NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No: [2010] NZLCDT 8

LCDT 022/09

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **WAIKATO BAY OF PLENTY STANDARDS COMMITTEE**

Applicant

AND **JAMES PARLANE**

Respondent

CHAIR

MR D J Mackenzie

MEMBERS OF TRIBUNAL

Ms S W Hughes QC
Ms A de Ridder
Ms S Gill
Mr O Vaughan

HEARING at HAMILTON on 2 & 3 March 2010

APPEARANCES

Mr P N Collins on behalf of the Waikato Standards Committee
The respondent in person

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] The Lawyers and Conveyancers Disciplinary Tribunal ("Tribunal") was convened to hear charges against Mr Parlane on 2 and 3 March 2010 at Hamilton. There were two charges laid against Mr Parlane, one of misconduct in his professional capacity and one of unsatisfactory conduct in his professional capacity.

[2] The misconduct charge listed eight particulars, and the unsatisfactory conduct charge, one particular. In respect of the misconduct charge the first five particulars related to matters associated with a property purchase and loan regarding a client of Mr Parlane's, a Mrs R. The remaining three particulars in the misconduct charge alleged that Mr Parlane had behaved in an unprofessional and belligerent manner, thereby obstructing the Complaints and the Standards Committee respectively. Finally, the single charge of unsatisfactory conduct was in relation to a letter written on 5 June 2009.

Standard of Proof

[3] The majority decision the Supreme Court in Z v Dental Complaints Assessment Committee [2009] 1 NZLR 1 delivered by McGrath J confirmed that the standard to be applied was that of balance of probabilities, but such was to be applied flexibly:

> *"[112] …The rule that a flexible approach is taken to applying the civil standard of proof where there are grave allegations in civil proceedings remains generally applicable in England. There is accordingly a single civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them. We are satisfied that the rule is long*

established, sound in principle, and that in general it should apply to civil proceedings in New Zealand."

[4] The Court then went on to hold:

"[114] …The flexibly applied civil standard is not only a more straightforward one to apply to disciplinary proceedings. It is also a standard which has conceptual integrity…

[116] …The flexible application of the civil standard will, however, give all due protection to persons who face such (professional disciplinary) proceedings.

[117] That approach continues at present to be applied by occupational disciplinary bodies in Australia, Canada and Hong Kong. It has long been applied without giving rise to difficulties in New Zealand…

[118] Accordingly, we are of the view that in this country there is no good reason for creating an exception covering disciplinary tribunals. A flexibly applied civil standard of proof should be adopted in proceedings under the Act and other similarly constituted disciplinary proceedings in New Zealand unless there is a governing statute or other rule requiring a different standard."

[5] This decision largely upheld the dicta in the Court of Appeal. The reasoning in that case was expressly adopted by the High Court in Complaints Committee No 1 of the Auckland District Law Society v APC [2008] 3 NZLR 105. Her Honour Winkelmann J held:

"[34] … The Tribunal directed itself that the standard to which the charges had to be proved by the complainant was "beyond reasonable doubt". In Z v Complaints Assessment Committee CA 231/05, 22 March 2007, the Court of Appeal

held that the standard of proof in medical and dental disciplinary proceedings was civil in nature and not quasi-criminal. The civil standard applied even though the subject matter of the charge against the dentist in that case was conduct which amounted to criminal offending and for which he had previously been tried before a jury and acquitted.

[35] In the Court's view, the civil standard reflected the nature of the proceedings and the procedure applicable to the dental disciplinary bodies. The civil standard was also apposite given the purpose of the disciplinary proceedings, which was not to punish the practitioner but to ensure appropriate standards of conduct were met and, in so doing, protect the public.

[36] The reasoning in Z seems to us to apply equally to proceedings under the Law Practitioners Act. The purpose of the disciplinary procedures under the Act is to ensure compliance by solicitors and barristers with appropriate and required standards of conduct; Chow v Canterbury District Law Society [2006] 2 NZAR 160 at [18]. By this means the public is protected and the standing of the profession maintained."

[6] To which end, the Tribunal reminds itself that the balance of probabilities applies but on a sliding scale. The more serious the charge and the potential outcome, the greater the evidential burden on the prosecuting authority.

Evidence

[7] Evidence before the Tribunal was given by Mrs R, Mrs Miles, Ms MacDonald and Mr Dixon for the prosecution, with Mr Parlane giving evidence for himself.

[8] The first of the witnesses was Mrs R. Mrs R worked at TMH with Mr Parlane some years ago. It is clear that she regarded Mr Parlane as a

friend and he similarly so regarded her. The two met one day in T, where Mrs R advised that she wished to purchase a new home. Mr Parlane said he would act for her.

[9] Mrs R said that she had made an application for funding to Kiwi Bank as she would require a mortgage to complete the purchase of any property subsequently purchased. In August of 2005 a property came onto the market but pressure was put on Mrs R by the vendor to confirm her willingness to purchase within 24 hours. Finance had not been concluded and Mr Parlane offered to help her purchase of the property by offering her a bridging loan until longer term finance could be arranged. This offer was accepted by Mrs R who then proceeded to acquire the property.

[10] The Agreement for Sale and Purchase in this regard is dated 23 August 2005 and shows the purchaser to be Mr Parlane or his nominee. We further note an ancillary document of Deed of Nomination, signed by Mrs R and her sons, as trustees and prospective purchasers of the property, authorised Mr Parlane to make the purchase on their behalf. This document is dated 25 August 2005.

[11] A purchase price of $178,000.00 was paid for the property. It is clear that there had been discussions between Mrs R and Mr Parlane as to the ownership of this property. Ownership by a trust appears to have arisen from a discussion regarding relationship property issues and Mrs R's ambition to protect her sons' inheritance. Two of her sons lived locally and one son, J, was resident in B. The idea was promoted by Mr Parlane that it would be best if the property was owned by a family trust with Mrs R and each of her sons being beneficiaries. The Tribunal finds that at least in the initial stages this advice was accepted by Mrs R and her sons.

[12] We should add at this stage, that both the investigation and prosecution of this matter were greatly hampered by Mr Parlane's failure to provide copies of documents off his file. Therefore, the prosecution case proceeded on the basis that a Deed of Trust had never been concluded.

At the outset of the hearing into this matter, the Tribunal requested that Mr Parlane furnish documents to the Registrar of the Tribunal for copying to the Tribunal and the prosecution. Mr Parlane acceded to that request and provided the documents. The Tribunal records however that had he done so at an earlier date, then the hearing of this matter would have been able to proceed in a more focussed and orderly fashion, and the particulars alleged regarding use of a family trust may not have been included in the misconduct charge.

[13] Suffice it to say however, despite Mrs R believing that a Family Trust Deed had never been signed, Mr Parlane produced a document dated 7 October 2005 which shows signatures for Mrs R and her sons. Mrs R positively identified her own signature and the signatures of her sons D and L, but was unable to identify J's signature.

[14] Mrs R presented to the Tribunal as a truthful witness, who was somewhat unsophisticated in matters of law and conveyancing and who had clearly devolved all responsibility in this transaction to Mr Parlane. She did agree however that there was at least one meeting at her home with her local sons present, and Mr Parlane, when documents were signed. It seems likely that the Deed of Trust was one of the documents signed at that time.

[15] Mr Parlane produced a letter dated 8 September 2005 addressed to J. Such letter included inter alia:

15.1 Mr Parlane's view, that the formation of a family trust served the purpose of protecting the property from any claim which might have been made by Mrs R's former partner, or in the event of her needing resthome care in her old age.

15.2 Mr Parlane's opinion that, should their mother find herself in a resthome, the property "will be in the name of you three

boys so that at the end of her life, each will inherit a third share as per her intended will".

15.3 A request that J sign various documents and return the documents to Mr Parlane.

15.4 A further comment that there had been no time for Mrs R to make a loan application, but that she was intending to make such an application to Kiwi Bank.

15.5 As a result of the purchase occurring in short order, Mr Parlane confirmed that he had agreed to advance the sum of up to $38,000.00 to her as a personal loan until such time as an application could be made to Kiwi Bank.

[16] We find that J did sign the documents and returned them to Mr Parlane.

[17] Mrs R then settled the sale of her then existing (RS) property, and purchased the property at BP, T.

[18] The evidence thereafter becomes unclear, but at some stage there was a falling out between Mr Parlane and Mrs R over sums being paid by her in reduction of the loan and the terms of the loan. This culminated in Mrs R resolving to take independent legal advice which she took from Mrs Miles, an experienced solicitor and partner in the Te Awamutu law firm of Gallie Miles. Mrs Miles advised us that she first met Mrs R on 23 March 2007.

[19] Mrs Miles confirmed in her affidavit that it was not easy to understand precisely how the purchase of the BP property had occurred. Mrs R complained to Mrs Miles that she had not appreciated that she had a loan with Mr Parlane, but rather thought that she had a loan with Kiwi Bank.

[20] We are satisfied that in fact Mrs R had not concluded her application for finance when the BS property became available. We are satisfied that Mr Parlane did offer to bridge the loan and in fact advanced to her funds sufficient to conclude the purchase. Thereafter, Mrs R made mostly regular payments to Mr Parlane although she mistakenly believed that these payments were being made to Kiwi Bank.

[21] It seems likely that the acquisition of the property by a family trust became derailed when mortgage documents, in favour of Kiwi Bank as security for the longer term finance the trust required to repay Mr Parlane's bridging loan, were sent to JR in A and he had declined to sign them.

[22] The evidence before the Tribunal was that Mrs R went to A in June 2006 to visit her son and believes that she took documents from Mr Parlane with her at that time. Mrs R was able to produce her passport which allowed the Tribunal to confirm that she had not travelled to A in 2005, as she had originally thought, but had travelled in June 2006. There appears to be no dispute that J, a trustee of the family trust, declined to sign the mortgage documents, thus preventing the trust from drawing down the Kiwi Bank loan to repay Mr Parlane.

[23] We note that we have not been provided with any offer of finance to Mrs R dating from 2005 which Mrs R spoke of, but there was evidence of a Kiwi Bank Home Loan Agreement dated 12 May 2006 signed by Mrs R on 16 May 2006. This Loan Agreement was addressed to all four trustees (Mrs R and her three sons). It appears that on J's refusal to sign this Loan Agreement the project was abandoned in so far as there was no further effort by the family to progress ownership by a family trust.

[24] Mrs Miles first sought to uplift Mrs R's file on 11 June 2007. Thereafter there were various efforts by Mrs R to have Mr Parlane provide the file including writing to him on other occasions, telephoning him, and indeed visiting him at his office.

[25] Due to the unsatisfactory progress being made in obtaining the file, Mrs Miles obtained a search copy of the Memorandum of Mortgage in favour of Mr Parlane and a search copy of the title of the property which was in the name of Mrs R and her three sons, being the trustees of Mrs R's family trust. The mortgage is dated 2 December 2005 and amounts to a mortgage of Mrs R's interest in the property and is for a sum of "up to" $40,000.00. Mrs R did not dispute that she had signed the mortgage, Mrs R did however dispute the registration of the property in the name of herself and her sons, and believed that the property should have been registered in her name alone.

[26] In this regard, we prefer the evidence of Mr Parlane that in fact Mrs R did intend to own the property in trust but that the matter became derailed when JR declined to sign mortgage documents. A search copy of the title shows the mortgage to Mr Parlane for his bridging loan was registered on 22 March 2007, the day before Mrs R approached Mrs Miles for assistance. Given that she had taken possession of BP on 7 October 2005, the Tribunal finds itself drawing the inference that Mr Parlane held the mortgage documents unregistered for a period of 15 months. That was no doubt because he had been expecting his temporary funding arrangement to be replaced by the proposed Kiwi Bank loan to the trust. The property had been registered in the name of a Trust, but of course, once J had refused to sign the Kiwi Bank loan documents, Mrs R decided she did not want the Trust to proceed.

[27] After the instruction of Mrs Miles, Mr Parlane appears to have taken great exception and seen Mrs R's conduct as being disloyal. He repeatedly declined to provide the file and when complaint was made to the Law Society his conduct appears to have escalated to a point where he would not discharge his mortgage without Mrs R agreeing to withdraw her complaint to the Law Society and pay him various sums for legal services rendered. In that regard these were said to be a fee of $787.50 for preparing and attending to settlement, fees for preparing a discharge of mortgage $675.00, and a fee for attending to other loan related issues of

$1,462.50, together with a sum of $2,287.50 said to be for previous bills sent but not paid.

[28] On 9 October 2008 Mr Parlane again wrote to Mrs Miles expressing the view that:

28.1 Any conflict of interest had been resolved by Mrs R changing solicitors.

28.2 That he was about to embark on litigation with the WBOPDLS.

28.3 That such litigation was to be at Mrs R's expense.

28.4 That he was able to claim all costs and expenses in relation to the loan and the enforcement of the security because he was acting as a lender only and not as a lawyer.

28.5 That he was going to apply for summary judgment for outstanding fees of $2,287.50.

28.6 That if she did not repay the loan by 10 January 2009 then penal interest at the rate of 14% would be charged and a mortgagee sale would ensue.

[29] On 9 December 2008, Mr Parlane again wrote to Mrs Miles complaining that as she had not met photocopy costs he would not provide a copy of his file. He also advised Mrs Miles that should he receive any further letters from the Law Society that he would require Mrs Miles to obtain the sum of $20,000.00 from Mrs R to hold as security for costs in litigation.

[30] Mr Parlane then furnished accounts dated 4 January 2009 for sums of $787.50, $1462.50 and $675.00 respectively.

[31] On 14 January 2009 Mr Parlane advised Mrs Miles:

> *"The discharge of mortgage will, be on that basis that it is obviously without prejudice to the personal covenants given in that mortgage that I will be protected from any future claims that may be considered by the borrower, their agents or any third party including any Law Society."*

[32] On 15 January 2009 Mr Parlane wrote to Mrs Miles asserting, amongst other things, that Mrs R was in default of her mortgage as she had added on to the property without Mr Parlane's permission as mortgagee, that she had damaged the property and that he required her to reinstate the property and indicated that he intended to inspect the property the following day. He concluded that if his accounts were not met in full he would commence mortgagee sale proceedings, and that he intended to recalculate the default interest from the date of default which by his reckoning would be the date that she added to her property without his permission. Finally he required:

> *"One further matter, as part of the settlement requirements I will require written confirmation from both the WBOPLTDLS and the NZLS that they have received confirmation that any complaint is withdrawn and an indemnity for all further costs signed irrevocably by Mrs R"*

[33] Mr Parlane then wrote another letter that day asserting that from that date on Mrs R was to be charged the default interest rate, that he had inspected the property and that "it is not tidy", and that his additional costs were in fact his entitlement to collect as a lender.

[34] On 21 January 2009 Mr Parlane again wrote to Mrs Miles, claiming that he would rework the interest from the date of Mrs Miles intervention and Mrs R was to be charged 14% per annum from that date, and concluding with the following:

> *"Just to be clear, don't try any of that accord and satisfaction nonsense. You are on notice that there will be no negotiated settlement. When you pay the required sum the mortgage will be discharged. I now need another $3,390.19 in settlement funds plus an extra $1.30 per day or $120.69 per week. Have a nice day.*
>
> *Remember each letter to and fro, another $300.00 plus GST."*

[35] Mrs R abandoned any further efforts at negotiation and instead instructed her solicitors to issue proceedings in the Hamilton District Court. These proceedings came before His Honour Judge Woolf on 29 July 2009.

[36] His Honour having heard from counsel indicated that he would enter judgment against Mr Parlane, but provided him with an opportunity to agree on terms which could be incorporated into a consent memorandum. This resulted in Mr Parlane furnishing a registerable discharge of mortgage in exchange for a payment by Mrs R in the sum of $18,759.99, after deduction of costs of $16,843.00 and disbursements of $721.00.

[37] Mr Parlane, as we have already said, gave evidence and confirmed the contents of his affidavit. Mr Parlane impressed the Tribunal as a truthful person, but someone who appeared to react very strongly and somewhat inexplicably to any apparent slight. He made clear that he felt he had done Mrs R a considerable favour assisting her by bridging the loan so she could acquire BP. It is also clear that he had rendered to her several acts of kindness including the repair to a toilet cistern, a hot water cylinder, and allowed her to store some of her property on his property. It was clear to the Tribunal that Mr Parlane was considerably affronted by Mrs R's temerity in questioning the circumstance of the purchase, and was positively enraged by her decision to complain about him when he considered he had gone out of his way to assist her to make the purchase.

[38] Thereafter, Mr Parlane compounded the situation exponentially by refusing to provide the file; demanding photocopy costs for the provision of

the file; refusing to provide a settlement figure to allow the repayment of his mortgage; demanding additional costs without the provision of copies of accounts; making demands on Mrs R to withdraw her complaint from the Law Society; threatening mortgagee sale proceedings; and demanding that Mrs R meet the costs of the complaint to the Law Society.

[39] The balance of the evidence was made up of correspondence between Mr Parlane, Mrs Miles and the Law Society. Mr Parlane did not dispute authorship of any of the documents in question but did seek to justify them.

Misconduct Charge

[40] The Waikato Bay of Plenty Standards Committee No 2 charged Mr Parlane:

> *"…with misconduct in his professional capacity, particulars of which are as follows…"*

[41] Therefore as pleaded, there is a single allegation of misconduct in relation to eight particulars relied upon. For the sake of completeness we record, that we have taken the view (subject to what we say in paragraphs 51 – 59 below) that proof of any of the particulars proves the charge, there being a single charge with, as we have already said, eight particulars.

First particular

[42] The first particular asserts that Mr Parlane:

> *"Between August and December 2005 he acted for a client, Mrs R, in relation to the purchase of her home, in the course of which he:*

(a) Personally made a loan to her in the sum of about $40,000.00;

(b) Took security for that loan by way of a registered mortgage over her home;

(c) Failed to take any steps to ensure that she received independent legal advice before she accepted the loan and before providing the security; and

(d) *Thereby acted for his client in circumstances of a conflict of interest, to her detriment."*

[43] When questioned regarding the provision of independent legal advice, it was clear to the Tribunal that Mr Parlane either did not understand his obligations in that regard or thought that the nature of the transaction and his relationship with Mrs R obviated the need for independent advice. We note however that he appears to have mentioned to Mrs R the day before settlement that she could take independent advice but it would cost her. We do not consider that such an utterance met his obligation to his client to advise her of her right to independent advice.

[44] He appeared to believe that once Mrs Miles took over acting for Mrs R, any conflict that might have existed was thereafter cured. Furthermore, he said that on two occasions he had told Mrs R that she could get another lawyer to look over the documents but that would cost more money. These statements appear to have been made after the arrangements to purchase had been made. At no time did Mr Parlane provide evidence of the clear and unequivocal statement to Mrs R of her right to independent advice that is expected of a solicitor in circumstances such as these. By that we mean, we consider that a reasonably competent solicitor in Mr Parlane's situation would have told his client that the situation was one of conflict and that she could obtain independent advice. Indeed, we would have expected a reasonably competent solicitor to have confirmed that advice in writing.

[45] Rule 1.03 of the *Rules of Professional Conduct for Barristers & Solicitors* provides inter alia:

> *"A practitioner must not act or continue to act for any person where there is a conflict of interest between the practitioner on one hand, and an existing of prospective client on the other hand…"*

[46] Mr Parlane's lack of understanding of conflicts of interest is more than adequately demonstrated in his letter of 17 September 2007 addressed to the WBOPDLS where he recorded inter alia:

> *"Any conflict of interest has been resolved by Mrs R seeking advice and representation by another solicitor Mrs Miles. I have not yet formally demanded repayment of the loan however I might now contemplate this."*

> *"No conflict of interest when a solicitor advances money to a client at a friendly rate to assist them. All they are asked to do is pay it back. This client fails to appreciate the help she has been given. She certainly had the chance to take independent advice. I do not know if she did or not. In fact it is me who should have had that advice. It is me who is disadvantaged here…"*

> *"A conflict of interest only arises when this loan goes into default and Mrs R refuses to take steps to remedy that…*

[47] On 1 June 2009 when writing to the Law Society Mr Parlane contended:

> *"You have yet to identify any proper and legitimate conflict of interest that was not resolved immediately that one has claimed to have arisen. Please do that before I am required to answer any further enquiries."*

[48] Mr Parlane indeed repeated such assertions in his closing submissions.

[49] However the Tribunal finds that in fact a conflict arose at the time Mr Parlane offered to personally fund Mrs R by way of a bridging loan to be recorded in a loan agreement and to be secured by mortgage in favour of Mr Parlane. A reasonably prudent solicitor in Mr Parlane's circumstances would have at least confirmed the need to obtain independent legal advice at that point, preferably in writing, and such advice should have been given in clear and unequivocal language before the advance was made. That is what would be expected of a competent solicitor.

[50] We find the facts of the first particular to be proved. However, that is not the end of the Tribunal's enquiry. The Tribunal must resolve whether in fact Mr Parlane's conduct in acting as he did amounts to misconduct.

What is Misconduct?

[51] We remind ourselves that to make a finding of misconduct in respect of matters occurring at a time when the Law Practitioners Act 1982 was in force, requires the Tribunal to find that the conduct was:

> *"…sufficiently reprehensible or indifferent to amount to an abuse of [the lawyers] professional privileges justifying a finding of serious misconduct in the interests of protecting the public."*
>
> (See Re A (Barrister and Solicitor of Auckland) [2002] NZAR 452 [52])

[52] This question was addressed directly by the High Court in the matter of Complaints Committee No 1 of the Auckland District Law Society v APC [2008] 3 NZLR 105 at paragraph 31 where approval was expressed for the judgment in Pillai v Messiter [No 2] (1989) 16 NSWLR 197 (Kirby P) where it was held:

"… but the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner."

[53] The Court further approved of a passage from Corpus Juris Secundum Vol 58, 1948, page 881 applied by Kirby P in Pillai at page 200:

"Both in law and in ordinary speech the term "misconduct" usually implies an act done wilfully with a wrong intention, and conveys the idea of intentional wrongdoing. The term implies fault beyond the error of judgment; a wrongful intention, and not a mere error of judgment; but it does not necessarily imply corruption or criminal intention, and, in the legal idea of misconduct, an evil intention is not a necessary ingredient. The word is sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful. Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences."

[54] The Court then concluded at paragraph 33:

"To conclude, the Atkinson test adopted by the Tribunal incorrectly includes within the definition of professional misconduct conduct falling within s112(1)(c) and, in other respects, is not particularly helpful. The Tribunal erred in directing itself that intentional wrongdoing is an essential element of a charge under s112(1)(a). While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such conduct. The authorities referred to above (and referred to in the Tribunal decision) demonstrate that a range of conduct may amount to professional misconduct, from actual

dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner."

[55] We accept, that Mr Parlane's motivation may have been altruistic, however that does not excuse him from minimum standards of conduct as a solicitor. There can be no doubt, that he should have advised Mrs R of the conflict inherent in him lending her money. Such advice should have been coupled with an insistence that she be independently represented in that regard. Mr Parlane's apparently genuinely held view, that a conflict did not exist and that he had therefore no obligation to give that advice is incorrect. Further the alternate contention that he had given her that advice at the time the purchase was completed, using words to the effect that she could get independent advice but it would cost her money, thereby discouraging her from taking that step, is insufficient to meet the standards expected of a competent solicitor.

[56] However we are not persuaded that Mr Parlane's departure from the standards expected was at such a level as to reflect the indifference referred to in the cases cited above. The evidence makes clear that his motivation was to help Mrs R at a time when she didn't have funds arranged for a purchase, which had to be completed at short notice. His desultory reference to her right to obtain independent advice on settlement day does not, in our opinion, amount to negligence so serious as to reflect an indifference, but rather, confirms our view of a lower level of professional incompetence.

[57] We find that Mr Parlane was negligent in that while he was doing his best (in his view) to help a client, he failed to apprehend that there was an issue that required him to offer her the opportunity to take independent advice, if that is what she wanted after being fully informed of that right.

[58] We therefore find that Mr Parlane's conduct in this regard demonstrated professional incompetence, but does not reach the threshold of misconduct.

[59] Accordingly the Tribunal finds this particular has not been proven to constitute misconduct.

Second Particular

[60] The next particular asserts that:

> *"During the same period, August to December 2005, he purported to settle a family trust for Mrs R:*
>
> *(a) Without providing adequate advice to her concerning the nature of a trust and its legal implications;*
> *(b) Without completing the trust by reference to any executed trust deed or other routine trust documentation; and*
> *(c) Facilitated the transfer of Mrs R's home into the name of purported trustees when no trust had been settled and contrary to her instructions."*

[61] In this regard, we are satisfied that in fact a Deed of Trust had been completed on 7 October 2005, furthermore, that such trust was completed on Mrs R's instructions, and whilst we are unable to discern any useful purpose for the trust, we accept Mr Parlane's advice that the trust was the device agreed between him and Mrs R for the acquisition of this property.

[62] It is again repeated, that had Mr Parlane provided documents when requested, it is unlikely that such a charge would have been laid in any event.

[63] The Society sought to withdraw this charge as part of its closing submission. The Tribunal is of the view that the preferable course is to find that this particular has not been proved.

Third Particular

[64] The third charge alleges that:

> *"In September and December 2005 he attended upon Ms R at her home for the purpose of having her sign a term loan contract and a memorandum of mortgage respectively, and later facilitated the attestation of those documents by his legal clerk, Leanne Cherie Hanning, who was not present at the time and who did not witness Mrs R signing those documents."*

[65] The Mortgage is dated 2 December 2005, the Term Loan Contract is dated 23 September 2005. Each appears to have been witnessed by Ms Hanning. Mrs R's evidence in this regard was that she did not call at Mr Parlane's office until after she had concluded work for a day and that was no earlier than 4.30 pm in the afternoon. She maintained, that Ms Hanning's hours meant that she was never present at the office when she called there.

[66] Mr Parlane maintained that these documents were either signed in his office before Ms Hanning, or that Mrs R attended his offices and confirmed that the signature in question was hers, to Mrs Hanning.

[67] Mr Parlane was invited to produce Ms Hanning to give evidence that she had in fact witnessed Mrs R's signature. Mr Parlane declined to do so. However, it is for the Society to prove its case on a balance of probabilities. To do that, a summons could have been issued to Mrs Hanning requiring her to attend. Instead, the Society chose to rely solely on Mrs R. As we have already recorded, whilst we have found Mrs R to be honest, it is entirely clear that she has from time to time forgotten or become confused regarding the various documents signed in this matter.

[68] Mr Parlane further advised that when the Deed of Trust was signed, he had Ms Hanning witness the signatures on confirmation by Mrs R, that

the signatures were genuine. Such is clearly an unacceptable and improper practice.

[69] However our enquiry is limited to whether or not Mrs R completed the term loan agreement and memorandum of mortgage in the presence of Mrs Hanning. We find that we are unable to resolve this issue because of the conflict in the evidence.

[70] Accordingly we find this particular not to have been proven.

Fourth Particular

[71] The fourth particular asserts that:

> *"During the period June 2007 to July 2009 he wrongly refused to discharge the mortgaged granted to him by Mrs R to secure the earlier personal loan and:*
>
> *(a) Obstructed Mrs R's solicitor in her attempts to facilitate refinancing and to discharge the mortgage; and*
> *(b) Relied on his status as mortgagee to demand payments and concessions from Mrs R to which he was not entitled."*

[72] The Tribunal has referred above to the evidence in this regard which was largely in the affidavit of Mrs Miles. Mrs Miles impressed the Tribunal as a measured, experienced, and intelligent practitioner who was genuinely surprised at the responses she received from Mr Parlane. It is abundantly clear that Mr Parlane's resistance to Mrs Miles approaches would have created considerable stress and cost to Mrs R. The demands he made to secure the discharge of mortgage are of course unjustified.

[73] The ultimate proof of this charge lay in Mrs R's need to issue proceedings to secure the discharge of mortgage.

[74] We find this particular proved, although we note that the real difficulty regarding obtaining a discharge of mortgage began in the latter part of 2008, not from June 2007 as noted in the particular.

Fifth Particular

[75] The fifth particular asserts:

> *"In relation to Mrs R's complaint against him to the Lawyers Complaints Service, he refused to comply with the requirements of the Standards Committee that he produce his relevant files and records, such requirements being communicated to him in writing by notices delivered on or about 27 August 2008, 5 October 2008 and 20 May 2009, and he thereby obstructed the Standards Committee in the lawful exercise of its statutory functions and powers."*

[76] The evidence in this regard came largely from the evidence of Mr Dixon who provided copies of the various requests he had made to Mr Parlane.

[77] The statutory function of the Committee is to enquire into complaints by members of the public or other practitioners and to do that, the Committee is entitled to request, and indeed direct, the provision by the practitioner of his file.

[78] We note, that two of the notices at least made specific reference to Section 147 of the Lawyers and Conveyancers Act 2006 which provides Standards Committees with powers of compulsion in undertaking investigations:

> *(2) "…For the purposes of any enquiry or investigation being conducted under this Act, a Standards Committee or an investigator -*

> *(a) May, at any time, require a source of information [including the lawyer under investigation] to do any of the following -*
>
> *(i) Produce for inspection by the Standards Committee or investigator all books, documents, papers, accounts, or records which are in the possession or under the control of the source of information and which are reasonably necessary for the purposes of the enquiry or investigation…"*

[79] Mr Parlane was unable to satisfy us that he had any explanation or excuse which would justify the non provision of the requested files.

[80] The Tribunal finds this particular proved.

Sixth Particular

[81] The next particular relied upon by the Society is:

> *"In relation to the investigation into Mrs R's complaint during the period February 2008 to April 2009 he communicated in writing with the Complaints Committee, and subsequently with the Standards Committee, in an unprofessional and belligerent manner and thereby obstructed the Complaints Committee and the Standards Committee in the lawful exercise of their statutory functions."*

[82] Again, the evidence for the prosecution was found in the evidence of Mr Dixon.

[83] Mr Parlane's correspondence with the WBOPDLS is peppered with allegations that the Society has "trumped up charges" (2 September 2008); assertions that the conduct of the Society has been unethical,

cheating and oppressive and that the Society has behaved in a tyrannical fashion. The Tribunal notes that Mr Parlane's Closing Submissions repeat many of these allegations.

[84] On 13 October 2008 Mr Parlane again wrote to the Society asserting that the Society was acting illegally, was on some kind of "fishing expedition", that they had prejudged the question of Mr Parlane's competence and that the Society had meddled in matters which could not be proven to be the substance of a complaint. On 30 January he again wrote to the Society accusing it of tyranny, its Officers of incompetence, its officials of cheating, its Complaints Committees of negligence, its Officers as unprofessional cheats, and said that the Society had brought "bogus ill conceived prosecutions". He expressed the wish that in the future the prosecuting body would not include "the same incompetent and unprofessional cheats", and concluded by stating:

> *"I look forward to these incompetent practitioners being kept in the cage that they belong in so that they will not inflict harm on their colleagues in the future."*

[85] The Tribunal in considering these issues has reminded itself that a high standard of conduct is expected of members of the Society. Such duties require members to engage with the Society, each other, and the public, in a measured and professional manner. Mr Parlane's correspondence is both unprofessional and belligerent and the Tribunal finds that in writing as he did that he obstructed both the Complaints Committee and the Standards Committee in the lawful exercise of their statutory functions.

[86] The Tribunal finds this particular to have been proved, but notes that the substance of this complaint can be found in conduct over the latter part of 2008, rather than from February 2008.

Seventh Particular

[87] The next particular relied upon by the Society is:

> *"In relation to a complaint by a former client, DM, in October 2008, he communicated in writing with the Standards Committee in an unprofessional and belligerent manner and thereby obstructed the Standards Committee in the exercise of its statutory functions."*

[88] This charge arose in circumstances where Mr M has been represented by Mr Parlane on a criminal matter successfully. Mr M had rather surprisingly formed the view that in the event that he was successful the Police would meet his costs. However after being found not guilty he was rendered an account by Mr Parlane, and he complained that Mr Parlane effectively put the debt collectors onto him and threatened to take his car. The Law Society requested Mr Parlane's file to review the complaint. Mr Parlane wrote to the Society on 20 October 2008, his letter concluded with the words:

> *"If this matter goes any further the WBOPDLS and the NZLS will be sued. This will simply be added to the list of cheating and tortious behaviour undertaken by them. Your flagrant waste of your members money has been well and truly noted."*

[89] The Society wrote again, on 22 October 2008, asserting the statutory obligation to enquire into complaints and concluded by noting that if no further material was provided then the complaint would be resolved on the material available.

[90] This seems to have excited Mr Parlane still further and on 22 October he wrote to the Society and included:

> *"Firstly, go jump in the lake."*

[91] He complained that the Society was comprised of bullies and cheats, that the Society had zero credibility, that the position and rules of the Society were routinely misused, that the Society behaved in a manner which was neither just nor reasonable, and included the following:

> *"Where is your noddy badge, saying that you are the person entitled to investigate?"*

and concludes with the following:

> *"I hasten to compare the fee charged to M was less than a third of that charged by Swarbrick Dixon to the HCC and for that they could not properly prosecute a $15.00 parking ticket for the rate payers of Hamilton as they did not have the testicular ability to front up for a defended hearing having first taken nearly $9,000.00 from their client only to tell them that they could not win.*
>
> *While we have that sort of circus going on with Swarbrick Dixon, I am of the view that I have absolutely nothing to worry about as the WBOPDLS is a standing joke. They should get outta town."*

[92] The Tribunal having considered the standards expected of a practitioner finds that the language used by Mr Parlane in his correspondence is both unprofessional and belligerent and thereby obstructed the Standards Committee in the exercise of its statutory duty.

[93] The Tribunal finds this particular proven.

Eighth Particular

[94] The next particular relied upon by the Society is:

> *"In relation to a complaint by a former client, AD, during the period February to June 2009, he communicated in writing with the*

Standards Committee in a unprofessional and belligerent manner and thereby obstructed the Standards Committee in the exercise of its statutory functions."

[95] This matter was commenced by the Society on 27 February 2009 on receipt of a complaint by Dr D and Mr Dixon for the Committee wrote to Mr Parlane requesting any comment in response to the complaint received. In response to the complaint Mr Parlane wrote on 2 March 2009 inter alia:

"I suggest that there are really only two lawyers in New Zealand to help Dr D. One of those is Michael Dixon and the other is Jon Olphert. I hasten to add that both should be in Springhill Prison with this client. Perhaps when they all end up there, Mister Pyke can visit them."

[96] On 18 March 2009 Mr Parlane again wrote to the Society such letter included inter alia:

"I do have concerns however if Swarbrick Dixon cannot properly and ethically prosecute a basic $12.00 parking ticket matter and still claim to reasonably charge their client in excess of $8,000.00 then they deserve to not be permitted to practice.

I will be pleased to agree to a reassignment based on a break down of communication between the complainant and myself and now give the great kiwi suggestion in relation to this file."

[97] Mr Parlane was then served with a summons by the Society requiring him to produce his file in this matter on 4 May 2009. The Society followed up that summons on 17 June 2009 and this was met by a letter of 25 June 2009 by Mr Parlane. Mr Parlane's letter contained the following inter alia:

> *"Are we going to have another situation where Mr Dixon files an affidavit of previous complaints designed only to influence or "knobble" (sic) the hearing Committee? Last time in front of the NZLS his affidavit was supposed to be refused as evidence as events have shown, he was actually cheating in his behaviour however the NZLS turned a blind eye to his cheating.*
>
> *My reasons for this are that clearly last time I was supposed to be summonsed to appear, the hearing was a sham and my view is that Mr Scotter and others blatantly breached all of the rules of natural justice and failed to properly explain what the (sic) wanted or why and what he was entitled to do at that hearing…"*

[98] The Tribunal having reminded itself of the standards expected of lawyers find that Mr Parlane's communication with the Committee was both unprofessional and belligerent and thereby obstructed the Standards Committee in the exercise of its statutory functions.

[99] The Tribunal finds this particular to have been proved.

UNSATISFACTORY CONDUCT CHARGE

[100] The particular supporting this charge asserts that Mr Parlane:

> *"In relation to a self represented person involved in a fencing dispute with his client, he made disrespectful and discourteous statements about that person in a letter dated 5 June 2009, contrary to Rule 12 in the* ***Conduct and Client Care Rules 2008****."*

[101] Rule 12 provides:

> *"A lawyer must, when acting in a professional capacity, conduct dealings with others, including self represented persons, with integrity, respect, and courtesy."*

[102] The letter relied upon by the Society in relation to this charge was written by Mr Parlane on 5 June 2009 on letterhead and contained the following:

> *"You say that R [Mr Parlane's client] is the problem and that you have had trouble with her. My view is that you have lived in St Helliers too long and the thin air of the "heights" has got to your brain and you are now not able to think properly and reasonably. I have relatives with property there and they too suffer from the sort of snobbery that you exhibit…*
>
> *I hasten to add that you may wish to take legal advice. The better advice for a person in your situation would be to see a psychologist and address your underlying personality issues."*

[103] Mr Parlane claimed that when he discussed the fencing dispute with Mr Y, he was doing it as a friend of the person with whom Mr Y was in dispute, not as a lawyer representing a client. He said in his affidavit and in his submissions that his friend was not a client. This appears to be aimed at showing he did not breach Rule 12 of the Conduct and Client Care Rules, which requires Mr Parlane to be acting in a professional capacity as a lawyer at the time.

[104] We do not accept that Mr Parlane was not acting in a professional capacity. Indeed, he refers in paragraph 8 of his affidavit to the fact that Mr Y "was not prepared to co-operate at all with my client". We note that the letter of 5 June 2009 relied on by the Society is on Mr Parlane's practice letterhead. That letter also twice refers to Mr Parlane's "client". We find that Mr Parlane has breached Rule 12 in writing as he did to Mr Y, and that lack of professionalism is also a breach of Rule 10 of the Conduct and Client Care Rules, being a failure to maintain a proper standard of professionalism in his dealings.

[105] That is not the end of the matter however, as the Tribunal finds itself with further issues regarding this charge upon which neither party has made submissions.

[106] In particular, it is clear that the Standards Committee made an error in that it made concurrent determinations under Section 152(2)(b) and 152(2)(a). It appears to have been accepted that the Committee had no authority to do so, and it is contended by the Society that the error has been rectified by the intervention of the Legal Complaints Review Officer (LCRO).

[107] The unresolved issue which the Tribunal has to grapple with is to understand what authority the LCRO has to modify a decision of the Standards Committee when the decision itself appears to be a nullity.

[108] Obviously, the Tribunal should not resolve this charge without receipt of additional submissions on this issue. To that end, we ask that the Society furnish any additional submission it wishes to make in this regard within 7 days, addressing in particular the question of whether the Standards Committee decision was a nullity and whether in those circumstances or otherwise, the LCRO has an ability to modify such a decision. Mr Parlane is then to be given a further seven days to respond thereafter.

Decision

[109] The Tribunal finds:

109.1 That Mr Parlane is guilty of misconduct in relation to five of the particulars pleaded, being the fourth, fifth, sixth, seventh, and eighth particulars pleaded.

109.2 The Tribunal has reserved its decision in relation to the charge of unsatisfactory conduct pending receipt of further submissions.

109.3 On receipt of those submissions (or after expiration of time provided for same without receipt of submissions) the Tribunal will make a decision on the unsatisfactory conduct charge and then fix a timetable to address the question of penalty in relation to matters proven.

[110] It would be of assistance, if both the Society and Mr Parlane could indicate whether they wish to have the issue of penalty addressed with a viva voce hearing or whether the parties are content to address the matter of penalty by way of written submissions in accordance with the timetable we fix.

[111] In conclusion, we should say that the manner in which the Society has laid the misconduct charge presented a difficulty for the Tribunal. The particulars supporting the charge traversed the two pieces of legislation guiding professional conduct of the legal profession, being the Law Practitioners Act 1982 and the Lawyers and Conveyancers Act 2006, the former applying up to and including 31 July 2008, and the latter from and including 1 August 2008.

[112] The Lawyers and Conveyancers Act replaced the Law Practitioners Act, effective 1 August 2008. The new Act applied some transitional provisions to deal with complaints and investigations already commenced under the Law Practitioners Act as at 1 August 2008. It also provided the manner in which complaints and investigations would proceed under the new Act, where relating to conduct occurring at a time when the Law Practitioners Act was in force (i.e. up to and including 31 July 2008), but in respect of which no complaint had been made prior to 1 August 2008.

[113] Particulars 1,2, and 3 supporting the charge of misconduct against Mr Parlane, were the subject of a complaint by Ms Miles in August of

2007. As both the complaint and the conduct were pre 1 August 2008, the Law Practitioners Act processes and powers apply, by virtue of Ss. 353 and 358 Lawyers and Conveyancers Act 2006. Under S.358 this Tribunal is to exercise the same duties and powers that the New Zealand Law Practitioners Disciplinary Tribunal, established under the Law Practitioners Act 1982, would have had under that Act in relation to the proceedings, if that Act had not been repealed.

[114] Particular 4 was the subject of a complaint by Mrs R in February 2009. It effectively arose from conduct post 1 August 2008, notwithstanding that the particulars referred to an extended period from June 2007 to July 2009. Accordingly this Tribunal considered that both the time of the relevant conduct and the time of the complaint required the charge to be dealt with wholly under the 2006 Act, without reference to the Law Practitioners Act. Similarly, particulars 5, 7 and 8 arise from conduct occurring and complaints made after the 2006 Act was in force.

[115] Particular 6 is a hybrid, given that the conduct complained of in this particular traversed a period when both the Law Practitioners Act and the Lawyers and Conveyancers Act applied. The decision to charge Mr Parlane was made by the Standards Committee after the 2006 Act was in force, but related to a course of conduct which was alleged to have commenced pre 1 August 2008, and to have continued after that date. The matter is to be dealt with under the Lawyers and Conveyancers Act in respect of pre 1 August 2008 conduct, but under S.351 of that Act any penalty is limited to that which would have been available under the Law Practitioners Act 1982. Post 1 August 2008 conduct is to be dealt with under the Lawyers and Conveyancers Act, without any reference to the Law Practitioners Act.

[116] In considering the charge of misconduct against Mr Parlane, the Tribunal, of course, had to have regard to each of the particulars supporting that charge. Some of those particulars related to conduct under the Law Practitioners Act and some related to conduct under the Lawyers and Conveyancers Act, with one particular alleging continuing conduct

over a period sequentially traversed by each Act. We note that the transitional provisions of the Lawyers and Conveyancers Act give this Tribunal concurrent jurisdiction, whichever of the two Acts was applicable at the time of the conduct in issue, with no difference in the composition of a misconduct charge, the burden of proof, nor the standard of proof between the two pieces of legislation.

[117] In respect of penalty, as noted above, any sanction applied by the Tribunal in respect of pre 1 August 2008 conduct, must be a sanction that could have been imposed in respect of that conduct at the time the conduct occurred. As it happens we have resolved that the first three particulars, involving conduct pre 1 August 2008, have not resulted in a finding of misconduct. We have found that Mr Parlane is guilty of misconduct in relation to the fourth, fifth, seventh and eighth particulars pleaded, and those findings are all based on post 1 August 2008 conduct. We are also mindful that in relation to the sixth particular we have found the misconduct proved on the basis of conduct that occurred after 1 August 2008, rather than pre 1 August conduct, so the hybrid nature of that particular is inconsequential.

[118] The facts of each particular which have been found proven in this case, all fall under the Lawyers and Conveyancers Act, so no issue arises in the context of two different Acts applying to one charge, even in the case of the particulars we have described as hybrid. In future cases involving allegations of both pre and post 1 August 2008 conduct, it may be preferable to file separate charges relating to conduct pre 1 August 2008 (which will be affected by the transitional provisions), and conduct from that date (which will not be so affected).

Suppression

[119] The interim suppression of Mr Parlane's name and details that might identify him granted at the commencement of this hearing shall lapse 7 days after publication of this decision.

[120] We confirm that the suppression of the names of all complainants is final.

DATED at Wellington this 4th day of June 2010

.....

SW Hughes QC

Member of the Tribunal