatisfactory conduct under s.152(2)(b) Lawyers and Conveyancers Act cannot sit with a determination to have the matter considered by the Tribunal under s.152(2)(a) Lawyers and Conveyancers Act. A similar matter, also involving the Waikato Bay of Plenty Standards Committee 2, was recently reviewed by the Legal Complaints Review Officer, who noted that it was not appropriate for the Committee to make a finding of unsatisfactory conduct and then to put the matter before the Tribunal to consider the charge and penalty.<sup>27</sup> We agree with that position.

[76] We do not need to consider these two points further, given the conclusion we reach in this decision regarding jurisdiction based on the application of s.351 Lawyers and Conveyancers Act. We record that these matters may themselves have justified the Tribunal taking the view that it had no jurisdiction to hear the charge, either because no such charge as unsatisfactory conduct existed at the time of the conduct complained of, or, that the complaint had already been determined by the Standards Committee.<sup>28</sup>

---

<sup>26</sup> See s.26 Bill of Rights Act 1990

<sup>27</sup> *Parlane v New Zealand Law Society* LCRO 133/2009 issued 11 November 2009

<sup>28</sup> The committee's determination, following its hearing on the papers of 10 July 2009, which was exhibited as part of the evidence supporting the charges, notes that the committee "*has determined that there has been unsatisfactory conduct on the part of (Mr) XXXX and that the complaint and any issues involved in the complaint, be considered by the Disciplinary Tribunal.*"

[77] For Mr XXXX it was also submitted that as Mr Z, one of the signatories to the mortgage he had witnessed, had not complained, the charge was a nullity, or that the Tribunal had no power to hear the complaint. The complaint against Mr XXXX's conduct arose from the improper witnessing of Ms Y's and Mr Z's respective signatures on a mortgage. The complaint was made by Ms Y only. The particulars recited to support the charge of unsatisfactory conduct noted that both Mr Z and Ms Y were shown as having their signatures witnessed by Mr XXXX as mortgagors. There is no requirement that both mortgagors lodge a complaint – Ms Y's complaint is sufficient to start the disciplinary process. Mr XXXX has admitted the facts. We see no basis for this submission, and it is not upheld.

### ***Decision***

[78] The complaint regarding conduct said to have occurred in July 2002 is out of time under s.351(2)(b) Lawyers and Conveyancers Act 2006, so the particulars relating to that conduct cannot be considered in determining the charge against Mr XXXX, as noted in paragraphs 32 – 34 above.

[79] The fact that Mr Z had made no complaint does not affect the validity of the charge, as noted in paragraph 77 above.

[80] We consider the requirement of s.351 Lawyers and Conveyancers Act, that proceedings could have been commenced under the Law Practitioners Act in respect of this conduct, has not been satisfied. In reaching this conclusion we have had regard, in particular, to the following;

- [a] The only jurisdiction given under the Law Practitioners Act, in respect of non-practitioner professional discipline, was for matters of serious misconduct requiring a charge of the nature contemplated by s.114 Law Practitioners Act. There was no alternative charge that could have been commenced under the Law Practitioners Act in the absence of serious misconduct by a non-practitioner employee;

- [b] The provisions of s.114 Law Practitioners Act indicate that the conduct complained of must support a charge of serious misconduct of the type that would make a practitioner liable to be struck-off. The Standards Committee in this case has charged Mr XXXX with unsatisfactory conduct only. It had a view that Mr XXXX's conduct did not reach the threshold that would have been required to commence proceedings involving serious misconduct. We agree that it does not reach that threshold by a considerable margin;
- [c] The requirement that in exercising its discretion under s.101(2) Law Practitioners Act, a complaints committee could only have formulated a charge of the type set out at s.114 of that Act (involving conduct justifying strike-off), which it could not have properly done in our view if faced with the factual background of Mr XXXX's conduct. That was the position implicitly accepted by the fact the Standards Committee limited its charge against him to one of unsatisfactory conduct, acknowledging that there was no misconduct.
- [d] Mr XXXX's conduct complained of could never have supported a charge of serious misconduct. In the absence of an allegation of serious misconduct by the Standards Committee, we do not consider that, on the facts of the case, proceedings could have been commenced against Mr XXXX under the Law Practitioners Act. We note that this finding accords with the Standards Committee's determination to lay an unsatisfactory conduct charge against Mr XXXX, rather than a serious misconduct charge.

[81] We find that s.351 Lawyers and Conveyancers Act 2006 prevents this charge of unsatisfactory conduct being brought because;

- [a] The charge is statute barred in respect of Mr XXXX's 2002 conduct;
- [b] Proceedings of a disciplinary nature could not have been commenced under the Law Practitioners Act in respect of Mr XXXX's 2004 conduct. It was not alleged by the Standards Committee that Mr XXXX's conduct reached the required threshold of serious misconduct necessary to have

allowed the Law Practitioners Act to respond. Our view of the facts is that serious misconduct of the nature required to charge a non-practitioner under that Act is not raised by his conduct, so to that extent we agree with the Standards Committee.

Accordingly we order that the charge be struck out.

[82] The Standards Committee did suggest that Mr XXXX should have addressed the jurisdictional issues by making an application for judicial review of the Standards Committee decision to lay charges, and as he had not availed himself of that course of action it was not for this Tribunal to go behind the decision of the Standards Committee. That may have been an alternative for Mr XXXX, but we are of the view that, in the circumstances of the Standards Committee itself deciding there was no serious misconduct, a pre-requisite for commencing proceedings under the Law Practitioners Act 1982, it is open to this Tribunal to look beyond the determination of the Standards Committee to lay a charge of unsatisfactory conduct, and, to test the jurisdictional issue under Section 351 thus arising.

### **Costs**

[83] For Mr XXXX it was submitted that costs could not be awarded against him because, unlike s.112 Law Practitioners Act which related to charges against practitioners, s.114, relating to charges against non-practitioner employees, had no provision for costs. While it was not clear, we take it from that submission that it was suggesting that costs were part of penalty, and that s.352 Lawyers and Conveyancers Act (which requires that no different penalty could be imposed on Mr XXXX than would have been possible under the Law Practitioners Act 1982) operated to preclude any order for costs against him.

[84] While such a submission overlooks s.129(1)(b) Law Practitioners Act, which entitled a costs order to be made notwithstanding no finding of guilt against the person charged, our view is that a costs order is not affected by s.352 Lawyers and Conveyancers Act in any event.



[85] For the Standards Committee it was submitted that an order for costs should be made under s.249 Lawyers and Conveyancers Act. As we have found that there is no jurisdiction for this Tribunal to hear this charge, because of the operation of s.351 Lawyers and Conveyancers Act, we do not consider it appropriate to make any costs orders which may have otherwise followed a "*hearing*", as referred to in s.249.

### ***Suppression***

[86] This Tribunal made interim suppression orders at the commencement of the hearing, pending our substantive decision. Mr XXXX's name, and that of the law firm which employed him, is now permanently suppressed, and we order accordingly. This suppression order is made not only because of the finding made on jurisdiction, but because of Mr XXXX's wife's ill-health noted in evidence and the possible effect on her of publication of Mr XXXX's name in any report of these proceedings. The names of the mortgagors (including the complainant) and the mortgagee are also permanently suppressed.

Dated at WELLINGTON this 6<sup>th</sup> day of July 2010

---

D J Mackenzie

Chair