McLaren v Legal Practitioners Disciplinary Tribunal & Anor
[2010] NTSCFC 02

PARTIES:	MCLAREN, Asha v LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL AND LAW SOCIETY OF THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	76 of 2009 (20917560)
DELIVERED:	Wednesday 20 January 2010
HEARING DATES:	4, 5, 23 November and 1 December 2009
JUDGMENT OF:	MARTIN (BR) CJ, Mildren and Riley JJ

CATCHWORDS:

APPEAL – APPEAL AGAINST DECISION OF DISCIPLINARY BOARD
Professional misconduct – serious allegations that other legal practitioners had breached their fiduciary duty to their clients – lack of instructions and necessary evidentiary material in making allegations – failure to withdraw allegations.

Jurisdiction of tribunal – investigation commenced under repealed Act – transitional provisions of legislation.

Appeal dismissed.

Legal Practitioners Act 1974 (NT), ss 45, 46, 46A, 46B, 47, 48B 49, 50 and 50(1A).
Legal Profession Act 2006 (NT), ss 464, 465, 466, 473, 488, 496, 497, 499, 513, 525, 533, 669, 743, 744, 745, 746, 747, 758, 759 and 761.
Legal Profession Regulations 2007 (NT), reg 96A.
Rules of Professional Conduct and Practice (NT), rr 12 and 17.21.
Supreme Court Act 1979 (NT), s 22.
Supreme Court Rules, rr 83.03, 83.20 and 95.01.

Clark v Barter (1989) NSW ConvR 55-483; *Council of the New South Wales Bar Association v Power* (2008) 71 NSWLR 451; *CDJ v VAJ* (1998) 197 CLR 172; *Jones v Dunkel* (1959) 101 CLR 298; *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154; *Minister Administering the Crown Lands (Consolidation) Act & Western Lands Act v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201; *Moody v Cox & Hatt* [1917] 2 Ch 71; *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204, referred.

REPRESENTATION:

Counsel:

Appellant:	G Bigmore QC, J Kohn
Respondent:	S Walsh QC

Solicitors:

Appellant:	Vincent Close
Respondent:	Hunt & Hunt Lawyers

Judgment category classification:	A
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Number of pages:	130

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McLaren v Legal Practitioners Disciplinary Tribunal & Anor
[2010] NTSC 02
No. 76 of 2009 (20917560)

IN THE MATTER of an appeal under the *Legal Profession Act 2006 (NT)*

BETWEEN:

ASHA MCLAREN
Appellant

AND:

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
First Respondent

AND

LAW SOCIETY OF THE NORTHERN TERRITORY
Second respondent

CORAM: MARTIN (BR) CJ, Mildren and Riley JJ

REASONS FOR JUDGMENT

(Delivered 20 January 2010)

Martin CJ:

Introduction

[1] This is an appeal against a finding by the Legal Practitioners Disciplinary Tribunal ("the Tribunal") that the appellant ("the practitioner") engaged in professional misconduct. In essence the Tribunal found that the practitioner

made serious allegations about the conduct of other legal practitioners without the necessary instructions and without evidentiary material supporting the allegations.

[2] The practitioner submits that the Tribunal lacked jurisdiction to hear and determine the charge of Professional Misconduct. In addition the grounds of appeal assert that the Tribunal made a number of errors of fact and law.

[3] For the reasons that follow in my opinion the Tribunal possessed jurisdiction. Although errors occurred and some findings of fact should be set aside, other factual findings should be confirmed and, on the basis of those facts, the finding that the practitioner was guilty of professional misconduct should be upheld and the appeal dismissed.

Background

[4] In 1978 a legal firm known as Cridlands was retained by the Uniting Church and the Uniting Church of Australia Property Trust ("the Church") as solicitors for the Church. By letter of 28 October 1994 Cridlands confirmed their appointment as the "sole lawyers" for the Church in the Northern Territory. The letter included a statement that it was an "implicit term" of the relationship that Cridlands would not act against the Church.

[5] On 2 July 2003 the practitioner wrote a letter to the Law Society of the Northern Territory ("the Law Society") making a number of assertions concerning the conduct of Cridlands. These assertions included a statement that Cridlands had "breached the ethical duty owed to the Church under

Rule 9A of the Professional Conduct Rules". The letter is set out below. Paragraphs 15 and 33 were central to the charge that the practitioner was guilty of professional misconduct:

> "**Re Complaint by the Uniting Church of Australia Property Trust against Cridlands**
>
> I act for the Uniting Church of Australia Property Trust (Church).
>
> Background:
>
> On or around 17 July 1978 Cridlands then known as Cridlands & Bauer was appointed by the Church as their Lawyers.
>
> On 28 October 1994 Cridlands confirmed their appointment as Lawyers for the Church in writing.
>
> The Church owns among others the following valuable commercial property within The Darwin CBD more fully described below:-
>
> A. Lot 2280 Town of Darwin Certificate, Title Volume 640 Folio 940, in the corner of Knuckey Street and Mitchell Street.
>
> B. Lot 7118 Town of Darwin 47 Cavanagh Street.
>
> I am instructed by the Church to make the following complaint against Cridlands:
>
> A. That Cridlands as the legal representatives of the Church breached the ethical duty owed to the Church under Rule 9A of the Professional Conduct Rules of the Law Society of the Northern Territory and approved by the Chief Justice of the Northern Territory.
>
> B. Cridlands failed or neglected to give its undivided fidelity to its client the Church.
>
> C. Cridlands failed or neglected to perform its duties and obligations unaffected by its own interests.

D. Cridlands failed or neglected to perform its duties and obligations unaffected by the interests of persons and or clients other than the Church.

E. Cridlands maintained the interests of other parties that were adverse or likely to be in conflict with the interests of the Church.

F. Cridlands failed or neglected to withdraw from representing the Church in the circumstances set out in paragraph E above.

G. Cridlands failed or neglected to fully inform the Church of the circumstances set out in paragraph E above and continued to act for the Church knowing that the Church had not voluntarily assented to Cridlands acting or continuing to act on its behalf.

H. Cridlands represented and continued to represent conflicting interests of the Church and other clients in circumstances that were prejudicial to the interests of the Church.

I. Cridlands failed or neglected to inform the Church of the nature and implications of such conflict and continued to act for the Church knowing that the Church had not voluntarily assented to Cridlands acting or continuing to so act.

J. Further and in the alternative Cridlands acted and continues to act for the other clients after it ceased to act for the Church having failed or neglected to direct both of its clients to seek other advice.

K. Cridlands gave and continued to give legal advice to the Church knowing that the interests of the Church were in conflict with the interests of another existing client or clients other than advice to secure the services of another practitioner.

L. Cridlands acted (and or continued to act) for the Church without keeping the Church fully informed and withheld information and advice from the Church because of conflicting duty owed to another client other clients.

Particulars – Lot 2280 Town of Darwin

1. At all material times to this complaint the Church was and continues to be, the registered owner of Lot 2280 – Town of Darwin Mitchell Street, Darwin (Lot 2280).

2. At all material times to this complaint, Cridlands legally represented the Church. The Church having appointed Cridlands and Bauer the predecessor of Cridlands on 17 July 1978 as lawyers of the Church.

3. On or around 28 October 1994 Cridlands were retained by the Church as its lawyers. On 28 October 1994 Cridlands accepted and confirmed their appointment as Lawyers for the Church in writing inter alia:

> '*That it is the Church's sole lawyers in the Northern Territory, and has been for many years. It is an association that Cridlands values and hopes will continue.'*

> *'That an implicit term of our relationship is that Cridlands does not and will not act against the Church. This is particularly relevant in the area of potential litigation, but also has applicability on occasions, with respect to commercial and property work.*'

4. By virtue of its retainer by and long association with the Church, Cridlands have always been and continue to be well acquainted with the facts and circumstances; including confidential and commercially sensitive information surrounding the commercial transactions entered into by the Church in respect of the above properties.

5. Cridlands was and continues to be aware of the recitals in the registered lease deed dated 29/4/1974 entered into between the Church and the Australian Temperance and General Mutual Life Assurance Society Ltd. Cridlands having obtained such information by virtue of its position as the lawyer for the Church.

6. Cridlands was aware of and continues to be aware among other things of the vesting of the right, title and interest of Lot 2280 in the Church on 13/1/1978.

7. At all material times to this complaint Cridlands was aware of the transfer and the circumstances of the transfer of the lease to National Mutual Life Association of Australasia as lessee of Lot 2280 on 8 November 1984.

8. At all material times to this complaint Cridlands was aware of the recitals and facts and circumstances surrounding the Deed of Assignment of lease from the tenant, National Mutual Life

Association of Australasia Ltd to United Super Pty (United Super) as trustee of C+Bus Trust dated 21/3/2001.

9. At all material times to this complaint Cridlands legally represented the Church during the negotiations and execution of the Deed of Assignment of Lot 2280 dated 21/3/2001 mentioned in paragraph 9 [sic] above.

10. At all material times to this complaint Cridlands were also acting as legal representatives of Randazzo Investments Pty Ltd (Randazzo).

11. At all material times to this complaint Cridlands failed or neglected to advise the Church that it was acting for Randazzo in its dealings and negotiations with United Super, the lessee of Lot 2280 regarding the development of the said property.

12. At all material times to this complaint Cridlands failed or neglected to keep the Church fully informed of the dealings and negotiations between Randazzo and United Super.

13. At all material times to this complaint Cridlands continued to act for Randazzo knowing that to be a conflict of interest in the duty owed by Cridlands to the Church in respect to the Church property being Lot 2280.

14. At all material times to this complaint Cridlands failed or neglected to advise the Church that Randazzo's dealings and negotiations with United Super were aimed at developing Lot 2280 being land owned by the Church.

15. ***At all material times to this complaint Cridlands used confidential and commercially sensitive knowledge and information gained as legal representatives of the Church to draft a 'Development Deed' for and on behalf of Randazzo that was prejudicial to the interests of the Church with respect to Lot 2280 Town Darwin***.[my emphasis]

16. Cridlands prepared the said Development Deed for and on behalf of Randazzo whilst still continuing to act for the Church.

17. At all material times to this complaint Cridlands failed or neglected to inform the Church of the nature and implications of continuing to act for both the Church and Randazzo whilst the Church had not voluntarily assented to Cridlands acting or continuing to act for the Church.

18. Thereafter on or around July 2002 Cridlands advised the Church that it will not be able to provide legal advice to the Church regarding the Development Deed and directed the Church to seek other advice but continued to act for Randazzo with respect to the 'Development Deed' relating to Lot 2280 Town of Darwin.

Particulars – Lot 7118 Town of Darwin

19. Cridlands continued to act for Randazzo during all negotiations and registration of the Consent Deed between the Church and Randazzo and United Super. In and around January 2003 Cridlands represented Randazzo and secured the Registration of the Consent Deed relating to Lot 2280 executed between the Church and Randazzo and United Super.

20. At all material times to this complaint the Church was the owner of and continues to be the registered owner of Lot 7118 Town of Darwin situated at 47 Cavanagh Street (Lot 7118).

21. In or around 1998 the Church decided to develop the land being Lot 7118 Town of Darwin situated at 47 Cavanagh Street, Darwin by constructing a shopping centre there on (CBD Plaza).

22. The Church also decided to secure Woolworths as an anchor tenant for the new shopping complex to be erected on the said land.

23. At all times material to this complaint Cridlands were privy to these decisions as their legal advisors.

24. At all times material to this complaint Cridlands was also privy to these decisions because Mr Gordon Berner, then Partner of Cridlands was a member of the Finance and Property Services Committee of the Church.

25. At all times material to this complaint Cridlands also acted for Mr Manolos (Manolos) whilst acting as legal representatives of the Church. Manolas was and continues to be the owner of the building at the Corner of Knuckey Smith Street, which was and continues to be leased by Woolworths which was conducting and continues to conduct a Supermarket from the property leased to them by Manolas (Old Shop).

26. At all times material to this complaint Cridlands were also acting for Woolworths as local agents for the legal firm called Clelands, Solicitors that is based in Adelaide.

27. In or around late 1998 Mr Gordon Berner excused himself from Finance and Property Services Committee meeting during discussions at the meeting about Woolworths on the ground of conflict of interest.

28. In fact on 9 December 1998, Mr Berner abstained from Finance and Property Services Committee of the Church for the same reason set out in Paragraph 28 [sic].

29. On or around 8 February 1999 Cridlands advised the Church that they were also legal representatives of Manolas & Woolworths.

30. At all times material to this complaint Cridlands continued in its role as the legal advisor for the Church knowing that the Church had not voluntarily assented to Cridlands continuing to act on its behalf as well as for Woolworths and Manolas.

31. Cridlands failed or neglected to advise the Church by continuing to act for all three parties, the interests of the Church would be prejudiced especially, with respect to its decision to develop Lot 7118 and to secure Woolworths as an anchor tenant or at all.

32. At all material times to this complaint Cridlands failed or neglected to inform the Church of the nature and implications of continuing to act for the Church and Woolworths and Manolas and the Church had not voluntarily assented to Cridlands acting or continuing to act for all three parties.

33. ***At all times material to this complaint Cridlands used and passed on commercially sensitive information relating to bids from prospective anchor tenants received in confidence on behalf of the Church for the CBD Plaza to Randazzo for its development***. [my emphasis]

34. Cridlands were negligent and alternatively not acting in the best interests of the Church when they advised that there is potential for Manolas to sue the Church for breach of Manolas' Lease with Woolworths but continued to act for all three parties.

35. As a consequence of that advice, the Church in or around February 1999 instigated a meeting between Harris Scarfe, Woolworths and Manolas & the Church in an effort to placate Manolas and provide him with an alternate tenant replacing Woolworths.

36. Cridlands at their offices arranged and facilitated for two (2) days, meetings between all and or some of the following parties: Cridlands – UCA – Harris Scarfe – Mr Jim Meirs of Woolworths, Mr Tony Vanstone of Clelands, Solicitors – representing Woolworths and Manolas. There were meetings between Harris Scarfe, Woolworths and Manolas at which the Church was not present. But Cridlands attended and or were privy to the discussions and outcomes of all the meetings.

37. The meeting between Cridlands, Woolworths, Manolas and The Church were arranged at Cridlands office to discuss the nature of alternate tenants for the Old Shop.

38. This above meeting was conducted by Cridlands at their offices where they acted as facilitator between and legal advisor of all three parties.

39. Cridlands was present at all meetings and therefore were aware of the discussions taking place within each group. Cridlands failed or neglected to advise The Church of the substance of the meeting between Manolas and Woolworths during which The Church was not present.

40. At all times material to this complaint Cridlands were aware that a number of meetings were also held between the Church and Woolworths on how the latter could extricate themselves from their lease of the Manolas Building and enter CBD Plaza on Lot 7118 as tenant of the Church. At all times material to this complaint Cridlands as legal advisors of the Church were aware of and privy to the details of the discussions and the outcome of the meetings.

41. At all times material to this complaint Cridlands were aware that the following was the outcome of various meetings held between the Church and Manolas and Woolworths:

    (a) Harris Scarfe did not take over the premises that were leased by Manolas to Woolworths.

    (b) Woolworths and Manolas reached an agreement regarding the operation of the Old Shop.

    (c) Woolworths agreed with The Church to be the anchor tenant at the CBD Plaza on Lot 7118. They also agreed to restrict their trading at the Old Shop to less than 1000 square metres.

42. Thereafter there were a number of meetings and discussions and negotiations between Woolworths and the Church resulting

in an Agreement for Lease deed dated 4 August 2000 between the parties.

43. The Agreement for Lease deed dated 4 August 2000 between the Church and Woolworths was drafted and prepared by Cridlands including the Indemnity Clause no: 14 therein.

44. At all material times during the meetings, discussions and negotiations referred to above, Cridlands acted for and advised the Church. At all material times during the said period Cridlands continued to act for Manolas, Woolworths and the Church.

45. Cridlands also prepared the Lease between Woolworths and the Church dated 17 October 2001 including clause 5.5 [in] relation to a restriction on trade by Woolworths which is as follows:

> '*The tenant must operate the Premises as a Supermarket in a first class and efficient manner and shall not itself operate or be concerned in the operation of or permit any Related Corporation to operate or be concerned in the operation of supermarket premises 1000 square metres or more in size within two (2) Kilometres of the Premises.*'

46. Woolworths has continued to operate at the Old Shop a supermarket premises that is 1000 square metres or more within the 2 kilometre radius of the new store in violation of the above clause 5.5.

47. Cridlands failed or neglected to clearly define the words 'Supermarket premises' in the Lease Deed dated 17 October 2001.

48. Cridlands knew or ought to have known that the failure to do so would lead to or have reasonably expected that the words 'Supermarket premises' being open to a different interpretation that would be detrimental and prejudicial to the Church but favorable to Woolworths and to Manolas. Such an event was foreseeable.

49. On 12 April 2002, the Church raised the issue of conflict of interests with [practitioner] and [practitioner] of Cridlands who advised the Church that they were not in a situation of conflict of interest. They, also advised the Church that:

(a) It was not worthwhile to pursue Woolworths regarding the breach of the lease, as it would be difficult to quantify damage in dollar terms.

(b) There was, therefore, no gain in pursuing a claim for damages for breach of contract of the Lease, against Woolworths.

Liquor Licence:

50. Prior to the execution of the Lease Deed dated 17 October 2001 there were numerous discussions between the Church and Woolworths regarding 'Liquor Licence' for the New Store.

51. The outcome of those discussions and negotiations was that there would be only one Liquor Store within the Darwin Central Business District which, was agreed between Woolworths and the Church to be located in the CBD Plaza on Lot 7118. Woolworths agreed to transfer the liquor licence from the Old Store to the CBD Plaza.

52. At all material times Cridlands was aware of those negotiations and discussions between the Church and Woolworths.

53. Cridlands failed or neglected to protect the interests of the Church by not stipulating in the Lease Deed a clause that the sale of liquor should be conducted only from the CBD Plaza. That Woolworths shall make every endeavour to transfer the existing liquor licence shall be transferred to the CBD Plaza from the Old Shore forthwith.

54. In or around late 2002 Cridlands represented Woolworths before the Liquor Licence Tribunal seeking to have a totally different liquor licence from Stuart Park transferred to the CBD Plaza.

55. At all material times Cridlands was aware that the new store was built to Woolworths specifications for a liquor store to operate therein.

56. The issue of conflict of interest was once again raised with [practitioner] and [practitioner] of Cridlands who advised the Church that there was no conflict of interest and in their view there was no monetary gain that would result.

57. The CBD Plaza belonging to the Church has suffered and continues to suffer loss of revenue as a result of Woolworths not operating a Liquor Outlet within the CBD Plaza by

> Woolworths failing and or refusing to transfer the Liquor Licence from the Old Shop to the CBD Plaza.
>
> Please contact the writer should you require further clarification of the matter. I look forward to hearing from you in due course."

[6] On 13 August 2003 the practitioner filed with the Law Society a document headed "Complaint against a legal practitioner" under seal of the Church ("the Complaint"). The Complaint was made in the name of the Church and specified Cridlands, together with three named practitioners, as the firm and practitioners against whom the Complaint was made. The nature of the complaint was identified as "Conflict of Interest" and, in a section headed "Particulars of a complaint", reference was made to the "letter of complaint" dated 2 July 2003. In a paragraph headed "Action required (Please state what action you consider should be taken by the Law Society or the practitioner)", the following words appeared:

> "Investigate the complaint. Admonish the practitioners and fine them."

[7] By letter of 19 August 2003 to the practitioner, the Law Society endeavoured to summarise the facts alleged by the Church and sought additional information. The practitioner responded by letter of 15 September 2003. That response included the following paragraph concerning use of confidential information and subparas (c), (e) and (f) were subsequently part of the particulars of the charge against the practitioner for professional misconduct:

"5. *Commercially Sensitive Information:*

(a) Cridlands were privy to all lease and allied negotiations between the Church and Woolworths and their competitor Coles in relation to becoming anchor tenants at the CBD Plaza which took place prior to the Development of Lot 2280.

(b) Cridlands were also aware of all negotiations over the rental rates, periods of discount, fit out arrangements with Specialty Shop Tenants at the CBD Plaza.

(c) ***Cridlands used the above information to R Is' advantage by securing Coles as the anchor tenant in the Mitchell Street Development Centre at Lot 2280. This information was commercially sensitive information that allowed R I to negotiate with Coles and obtain a financial advantage. It also allowed R I to maximize the rental it obtained from Coles***. [my emphasis]

(d) By bringing Coles into the Darwin CBD it created competition between the two supermarkets that resulted in the loss of revenue to the Church which has a rent based also on the Turnover of Woolworths.

(e) ***Cridlands also used the information to obtain a personal advantage for themselves to negotiate and obtain a commercial lease of office floor space within Mitchell Street Development Centre at Lot 2280.*** [my emphasis]

Alternatively

(f) ***By providing this commercially sensitive information to R I Cridlands were able to obtain a personal advantage for themselves by negotiating and obtaining a commercial lease of office floor space within Mitchell Street Development Centre at Lot 2280.*** [my emphasis]

(g) **See also Paragraph 33 of my letter dated 2 July 2003**." [my emphasis].

[8] On 6 October 2003 the Law Society wrote to the practitioner enclosing a copy of a letter to the Law Society from one of the practitioners named in the Complaint seeking particulars of the conduct of the individual

practitioners alleged to have constituted unprofessional conduct. The Law Society requested that the practitioner provide particulars:

> "Please provide specific instances of [A's] conduct which the Church alleges breach the Professional Conduct Rules. You will also need to do this in relation to the other two named practitioners."

[9] In addition the letter referred to advice from A that instructions were received by A from Reverend Hall and requested that a statement be provided by Reverend Hall concerning the conduct of A and whether he had raised any issue of conflict or other complaint with A.

[10] The practitioner responded by letter of 20 November 2003:

> "**Re Complaint against [B, C] and [A]**
>
> I refer to your letter dated 6 October 2003 and am instructed to respond as follows:
>
> 1. Although the original complaint is made against the firm Cridlands it was the individual practitioners that committed some or all of the breaches complained of and further explained in my letters dated 2 July 2003 and 15 September 2003. These practitioners have been named in the complaint lodged by the church on 13 August 203.
>
> **[B]:**
>
> 2. [B] was the Supervising Partner who had carriage and conduct of the Church's matters at all relevant times. ***Each and every allegation made in the complaint dated 2 July 2003 was committed by [B]. Similarly the conduct setout in my letter dated 15 September are attributed to [B].*** [my emphasis]
>
> 3. On 1 March 2002 the Church wrote to [B] regarding the conflict of interest by Cridlands acting for Woolworths as well as the Church and requested a full disclosure of its dealings with Woolworths in regard to the Church. [B] and [C] advised the Church that there was no conflict of interest. The letter dated 1 March 2002 is attached.

[A]:

4. [A] was a Senior Associate at Cridlands at all relevant times and as such [A] was privy to and was fully aware of the firm's clients including the fact that the firm had acted and alternatively continued to act for Woolworths and Manolas. [A] was aware that the interests of the Church conflicted with the interests of the other two parties and vice versa.

5. [A] acted on behalf of the Church with respect to Lot 7118 the CBD Plaza. [A] was involved with the matter up to about March 2001. ***The specific instances of conduct attributed to Cridlands is to be attributed to [A] until [A] ceased … involvement with the file***. [my emphasis]

6. [A] was involved in preparing the Agreement to Lease and Lease Deed between the Church and Woolworths. [A] was also involved with the file and took part in the meetings and negotiations that took place between the Church, Woolworths, Manolas and Harriscarfe.

7. My instructions from Rev Gale Hall are that during dealings with [A, A] did not raise the issue of conflict of interest with him. [A] is guilty of the conduct set out in paragraphs A to L and the particulars set out in paragraphs 20 to 57 with the exception paragraph 33, 49 and 56 in my letter dated 2 July 2003. [A] is also guilty of the conduct set out in paragraphs 5(a) and 8 of my letter dated 15 September 2003.

8. During [A's] relationship with Rev Hall it appeared that he was getting good advice from [A]. This is, however, questionable in the light of the conflict of interest that was present at all times but never revealed to Rev Hall or the Church. [A] has a conscience of [A's] own and ought to have informed the Church and its representatives of the nature and implications of the conflict of interest. [A] never did. In view of the underlying conflict of interest any relationship [A] had with Rev Hall and the Church was fundamentally flawed.

9. [B] and [A] sent a letter dated 8 February 1999 requesting the Church to obtain independent legal advice regarding one aspect of the Lease to Woolworths admitting that the interests of the Church conflict with Woolworths and Manolas. The letter dated 8 February 1999 is attached.

[C]:

10. [C's] carriage and conduct of the matters relating to the Church commenced after [A's] involvement with it ceased. [C] was at all relevant times a Senior Associate at Cridlands and as such [C] was privy to and was fully aware of the firm's clients including the fact that the firm had acted and alternatively continued to act for Woolworths and

Manolas. [C] was aware that the interests of the Church conflicted with the interests of the other two parties and vice versa.

11. [C] acted on behalf of the Church with respect to Lot 7118, CBD Plaza after March 2001. [C] was also involved with the matter relating to Lot 2280. ***Specific instances of conduct attributed to Cridlands is to be attributed to [C] during her involvement***. [my emphasis]

12. [C] provided legal advice to the Church with respect to the specialty shops leases within the CBD Plaza in Lot 7118. [C] was therefore privy to commercially sensitive information set out in paragraph 5(b) to (g) in my letter dated 15 September 2003. I understand that [C] was not actively involved in the case when the Agreement to Lease and Lease Deed was prepared. However, [C] became fully aware of the facts and circumstances of the case when [C] assumed carriage of the matter but failed to advise the Church of the conflict of interest between [the] clients. In fact [C] advised the Church that no conflict existed.

Rev Gale Hall left the Church in December 2000. He is not privy to the developments that took place after his Departure especially those leading up to this complaint. I have spoken to Rev Hall and he informs me that [A] never raised issues regarding conflict of interest with him at all. Please let me know whether you still require a statement from Rev Hall."

[11] By letter dated 21 November 2003 to the Law Society, Cridlands denied any inappropriate or improper conduct and set out particulars of their involvement in the commercial matters identified in the practitioner's letter of 2 July 2003. Cridlands also asserted that the practitioner was alleging that Cridlands had committed fraud:

"At paragraph 5 of Mrs McLaren's letter of 15 September 2003 and at paragraph 33 of her letter of 2 July 2003 on behalf of the Uniting Church she alleges that Cridlands have committed fraud."

[12] Cridlands also denied the misuse of privileged and confidential information:

"The Uniting Church has claimed Cridlands used confidential and commercially sensitive knowledge and information, which it gained in its capacity as lawyers for the Uniting Church, that was prejudicial to the interests of the Uniting Church.

…

> Those allegations are totally denied and are without any factual basis whatsoever."

[13] Cridlands sought from the practitioner material supporting the assertions:

> "Both the Uniting Church and Mrs McLaren must be asked to provide any material in support of these defamatory and damaging assertions of fraudulent conduct."

[14] Cridlands' letter of 21 November 2003 was provided to the practitioner who responded by letter of 10 May 2004. In essence the practitioner continued to maintain the assertions set out in previous correspondence but specifically denied that the Church was alleging that the practitioners had committed fraud. Referring to the passage in Cridlands' letter of 21 November 2003 concerning fraud, the practitioner wrote:

> "Denied, not true.
>
> It is false to say that the Church alleges that the Relevant Practitioner(s) Complained Against committed fraud in at [sic] paragraph 5 of the letter dated 10/9/2003 from Mrs A McLaren Barrister and Solicitor and paragraph 33 of her letter dated 2/7/2004 or at all."

[15] Although the denial referred to letters of 10 September 2003 and 2 July 2004, it is apparent that the practitioner was referring to her letters dated 15 September 2003 and 2 July 2003.

[16] The practitioner's letter of 10 May 2004 concluded with the statement that she was "instructed to request you to proceed with the complaint".

[17] Correspondence then followed concerning the possibility of conciliation. Included in that correspondence was a repetition of the assertion by

Cridlands that "Ms McLaren has effectively accused Cridlands of fraud". Cridlands specifically referred to par 33 in the letter of 2 July 2003 and par 5(f) of the letter of 15 September 2003. Cridlands also noted that the practitioner had not provided any evidence to support the assertions in her correspondence.

[18] Eventually the parties consented to conciliation of the Complaint by the Church and that conciliation was successful. By letter of 12 July 2005 the Law Society advised the practitioner that following the successful conciliation, the Professional Standards Committee of the Law Society ("the Committee") had "determined to dismiss the complaint" by the Church. The letter enclosed a copy of the Determination by the Committee and a separate letter advised the practitioner of rights of appeal.

[19] The letter of 12 July 2005 from the Law Society to the practitioner also advised the practitioner that the Committee was concerned that aspects of the practitioner's conduct in making the Complaint on behalf of the Church might amount to a breach of the Professional Conduct Rules. The aspects about which the Committee was concerned were explained as follows:

> "We refer specifically to the allegations of fraud, as outlined below. The Committee is of the view that whilst the allegations of conflict were rightly raised, there appears to be no such justification for the allegations of fraud.
>
> We accordingly seek a detailed explanation from you as to the basis for making the following complaints, which in our view amount to allegations of serious misconduct and/or fraud. We say this because the allegations assert that Cridlands used confidential and commercially sensitive information:
>
> a. In breach of its ethical obligations to it's client;

b. To achieve a benefit for a third party also a client of Cridlands;

c. To the detriment of the Uniting Church; and

d. To Cridlands personal advantage.

Specifically the particulars of these allegations are set out as follows:

By complaint 2 July 2003

At paragraph 15 it is alleged that:

> 'At all material times to this complaint Cridlands used confidential and commercially sensitive knowledge and information gained as legal representatives of the Church to draft a development deed for and on behalf of Randazzo Investments that was prejudicial to the interests of the Church with respect to lot 2280 Town of Darwin.'

At paragraph 33 it is alleged that:

> 'At all times material to this complaint Cridlands used and passed on commercially sensitive information relating to bids from prospective anchor tenants received in confidence on behalf of the Church for the CBD Plaza to Randazzo Investments for its development.'

By letter to Law Society of the Northern Territory 15 September 2003

At paragraph 5(c) it is alleged that:

> 'Cridlands used the above information to RI's advantage by securing Coles as the anchor tenant in the Mitchell Street Development Centre at Lot 2280. This information was commercially sensitive information that allowed RI to negotiate with Coles and obtain a financial advantage. It also allowed RI to maximise the rental from Coles.'

At paragraph 5(e) it is alleged that:

> 'Cridlands also used the information to obtain a personal advantage for themselves to negotiate and obtain commercial lease of office floor space within Mitchell Street Development Centre at Lot 2280.'

At paragraph 5(e) it is alleged that:

> 'By providing this commercially sensitive information to RI, Cridlands were able to obtain a personal advantage for themselves by negotiating and obtaining a commercial lease of office floor space within Mitchell Street Development at Lot 2280.'
>
> We observe that your previous responses of 10 May 2004 and 25 August 2004 to the concerns raised that these allegations are tantamount to allegations of fraud, are simple denials and in the context of the allegations particularised above do not make sense. Without further explanation these denials are not considered sufficient in the context of your detailed complaints.
>
> Whether the allegations are tantamount to fraud or serious misconduct they are of a very serious nature which on the material before us do not have any factual basis. Nor does it appear that there was any attempt by you, prior to lodging the complaint, to raise these issues and seek a response directly from Cridlands.
>
> We seek that you provide a detailed explanation setting out the basis upon which you made the allegations particularised above within thirty days of this date."

[20] On 5 August 2005 Cridlands wrote a letter of apology to the Church. The letter maintained that Cridlands did not breach any legal or professional duty to the Church, but apologised for not being able to act for the Church in its proceedings against Woolworths and stated that Cridlands were embarrassed by the creation of a document "that may have given the appearance that Cridlands had advised parties other than the Church in relation to the Lease from the Church over Lot 2280 Mitchell Street."

[21] On 31 March 2007 the *Legal Practitioners Act* was repealed ("the repealed Act") and the *Legal Profession Act 2006* ("the LPA") commenced operation. Although there is no material before the Court to identify what was happening with respect to the question of charges against the practitioner, the hearing before this Court was conducted on the basis that as at 31 March 2007 the investigation of the question was continuing.

[22] By letter of 31 October 2007 the Attorney-General for the Northern Territory consented to the laying of charges against the legal practitioner in accordance with s 50(1A) of the repealed Act.

Charges and Response

[23] The charges brought to the Tribunal were presented in a document headed "Disciplinary Application - Charges for Professional Misconduct" dated 21 November 2007 and signed by the Chief Executive Officer of the Law Society ("the Application"). The charges were expressed to be made pursuant to s 496 of the LPA and reg 96A of the *Legal Profession Regulations 2007* ("the regulations").

[24] The practitioner was charged with "professional misconduct", but detailed particulars were provided in the Application. It is a lengthy document more in the nature of a pleading than particulars of a charge. As it is necessary to refer to the particulars in some detail, a copy of the Application is annexed to these reasons.

[25] Although somewhat prolix, the Application clearly identified the basis of the charge that the practitioner had been guilty of professional misconduct. Three specific "allegations" made by the practitioner were identified and the case for the Law Society as to the "meaning and effect" of each allegation were specified. Further, the particular failures of the practitioner with respect to each allegation were identified.

[26] In summary, the Application gave the following particulars of the "allegations" made by the practitioner and why the making of the allegations amounted to professional misconduct:

- Paragraph 3 of the Application stated that the Complaint by the Church dated 13 August 2003 incorporated the statements made in the practitioner's letter of 2 July 2003 and para 4 stated that two "allegations" were made in that letter:

  (i) The "first allegation" was that Cridlands, "when acting for a client Randazzo Investments Pty Ltd ("Randazzo") in drafting a deed affecting the development by Randazzo of land in which [the Church] was interested ("the Mitchell Centre site"), had used confidential and commercially sensitive knowledge and information gained by it as the solicitors for [the Church] prejudicially to the interests of [the Church]."

  (ii) The "second allegation" was that Cridlands, "when acting for [the Church] in relation to the development of land in which [the Church] was interested ("the CBD Plaza site") had used and passed on to Randazzo, for use to Randazzo's advantage in respect of Randazzo's development of the Mitchell Centre site, commercially sensitive information relating to bids received by [the Church] from prospective anchor tenants for the Woolworths site."

- Further details of the "second allegation" were found in the letter of 15 September 2003, "the substance of which was that the commercially sensitive information in question related to the detail of lease negotiations respectively between [the Church] and Woolworths, and [the Church] and Coles, for a lease of retail premises at the CBD Plaza site, which information was used to Randazzo's advantage when Randazzo negotiated with Coles a lease of retail premises at the Mitchell Centre site." (Application para 5(a)).

- The "third allegation" was made in the letter of 15 September 2003, "the substance of which was that Cridlands had secured for itself a lease from Randazzo of commercial premises at the Mitchell Centre site either by using the information referred to in [the second allegation] or by providing that information to Randazzo." (Application para 5(b)).

- The natural meaning and effect of the allegations were set out in paras 6, 7 and 8 of the Application. As to the second and third allegations, such meaning and effect was that Cridlands or the Cridlands practitioners "had deliberately acted so that the commercial interests of other clients were preferred to the commercial interests of [the Church]."

- The natural meaning and effect of the third allegation was that Cridlands or the Cridlands practitioners "had deliberately acted so that

the commercial interests of … Cridlands itself [was] preferred to the commercial interests of [the Church].

- The natural meaning and effect of each of the three allegations was:

  (i) Cridlands or the Cridland's practitioners "had engaged in conduct that involved intentional and contumelious breaches of their fiduciary obligations to [the Church]."

  (ii) Cridlands or the Cridlands practitioners "had deliberately misused confidential information obtained by Cridlands in the context of acting for and on behalf of [the Church]."

  (iii) Cridlands or the Cridlands practitioners "had deliberately acted in a manner calculated to prejudice the interests of [the Church]."

  (iv) Cridlands or Cridlands practitioners "were guilty of serious and wilful professional misconduct."

- The practitioner "well knew and intended" that each of the three allegations "have the meanings and effects" alleged in paras 6 – 8. (Application para 9).

- By letter dated 20 November 2003 the practitioner made "personal allegations" against the Cridlands practitioners alleging that the practitioners "committed the conduct the subject of each of the first,

second and third allegations" or such of the conduct contained in those allegations as occurred when the practitioners were acting for the Church. (Application para 10).

- At the time of making each of the three allegations and the personal allegations, the practitioner:

  (i) "had not seen evidentiary material capable of supporting those allegations or any of them;"

  (ii) "did not reasonably believe that evidentiary material capable of supporting those allegations or any of them was available;"

  (iii) "had not obtained instructions from [the Church] to make those allegations or any of them;"

  (iv) in the alternative, "had not obtained instructions from [the Church] to make those allegations or any of them having first advised [the Church] that those allegations should not be made unless evidentially material capable of supporting them was available." (Application para 12).

- By making each of the three allegations and the personal allegations in the circumstances identified in the Application:

(i) "the practitioner substantially failed to meet the standards of professional conduct reasonably to be expected of a competent legal practitioner and is guilty of professional misconduct;" and

(ii) "further or alternatively, the practitioner [was] guilty of professional misconduct in that she wilfully or recklessly failed, when exercising the forensic judgments called for in the conduct of the Complaint, to take care to ensure that allegations or suggestions made by her on behalf of [the Church] … were reasonably justified by the material then available to her (contrary to rule 17.21 of the Rules of Professional Conduct and Practice)." (Application para 13).

- From December 2003 the practitioner was aware that each of the three allegations and the personal allegations were strenuously denied by Cridlands and the individual practitioners and Cridlands regarded the second and third allegations as allegations of fraud. (Application para 14).

- Notwithstanding knowledge of those denials, and notwithstanding that the practitioner had not seen evidentiary material capable of supporting the allegations and did not reasonably believe that such material was available and had not obtained instructions from the Church to maintain the allegations, the practitioner continued to maintain each of the three allegations and the personal allegations or failed to have them

withdrawn. In this maintenance and failure the practitioner was guilty of professional misconduct. (Application paras 15 and 16).

[27] On 28 February 2008 the practitioner responded in writing to the Application ("the Response"). In essence she admitted the correspondence and lodging the Complaint on behalf of the Church, but denied the natural meanings and effects alleged in the Application. Specifically as to paras 4 and 5 of the Application which set out the three allegations, the Response stated they were "denied as to the 'natural meaning and effect' alleged" as set out in the Application.

[28] The Response also denied para 9 which asserted that the practitioner well knew and intended that the allegations have such meanings and effects.

[29] The Response admitted para 10 of the Application which contained the "personal allegations".

[30] In her Response the practitioner denied the essence of the charge that she had made each of the three allegations and the personal allegations without seeing evidentiary material or believing evidentiary material was available and without obtaining instructions or advising that the allegations should not be made unless evidentiary material capable of supporting the allegations was available.

[31] Prior to the hearing before the Tribunal, a number of matters were admitted by the practitioner. Of particular importance were admissions that at the

relevant times the practitioner did not have evidentiary material capable of supporting the first and third allegations, the "further details" of the second allegation or the personal allegations. The terms of the admissions were as follows:

- At the time of lodging the Complaint, "the practitioner did not have any evidentiary material capable of supporting allegations that Cridlands, when acting for a client Randazzo in drafting a deed affecting the development by Randazzo of land in which [the Church] was interested ('the Mitchell Centre site'), had used confidential and commercially sensitive knowledge and information gained by it as the solicitors for [the Church] prejudicially to the interests of [the Church] ('the first allegation')."

- "At the time of forwarding the correspondence dated 15 September 2003 the practitioner did not have evidentiary material capable of supporting the further details in respect of the second allegation, the substance of which was that the commercially sensitive information in question related to the detail of lease negotiations respectively between [the Church] and Woolworths, and [the Church] and Coles, for a lease of retail premises at the CBD Plaza site, which information was used to Randazzo's advantage when Randazzo negotiated with Coles a lease of retail premises at the Mitchell Centre site ('the further details')."

- "At the time of forwarding the correspondence dated 15 September 2003 the practitioner did not have any evidentiary material capable of supporting a further allegation the substance of which was that Cridlands had secured for itself a lease from Randazzo of commercial premises at the Mitchell Centre site either by using the information referred to in paragraph 4(b) of the application before the Disciplinary Tribunal or by providing that information to Randazzo ('the third allegation')."

- "At the time of forwarding the correspondence dated 20 November 2003 the practitioner did not have evidentiary material capable of supporting any of the following allegations:

  18.1 specifically that [practitioner] committed the conduct the subject of each of the first, second and third allegations;

  18.2 in substance that [practitioner] committed such of the conduct the subject of the first, second and third allegations as occurred prior to about March 2001; and

  18.3 in substance that [practitioner] committed such of the conduct the subject of the first, second and third allegations as occurred after about March 2001."

The Hearing

[32] In view of the practitioner's attack upon the reasons of the Tribunal, and her contention that there was confusion as to the "allegations" that were said to have been made without instructions and without an evidentiary basis, it is necessary to consider the conduct of the hearing and to identify the primary issues presented to the Tribunal.

[33] In opening to the Tribunal, the Law Society advanced a case that a search of the records of the Church and enquiries of people involved "found no evidence to support the allegations that Cridlands had made any improper use of commercially sensitive information to benefit themselves, Randazzo or anybody else", and that the person who conducted the search was satisfied that "no-one from the church had given specific instructions" to make the allegations. The Law Society also relied upon the admissions made by the practitioner as to the absence of evidentiary material.

[34] The case for the Law Society was presented in counsel's opening on the basis that the practitioner was guilty of professional misconduct because she had alleged "serious misconduct, dishonesty [and] serious professional misconduct" against Cridlands and the practitioners without being in possession of a sufficient evidentiary basis for the allegations and without specific instructions to make them. As to whether the allegations made by the practitioner amounted to allegations of fraud, and as to what counsel described as the "apparent defence" that fraud was not alleged, while maintaining that the allegations amounted to assertions of fraud, counsel put

to the Tribunal that even if fraud was not alleged the allegations were of serious professional misconduct and, therefore, came within the Professional Conduct Rules.

[35] The Law Society tendered the practitioner's file and called two witnesses. First, the General Secretary of the Church Synod who had searched the records of the Finance and Property Services Committee. The relevant minutes were tendered for the purpose of establishing the absence of any resolution to make the Complaint or the "allegations".

[36] The second witness was a person who had previously held the position of General Secretary of the Synod. He had been involved in the reconciliation and had made himself familiar with the nature of the allegations contained in the correspondence. He checked the records of the Church and was unable to find any record of discussion of the matters raised in the practitioner's correspondence and, in particular, no reference to the conduct that was the subject of the statements in paras 15 and 33 of the letter of 2 July 2003 or to concerns of that nature. Similarly, he did not find any evidence in the Church files that Cridlands had used commercially sensitive information to their own advantage or had passed confidential information to Randazzo. As to a possible conflict of interest, the witness said:

> "I was unable to find any documentation that we had that would say 'Here's a serious conflict of interest with Cridlands and we should do something about it'. I didn't find anything specifically suggesting that there was any evidence on our files that Cridlands had anything that would suggest there was a conflict of interest."

[37] It appears to be common ground that contrary to the evidence of the second witness, the Church records contained references to a possible conflict of interest, but the witness had not seen those records.

[38] The witness also spoke with Mr John McLaren, the Chairman of the Finance and Property Services Committee and the Secretary of that Committee, Ms Julie Watts.

[39] At the conclusion of the evidence, counsel for the practitioner sought an opportunity to obtain instructions as to whether the practitioner wished to call evidence. The following morning counsel advised the Tribunal that no evidence would be called.

[40] In written closing submissions to the Tribunal, counsel for the Law Society identified the specific statements in the correspondence which were identified in the Application as the first, second and third allegations. She also referred to the specific terms of the letter of 20 November 2003 which introduced the "personal allegations". Relying on admissions made by the practitioner as to the absence of evidentiary material, counsel put to the Tribunal that on the basis of the admissions alone the practitioner had been guilty of professional misconduct.

[41] In respect of the allegation against each of the individual solicitors of obtaining a personal advantage for the individual solicitor and partners by securing a lease through direct use of confidential and commercially sensitive information, counsel characterised the allegation as one of "gross

professional misconduct involving actual dishonesty". The written submissions identified the features of the evidence from which counsel urged that the Tribunal could infer that the practitioner did not have instructions to make the specific allegations against the individual practitioners.

[42] The oral submissions of counsel for the Law Society followed the course of written submissions. In addition, counsel relied upon the failure of the practitioner to give evidence and the election not to call other evidence, for example, the practitioner's husband who was the Chairman of the Committee. Mr McLaren was recorded in the practitioner's file as having given instructions concerning the Complaint and had been present throughout the proceedings.

[43] The transcript suggests that a written outline of closing submissions was provided by counsel for the practitioner. The parties have not been able to locate a copy of that document. In oral submissions as to the merits of the charges, counsel for the practitioner said very little. He maintained that the document under seal established the existence of instructions to make the Complaint and submitted that the language of the correspondence fell short of an allegation of fraud. The primary attack was addressed to the section relied upon in laying the Application, the question of privilege and the inapplicability of r 17.21 of the Rules of Professional Conduct and Practice. Counsel also asserted that there was confusion as to the precise charges being faced by the practitioner.

Ground 1

"The Tribunal erred in fact and law in holding at [27] that [the practitioner] acted without authority in making the complaint to [the Law Society]."

[44] In support of this ground, counsel for the practitioner submitted that there was confusion in the proceedings as to the "allegations" made by the practitioner which were the subject of the charge of professional misconduct. As a consequence, urged counsel, the parties presented different cases to the Tribunal that were like "ships passing in the night". Counsel contended that this confusion arose because paras 4 and 5 of the Application misquoted the statements made in the letter of 2 July 2003 and the meaning and effect set out in paras 6 – 8 of the Application misrepresented the contents of the correspondence from the practitioner to the Law Society. The practitioner denied making allegations of fraud and it necessarily followed that she did not have instructions to make such allegations. The Tribunal did not address itself to the correct question.

[45] I do not agree with these contentions. First, para 4(a) of the Application accurately conveyed the substance of the assertion made in para 15 of the letter of 2 July 2003. This assertion was specifically identified as the "first allegation".

[46] Secondly, para 4(b) of the Application correctly stated the substance of the assertion in para 33 of the letter of 2 July 2003, as particularised in the

letter of 15 September 2003. This assertion was specifically identified as the "second allegation".

[47] Thirdly, para 5(b) of the Application correctly stated the effect of paras 5(e) and (f) of the letter of 15 September 2003. The substance of the assertions made in those paragraphs of that letter was specifically identified as the "third allegation".

[48] Fourthly, the essence of each of the three allegations, and the attribution of the conduct at the heart of each of those allegations to the individual practitioners, was stated in the Application.

[49] Fifthly, the paragraphs from the correspondence that were said to contain each of the three allegations were identified in the course of the proceedings.

[50] Sixthly, from the outset of the hearing the Law Society presented its case on the basis that each of the three allegations, and the personal allegations, were allegations of serious professional misconduct made without instructions and without an evidentiary basis. This was stated as being the case for the Law Society regardless of whether the allegations were properly characterised as allegations of fraud.

[51] The description in the Application of the meaning and effect of each of the specific allegations did not lead to any confusion. The practitioner could not have been under any misapprehension as to the specific statements in her

correspondence that were the subject of the three allegations identified in paras 4 and 5 and attributed to the individual solicitors by her letter of 20 November 2003. Nor could she have been under any misapprehension that, regardless of whether the statements amounted to allegations of fraud, they were said to be allegations of serious professional misconduct which the Law Society asserted were made without instructions when the practitioner was not in possession of evidentiary material to support the statements. This was not a case of ships passing in the night. It was a case of the practitioner in her slow and leaky vessel endeavouring unsuccessfully to slip past the opposing ship in order to avoid being sunk by its heavy fire.

[52] In the reasons for decision, the Tribunal correctly identified each of the individual statements specified in the Application as the three allegations by quoting from paras 15 and 33 of the letter of 2 July 2003 and from the relevant paragraphs of the letter of 15 September 2003. Having quoted the actual words of the relevant parts of those letters, together with reference to the relevant sections of the letter of 20 November 2003 attributing the conduct to the individual practitioners, the Tribunal correctly noted that "these allegations" were set out in paras 4 and 5 of the Application and that the meaning to be derived from "those allegations" was contained in paras 6 – 8 of the Application. The Tribunal then correctly summarised the essence of the allegations in the following terms:

> "12. The essence of the allegations is that the three practitioners used information obtained from the Uniting Church in Australia to the advantage of another client and of themselves. …

> The allegations by [the practitioner] are that the three practitioners used information gained in the course of acting for a client to the benefit of themselves and another party and to the disadvantage of the client. …"

[53] As to the characterisation of the allegations, the Tribunal correctly observed that they were "serious allegations that the practitioners contravened the fiduciary duty owed to their client, the loyalty which they are expected to demonstrate to their client (whether then currently acting for them or not) and their obligations to the legal profession to act in a manner in keeping with the honour of the profession." The Tribunal then noted that the Law Society argued that the allegation of use by the three practitioners of information for their benefit amounted to an allegation of fraud.

[54] In my opinion, there was no confusion when the Tribunal spoke of the "allegations". The Tribunal was speaking of the statements made in the relevant paragraphs of the practitioner's correspondence as accurately reflected in the description of the three allegations contained in paras 4 and 5 of the Application. In the following passage the Tribunal distinguished the "allegations" from the issue as to the meaning to be given to the allegations:

> "[T]he response raises issues with the meaning to be derived from the allegations (the meaning described in paragraphs 6, 7 and 8 of the Disciplinary Application), [and] denies that the respondent intended the allegations to have the meaning so derived".

"Authority" – "Instructions"

[55] Ground 1 includes a complaint that the Tribunal erred in finding that the practitioner acted "without authority" in making the "complaint". It appears

that notwithstanding the presentation of the case on the basis that the practitioner did not have instructions to make each of the three allegations, the distinction between instructions to make each of the three allegations and authority to make the Complaint to the Law Society dated 13 August 2003 became blurred.

[56] In the following passage, the Tribunal correctly identified the case for the Law Society with respect to the obtaining of instructions:

> "17. The case against the [practitioner] was, as Ms Kelly SC, counsel for the Law Society, pointed out, a case in the negative. What the Law Society sought to prove was that at the relevant time of making the complaint the respondent did not have instructions from the Uniting Church in Australia to make the allegations contained in the complaint against the three practitioners …"

[57] In that passage, the Tribunal was referring to the "allegations" contained in the Complaint to the Law Society, namely, the three allegations identified in paras 4 and 5 of the Application. The Tribunal was treating the third allegation found in para 5(c) of the letter of 15 September 2003 as part of the Complaint dated 13 August 2003 because the letter of 15 September 2003 was by way of particulars of matters found in the letter of 2 July 2003 which had been incorporated into the Complaint. In this passage the Tribunal correctly identified the case for the Law Society that the practitioner did not have instructions to make "the allegations" contained in the Complaint.

[58] Immediately after this passage, the language of the Tribunal moved from a question of "instructions" to make the allegations to a question of "authority to make the complaints":

> "18. To support the allegations that the respondent had no authority to make the complaints and had no evidence upon which to support those complaints, the Law Society called two witnesses."

[59] After referring to the evidence of the two witnesses, and to the failure of the practitioner to give evidence or call other witnesses, the Tribunal returned to "allegations" when it addressed itself to the question in the following terms:

> "22. The question of whether the respondent had authority from the Uniting Church to make the allegations against Cridlands and the three practitioners remains unanswered. The respondent chose to either deny or not admit that she did not have the authority of her client to make the allegations contained in the complaint."

[60] The Tribunal then discussed the affixing of the Common Seal to the Complaint of 13 August 2003. After observing that it was not known whether those who witnessed the seal had the "authority" of the Church to make the "complaint against the three practitioners or against Cridlands", and that it would have been an easy matter to call the signatories, the Tribunal observed that it had not been "invited" by the practitioner to find that she relied upon the fact of the seal as "evidence of her instructions". The Tribunal then used the failure to rely upon the execution under seal or to call evidence as "persuasive indicia that the respondent could not establish that she had the authority of her client to make the allegations in the complaints". The Tribunal continued:

"25. However, can the Tribunal be satisfied that the respondent acted entirely by herself in making the complaint? It seems that others connected with the Property Trust witnessed the application of the seal to the complaint. In addition it seems moderately clear to the Tribunal that the respondent's husband, Mr John McLaren, the chairman of the Property Trust, was interested in making the complaint, as his letter to the Law Society demonstrates.

26. The Tribunal is left in an unsatisfactory position on this question. The Tribunal might find that the respondent acted entirely on her own volition, as unlikely as that might seem. Alternatively, the Tribunal might accept that there is indirect evidence of the involvement of some of those who held positions in the Property Trust apparently instructing the respondent to make the complaint. For instance, there are entries in the respondent's file that she was taking instructions from John McLaren. …

Without the evidence of John McLaren or the respondent on this question, *the Tribunal cannot be sure whether the instructions of John McLaren carried the authority of the Uniting Church or the Property Trust*. The unexplained absence of that evidence combined with the lack of any evidence in relation to the implications of using the Property Trust seal suggest that the respondent was aware that she was acting without the authority that she required to make the complaint when she did so. [my emphasis]

27. The Tribunal must resolve this question against the respondent and find that although there appeared to have been some involvement of office holders of the Property Trust, notably John McLaren, and the witnesses to the affixing of the common seal all of whom may have provided some instruction or encouragement to the respondent to make the complaints, *there is insufficient evidence to show that the respondent was acting with the authority of the Property Trust to make the complaints against the three practitioners, and further, that she knew that to be the case.*" [my emphasis]

[61] It is in these passages that, in my opinion, error occurred. It was necessary to maintain a distinction between the question of instructions to make each of the three allegations and instructions to lodge the Complaint with the Law Society. Further, the question of authority to affix the Church seal to the Complaint is a separate question from whether instructions were given to the practitioner to file the Complaint. In the passages to which I have referred, the Tribunal failed to maintain these distinctions and concentrated upon

whether the instructions of Mr McLaren "carried the authority" of the Church, that is, whether the seal was affixed with the authority of the Church.

[62] The question whether the seal was properly affixed with the authority of the Church was not raised in the course of the hearing. Nor was it suggested that the instructions of Mr McLaren did not carry the authority of the Church. In the only discussion that occurred concerning the affixing of the seal, in response to a suggestion by the Chairman of the Tribunal that the presence of the seal was capable of supporting an inference that the Church gave instructions to lodge the Complaint and intended that it be a Complaint concerning the matters raised in the letter of 2 July 2003, counsel for the Law Society accepted that proposition in a "formal sense". Counsel argued, however, that the presence of the seal was not sufficient "to say this that someone from the church actually had their attention drawn to the fact that there were these particular paragraphs making particular accusations of dishonest conduct against practitioners and then said yes, okay, go ahead". Counsel submitted that it would be necessary for instructions to exist to make "those particular allegations as distinct from a general complaint". Counsel then identified the essence of the case for the Law Society that such instructions were not given:

> "And the likelihood is that that didn't occur for all the reasons that I've just outlined. If there is no evidence in the church files to support those allegations why on earth would anybody instruct her to make them as distinct from saying yeah, yeah, the letter looks fine go ahead."

[63] It is clear from the transcript that counsel for the Law Society was drawing a distinction between instructions to file a "general complaint" with the Law Society and instructions to make the specific allegations found in paras 15 and 33 of the letter of 2 July 2003. In subsequent discussion, counsel accepted that the file documentation and order of correspondence left open the inference that there were instructions to move along the path of a complaint about a conflict of interest. Counsel again drew a distinction between a general complaint about a conflict of interest and the specific "accusations" found in paras 15 and 33 of the letter of 2 July 2003.

[64] As this summary demonstrates, there was no discussion in the hearing and no issue raised concerning the authority of Mr McLaren to give instructions. Nor was any issue raised as to the authority of the signatories to affix the seal on behalf of the Church. In these circumstances, the evidence before the Tribunal was to the following effect:

- There was reference in the files to a possible conflict of interest affecting Cridlands.
- Mr McLaren was the Chairman of the Church Property Trust.
- Mr McLaren gave instructions to the practitioner in respect of "drafting complaint to Law Society".

- The Church seal, applied with two signatories, one of whom was Ms Watts, was affixed to the Complaint to the Law Society of 13 August 2003.

- The Complaint incorporated the letter of 2 July 2003.

- There was no evidence to suggest that Mr McLaren did not have the "authority" of the Church to give instructions to the practitioner in connection with a complaint to the Law Society about Cridlands and a conflict of interest.

- There was no evidence that the seal was not affixed to the Complaint with the authority of the Church.

- There was no evidence as to whether Mr McLaren or anyone who gave instructions to the practitioner appreciated the significance of the particular statements found in paras 15 and 33 of the letter of 2 July 2003.

[65] In my opinion there was no basis upon which the Tribunal could find that Mr McLaren did not have the authority of the Church to give instructions to lodge the Complaint with the Law Society and, therefore, no basis for a finding that the practitioner did not have the authority of the Church to do so. In the absence of evidence to the contrary, the Tribunal should have presumed that the seal was affixed to the Complaint with the authority of the Church. It would follow, therefore, that the Tribunal should have found that

the Complaint was filed with the authority of the Church. At the least, the burden resting upon the Law Society to prove to the contrary had not been discharged.

[66] In these circumstances, in my opinion the Tribunal erred in concluding that the practitioner did not have the "authority" or instructions of the Church to lodge the Complaint with the Law Society.

[67] Further, there appears to have been a reversal of the onus of proof. The Tribunal concluded that there was "insufficient evidence to show that the respondent was acting with the authority of the Property Trust". This conclusion came after the observation that the Tribunal could not be sure whether "the instructions of John McLaren carried the authority" of the Church. As I have said, there was no evidence of a lack of authority to file the Complaint and the presumption of regularity attending the affixing of the seal applied. The burden was on the Law Society to prove a lack of authority and to rebut the presumption of regularity. In these circumstances, in the absence of even a prima facie case concerning a lack of authority, there was no burden, evidential or otherwise, resting on the practitioner in this respect.

[68] In addition, the Tribunal erred in finding that the practitioner was aware that she was acting without authority in lodging the Complaint. There was no evidence from which such a conclusion could be drawn. The evidence of the provision of instructions by Mr McLaren and the affixing of the seal tended

to establish otherwise. Again, it appears there was a reversal of the onus of proof.

[69] In different passages, the Tribunal spoke of instruction or authority to make "the complaint" and "the complaints against the three practitioners". It is unclear whether the Tribunal was intending on each occasion to refer to the Complaint lodged with the Law Society or whether, at times, it was addressing itself to authority or instructions to make the three allegations specified in paras 4 and 5 of the Application and the personal allegations.

[70] As I have said, the evidence failed to establish a prima facie case that there was no authority or instruction to lodge the Complaint with the Law Society. The Law Society contended that instruction to make a "general complaint" about conflict of interest did not necessarily include instruction to make the three allegations. However, although there was no positive evidence that those instructing Ms McLaren and affixing the seal were aware of the contents of the letter of 2 July 2003, it must be recognised that the seal of the Church was affixed to the Complaint which specifically incorporated the letter of 2 July 2003.

[71] The Law Society relied upon the absence of any record within the Church files of any concern being expressed or of an evidentiary basis for the three allegations that were the subject of the charge. As counsel put it to the Tribunal, if the Church was not in possession of any information suggesting misconduct of the type found in the three allegations, it is hardly likely that

instructions would be given to make those allegations (as opposed to making a complaint about a conflict of interest). Counsel urged that in these circumstances, the failure of the practitioner to give evidence or to call evidence of the content of her instructions was significant.

[72] There is a further matter of significance. The practitioner admitted that at the time she lodged the Complaint with the Law Society, she was not in possession of evidentiary material capable of supporting the first allegation found in para 15 of the letter of 2 July 2003 that Cridlands used confidential and commercially sensitive knowledge and information prejudicially to the interests of the Church. Secondly, the practitioner admitted that at the time of providing the further details of the second allegation by letter of 15 September 2003, and in particular in para 5(c) of that letter, the practitioner did not have evidentiary material capable of supporting the allegation that Cridlands used commercially sensitive information to the advantage of Randazzo. Thirdly, the practitioner admitted that at the time of her letter of 15 September 2003 she did not have evidentiary material capable of supporting the third allegation that Cridlands had used information to the personal advantage of Cridlands.

[73] In my opinion, in the absence of any evidence in the file identifying a concern on the part of the Church about any of the three allegations, and in view of the admissions to which I have referred concerning the absence of evidentiary material with respect to the allegations, a prima facie case was raised that the appellant did not have specific instructions to make those

particular allegations. This prima facie case exists notwithstanding that the letter of 2 July 2003 became part of the Complaint to which the seal was affixed. Paragraphs 15 and 33 contained serious assertions of misconduct by Cridlands which took the allegations well beyond a mere conflict of interest. In these circumstances the failure to give evidence or call evidence confirming the existence of the specific instructions to make those allegations was particularly significant. In my view, it was open to the Tribunal to draw a conclusion adverse to the practitioner and to find that the Law Society had proved the absence of specific instructions on these particular matters.

[74] Although it was open to the Tribunal to find that the practitioner lacked specific instructions to make the three allegations in the Complaint, as I have said there was a blurring of the distinction between "authority" and "instructions" and a reversal of the onus of proof occurred. In respect of the issue of instructions, the reversal is confirmed in the following passage:

> "50. The respondent has breached the obligations set out in clause 12 of the Conduct Rules by her failure to demonstrate that she had instructions from her client to make the allegations against the three practitioners …"

[75] Error having occurred, this Court must determine whether it should allow the appeal and remit the matter to the Tribunal or whether the finding of professional misconduct should stand on the basis of other findings. This determination requires consideration of other findings and an application by the practitioner to call additional evidence.

Application to call evidence

[76] In connection with the issues of authority and instructions, the practitioner sought to call additional evidence on the hearing of the appeal. Pursuant to s 22(4) of the *Supreme Court Act* an appeal from the Disciplinary Tribunal is by way of rehearing. Section 22(4)(b)(iii) provides that on the hearing of the appeal the Full Court has the power "to receive further evidence in a manner the Full Court directs". Rule 83.20(2) of the *Supreme Court Rules* provides as follows:

> "(2) Where an appeal is by way of rehearing, either party may call new evidence at the hearing."

[77] For the reasons his Honour has given, I agree with Mildren J that O 83.20 does not apply. In addition, even if it applied, in my view the application to call additional evidence should be refused.

[78] The practitioner submitted that by reason of r 83.20(2), the practitioner has an unfettered right to call admissible evidence on appeal and leave is not required. I do not agree. Such an interpretation would give an unfettered right to lead additional evidence on appeal regardless of the circumstances in which the party failed to call the evidence before the Tribunal. A party could deliberately decline to call relevant and cogent evidence before the Tribunal for tactical reasons and await the decision in the knowledge that an appeal could be lodged and the evidence led on appeal. This would be a startling result.

[79] In my view, if O 83 applies, leave is required. In accordance with ordinary principles, the applicant for leave is required to explain why the evidence was not called before the Tribunal and to persuade the Court that it is in the interests of justice to permit the evidence to be called on the appeal.

[80] The question of whether the applicant possessed instructions to make the three allegations was always a live issue in the proceedings before the Tribunal. The practitioner cannot escape that fundamental premise by asserting that she was fighting a case that she had alleged fraud and, as she had no instructions to allege fraud, there was no occasion to give or call evidence. The only reasonable conclusion is that with full knowledge of the case she was required to meet, the practitioner deliberately chose not to give or call evidence concerning the obtaining of instructions to make the three specific allegations and the personal allegations that were the basis of the charge against her of professional misconduct.

[81] In these circumstances, in the absence of any explanation for the failure, there is strong reason to refuse the application. However, it remains necessary to consider the nature and content of the proposed evidence and to balance the competing interests of the parties in determining which course best advances the interests of justice.

[82] The practitioner seeks to place before the Court the affidavits of three witnesses. First, the practitioner's husband Mr John McLaren who was the Chairman of the Church Property Trust and the Chairman of the Finance and

Property Services Committee of the Church from 1990 to 2008. Mr McLaren deposes to correspondence with Cridlands relating to a perceived conflict of interest and to numerous conversations with the General Secretary of the Church and the Secretary of the Finance and Property Services Committee concerning the conflict of interest. In addition, Mr McLaren provided instructions to the practitioner about the perceived conflict of interest and saw a draft of the letter of 2 July 2003 prepared by the practitioner to which he made amendments. According to Mr McLaren, the letter of 2 July 2003 reflected the instructions provided to Ms McLaren. I note that the draft contained the paragraph which became para 15 of the letter of 2 July 2003, but not a paragraph which became para 33 of that letter.

[83] In addition, Mr McLaren states that he provided further instructions to the practitioner on 15 September 2003 and saw a draft of the letter of that date. Having read the draft letter, he instructed the practitioner to send the letter to the Law Society.

[84] Reverend John Rowland was the General Secretary of the Church Synod between January 2001 and December 2004. In his affidavit he states that he attended numerous Finance and Property Services Committee meetings during 2002 when the perceived conflict of interest by Cridlands was discussed. He and Ms Julie Watts, the Property Officer and Secretary of the Property Trust, provided instructions to Ms McLaren concerning the perceived conflict and requested that she lodge a complaint against

Cridlands with the Law Society on behalf of the Church. Reverend Rowland saw the letter of 2 July 2003 and says that it reflected the instructions provided to Ms McLaren. In addition, Rev Rowland states that he read the Complaint and the attached letter of 2 July 2003 to ensure that the letter "was expressing the Church's will" and "was satisfied with its content". He deposes to affixing the seal of the Church to the Complaint, following which he and Ms Watts affixed their signatures, and says that the Complaint "was sent with the authority of the Church".

[85] Ms Julie Watts confirms the evidence of Rev Rowland. She also saw the letter of 2 July 2003 at about that time and says that it reflects instructions previously provided to the practitioner. In addition, Ms Watts was involved, together with Mr McLaren, in providing further instructions in relation to the Complaint which she says occurred on or about 15 September 2003.

[86] The Law Society did not seek to cross-examine the proposed witnesses.

[87] None of the proposed witnesses say that they specifically considered paras 15 and 33 of the letter of 2 July 2003 or the nature of the assertions made in those paragraphs. Nor do Mr McLaren or Ms Watts say they addressed their minds to the specific assertions in the letter of 15 September 2003 that are now under consideration.

[88] Neither Mr McLaren nor Rev Rowland mention providing further instructions concerning the letter of 20 November 2003 or making allegations against the three individual practitioners personally. Ms Watts

does not discuss that matter, but refers to instructions in November 2003 in the following terms:

> "12. In November 2003 Mrs McLaren asked me for further instructions in relation to the Complaint. I provided instructions to Mrs McLaren."

[89] To the extent that the proposed evidence related to the question of "instructions", in the absence of an explanation for the failure to call the evidence before the Tribunal I would refuse the application to call the evidence. However, the evidence also addresses the question of the Complaint being made with the "authority of the Church". The proposed evidence establishes that the Complaint was lodged with the authority of the Church. This question was not a live issue during the hearing and the practitioner could not reasonably have anticipated the Tribunal addressing it and making a finding adverse to the practitioner. In these circumstances, ordinarily the practitioner would have a strong case for allowing the evidence to be led on appeal. However, as I have said, the finding as to the absence of authority was attended by error and must be set aside.

[90] The finding as to the absence of instructions to make the three allegations, while open on the evidence, was also attended by error relating to the burden of proof. This finding must also be set aside.

[91] In these circumstances the proposed additional evidence is of no relevance to the appeal and should not be received.

Instructions – Personal Allegations

[92] As to the personal allegations, there is nothing in the Church files to suggest any discussion had occurred or concern had been expressed about the role of individual practitioners. The Complaint to which the seal was affixed did not include the personal allegations. Further, the practitioner has admitted that at the time of forwarding the letter of 20 November 2003, she did not possess evidentiary material capable of supporting the personal allegations. She also admitted not being in possession of material capable of supporting the first and third allegations and the further detail of the second allegation. In these circumstances in my opinion there was a prima facie case that the appellant did not have specific instructions to make the personal allegations.

[93] The personal allegations against the individual practitioners that they used confidential information to the disadvantage of the Church and to the advantage of another client and themselves, were correctly described by the Tribunal as "serious" and of the type that, if established, would amount to such a serious breach of fiduciary duty as to place a continuation of their right to practice at "serious risk". The practitioner could not have been in any doubt as to the serious nature of the personal allegations. She was aware that the allegations would be read by practitioners employed or retained by the Law Society. The making of such personal allegations without first receiving specific instructions to do so would amount to a serious breach of the practitioner's duty and to professional misconduct.

[94] Given the serious position in which the practitioner was placed, and given that the critical issue concerned instructions or lack of instructions to the practitioner, in my view the failure of the practitioner to give or call evidence before the Tribunal leads to a conclusion that the practitioner was not able to give or provide evidence to the Tribunal which would assist her in this respect.

[95] The absence of such evidentiary materials adds weight to the view that it was unlikely that anyone from the Church gave specific instructions to make the personal allegations.

[96] In these circumstances, notwithstanding that the Tribunal erred in the way I have described, this Court has the power to draw its own inferences from the evidence. In my opinion, bearing in mind the serious nature of the charge against the practitioner, the only reasonable inference to be drawn on the balance of probabilities is that the Law Society proved that the practitioner was not in receipt of specific instructions to make the personal allegations at the time she wrote the letter of 20 November 2003.

Evidentiary material

[97] As to the question whether the Law Society proved that the practitioner did not have evidentiary material capable of supporting the three allegations and the personal allegations, the position taken by the practitioner through her admissions before the Tribunal can be summarised as follows:

- The practitioner admitted that she did not have "any evidentiary material" capable of supporting the first allegation.

- The practitioner did not admit that she did not have "any evidentiary material" capable of supporting the second allegation.

- The practitioner admitted that she did not have "evidentiary material" capable of supporting the further details in respect of the second allegation provided in the letter of 15 September 2003.

- The practitioner admitted she did not have "any evidentiary material" capable of supporting the third allegation.

- The practitioner admitted she did not have "evidentiary material" capable of supporting the personal allegations.

[98] The non admission concerning the second allegation requires further analysis. The second allegation was an allegation that Cridlands had used and passed on information in connection with bids received by the Church from prospective anchor tenants at the Woolworths site to Randazzo for use to Randazzo's advantage in respect of the development of the Mitchell Centre site. While the practitioner did not admit the absence of an evidentiary basis for that particular allegation, she admitted that she did not have evidentiary material capable of supporting the further detail of that allegation provided in para 5(c) of the letter of 15 September 2003. That further detail identified the commercially sensitive information to which the

second allegation related as details of negotiations between the Church and both Woolworths and Coles which Randazzo was able to use to its advantage in negotiating with Coles by maximising the rental obtained from Coles. The admission of the absence of evidentiary material capable of supporting the further details was tantamount to an admission of the absence of evidentiary material capable of supporting the second allegation.

[99] In substance, therefore, the practitioner admitted that at the time of making the three allegations and the personal allegations, she did not have evidentiary material capable of supporting those allegations. In respect of the first and second allegations, this view is reinforced by the practitioner's file note of information conveyed to her on about 8 August 2003 by Ms Watts as to the view of Mr McLaren concerning the availability of proof of the allegations:

> "John felt if it went to the Complaints Committee we would have to prove our case
>
> we did not have concrete proof
>
> Decided: - -
>
> To just say admonish & fine even though Church has lost a lot of money."

[100] In my opinion, the only reasonable inference from the evidence and the admissions, coupled with the failure of the practitioner to give evidence, is that the practitioner did not have evidentiary material capable of supporting

the three allegations or the personal allegations at the time those allegations were made. This finding by the Tribunal should be upheld.

[101] In addition, in the absence of evidence from the practitioner, this Court should also uphold the finding of the Tribunal that, following receipt of the instructions on about 8 August 2003 concerning the absence of concrete proof, the practitioner was aware when she wrote the letters of 15 September and 20 November 2003 that the Church was unable to provide evidence to establish the three allegations or the personal allegations.

Ground 2

The Tribunal erred in fact and law in holding that there was no basis for making certain statements contained in the Communications, in particular paras 15 and 33 of the Communication dated 2 July 2003 and paras 5(c), 5(e) and 5(f) of the Communication dated 15 September 2003.

[102] In substance this ground asserts that on the basis of the instructions received by the practitioner concerning the perceived conflict of interest, an inference was available to the practitioner that the fiduciary duty owed by Cridlands to Randazzo obliged Cridlands to use information gained as solicitors for the Church to the benefit of Randazzo and, therefore, that Cridlands would have done so. The submission ignores the fact that to do so would amount to a breach of a fiduciary duty owed to the Church. The fact that Cridlands was in a position of conflict of interest did not support an inference that

Cridlands would have breached the duty owed to the Church in the manner asserted in the practitioner's correspondence.

[103] In addition, the approach taken by the practitioner in this ground assumes that the Tribunal was obliged to search for possible inferences in support of the case now advanced by the practitioner on appeal in respect of this ground. It does not appear that this case was put to the Tribunal and the practitioner chose not to give evidence that she drew such an inference.

[104] Further, the suggestion that the practitioner might have drawn an inference does not sit well with the practitioner's admissions as to the absence of an evidentiary basis for the allegations.

[105] This ground is not made out.

Ground 3

The Tribunal erred in fact and law in holding that the Allegations had been made in the complaint to the Law Society. In particular, the Tribunal failed to have any or sufficient regard to the absence in the Communications of any suggestion that the Cridlands practitioners intended to deceive, or to obtain a secret profit at the expense of the Church.

[106] This ground confuses the "allegations" identified in paras 4 and 5 of the Application with the meaning attributed to the allegations in the case for the Law Society. The first and second allegations as specified in paras 4(a) and

(b) of the Application appeared in paras [15] and [33] of the practitioner's letter of 2 July 2003. The Complaint to the Law Society dated 13 August 2003 under the seal of the Church identified the particulars of the Complaint as contained in the letter of 2 July 2003. The "allegations" as specified were plainly made in the Complaint to the Law Society. There is no substance in this ground.

Ground 4, 4A, 5 and 5A

[107] Grounds 4, 4A, 5 and 5A have been dealt with in the discussion with respect to ground 1.

Ground 6 - Jurisdiction

[108] Ground 6 complains that the Tribunal lacked jurisdiction to hear and determine the Application by the Law Society. This ground requires consideration of the transitional provisions of the LPA.

[109] The investigation into the professional conduct of the practitioner was commenced by the Law Society on its own motion pursuant to s 46B of the repealed Act. The investigation was not completed by the commencement date. Section 745 of the LPA required that the investigation "be completed under the repealed Act as if it had not been repealed."

[110] The Law Society submitted that an investigation having been completed under s 745(2), reg 96A authorised the commencement of proceedings in the Disciplinary Tribunal:

> "**96A. Investigations into professional conduct**
>
> (1) If, on completion of an investigation under section 745(2) of the Act, the Law Society would have been entitled to lay a charge of professional misconduct under the repealed Act, the Society must start proceedings in the Disciplinary Tribunal under Chapter 4.
>
> (2) If, on completion of an investigation under section 745(2) of the Act, the Society decides to dismiss the complaint and the complainant would have been entitled to lay a charge of professional misconduct under the repealed Act, the complainant may appeal against the decision as if it were made under section 498."

[111] On the other hand, the practitioner submitted that reg 96A is invalid because the LPA makes adequate provision for the circumstances under consideration. As the regulation making power found in s 761 only applies where the LPA does not make provision or sufficient provision for transition in the circumstances contemplated by reg 96A, the regulation is invalid. In that event, argued the practitioner, the proceedings were invalidly instituted in the Disciplinary Tribunal because conditions precedent to the taking of the proceedings as required by s 473 of the LPA had not been fulfilled.

[112] Chapter 10 of the LPA contains the relevant transitional provisions. Division 12 relates to "Complaints and discipline". A consideration of the scheme in Div 12 demonstrates that the legislature sought to deal with different categories of situations, beginning with investigations or proceedings in one form or another that were started but not completed by the commencement date. The provisions then deal with complaints about conduct that occurred before the commencement date but about which no "complaint" had been made before that date.

[113] The relevant transitional provisions are as follows:

> "**744. Pending investigations into professional conduct**
>
> (1) This section applies if:
>
> (a) before the commencement date:
>
> (i) a complaint had been made to the Law Society under section 46 of the repealed Act in relation to the professional conduct of a legal practitioner or former legal practitioner; or
>
> (ii) the Attorney-General had directed the Society to investigate the professional conduct of a practitioner or former legal practitioner; and
>
> (b) immediately before the commencement date, an investigation into the conduct had not started.
>
> (2) Chapter 4 applies (with the necessary modifications) in relation to the conduct as if a complaint were made under Division 4 of that Part about the conduct.
>
> (3) However, disciplinary action may not be taken against a person under this Act in relation to the conduct that is more onerous than the disciplinary action that could have been taken against the person under the repealed Act in relation to the conduct.
>
> **745. Investigations into professional conduct**
>
> (1) This section applies if:
>
> (a) before the commencement date, the Law Society had started an investigation under section 46B of the repealed Act in relation to the professional conduct of a legal practitioner or former legal practitioner; and
>
> (b) immediately before the commencement date, the investigation had not been completed.

(2) The investigation must be completed under the repealed Act as if it had not been repealed.

(3) If a person would have been entitled to appeal against a decision of the Society on the investigation under section 49 of the repealed Act had that Act not been repealed, the person may appeal to the Supreme Court against the decision of the Society under section 513 as if it were a decision to take action under section 499(2).

746. Pending hearings and inquiries

(1) This section applies if:

(a) before the commencement date:

(i) an appeal was lodged under section 49 of the repealed Act; or

(ii) a charge was laid under section 50 of the repealed Act; and

(b) immediately before the commencement date, the Legal Practitioners Complaints Committee had not completed its hearing into the appeal or inquiry into the charge.

(2) The appeal or charge must be completed under the repealed Act as if it had not been repealed.

(3) For this section, the Committee constituted under the repealed Act for the appeal or inquiry continues in existence.

(4) The decision of the Committee on the hearing or charge may be enforced as if it were an order of the Disciplinary Tribunal.

(5) If a person would have been entitled to appeal against the decision under section 51B of the repealed Act had that Act not been repealed, the person may appeal to the Supreme Court against the decision under section 533 as if it were a decision of the Tribunal to make an order under section 525.

747. New complaints about old conduct

(1) This section applies to conduct that:

(a) happened or is alleged to have happened before the commencement date; and

(b) could have been, but was not, the subject of a complaint under the repealed Act.

(2) A complaint about the conduct may be made and dealt with under this Act even if the conduct could not be the subject of a complaint under this Act if it had happened after the commencement date.

(3) Chapter 4 applies (with the necessary modifications) in relation to the conduct.

(4) However, disciplinary action may not be taken against a person under this Act in relation to the conduct that is more onerous than the disciplinary action that could have been taken against the person under the repealed Act in relation to the conduct."

[114] In summary, the effect of the transitional provisions is as follows:

- If a complaint has been made to the Law Society about conduct of a legal practitioner, but an investigation into that conduct had not started by the commencement date, ch 4 of the LPA applies both to the conduct and to the investigation of that conduct: s 744. The application of ch 4 is subject to the proviso that disciplinary action may not be taken under the LPA "that is more onerous than the disciplinary action" that could have been taken under the repealed Act: s 744(3).

- If an "investigation" has been commenced under the repealed Act, but not completed by the commencement date, such investigation must be completed under the repealed Act: s 745.

- For the purposes of s 745, an "investigation" appears to encompass a decision by the Law Society following the completion of the investigation:

  (i) Section 745(3) provides that if a person would have been entitled to appeal "against a decision of the Society on the investigation under section 49 of the repealed Act", the person may appeal to the Supreme Court against the decision of the Society under s 513 of the LPA as if it were a decision to take action under s 499(2) of the LPA. Section 499 is concerned with summary disposition by the Law Society following completion of an investigation. Section 513 is concerned with appeals.

  (ii) A reading of s 745 in its entirety suggests that the direction to complete an "investigation" under the repealed Act includes completing the exercise of the powers pursuant to s 47 of the repealed Act upon completion of the investigation. These powers include summary disposition and a determination to lay charges before the Complaints Committee.

- If proceedings were commenced under the repealed Act by way of an appeal under s 49 or the laying of a charge under s 50, but the Complaints Committee had not completed its hearing into the appeal or enquiry into the charge by the commencement date, the appeal or enquiry must be completed under the repealed Act: s 746. For these purposes the

Committee constituted under the repealed Act continues in existence and the decision of the Committee may be enforced as if it were an order of the Disciplinary Tribunal. The right of appeal under the repealed Act becomes a right of appeal under s 533 of the LPA as if were a decision of the Tribunal to make an order under s 525 of the LPA.

- Investigations or proceedings in one form or another not completed under the repealed Act having been dealt with in ss 744 – 746, provision is made in s 747 to deal with complaints first made after the commencement date about conduct that occurred before the commencement date. The ambit of the operation of s 747, and its possible application to the circumstances under consideration, are discussed in the reasons that follow.

[115] Section 747 is headed "New complaints about old conduct". It is expressed to apply to conduct that occurred before the commencement date, which conduct could have been, but was not, "the subject of a complaint under the repealed Act". This brings into question the meaning of "complaint" in s 747(1)(b). That meaning must be determined by reference to s 747 in its entirety in the context of the statutory scheme for transition from the repealed Act to the LPA.

[116] Read literally, s 747(1) refers to conduct that was not the subject of a "complaint" under s 46 of the repealed Act. Section 46 provided that "A person may complain, in writing, to the Law Society regarding the

professional conduct of a legal practitioner or former legal practitioner". No such "complaint" was made about the conduct of the practitioner. The investigation into the conduct of the practitioner was undertaken by the Law Society of its own motion under s 46B and not following a receipt of a complaint under s 46.

[117] If the word "complaint" is construed narrowly by applying a literal interpretation, no "complaint" having been made about the conduct of the practitioner under s 46 of the repealed Act, s 747 applies and brings into operation ch 4 of the LPA. However, on another view, bearing in mind the scheme of the transitional provisions, s 747 was intended to apply only to complaints about conduct first made after the commencement date. On this view the word "complaint" in s 747(1) should be given a broad interpretation such that s 747 does not apply to conduct that has been formally called into question under the repealed Act before the commencement date. The conduct of a legal practitioner could have been called into question by a complaint under s 46, direction to the Law Society by the Attorney-General under s 46A to investigate or by the Law Society of its own motion under s 46B. If any of these events has occurred, for the purposes of s 747 the conduct has been the subject of a "complaint" under the repealed Act and s 747 has no application.

[118] The application of s 747 and ch 4 of the LPA to the circumstances under consideration would carry with it consequences which the Law Society argued provide an indication that the legislature did not intend that s 747

apply. First, notwithstanding the completion of an investigation as required by s 745 and a determination that a charge should be laid before the Disciplinary Tribunal, it would be necessary to undertake the complaint process found in ch 4. This process is designed and intended to apply to new complaints made under the LPA. It is not well suited to the circumstances where either a complaint was made under the repealed Act or the Law Society, of its own motion, has undertaken an investigation under the repealed Act. If ch 4 applies, notwithstanding the completion of a previous investigation as directed by s 745, the complaint process under ch 4 would require that a "complaint" be made under the LPA either to the Law Society or by the Law Society.

[119] Secondly, notwithstanding the completion of the previous investigation as directed by s 745, the Law Society would then be required to conduct an investigation unless it determined that the complaint should be dismissed or to exercise other powers of resolution: s 488. The consequence of a second investigation could be avoided, however, through the operation of s 497 of the LPA which empowers the Law Society to commence proceedings in the Tribunal without the need to start or complete an investigation if the Law Society is satisfied that action should be taken having regard to the nature of the subject matter of the complaint and the "reasonable likelihood" that the Disciplinary Tribunal would find that the practitioner had engaged in unsatisfactory professional conduct or professional misconduct.

[120] A further consequence of the application of ch 4 is found in s 473. This section relates to complaints made under the LPA and first made more than three years after the conduct is alleged to have occurred. If s 747 applies to bring ch 4 into play, s 473 would apply to a complaint by the Law Society under ch 4 about the conduct of the practitioner which occurred in 2003. Section 473 directs that a complaint about conduct made more than three years after the conduct is alleged to have occurred cannot be dealt with, other than by way of dismissal or referral to mediation, unless the Law Society first decides:

> "(a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; or
>
> (b) the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint."

[121] In other words, notwithstanding that the Law Society commenced its investigation into the conduct of the practitioner by its letter of 12 July 2005, being a letter sent to the practitioner two years after the occurrence of the conduct under investigation, and notwithstanding the completion of that investigation and a determination by the Law Society that a charge should be laid before the Disciplinary Tribunal, through the operation of s 473 the Law Society would be required to undertake the process specified in s 473(2)(a) and (b). It can be said with some force that it is unlikely that the legislature intended to require the Law Society to undertake this process in these circumstances and that s 473 is aimed at the situation where, prior to the commencement date, the conduct has not been the subject of any form of

complaint or investigation. In other words, s 473 is intended to cater for the situation where the conduct is first called into question after the commencement date and more than three years after the conduct is said to have occurred. It is a form of protection given to a practitioner whose conduct, for over three years, has not been called into question and it provides a mechanism for having regard to the delay and the public interest. This situation is far removed from the circumstances of the investigation into the conduct of the practitioner.

[122] There is a further matter of significance to this question found in the operation of s 745 of the LPA. As I have said, s 745 directs that an existing investigation under s 46B of the repealed Act which is not completed by the commencement date "must be completed under the repealed Act as if it had not been repealed". Section 745(3) contemplates that the "investigation" to be completed includes the exercise of the functions and powers of the Law Society found in s 47 of the repealed Act in providing that if a person would have been entitled to appeal "against a decision of the Society on the investigation under section 49", the person may appeal to the Supreme Court "against the decision of the Society" under the LPA "as if it were a decision to take action under section 499(2)" of the LPA.

[123] In my view, the direction in s 745 to complete the "investigation" under the repealed Act is a direction to finalise the investigation and exercise the functions or powers found in s 47 of the repealed Act. Those functions and powers include powers of summary disposition and, significantly, the power

to “lay charges of professional misconduct before the Complaints Committee” (with the consent of the Attorney-General). In other words, s 745 is a direction to complete both the investigation and the exercise of powers on investigation under the repealed Act. In the circumstances under consideration, it is a direction both to finalise the investigation into the conduct of the practitioner and to lay the charges before the Complaints Committee. Such a direction does not sit well with a construction of s 747 that applies the ch 4 process to an “investigation” completed under the direction of s 745.

[124] When the transitional scheme is viewed in its entirety, in my opinion the legislature did not intend to apply the complaint process under ch 4 of the LPA to those matters in which investigations or proceedings were underway under the repealed Act. Section 747 is positioned at the end of the transitional provisions with the evident purpose of providing a mechanism to deal with complaints made under the LPA about conduct not previously called into question in formal processes under the repealed Act. The intention was to complete those processes under the repealed Act, including the exercise of the powers found in s 47, which include the power to lay charges of professional misconduct. The legislature did not intend to revisit those processes by applying ch 4 procedures which would necessarily involve the inefficiencies of repetition of processes. The interests of fairness do not suggest that such repetition might have been considered

desirable and the interests of both parties through the efficiencies of the processes are best served by avoiding such a consequence.

[125] For these reasons, in my opinion s 747 was not intended to apply to conduct occurring before the commencement date which has formally been called into question under ss 46, 46A or 46B of the repealed Act before the commencement date. Section 747 should be given a construction consistent with the evident purposes of the transitional scheme and the word "complaint" in s 747(1)(b) should not be read literally and narrowly. Rather, it should be construed as encompassing the formal processes found in ss 46, 46A and 46B of the repealed Act which s 745 directs must be completed under the repealed Act. On this construction, as the conduct was the subject of a "complaint" before the commencement date, s 747 has no application.

[126] If, contrary to my view, s 747 applies, and if it is the only route by which the Law Society could proceed with the laying of charges against the practitioner, it was contended by the practitioner that as the Law Society did not fulfil the conditions identified in s 473(2)(a) and (b), being conditions precedent to the taking of disciplinary proceedings, the proceedings before the Tribunal were invalid. However, invalidity would depend upon the fundamental premise that s 747 supplies the exclusive route to the Tribunal where, as required, an investigation has been completed under the repealed Act. Invalidity would also depend upon the nature of the directions in s 743 and the consequences of a failure to comply with those directions.

[127] As to exclusivity, the Law Society submitted that s 747 is an enabling provision and does not operate to the exclusion of other provisions which provide a basis for the proceedings in the Tribunal. I agree. Section 747 is one of a number of transitional provisions and there is nothing in the wording of s 747 or the context in which it appears to suggest that the legislature intended that it be the exclusive route to the laying of charges. The direction in s 745 suggests to the contrary.

[128] The Law Society submitted that s 496 of the LPA provides the direct route to the Tribunal. Section 496 directs the Law Society to start proceedings in the Disciplinary Tribunal or take other action after "completing an investigation of a complaint against an Australian legal practitioner …". Section 496 is found in ch 4 and is not concerned with the transition from the repealed Act to the LPA. It relates to completing an investigation of a "complaint" against an "Australian legal practitioner". Section 462 provides that a "complaint" means a complaint under ch 4. The Law Society had not undertaken or completed an investigation of a "complaint" under ch 4. Nor was the practitioner an "Australian legal practitioner" prior to the commencement date. On this approach, absent the operation of s 758, s 496 has no application as it only authorises the commencement of proceedings after the completion of an investigation of a complaint made after the commencement date.

[129] The Law Society contended that the step from the completion of the investigation under the repealed Act to charging under s 496 is enabled by the general "saving and transitional provision" in s 758:

> "**758. General saving and transitional provision**
>
> (1) If anything of a kind required or permitted to be done under a provision of this Act was done under a corresponding provision of the repealed Act and still had effect immediately before the commencement date, the thing continues in effect on and after that date as if:
>
> (a) this Act had been in force when it was done; and
>
> (b) it had been done under this Act.
>
> (2) If subsection (1) applies in relation to the signing, lodgement, issue or publication of a written instrument, a reference in the instrument to a provision of the repealed Act must, for that subsection, be read as a reference to the corresponding provision of this Act.
>
> (3) Without limiting subsections (1) and (2), if a provision of the repealed Act that corresponds to a provision of this Act would, but for its repeal, have applied in relation to anything done or being done or in existence before the commencement date, the provision of this Act applies (with the necessary modifications) in relation to the thing.
>
> (4) This section does not have effect to the extent that:
>
> (a) other provision is made by this Part; or
>
> (b) the context or subject matter otherwise indicates or requires.
>
> (5) In addition, this section has effect subject to transitional regulations made under section 761."

[130] In my view, s 758(3) assists the Law Society. Section 47 of the repealed Act corresponds to s 496 of the LPA. But for its repeal, s 47 would have applied to the investigation which was current at the commencement date.

By virtue of s 758(3), therefore, s 496 applies, "with the necessary modifications", in relation to that investigation. As s 47 would have applied to the investigation by empowering the Law Society to lay charges of professional misconduct before the Complaints Committee on finalisation of the investigation, s 496 applies and the necessary modification is to empower the Law Society to lay charges before the Disciplinary Tribunal as opposed to the repealed Complaints Committee.

[131] The operation of s 758 is subject to transitional regulations made under s 761. There will be no occasion for the operation of s 758 unless reg 96A is invalid.

Validity of Regulation 96A

[132] Regulation 96A is set out in para [111] of these reasons, and authorises the commencement of proceedings in the Tribunal under ch 4. Section 761 is as follows:

> "**761. Transitional regulations**
>
> (1) The regulations may make provision (a 'transitional regulation') about a matter for which:
>
> (a) it is necessary to make provision to allow or facilitate the doing of anything to achieve the transition from the operation of the repealed Act to this Act; and
>
> (b) this Act does not make provision or sufficient provision.
>
> (2) A transitional regulation may have retrospective operation to a date not earlier than the date of assent to this Act.

> (3) However, to the extent a transitional regulation has retrospective operation, it does not operate to the disadvantage of a person (other than the Territory or a Territory authority) by decreasing the person's rights or imposing liabilities on the person.
>
> (4) This section expires 2 years after the commencement date."

[133] Section 761(1)(a) is fulfilled. It was necessary to make transitional provision for the subject matter of reg 96A. The critical question is found in s 761(1)(b), namely, whether it can reasonably be said that the LPA "does not make provision or sufficient provision" for the transition in the type of circumstances from which reg 96A caters.

[134] If, contrary to my view, s 747 applies, notwithstanding that it is ill suited to circumstances where the Law Society has completed an investigation and determined that a charge should be laid before the Tribunal, "provision or sufficient provision" will have been made for the subject matter in respect of which reg 96A operates. In that event, reg 96A would not be authorised by s 761 and it would be invalid.

[135] The same conclusion appears to follow if I am correct in my view that s 496 applies through the operation of s 758.

[136] On the other hand, if neither s 747 nor s 496 apply, provision will not have been made in the Act for the subject matter of reg 96A and the regulation would be valid.

Professional misconduct

[137] In conjunction with the question of jurisdiction, the practitioner submitted that the Tribunal misdirected itself in finding the practitioner had been guilty of "professional misconduct within the meaning of section 465(1)(b) of the LPA" on the basis that her conduct was a breach of rule 12 of the Conduct Rules. The argument proceeded this way:

- The LPA does not include a breach of the Professional Conduct Rules as "professional misconduct".

- The LPA cannot apply to conduct that occurred before the commencement date unless at least one of the provisions in ss 744 – 747 and 758 so operate and none of them do.

- Even if reg 96A is valid, it does not purport to apply s 465(1)(b) of the LPA to conduct occurring in 2003. Any implication that the regulation has such an effect would be inconsistent with s 747 and would impermissibly make 2003 conduct, in respect of which a necessary element was wilfulness or recklessness, amenable to sanction under the LPA pursuant to which such an element is not required.

- If s 45(2)(a) of the repealed Act applied, "no finding was (or could have been) made by the Tribunal that the breach of r 12 of the Professional Conduct Rules was wilful or reckless."

- If a breach of the Professional Conduct Rules is capable of constituting professional misconduct within the meaning of s 465(1)(b), then such a breach can only constitute "professional misconduct" if the practitioner is additionally found not to be a fit and proper person to engage in legal practice.

- The Tribunal erred to the extent that it considered the provisions of s 465(1)(a) of the LPA, in respect of which there is no corresponding provision in the repealed Act.

[138] The Application gave particulars of the "professional misconduct" in para 13:

> "13. By making the first, second and third allegations, and the personal allegations, in the circumstances alleged in paragraph 12:
>
> (a) the practitioner substantially failed to meet the standards of professional conduct reasonably to be expected of a competent legal practitioner and is guilty of professional misconduct; and
>
> (b) further or alternatively, the practitioner is guilty of professional misconduct in that she wilfully or recklessly failed, when exercising the forensic judgments called for in the conduct of the Complaint, to take care to ensure that allegations or suggestions made by her on behalf of [the Church] under the privilege of the procedure laid down by Part VI Division 2 of the LPA were reasonably justified by the material then available to her (contrary to rule 17.21 of the Rules of Professional Conduct and Practice ['Conduct Rules'])."

[139] The Tribunal noted that the Law Society relied upon both r 12 and r 17.21 of the Conduct Rules, but there was a debate as to whether r 17.21 applies because it is headed "Advocacy Rules" and an explanatory note states that it applies to legal practitioners when acting as advocates, but not to barristers.

The Tribunal determined that it was not necessary to resolve that issue because, in the view of the Tribunal, r 12 applied.

[140] Rule 12 of the Conduct Rules is in the following terms;

> **"12. Preparation of Court Documents**
>
> A practitioner must not draw or settle any court document alleging criminality, fraud or other serious misconduct unless the practitioner believes on reasonable grounds that:
>
> 12.1 factual material already available to the practitioner provides a proper basis for the allegation if it is made in a pleading
>
> 12.1 the evidence in which the allegation is made, if it is made in evidence, will be admissible in the case, when it is filed; and
>
> 12.3 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client if it is not made out."

[141] After discussing authorities concerned with the duties of practitioners, the Tribunal identified the duty of the practitioner in the following terms:

> "47. We find that the obligation carried by a legal practitioner is to take care when making serious allegations of impropriety against another on behalf of a client. The obligation arises not only when making allegations or preparing pleadings in a court proceeding but in other situations where the practitioner is protected by privilege and, indeed, in all circumstances, to maintain standards of decency and fairness. The appropriate standard of care is exercised by ensuring that there is evidence upon which allegations might be made and in the light of that evidence by seeking specific instructions in relation to the allegations.
>
> 48. Our view is reinforced by Rule 12 of the Conduct Rules which expresses the care that should be exercised by a practitioner when making serious allegations in respect to a person in the course of the conduct of litigious matters clearly and unequivocally. The extended definition of 'court' in the Conduct Rules clearly indicates that Rule 12 applied to the respondent's conduct when making the complaint to the Law Society: …"

[142] The Tribunal's view as to the "obligation" resting on the practitioner was a view formed on the basis of authorities and general principles. It was not dependent upon r 12 but, as the Tribunal explained, the view of the Tribunal was "reinforced by Rule 12". There is no challenge to the Tribunal's view of the practitioner's obligation as expressed in para [47]. In my view that statement is uncontroversial and accurate.

[143] Having identified the practitioner's "obligation" in those terms, the Tribunal made the following findings:

> "50. The respondent has breached the obligations set out in clause 12 of the Conduct Rules by her failure to demonstrate that she had instructions from her client to make the allegations against the three practitioners and her failure to determine that there existed factual material to substantiate the allegations. Further, the respondent continued to make those allegations against the three practitioners and expanded upon them in the course of the letters following the complaint when she knew that there was no evidence that could substantiate either the initial complaint or the further particulars.
>
> …
>
> 54. The Tribunal finds that the conduct of the respondent in making the complaint to the Law Society dated 13 August 2003 in concert with the allegations made in the three letters of 2 July 2003, 15 September 2003 and 20 November 2003 constitutes professional misconduct within the meaning of section 465(1)(b) LPA."

[144] In respect of the application of the LPA to the conduct of the practitioner, the Tribunal found that the conduct amounted to "professional misconduct" rather than "unsatisfactory professional conduct". The essence of the Tribunal's reasoning is apparent in the following passages where, although the Tribunal referred to "unprofessional conduct", it was considering "unsatisfactory professional conduct" as defined in the LPA:

> "66. The specific examples of unprofessional conduct in section 466(1) LPA can be disregarded for present purposes. It is worth noting that the definition of 'unprofessional conduct' in section 464 LPA concerns expectations of competence and diligence rather than questions of integrity or honesty. When a practitioner makes allegations calling into question another practitioner's honesty to a substantial degree the matter will generally be elevated to a level where the allegations may constitute professional misconduct on the part of the accused. The price for making those allegations is that the accuser will be at risk of professional misconduct if due care is not taken.
>
> 67. Consequently, the conduct transcends 'unprofessional conduct' as defined by section 464 LPA for a number of reasons. First, the Tribunal has found that the allegations made by the respondent against the solicitors were made without the authority of the Uniting Church. Secondly, those allegations were made without a foundation in fact or any evidence that might lead to the establishment of those allegations. Thirdly, after the respondent was clearly aware that there was no foundation in fact or no evidence likely to establish the allegations, the respondent continued to make the allegations on three further occasions and in the course of so doing expanded upon the conduct complained of. Fourthly, the allegations made by the respondent were to accuse the three solicitors of a very serious breach of ethical conduct amounting to fraudulent conduct. Lastly, the respondent had ample opportunity to withdraw the allegations and chose not to do so."

[145] As to the findings of fact upon which the Tribunal based its conclusion, as I have said the findings that the practitioner did not have instructions to make the three allegations set out in paras 4 and 5 of the Application and did not have the authority of the Church to lodge the Complaint should be set aside. However, those findings were not mentioned in para [67] of the reasons. In para [67] the Tribunal identified three reasons for its view that the conduct transcended unsatisfactory professional conduct, namely:

(i) The allegations made against the solicitors were made without the authority of the Church.

(ii) The allegations against the solicitors were made "without a foundation in fact or any evidence that might lead to the establishment of those allegations".

(iii) After the practitioner was "clearly aware that there was no foundation in fact or no evidence likely to establish the allegations, the [practitioner] continued to make the allegations on three further occasions and in the course of so doing expanded upon the conduct complained of".

(iv) The allegations made by the practitioner were to "accuse the three solicitors of a very serious breach of ethical conduct amounting to fraudulent conduct".

(v) The practitioner "had ample opportunity to withdraw the allegations and chose not to do so".

[146] I expressed my view earlier in these reasons that the first and second findings were well supported by the evidence and should be upheld. As to the third finding concerning the knowledge or awareness of the practitioner, in view of the admissions and the file note concerning the absence of "concrete proof" which was made before the Complaint was lodged with the Law Society, the third finding is also well supported by the evidence and should be upheld.

[147] The fourth finding involves two aspects. First, that the allegations were to "accuse the three solicitors of a very serious breach of ethical conduct". In my opinion, that conclusion is correct. The breach of ethical conduct alleged was the use of confidential information gained from one client, not only to the disadvantage of that client, but to the benefit of the solicitor and another client. An allegation that a solicitor "used" information in this way could not reasonably bear any meaning other than that the solicitor intentionally or deliberately used information in this way. Such an allegation is an allegation of a "very serious breach of ethical conduct".

[148] As to whether it amounts to an allegation of fraudulent conduct, the Tribunal accepted that it was an allegation of fraud in the following senses derived from the Macquarie Dictionary:

- "deceit, trickery, sharp practice, or breach of confidence, by which it is sought to gain some unfair or dishonest advantage."
- "(in common law) advantage gained by unfair means, as by a false representation of fact made knowingly, or without belief in its truth, or recklessly, not knowing whether it is true or false."
- "(in equity) violation, intentional or otherwise, or the rules of fair dealing."

[149] In the sense in which the Tribunal was using the expression "fraudulent conduct", in my view the Tribunal correctly characterised the allegation as

an allegation of conduct amounting to "fraudulent conduct". Whether it amounted to an allegation of fraud in the context of the criminal law is not the issue. At the least it was an allegation of "sharp practice" or a "breach of confidence", by which the solicitor sought to gain some "unfair advantage". It was also an allegation that fitted the common law definition of gaining an advantage by unfair means and the equitable definition of a violation of the rules of fair dealing.

[150] Finally, the evidence establishes that the practitioner continued to make the allegations after she was aware of denials and the absence of evidence and, apart from denying that she had alleged fraud, the practitioner chose not to withdraw the allegations.

[151] It is against this factual background that the Tribunal was of the view that the conduct amounted to professional misconduct under the LPA rather than unsatisfactory professional conduct. In my view, this was a correct conclusion. The LPA does not endeavour to provide a definitive definition of either form of conduct. Sections 464 – 466 merely identify conduct which is included in both categories. Nor does the LPA endeavour to draw the line in a definitive way between the two categories of conduct. A Tribunal and this Court are left to discern where that line is to be drawn in a particular case by reference to the type of conduct identified as included in each category and general principles guiding the conduct of legal practitioners.

[152] In my view, when the practitioner's conduct is viewed in its entirety, and particularly having regard to the seriousness of the allegations against the individual solicitors, the maintenance of those allegations and the practitioner's knowledge of the absence of instructions and the absence of evidentiary material to support the allegations, the practitioner's conduct amounted to professional misconduct under the LPA rather than unsatisfactory professional conduct.

[153] The practitioner submitted that the LPA does not include as professional misconduct a breach of the Professional Conduct Rules. This is not to the point. The LPA does not exclude a breach of the Professional Conduct Rules as amounting to professional misconduct for the purposes of the LPA. Whether a breach of those Rules will amount to such professional misconduct must be determined by having regard to all the circumstances, including the nature of the breach and its seriousness. While finding that the practitioner breached r 12 of those Rules, the Tribunal did not regard such a breach as necessarily amounting to professional misconduct under the LPA. In determining whether the particular failure by the practitioner amounted to professional misconduct or unsatisfactory professional conduct, the Tribunal correctly had regard to the practitioner's conduct in its entirety and to the gravity of her failure to comply with her duty as a practitioner.

[154] As part of this submission, the practitioner contended that wilfulness or recklessness on the part of the practitioner was an essential feature of the conduct and a finding in that regard was not, and could not have been made.

In this submission the practitioner was relying upon s 45(2) of the repealed Act which provides that "professional misconduct" includes a failure to comply with the Conduct Rules, but only if the failure was "wilful or reckless".

[155] However, this submission overlooks two matters. First, subs (1) of s 45 provides that "professional misconduct" means "misconduct in a professional capacity". It is a very broad definition which is not confined by subs (2) in which the legislature provided that professional misconduct "includes" the failure to comply with the Conduct Rules if the failure was wilful or reckless. Subsection (2) states:

> "(2) Without prejudice to the generality of subsection (1), 'professional misconduct' includes in particular - …"

[156] As to the proposition that no finding was made that the practitioner acted wilfully or recklessly, and that no such finding could have been made, the Tribunal did not use the words wilful or reckless, but its findings necessarily encompassed both concepts. The Tribunal found that the practitioner did not have instructions to make the personal allegations and that she was not in possession of any evidentiary basis to support any of the three allegations or the person allegations. Further, the Tribunal found that the practitioner "had no grounds to believe that the 'allegation' was supported by evidence at any stage" and that the practitioner "knew, or ought to have known, the seriousness of the allegations made against the practitioners and that those allegations amounted to fraud." The Tribunal also expressed its finding

concerning the practitioner's knowledge in para [67] cited at para [144] of these reasons.

[157] In view of those findings, it is idle to suggest that the Tribunal was not of the view that the practitioner's conduct was wilful or reckless. In my view it is also idle to suggest that the evidence did not support such a finding. The inference of wilfulness or recklessness was and is irresistible.

[158] As to the application of the LPA to the practitioner's conduct, in my view, for the purposes of the general saving provisions found in s 758, s 45 of the repealed Act corresponds with ss 464 – 466 of the LPA. They are sections concerned with defining professional misconduct. Through the operation of s 758, the LPA applies. In particular, ss 464 – 466 apply to the practitioner's conduct.

Inherent jurisdiction

[159] The Law Society submitted that if this Court was of the view that the Tribunal lacked jurisdiction, as the evidence and the matter of the practitioner's conduct is now before the Court, it should exercise its inherent jurisdiction over the profession by dealing with the practitioner in respect of her conduct. This approach would require this Court to rely on evidence placed before the Tribunal in the course of invalid proceedings. Counsel for the practitioner submitted that as the Law Society chose the Tribunal route, it would be inappropriate for this Court to exercise other than the appellate jurisdiction. As counsel put it it is "counter-intuitive" to

make use of material put before the Tribunal and, if the Tribunal lacked jurisdiction, justice demands a fresh proceeding. To exercise the inherent jurisdiction de novo would involve formulating a charge and carrying the baggage of the old proceedings. Overall, suggested counsel, exercising the inherent jurisdiction would carry with it a flavour of the "wild west".

[160] In my view, there is considerable force in the submissions of counsel for the practitioner. If I am wrong in my view that the Tribunal possessed jurisdiction, in my opinion this Court should not endeavour to exercise its inherent jurisdiction.

Conclusions

[161] For these reasons, in my opinion this Court should set aside the findings that the practitioner did not have specific instructions to make the three allegations set out in paras 4 and 5 of the Application and did not have the "authority" of the Church to lodge the Complaint with the Law Society. However, the findings that the practitioner did not have specific instructions to make the personal allegations, and did not have evidentiary material to support the three allegations or the personal allegations, should be confirmed. In addition, this Court should not disturb the findings that the practitioner was aware that she was making allegations of very serious breaches of ethical conduct and, notwithstanding the known absence of evidentiary material to support the three allegations and the personal

allegations, she continued to maintain those allegations and declined to withdraw them.

[162] Finally, notwithstanding the errors made by the Tribunal, the finding that the practitioner was guilty of professional misconduct should stand and the appeal should be dismissed.

Mildren J:

[163] This is an appeal brought by the appellant practitioner against a finding of professional misconduct by the Legal Practitioners Disciplinary Tribunal.

[164] An appeal to this Court is by way of rehearing[1] with power to draw any inferences the Court thinks fit from the evidence taken before the Tribunal and a further power to receive further evidence in a manner the Court thinks fit.[2] Pursuant to r 95.01 of the *Supreme Court Rules*, this appeal is required to be dealt with by the Full Court.

Background Facts

[165] In or around 2001 the Uniting Church of Australia Property Trust (UCAPT) was the registered proprietor of two parcels of land in the central business district of Darwin in respect of which shopping centres were intended to be developed. The first (Lot 2280) was situated in Mitchell Street. This parcel when developed became known as The Mitchell Centre. The land was subject to a lease to National Mutual Life Association of Australasia

[1] *Supreme Court Act* s 22(4)(a).
[2] *Supreme Court Act* s 22(4)(b)(i) and (iii).

Limited. In 2001, this lease was assigned to another entity, United Super Pty Ltd (United Super) as trustee of the C+Bus Trust. There is no suggestion that United Super is an entity related to the Uniting Church or to any other relevant party including the legal firm of Cridlands.

[166] Randazzo Investments Pty Ltd (Randazzo) was the registered owner of an adjacent lot (Lot 5566) and it was envisaged that the Mitchell Centre would be constructed over both lots. A development deed was entered into between Randazzo, United Super, Randazzo Investments (Mitchell Centre) Pty Ltd (RIMC), United Super Investments (Mitchell Plaza) Pty Ltd (USIMP) and the UCAPT pursuant to which subleases were granted over both lots to RIMC and USIMP who were to develop the lots. Subsequently, a Joint Venture Agreement was executed between USIMP, RIMC and Mitchell Centre Nominees Pty Ltd (MCN). The purpose of this agreement was to establish a single entity which would then sublease shops in the Mitchell Centre. This required a consent deed to be executed by the UCAPT.

[167] The UCAPT owned a second block (Lot 7118, Cavenagh Street) which was also to be developed as a shopping centre at about the same time as the Mitchell Centre. The developer in this case was the UCAPT itself. This development became known as the CBD Plaza. Both centres needed an anchor tenant such as Woolworths or Coles. Ultimately, Coles became the anchor tenant at the Mitchell Centre. The UCAPT was keen to lease part of the CBD Plaza to Woolworths. Woolworths already held a lease on

premises situated at the corner of Knuckey and Smith Streets (the Manolis premises) from which it operated a supermarket and licensed bottle shop. The registered owner of the Manolis premises was Manolis Properties Pty Ltd (Manolis). Woolworths were interested in leasing part of the CBD Plaza, but this effectively required Woolworths to terminate its lease with Manolis and to transfer its liquor licence to the CBD Plaza. This led to negotiations between Harris Scarfe Limited (a well-known department store operator in Adelaide), Woolworths, Manolis and the UCAPT to see if Harris Scarfe would take over the lessee of the Manolis premises. These negotiations were unsuccessful. Ultimately, Woolworths entered into a lease with the UCAPT over part of the CBD Plaza. The lease contained an indemnity from Woolworths in the event that Manolis brought proceedings against the UCAPT for instigating a breach of the lease between Woolworths and Manolis. It was not a condition of the lease from the UCAPT to Woolworths that the latter transfer its liquor licence. Woolworths did in fact apply to the Northern Territory Licensing Commission to transfer another license it held in suburban Stuart Park to the CBD Plaza. The firm of Cridlands acted for Woolworths in that application with the knowledge and consent of the UCAPT. Cridlands were at all times acting for the UCAPT and had been acting for the UCAPT for many years. According to Cridlands, it did not act for Woolworths, although it was normally Woolworths' solicitors, but acted solely for the UCAPT in relation to the terms of the lease between the UCAPT and Woolworths.

[168] On 2 July 2003, the appellant drafted and sent a letter of complaint to the Law Society of the Northern Territory that the firm of Cridlands, whilst acting for the UCAPT in relation to the two developments in the CBD, acted for other parties as well which gave rise to a conflict of interest between the interests of the UCAPT and Cridlands' other clients, Woolworths, Randazzo and Manolis, which conflict was not resolved in accordance with the proper standards of the legal profession. The full text of that letter is set out in the judgment of Martin CJ.

[169] In response to the original letter, the Law Society apparently advised the appellant that it required the complaint to be made on the Law Society's proper form. Consequently, the appellant lodged a formal complaint under the common seal of the UCAPT dated 13 August 2003 which attached the original letter of 2 July 2003 to it as forming the particulars of the complaint. The form required that the appellant identify the individual practitioners of the firm as well as the firm against which the complaint was made. The form identified three practitioners and the firm of Cridlands. The form required the complainant to identify the nature of the complaint. This was identified as "conflict of interest".

[170] By letter dated 19 August 2003, the Law Society wrote to the appellant seeking further information and advising the appellant that the Law Society could not (despite the terms of its own form) take action against a firm, only against individual practitioners.

[171] The appellant replied to the Law Society by letter dated 15 September 2003 in which further details of the complaint were given. The text of this letter is also set out in the judgment of Martin CJ.

[172] The Law Society replied by letter dated 6 October 2003 requesting that the appellant identify the specific instances of conduct by each of the three named practitioners which breached the professional conduct rules. This resulted in a further letter from the appellant dated 20 November 2003, which provided the details sought. The text of this letter is also to be found in the judgment of the Chief Justice. Mr Farquhar, a partner of the firm of Cridlands, responded in a detailed letter dated 21 November 2003 denying the allegations. In particular, Mr Farquhar denied that Cridlands had in any way acted improperly in relation to its professional obligations to the UCAPT. He denied any involvement in the commercial arrangements between any of the parties to the Mitchell Centre. He did acknowledge receiving instructions to act for Randazzo to prepare retail tenancy agreements for the Mitchell Centre and that Cridlands prepared a draft development deed which included common lease terms for Lots 2280 and 5566 to MCN. However, he asserted that Cridlands was not involved in the development deed which was ultimately executed. Cridlands also prepared a draft consent deed but did not secure registration of the settled consent deed. Mr Farquhar maintained that Cridlands advised both Randazzo and the UCAPT that it could not act for either party in relation to any contractual arrangements involving those parties in relation to the Mitchell Plaza.

[173] Mr Farquhar also maintained that Cridlands had nothing to do with the lease arrangements between Coles and Randazzo (or MCN) and no involvement in arranging the financial terms of the retail leases in the Mitchell Centre.

[174] The firm of Cridlands had also entered into a lease with Randazzo in the Mitchell Centre, which became that firm's professional offices.
Mr Farquhar maintained that Cridlands did not gain any advantage in negotiating its own lease with Randazzo.

[175] Three particular allegations which the appellant had made in the appellant's letters to the Law Society are of critical importance and need to be specifically mentioned. These allegations were later to become the subject of charges brought against the appellant by the Law Society. The first allegation was made in the letter of 2 July 2003. The Law Society maintained that the appellant had alleged that "Cridlands, when acting for a client Randazzo Investments Pty Ltd [Randazzo] in drafting a deed affecting the development by Randazzo of land in which UCAPT was interested ["the Mitchell Centre site"], had used confidential and commercially sensitive knowledge and information gained by it as the solicitors for UCAPT".

[176] The second allegation was defined by the Law Society to mean an allegation in the letter of 2 July 2003 that "Cridlands, when acting for UCAPT in relation to the development of land in which the trust was interested ["the CBD Plaza site"] had used and passed onto Randazzo, for use to Randazzo's advantage in respect of Randazzo's development at the Mitchell Centre site,

commercially sensitive information relating to bids received by UCAPT from prospective anchor tenants for the Woolworths site".

[177] The third allegation related to the letter of 15 September 2003 written by the appellant and was defined by the Law Society to mean "a further allegation the substance of which was that Cridlands had secured for itself a lease from Randazzo of commercial premises at the Mitchell Centre site either by using the information referred to in paragraph 4(b) [of the complaint lodged with the Disciplinary Tribunal] or by providing that information to Randazzo".

[178] The Law Society also asserted that the letter of 20 November 2003 made personal allegations relating to each of the first, second and third allegations against various individual practitioners whom the appellant had named in her letter.

[179] These particular allegations were strongly denied by Mr Farquhar in his letter of 21 November 2003. Mr Farquhar stated that these claims made by the appellant were in effect claims that Cridlands had committed fraud.

[180] Further correspondence between the appellant, the Law Society and Cridlands ensued during 2004. The appellant responded by letter dated 10 May 2004 in which she stated, inter alia, that fraud was not alleged.

[181] Subsequently, a conciliation conference between the practitioners complained of and the UCAPT was conducted. The Law Society engaged counsel not only to conduct the conciliation conference, but also to

investigate the complaints themselves. As a result of the conference, a settlement of the dispute was reached, but in addition, counsel for the Law Society reported to the Law Society's Professional Standards Committee that following his investigation, he reached the conclusion that the complaints were without substance and should be dismissed. He also recommended that the appellant should be asked to explain the basis upon which the specific allegations mentioned above were made. Subsequently, the Professional Standards Committee of the Law Society wrote to the appellant advising her that the complaints had been dismissed by the Committee and asking her for an explanation in terms of the recommendation made by the Law Society's counsel. This led the Law Society to conduct its own investigation into the conduct of the appellant pursuant to s 48B of the *Legal Practitioners Act.*

[182] On 31 March 2007, the *Legal Profession Act* came into force. This Act repealed the *Legal Practitioners Act*. At that stage, the investigation by the Law Society into the appellant's conduct had still not been completed. Eventually charges were laid before the Legal Practitioners Disciplinary Tribunal established under s 669 of the *Legal Profession Act* on 22 November 2007.

The proceedings before the Tribunal

[183] The charge sheet contained three charges of professional misconduct. It is a very prolix and confusing document which more resembles a statement of

claim in a libel action than it does a charge sheet before a professional misconduct tribunal. Nevertheless, no point is taken about this.

[184] Count 1 alleged professional misconduct by substantially failing to meet the standards of professional conduct reasonably to be expected of a competent legal practitioner. Alternatively, it was alleged that the appellant was guilty of professional misconduct by wilfully or recklessly failing, when exercising the forensic judgments called for in the conduct on complaint, to take care to ensure that the allegations or suggestions made by the appellant on behalf of the UCAPT under the privilege of the procedure laid down by Part VI Division 2 of the *Legal Practitioners Act* were reasonably justified by the material then available to her (contrary to r 17.21 of the *Rules of Professional Conduct and Practice*).

[185] The particulars to which this charge related, referred to the making of "the first, second and third allegations and the personal allegations".

[186] The "first allegation" was defined to mean the allegation in the letter of 2 July 2003 referred to in paragraph [175] above.

[187] The "second allegation" was defined to mean the allegation in the letter of 2 July 2003 referred to in paragraph [176] above].

[188] The third allegation referred to the letter of 15 September 2003 and was defined to mean the allegation referred to in paragraph [177] above].

[189] The “personal allegations” referred to the letter of 20 November 2003 which alleged that:

(a) A practitioner, RG, committed the conduct the subject of each of the first, second and third allegations;

(b) A practitioner, KC, committed such of the conduct the subject of the first, second and third allegations as occurred prior to March 2001;

(c) A practitioner, AM, committed such of the conduct the subject of the first, second and third allegations as occurred after about March 2001.

[190] Paragraph 12 of the charge sheet alleged that at the time of making the first, second and third allegations and the personal allegations, the appellant:

(a) Had not seen evidentiary material capable of supporting those allegations or any of them;

(b) Did not reasonably believe that evidentiary material capable of supporting those allegations or any of them was available;

(c) Had not obtained instructions from UCAPT to make those allegations or any of them;

(d) Alternatively to 12(c), had not obtained instructions from UCAPT to make those allegations or any of them having first advised UCAPT that those allegations should not be made unless evidentiary material capable of supporting them was available.

[191] The findings of the Tribunal in relation to Count 1 were:

1. The appellant was not acting with the authority of UCAPT to make any of the allegations and knew that to be the case.

2. The appellant had not seen any evidentiary material capable of supporting any of the allegations.

3. The appellant knew that she was unable to produce any evidence in support of the allegations.

4. The personal allegations were "of a very serious breach of ethical conduct amounting to fraudulent conduct".

5. The appellant "knew, or ought to have known, the seriousness of the allegations against the practitioners and that those allegations amounted to fraud".

6. The allegations were made to the Law Society on an occasion where at the very least qualified privilege arose.

7. "The obligation carried by a legal practitioner is to take care when making serious allegations of impropriety against another on behalf of a client. The obligation arises not only when making allegations or preparing pleadings in a court proceeding but in other situations where the practitioner is protected by privilege and, indeed, in all circumstances, to maintain standards of decency and fairness".

8. The appropriate standard of care is exercised by ensuring that there is evidence upon which allegations might be made and in the light of that evidence by seeking specific instructions in relations to the allegations.

9. The appellant breached the obligations set out in Clause 12 of the Conduct Rules which reinforced the Tribunal's view as to the care which should be exercised. The breaches arose from findings that she had "failed to demonstrate that she had instructions from her client to make the allegations against the three practitioners and her failure to determine that there existed factual material to substantiate the allegations".

10. It was unfair and improper for the appellant to "make the complaint" in the light of finding (3), "and to have adopted that course in the expectation that the allegations against the practitioners were serious enough that to suggest a lesser penalty would somehow have the affect of inveigling the Law Society to accept the allegations without proper proof or for the practitioners to concede the allegations and reduced penalty against whatever eventuality they have feared, such as the costs to be incurred in defending the complaint" (sic).

11. The ultimate finding was that the appellant's conduct amounted to professional misconduct within the meaning of s 465(1)(b) of the *Legal Profession Act 2006*. The findings particularly referred to in this regard are findings (1), (2) and (3), a finding that the appellant

"continued to make the allegations on three further occasions and in the course of doing so expanded upon the conduct complained of"; a further finding that "the allegations made by the respondent were to accuse the three solicitors of a very serious breach of ethical conduct amounting to fraudulent conduct. Lastly, the respondent had ample opportunity to withdraw the allegations and chose not to do so". The alternative count was not addressed.

[192] Count 2 was a charge of professional misconduct by maintaining the first, second and third allegations and the personal allegations or, failing to cause those allegations to be withdrawn or qualified in the circumstances alleged in paragraph 15 of the charge sheet. Alternatively, there was a charge in identical terms to the alternative charge to count 1.

[193] Paragraph 15 of the charge sheet essentially repeated the allegations in paragraph 12.

[194] The difference between count 1 and count 2 was that whereas count 1 related to the making of the allegations, count 2 dealt with the maintenance of the allegations after December 2003 in circumstances where Cridlands and the Cridlands practitioners had denied the allegations.

[195] The Tribunal considered that this charge did not amount to a separate instance of professional misconduct. Although the Tribunal did not, in so many words, dismiss count 2, it may be assumed that this is what happened.

[196] Count 3 was in identical terms to count 2, but related to the period after August 2004. It was dealt with by the Tribunal in the same way as count 2.

Jurisdiction of the Tribunal – ground 6

[197] A number of grounds of appeal were maintained in this Court. The first ground attacked the jurisdiction of the Tribunal to hear and determine the Law Society's complaint. In order to consider this argument, it is necessary to consider the transitional provisions of the *Legal Profession Act* and also reg 96A of the *Legal Profession Regulations* made under the Act.

[198] As noted earlier, the investigation into the professional conduct of the appellant was commenced by the Law Society of its own motion under s 46B of the repealed Act. As the investigation was not completed by the commencement date of the *Legal Profession Act*, s 745 of that Act required that the investigation "be completed under the repealed Act as if it had not been repealed".

[199] The Law Society's submission was that the investigation having been completed, reg 96A authorised the proceedings to be brought in the Disciplinary Tribunal.

[200] Counsel for the appellant submitted that reg 96A was invalid. Section 761 of the *Legal Profession Act*, it was submitted, only permitted a regulation to be made where the Act did not make provision or sufficient provision for transitional matters and the Act did not make sufficient provision. It was submitted that the proceedings were invalidly instituted in the Tribunal

because conditions precedent to the taking of those proceedings as required by s 473 of the *Legal Profession Act* had not been fulfilled.

[201] The relevant provisions of the Act and of reg 96A are set out in paras [110] and [113] of the Chief Justice's judgment and I will not repeat them.

[202] Clearly, the Tribunal had jurisdiction if reg 96A was valid. The argument that it was invalid was that the Act did make provision or "sufficient provision" to allow or facilitate the doing of anything (in this case, starting disciplinary proceedings after completion of the investigation under s 46B of the repealed Act). It was put that the provision in question was s 747, which enables a complaint to be made and dealt with under the Act in relation to conduct which happened before the commencement date of the Act and which had not been the subject of a complaint under the repealed Act. It was put that although the Law Society had conducted an investigation on its own motion under s 46B(a) of the repealed Act, there had been no "complaint" under the repealed Act.

[203] The appellant's argument was that "complaint under the repealed Act" referred to a complaint under s 46. It is clear that there was no complaint under that provision.

[204] I do not consider that the expression "complaint under the repealed Act" is confined to a complaint under s 46 of the repealed Act. First, it is to be noted that s 744 of the Act deals with a situation where "a complaint has been made to the Law Society under s 46 of the repealed Act" but an

investigation has not started before the Act came into force. In s 744, the draftsman has used the expression "complaint… under s 46", whereas the expression "complaint under the repealed Act" is not so confined. Section 744 of the Act also deals with a direction to the Law Society by the Attorney-General to conduct an investigation in circumstances where the investigation has not started. In both of those situations, s 744(2) provides that Chapter 4 of the Act applies, with the consequence that the investigation of the complaint and any charges which arise from the complaint must follow the procedure set out in the Act and each of the charges would then be heard by the Tribunal. The difference in the expressions used suggests that "complaint" is not to be given a confined meaning.

[205] Secondly, the structure of the transitional provisions of Division 12 of the Act supports this view. Section 745 is the only provision which specifically deals with a situation where an investigation had already been started under the repealed Act, but had not been completed. Under s 46B, an investigation could have been the result either of a complaint under s 46, or as the result of a direction from the Attorney-General. In both of these situations, if the investigation was not started, Chapter 4 applies with the necessary modifications (s 744). If a charge has already been laid before the old Complaints Committee under s 50 of the former Act and the Complaints Committee had not completed its hearing into the charge, the Complaints Committee continues in existence and must hear and determine the

complaint (Section 745). Presumably, this would still be the case if the Complaints Committee had not even begun its hearing.

[206] The other possibility, which is that there is an investigation underway which has not been completed, is dealt with by s 745. This section applies to all investigations, whether as the result of a formal complaint or a direction of the Attorney-General or an investigation by the Society of its own motion. Clearly, s 745 contemplated that when the investigation is completed the Law Society could exercise its powers under s 49 of the repealed Act, because s 745 specifically confers a right of appeal against a "decision of the Society on the investigation…" One of the powers of the Society on completion of its investigation is a power to lodge a charge, subject to obtaining the consent of the Attorney-General under s 50(1A) of the repealed Act if necessary, with the Complaints Committee. However, unlike s 746(3), s 745 does not provide that the Committee still continues in existence for this purpose. Nor is there the equivalent of s 746(5) providing for a right of appeal from the Complaints Committee to the Supreme Court. The absence of these provisions suggests that although the general powers and functions under s 49 of the repealed Act continue to exist, there is no power to lodge an appeal to the Complaints Committee because it no longer had jurisdiction in that kind of matter; its jurisdiction was confined to "completing a hearing in respect of a charge which had been lodged before the date of the repeal" vide s 746. That being so, there was either no

provision, or at least, no sufficient provision, made to deal with that situation and therefore reg 96A is valid.

[207] Section 759 provides that if a provision of the repealed Act continues to apply under this Part, other provisions of the repealed Act continue to apply to the extent necessary to give effect to the continued provision. It could be argued that provisions of the former Act relating to the jurisdiction and existence of the Complaints Committee continued on to give effect to s 47(1)(d) of the repealed Act. Presumably, the appeal provisions would not, because they are not necessary to give effect to the continued provision. Attractive as that may sound, it is difficult to conceive that it was intended that the Complaints Committee would continue to have jurisdiction via such a circuitous route, particularly as the appeal provisions are not enlivened. It is one thing to keep a body which has jurisdiction once its jurisdiction has been enlivened for the limited purpose of dealing with that matter; it is another thing entirely to keep it in existence for the mere possibility that its jurisdiction might be enlivened at some future time. Further, s 758(3) suggests that it would apply to assist the Law Society's argument as the Chief Justice points out in para [130] of his judgment. The general policy of the Act seems to be that, except in the limited circumstances to which s 746 refer, the Complaints Committee's jurisdiction has come to an end.

[208] In conclusion, in my opinion, reg 96A was valid and the Tribunal did have jurisdiction to entertain the complaint.

[209] Alternatively, if I am wrong in this conclusion and reg 96A is invalid, I agree with the Chief Justice that by virtue of s 758(3) of the Act s 496 applies and the same result is achieved: jurisdiction is conferred on the Tribunal.

Application to call evidence

[210] At the hearing before the Tribunal, the appellant did not give evidence or call any evidence.

[211] The appellant sought to call evidence at the hearing of the appeal.

[212] The power to receive further evidence which was relied upon by the appellant is *Supreme Court Rule* 83.20(2) which provides that "where an appeal is by way of rehearing, either party may call new evidence at the hearing".

[213] Rule 83.20 is contained in O.83 which deals with "appeals to the Supreme Court".

[214] Rule 83.03 provides that O.83 applies to an appeal to the Court to the extent that:

"(a) No other procedure is provided under the Acts; and

(b) It does not conflict with any other law now in force or in the future to be in force in the Territory".

[215] "Acts" is defined to mean, "subject to r 83.03, any other Act of the Territory or of the Commonwealth which provides for a procedure in relation to appeals to the Court".

[216] In my opinion, s 22 of the *Supreme Court Act* provides for the procedure on the hearing of an appeal of this kind and therefore r 83.20 does not apply. Therefore, there is no absolute right in the appellant to call further evidence. The Court has a power to permit further evidence to be called under s 22(4) of the *Supreme Court Act*. That power does not confer a right and must be exercised judicially.

[217] A provision similar to s 22(4) was considered by the High Court in the case *CDJ v VAJ*.[3] In the light of that decision, the following propositions may be stated:

1. The Court is not restricted by the common law rules which restrict the power to "fresh evidence".

2. There is nothing which restricts the power to those cases where the object of the appeal is to set aside the decision of the Tribunal.

3. The power is remedial in nature. It is designed to facilitate the avoidance of errors which cannot otherwise be remedied by the conventional process. A subsidiary purpose is to allow the Court to admit evidence to buttress the findings made by the Tribunal.

[3] (1998) 197 CLR 172 at [50]-[57]; [100]-[103]; [186].

4. The provision should be construed liberally.

5. The Court is not merely exercising appellate jurisdiction because the appeal is from the Tribunal and not a court. In this sense, the Court is exercising original jurisdiction.

6. Nevertheless, the distinction between original and appellate jurisdiction should not be altogether obliterated.

7. The power exists to serve the interests of justice.

8. Further evidence would be not be admitted if it will not affect the result.

9. The Court will not admit the evidence merely because it is useful.

10. Further evidence is more readily admitted if it will avoid a rehearing, particularly if it is not in dispute.

11. Further evidence will be more readily admitted where it relates to events after the hearing.

12. Where there is no need for a new trial or the extensive taking of evidence, factors such as the availability of the evidence at trial and the need for finality in litigation are likely to be more relevant to the exercise of the discretion.

13. The failure to adduce the evidence at the hearing is a variable factor, the weight of which will depend on all the factors pertinent to the case.

14. Where the evidence has been deliberately withheld, the failure to adduce it will ordinarily weigh heavily in the exercise of the discretion.

15. Where the evidence could have been discovered by reasonable diligence, this may be of little significance.

16. No invariable rule should be laid down or can be made concerning the failure to call the evidence.

[218] In my opinion, the evidence should not be admitted in the exercise of the Court's discretion because it will not affect the result of this appeal for the reasons which follow. The evidence could have been readily called at the hearing before the Tribunal and no explanation has been given for it not being called.

Grounds 1, 4 and 4A

[219] These grounds challenge the finding by the Tribunal that the appellant acted without authority in making "the complaint" to the Law Society and knew that to be the case. I agree with what the Chief Justice has said in his judgment at paragraphs [44]-[51].

[220] In my opinion, there was no prima facie case made out against the appellant that the appellant was not authorised to make any of the allegations and knew that to be the case.

[221] The particulars of the complaint allege that the appellant had not obtained instructions from UCAPT to make the allegations or any of them. There is no allegation that she knew that to be the case.

[222] The Law Society called two witnesses from the Uniting Church. The first was Mr James, the General Secretary of the Uniting Church Northern Synod. Mr James produced the minutes of the Finance and Property Services Committee. What relationship this Committee had to do with the Uniting Church of Australian Property Trust, which appears to be an incorporated body, is not clear. Mr James gave no evidence to explain the relationship.

[223] The next witness was Mr Davis, the General Secretary of the Northern Synod of the Uniting Church. Mr Davis gave evidence that he was not the General Secretary until 2005. His evidence was that he had no knowledge of the letters written by the appellant until 2005. His involvement in the matter arose at a time when the complaints against the practitioners were going to conciliation. He searched "the records" and the minutes of the Financial and Property Services Committee and could find no reference to an allegation of the nature alleged in paragraph 15 of the letter of 2 July 2003. He gave evidence that Mr John McLaren was the Chairman of this Committee and that Ms Julie Watts was the Secretary of that Committee as well as the senior auditor. What relationship he had, or the Finance and Property Services Committee had, to the UCAPT was not explained.

[224] The letter of 2 July 2003 begins with "I act for the Uniting Church Property Trust". When the Law Society rejected the letter, presumably because it was not on the appropriate form, the appellant lodged a complaint on a form supplied by the Law Society, which was apparently executed under the common seal of the UCAPT, countersigned apparently by Ms Watts and a Mr Rowland. No evidence was called by the Law Society from either Ms Watts or Mr Rowland. Attached to the complaint was the letter of 2 July 2003. The form, in answer to the question requiring particulars of the complaint states: "see letter of complaint dated 2 July 2003". That letter was attached to the formal complaint.

[225] No evidence was led that the formal complaint was not properly executed under the common seal of the UCAPT. There was no evidence led that Ms Watts and Mr Rowland had no authority to fix the seal to the formal complaint. There was no evidence that the appellant had any knowledge one way or the other about the authority of those persons to execute the formal complaint under seal. In the absence of any such evidence, no inference could be drawn that the appellant was not entitled to assume that the seal had not been duly affixed and was not entitled to assume that the letter attached to the complaint was not authorised by the UCAPT. No prima facie case had been made out on that question in relation to the letter of 2 July 2003 or the complaint dated 13 August 2003. In my opinion, an inference can be drawn that the UCAPT was aware of all of the complaints made on its behalf and did nothing to correct the appellant if the complaints contained

errors or allegations which are not in accordance with the practitioners instructions. I, therefore, do not think that a prima facie case was made out about the question of the appellant's authority or instructions.

[226] It is well established that in disciplinary proceedings of this nature, the burden of proof is on the Law Society and the standard of proof is the civil standard applying the *Briginshaw* test.[4] The Tribunal drew an adverse inference against the appellant because the appellant did not call any evidence. The Tribunal said in relation to the formal complaint:

> "It is not known whether those who witnessed the seal had the authority of the Property Trust to make the complaint against the three practitioners or against Cridlands. It should have been an easy matter to call the signatories to give evidence concerning the circumstances surrounding the fixing of the seal and whether that step had been authorised by the Property Trust or some other official of the Uniting Church. The Tribunal was not told of any practical difficulties in calling that evidence. Nor was the Tribunal invited by the respondent to find that she relied upon the fact that the seal of the Property Trust was affixed to the complaint for evidence of her instructions or to infer that because the seal was affixed it was unnecessary for her to make further inquiries about her authority to make the complaint.
>
> The failure of the respondent to rely upon the execution of the complaint under common seal or to call evidence to assert that she had the authority of the Property Trust to make the complaints against the three practitioners is persuasively indicative that the respondent could not establish that she had the authority of her client to make the allegations in the complaint.
>
> However, can the Tribunal be satisfied that the respondent was entirely by herself in making the complaint? It seems that others connected with the Property Trust witnessed the application of the seal to the complaint. In addition, it seems moderately clear to the Tribunal that the respondent's husband, Mr John McLaren, the

[4] *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 at 220.

> Chairman of the Property Trust, was interested in making the complaint, as his letter to the Law Society demonstrates.
>
> The Tribunal is left in an unsatisfactory position on this question. The Tribunal might find that the respondent acted entirely on her own volition, as unlikely as that might seem. Alternatively, the Tribunal might accept that there is indirect evidence of the involvement of some of those who held positions in the Property Trust apparently instructing the respondent to make the complaint. For instance, there are entries in the respondent's file that she was taking instructions from John McLaren…
>
> Without the evidence of John McLaren or the respondent on this question, the Tribunal cannot be sure whether the instruction of John McLaren carried the authority of the Uniting Church or the Property Trust. The unexplained absence of that evidence combined with the lack of any evidence in relation to the implications of using the Property Trust seal suggest that the respondent was aware that she was acting without the authority that she was required to make the complaint when she did so.
>
> The Tribunal must resolve this question against the respondent and find that although there appear to have been some involvement of office holders of the Property Trust, notably John McLaren, and the witnesses to the affixing of the common seal, all of whom may have provided some instruction or encouragement to the respondent to make the complaints, there is insufficient evidence to show that the respondent was acting with the authority of the Property Trust to make the complaints against the three practitioners, and further, that she knew that to be the case."

[227] I agree with the judgment of the Chief Justice that there is no basis for a finding that the appellant acted without the authority of the UCAPT in lodging the complaint letter of 2 July 2003. Further, I agree with his Honour that there is no basis for a finding that the appellant acted without the authority of the UCAPT in lodging the complaint under seal dated 13 August 2003 and that the findings of the Tribunal to the contrary reverse the onus of proof. As to the letter of 15 September 2003 and the letter of

20 November 2003, there is no separate analysis by the Tribunal of the facts concerning the authority of the appellant to lodge these letters. The conclusion drawn is a compendious one which the Tribunal expressed this way:

> "… there is insufficient evidence to show that the respondent was acting with the authority of the Property Trust to make the complaints against the three practitioners, and further, that she knew that to be the case."

[228] Plainly, the Tribunal again reversed the onus of proof in relation to the lodging and drafting of those letters as well, unless there was a prima facie case. The so-called rule in *Jones v Dunkel*[5] applies to proceedings before the Tribunal.[6] However, before an inference can be drawn there must be a prima facie case and the standard of proof overall must still pass the *Briginshaw* test. The requirement to give evidence as expressed in *Power* and other cases applies only when excuses are offered from the Bar Table. Further, the rule in *Jones v Dunkel* only applies where the witnesses concerned are not available or not reasonably available to the Law Society and would be available to the appellant. Whilst it may be said that John McLaren was in the appellant's camp, bearing in mind that he was her husband, no such inference can be drawn in relation to Julie Watts or to Mr Rowland who were the signatories to the Property Trust's seal.

[5] (1959) 101 CLR 298.
[6] *Council of New South Wales Bar Association v Power* (2008) 71 NSWLR 451.

[229] I do not agree that the admission that the appellant had not seen any evidentiary material capable of supporting the allegations is a sufficient basis upon which to draw an inference that the Law Society had made out a prima facie case that she knew that she had no instructions to make any of the allegations. Further, there was evidence in the appellant's file that she had sent copies of the letters to the UCAPT.

[230] I would therefore uphold ground 1 of the appeal. However, this does not necessarily alter the result, as in order to succeed the appellant must also establish the remaining grounds.

Ground 2

[231] This ground asserts that the Tribunal erred in fact and law in holding that there was no basis for making the first allegation, the second allegation, the further details of the second allegation, the third allegation or the alternative form of the third allegation set out in the letters of 2 July 2003 and 15 September 2003.

[232] The actual finding was that "the appellant knew that there was no evidence to substantiate either the initial complaint or the further particulars". This finding cannot be supported in this form because the case against the appellant was limited to "the allegations", not the whole complaint or the particulars. However, the Tribunal later found that "those allegations [presumably limited to the allegations complained of] were made without a foundation in fact or any evidence that might lead to the establishment of

those allegations" and that "after the practitioner was clearly aware that there was no foundation of fact or no evidence likely to establish the allegations, the respondent continued to make the allegations on three further occasions and in the course of doing so expanded upon the conduct complained of".

[233] It is very clear from the appellant's file that the appellant had not obtained any statement, signed or otherwise, from any witness to substantiate any of the relevant allegations, and had no other documentary evidence to support them. Further, the appellant admitted that at the time of sending the letter of 23 September 2003, she had no evidentiary material capable of supporting the allegation that commercially sensitive information had been used by Cridlands to the advantage of Randazzo; that she did not have any evidentiary material capable of supporting an allegation that Cridlands had used confidential information to assist them in obtaining a lease of the office premises at the Mitchell Centre; and that she did not have any evidentiary material to support the same allegations against the three practitioners concerned.

[234] Counsel for the appellant submitted that the Tribunal erred in finding that there was no basis for the making of the allegations because it was an available inference arising from the fiduciary duty owed by Cridlands to its various clients to use the information that was alleged. I take this to mean that where a practitioner serves different clients in the same matter, there is

an obligation to make full disclosure to all clients.[7] Therefore, so the argument went, it was an available inference that because Cridlands were acting for Randazzo, any information it received from the UCAPT was required to be disclosed to Randazzo.

[235] However, as Mr Walsh QC for the Law Society submitted, there was no evidence that the appellant drew any such inference, or that this was the evidentiary basis upon which she relied. Furthermore, there were a number of possible explanations which would have had to have been considered before such an inference could have been drawn. For example, Cridlands may have informed Randazzo of the conflicting duties, and obtained an agreement from that client that it would not have to perform the full duties of disclosure.[8] Further, the matters upon which Cridlands were acting for Randazzo may not have required any disclosure at all if the matters which it undertook bore no relationship to the interests of the UCAPT.

[236] In relation to the allegation concerning the use of confidential information to obtain the lease for its own premises in the Mitchell Centre, it was submitted likewise that this was an available inference from information derived by Cridlands from its instructions from UCAPT. However, there was no evidence that the appellant drew any such inference; nor was there in fact any evidence from which she could have drawn such an inference. The facts asserted by the appellant, at the highest, would not have supported

[7] *Clark v Barter* (1989) NSW Conv R 55-483 at 58,504 per Clarke JA.
[8] *Moody v Cox & Hatt* [1917] 2 Ch.71 at 81.

such an inference and any such inference was in my opinion entirely baseless.

[237] Counsel for the appellant submitted that the finding of the Tribunal that these allegations were tantamount to allegations of fraud could not be sustained. He submitted that there was no suggestion in the letters of complaint that either Cridlands or the solicitors concerned deliberately intended to deceive or gain a personal advantage for either Randazzo or themselves. Further, it was submitted that the charge did not allege that the appellant made accusations amounting to fraud. Counsel for the Law Society submitted that the Law Society never contended at the hearing before the Tribunal that the appellant had alleged that Cridlands or its practitioners intended to deceive, or to obtain a secret profit at the expense of the UCAPT. In those circumstances, the finding by the Tribunal that the allegations were tantamount to allegations of fraud cannot be sustained.

[238] Irrespective of whether or not the appellant was in effect alleging fraud by Cridlands or its practitioners, the allegations were of serious misconduct such as to require the appellant to ensure that there was evidence upon which such allegations could be made. As to the seriousness of the allegation that Cridlands used confidential information from the UCAPT to obtain a personal advantage, I need only refer to the *Law Society of New South Wales v Harvey*.[9]

[9] [1976] 2 NSWLR 154 at 172.

[239] Counsel for the Law Society submitted also that its case was not only that the appellant made the allegations without any evidence to support them, but also that she did not have "strict" instructions from the client to make them. Presumably what it meant by this, is that the appellant, before making allegations of this nature, needed to draw to the client's attention the specific allegations and advise the client that such allegations are serious allegations which cannot be made without proper evidence to support them, and of the possible consequences to the client if they are not made out.[10]

[240] To the extent that the Tribunal found that the appellant had not obtained such specific instructions, in my opinion it was open to the Tribunal to infer from all of the evidence that the appellant had not sought "strict instructions". There was nothing in the appellant's file to suggest that the appellant had obtained such instructions and, in view of the admissions made as to the evidence available to her, it is unlikely that she did; moreover, it is unlikely that UCAPT would have instructed her to proceed to make the allegations if such advice had been given and even more unlikely that the appellant would have accepted such instructions in those circumstances.

[241] In my opinion, ground 2 of the appeal has not been made out. The conduct of the appellant in making the allegations which were, on any view of the matter, serious allegations which required evidence to support them. This

[10] *Minister Administering the Crown Lands (Consolidation) Act & Western Lands Act & Ors v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201 at 203-204; *c.f. Rules of Professional Conduct*, r 12.3.

was in itself sufficient to warrant a finding by the Tribunal that the appellant's conduct amounted to professional misconduct.

Conclusion

[242] Although not all of the Tribunal's findings have been upheld, as there is no appeal against the penalty imposed, I would dismiss the appeal with costs.

Riley J:

[243] I agree with the Chief Justice.

Under s 515 Legal Profession Act

DISCIPLINARY TRIBUNAL

In the Matter of the Law Society of the Northern Territory of Australia

AND

ASHA McLAREN a Legal Practitioner holding a practicing certificate in the Northern Territory of Australia under the Legal Practitioner's Act.

DISCIPLINARY APPLICATION

CHARGES FOR PROFESSIONAL MISCONDUCT

On the grounds more particularly set out below, the Law Society of the Northern Territory ["LSNT"] of 1st Floor, Paspalis Centrepoint, 48-50 Smith Street Mall, Darwin in the Northern Territory of Australia, HEREBY CHARGES Asha McLaren of Suite 6, 2nd Floor, Carpentaria House, 13 Cavenagh Street Darwin in the Northern Territory of Australia ["the practitioner"], pursuant to Section 496 of the Legal Profession Act 2006 and Regulation 96A of the Legal Profession Regulations 2007, with professional misconduct.

1. At all material times the practitioner was a legal practitioner holding an unrestricted practising certificate under the *Legal Practitioners Act* ["LPA"].

2. By notice under section 46 of the LPA dated 13 August 2003 the practitioner, purportedly on behalf of her client the United Church in Australia Property Trust (N.T.) ["UCAPT"], made a complaint ["the Complaint"] to LSNT against three legal practitioners in the employ of Cridlands Lawyers, namely [B] , [C] and [A] ["the Cridlands practitioners"].

3. The complaint incorporated by reference a letter from the practitioner to LSNT dated 2 July 2003.

4. The 2 July 2003 letter, which will be referred to at the hearing for its full meaning and effect, included allegations the substance of which were that:

   (a) Cridlands, when acting for a client Randazzo Investments Pty Ltd ["Randazzo"] in drafting a deed affecting the development by Randazzo of land in which UCAPT was interested ["the Mitchell Centre site"], had used confidential and commercially sensitive knowledge and information gained by it as the solicitors for UCAPT prejudicially to the interests of UCAPT ["the first allegation"].

   (b) Cridlands, when acting for UCAPT in relation to the development of land in which UCAPT was interested ["the CBD Plaza site"] had used and passed on to Randazzo, for use to Randazzo's advantage in respect of Randazzo's development of the Mitchell Centre site, commercially sensitive information relating to bids received by UCAPT from prospective anchor tenants for the Woolworths site ["the second allegation"].

5. By letter to LSNT dated 15 September 2003, which will be referred to at the hearing for its full meaning and effect, the practitioner:

   (a) provided further details in respect of the second allegation, the substance of which was that the commercially sensitive information in question related to the detail of lease negotiations respectively between UCAPT and Woolworths, and UCAPT and Coles, for a lease of retail premises at the CBD Plaza site, which information was used to Randazzo's advantage when Randazzo negotiated with Coles a lease of retail premises at the Mitchell Centre site ["the further details"]; and

(b) made a further allegation the substance of which was that Cridlands had secured for itself a lease from Randazzo of commercial premises at the Mitchell Centre site either by using the information referred to in paragraph 4(b) or by providing that information to Randazzo. [the third allegation]

6. The natural meaning and effect of the first allegation was that:

(a) Cridlands or the Cridlands practitioners had engaged in conduct that involved intentional and contumelious breaches of their fiduciary obligations to UCAPT;

(b) Cridlands or the Cridlands practitioners had deliberately misused confidential information obtained by Cridlands in the context of acting for and on behalf of UCAPT;

(c) Cridlands or the Cridlands practitioners had deliberately acted in a manner calculated to prejudice the interests of UCAPT;

(d) Cridlands or the Cridlands practitioners were guilty of serious and wilful professional misconduct.

7. The natural meaning and effect of the second allegation (including the further details) was that:

(a) Cridlands or the Cridlands practitioners had engaged in conduct that involved intentional and contumelious breaches of their fiduciary obligations to UCAPT;

(b) Cridlands or the Cridlands practitioners had deliberately misused confidential information obtained by Cridlands in the context of acting for and on behalf of UCAPT;

(c) Cridlands or the Cridlands practitioners had deliberately acted in a manner calculated to prejudice the commercial interests of UCAPT;

(d) Cridlands or the Cridlands practitioners had deliberately acted so that the commercial interests of other clients were preferred to the commercial interests of UCAPT;

(e) Cridlands or the Cridlands practitioners were guilty of serious and wilful professional misconduct.

8. The natural meaning and effect of the third allegation was that:

(a) Cridlands or the Cridlands practitioners had engaged in conduct that involved intentional and contumelious breaches of their fiduciary obligations to UCAPT;

(b) Cridlands or the Cridlands practitioners had deliberately misused confidential information obtained by Cridlands in the context of acting for and on behalf of UCAPT;

(c) Cridlands or the Cridlands practitioners had deliberately acted in a manner calculated to prejudice the commercial interests of UCAPT;

(d) Cridlands or the Cridlands practitioners had deliberately acted so that the commercial interests of other clients, or of Cridlands itself, were preferred to the commercial interests of UCAPT;

(e) Cridlands or the Cridlands practitioners were guilty of serious and wilful professional misconduct.

9. The practitioner well knew and intended that the allegations have the meanings and effects alleged in paragraphs 6, 7, and 8.

10. By letter to LSNT dated 20 November 2003, which will be referred to at the hearing for its full meaning and effect, the practitioner:

(a) specifically alleged that [B] committed the conduct the subject of each of the first, second and third allegations;

(b) alleged in substance that [A] committed such of the conduct the subject of the first, second and third allegations as occurred prior to about March 2001; and

(c) alleged in substance that [C] committed such of the conduct the subject of the first, second and third allegations as occurred after about March 2001;

[the allegations in sub-paragraphs (a), (b) and (c) above are collectively referred to below as "the personal allegations"].

11. The first, second and third allegations, and the personal allegations, and each of them, were allegations of a type and nature that a legal practitioner should not make on behalf of a client unless the practitioner:

(a) has formed the considered view, on the basis of available evidentiary material, that the allegations can justifiably be made;

(b) has warned the client that the allegations should not be made in the absence of evidentiary material to justify them; and

(c) has obtained clear and unequivocal instructions from the client to make the allegations.

12. At the time of making the first, second and third allegations, and the personal allegations, the practitioner:

(a) had not seen evidentiary material capable of supporting those allegations or any of them;

(b) did not reasonably believe that evidentiary material capable of supporting those allegations or any of them was available;

(c) had not obtained instructions from UCAPT to make those allegations or any of them;

(d) alternatively to 12(c) had not obtained instructions from UCAPT to make those allegations or any of them having first advised UCAPT that those allegations should not be made unless evidentiary material capable of supporting them was available

13. By making the first, second and third allegations, and the personal allegations, in the circumstances alleged in paragraph 12:

(a) the practitioner substantially failed to meet the standards of professional conduct reasonably to be expected of a competent legal practitioner and is guilty of professional misconduct; and

(b) further or alternatively, the practitioner is guilty of professional misconduct in that she wilfully or recklessly failed, when exercising the forensic judgments called for in the conduct of the Complaint, to take care to ensure that allegations or suggestions made by her on behalf of UCAPT under the privilege of the procedure laid down by Part VI Division 2 of the LPA were reasonably justified by the material then available to her (contrary to rule 17.21 of the Rules of Professional Conduct and Practice).

14. The practitioner was aware from December 2003:

(a) that the first, second and third allegations and the personal allegations were strenuously denied by Cridlands and by the Cridlands practitioners;

(b) that Cridlands and the Cridlands practitioners denied having engaged in any inappropriate or improper conduct while acting as the solicitors for UCAPT, or afterwards;

(c) that Cridlands regarded the second and third allegations as allegations of fraud;

(d) that Cridlands insisted that the practitioner and or the UCAPT identify the material if any upon the basis of which the second and third allegations were made.

Particulars

letter from Cridlands to LSNT dated 21 November 2003 and received by the practitioner no later than 19 December 2003

15. Notwithstanding the matters in paragraph 14, and notwithstanding that the practitioner:

(a) had not seen evidentiary material capable of supporting the allegations or any of them;

(b) did not reasonably believe that evidentiary material capable of supporting the allegations or any of them was available;

(c) had not obtained instructions from UCAPT to maintain the allegations or any of them;

(d) alternatively to 15(c) had not obtained instructions from UCAPT to maintain the allegations or any of them having first advised UCAPT that the allegations should not be maintained, and should immediately be withdrawn, unless evidentiary material capable of supporting them was available;

the practitioner from and after December 2003 maintained the first, second and third allegations, and the personal allegations, or failed to cause those allegations to be withdrawn.

16. By maintaining the first, second and third allegations, and the personal allegations, or failing to cause those allegations to be withdrawn or qualified, in the circumstances alleged in paragraph 15:

(a) the practitioner substantially failed to meet the standards of professional conduct reasonably to be expected of a competent legal practitioner and is guilty of professional misconduct; and

(b) further or alternatively, the practitioner is guilty of professional misconduct in that she wilfully or recklessly failed, when exercising the forensic judgments called for in the conduct of the Complaint, to take care to ensure that allegations or suggestions made by her on behalf of UCAPT under the privilege of the procedure laid down by Part VI Division 2 of the LPA were reasonably justified by the material then available to her (contrary to rule 17.21 of the Rules of Professional Conduct and Practice).

17. The practitioner was aware from no later than 20 August 2004:

(a) that Cridlands maintained its assertion that matters alleged by UCAPT in support of the complaint were allegations of fraud;

(b) that Cridlands further asserted that conduct alleged by UCAPT in support of the complaint also arguably amounted to a criminal offence; and

(c) of the basis upon which Cridlands made the assertions in paragraphs (a) and (b) above.

Particulars

letter from Cridlands to LSNT dated 19 August 2004 and forwarded by LSNT to the practitioner on 20 August 2004 Cridlands

18. Notwithstanding the matters in paragraph 17, and notwithstanding that the practitioner:

(a) had not seen evidentiary material capable of supporting the allegations or any of them;

(b) did not reasonably believe that evidentiary material capable of supporting the allegations or any of them was available;

(c) had not obtained instructions from UCAPT to maintain the allegations or any of them;

(d) alternatively to 18(c) had not obtained instructions from UCAPT to maintain the allegations or any of them having first advised UCAPT that the allegations should not be maintained, and should immediately be withdrawn, unless evidentiary material capable of supporting them was available;

the practitioner from and after late August 2004 maintained the first, second and third allegations, and the personal allegations, or failed to cause those allegations to be withdrawn.

19. By maintaining the first, second and third allegations, and the personal allegations, or failing to cause those allegations to be withdrawn or qualified, in the circumstances alleged in paragraph 18:

(a) the practitioner substantially failed to meet the standards of professional conduct reasonably to be expected of a competent legal practitioner and is guilty of professional misconduct; and

(b) further or alternatively, the practitioner is guilty of professional misconduct in that she wilfully or recklessly failed, when exercising the forensic judgments called for in the conduct of the Complaint, to take care to ensure that allegations or suggestions made by her on behalf of UCAPT under the privilege of the procedure laid down by

Part VI Division 2 of the LPA were reasonably justified by the material then available to her (contrary to rule 17.21 of the Rules of Professional Conduct and Practice).

DATED this 21st day of November 2007.

Duncan McConnel, President of the Law Society of the Northern Territory of Australia

These charges were prepared by Mr Richard Bruxner of Counsel

RECEIPT NO.
FEE PAID: $
FILED 22 NOV 2007
TIME:
SUPREME COURT - DARWIN