

06

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

BETWEEN:

LAW SOCIETY NORTHERN
TERRITORY

Complainant

AND

ASHA McLAREN

Respondent

REASONS FOR DECISION

27 April 2009

For the complainant: Judith Kelly SC

For the respondent: John Waters QC

Dates of hearing: 11 and 12 March 2009

1. This matter was heard by the Tribunal on 11 and 12 March 2009 when the Tribunal reserved its decision. Following the hearing before the Tribunal, the parties were invited to make submissions concerning the application of section 516 of the Legal Profession Act 2006 ("LPA") to this matter.
2. Submissions were received from the Law Society attaching the relevant decision of the Law Society to initiate charges against the respondent on 31 May 2007. Those charges were laid in the form of a disciplinary application on 22 November 2007 ("the Disciplinary Application"), within the 6 month limitation

prescribed by section 516 LPA. No submissions were received from the respondent to the contrary.

3. The Disciplinary Application brought by the Law Society against the respondent charges her with professional misconduct arising from a complaint made by her purportedly on behalf of the Uniting Church of Australia against three practitioners employed by the firm of Cridlands, namely Richard Giles, Alison Maynard and Karen Christopher. The authority for the complaint is variously attributed to the Uniting Church of Australia or the Uniting Church in Australia Property Trust. There is no need to be overly concerned about differentiating between these two organisations. It would be sufficient if the respondent was authorised to make the complaint against the Cridlands practitioners by either organisation.
4. The background to the complaint by the respondent and the charge by the Law Society is that two developments involving the establishment of supermarkets operated by Coles and Woolworths began in close temporal and physical proximity. The site upon which the Woolworths supermarket was to be established was owned by the Uniting Church of Australia, an existing client of Cridlands.
5. The site upon which the Coles supermarket was to be established included an office building part of which would be leased by Cridlands as the Darwin office of Cridlands ("the Mitchell Centre"). Cridlands had also acted for the developer of that building, Randazzo Investments Pty Ltd ("Randazzo"). Finally, Cridlands had also acted for a Mr Manolas who was somehow

connected with the development of Lot 7118 Cavenagh Street, Darwin, that is, the Woolworths development.

6. The relevant section of the Uniting Church of Australia that dealt with the Woolworths development was the Uniting Church in Australia Property Trust. There are two relevant members of that trust and those people were Mr John McLaren and Ms Julie Watts. Copies of the relevant minutes of meetings of the Property Trust were tendered before the Tribunal.

7. On 13 August 2003 the respondent filed with the Law Society a form entitled "complaint against a legal practitioner" pursuant to section 46 of the Legal Practitioners Act ("the former Act"). That complaint identified the practitioners complained about as Richard Giles, Alison Maynard and Karen Christopher. The complainant was the Uniting Church in Australia Property Trust. The complaint alleged a conflict of interest and by way of particulars referred to a letter dated 2 July 2003 from the respondent to the Law Society. The complaint requested that action be taken to investigate the complaint and to admonish the practitioners and fine them. The complaint bears what appears to be the common seal of the Uniting Church in Australia Property Trust (N. T.). One of the signatures appearing below the common seal appears to be "J Watts" but the other signature is undecipherable. No evidence was called to identify the other signatory.

8. This complaint was eventually dealt with by the Law Society and was resolved following a formal mediation. The relevance of the complaint against Cridlands and the three practitioners to this matter is that it set off a chain of events that led to the

respondent being charged by the Law Society concerning the content of the complaint. How the original complaint was resolved is not relevant to the consideration of this matter.

9. The complaint made by the respondent on behalf of the Uniting Church in Australia Property Trust eventually consisted of a number of documents. The first was a letter dated 2 July 2003¹, the second was the complaint form², the third was a letter from the respondent to the Law Society dated 15 September 2003³ and the fourth was a letter from the respondent to the Law Society dated 20 November 2003⁴.
10. Each of the components of the complaint made, sequentially, a series of allegations of conduct that was eventually narrowed down to specific allegations against the 3 practitioners. By way of summary the allegations made in each of the relevant parts of the complaint are:

Letter of 2 July 2003:

- 10.1 "15.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 Church⁵ with

¹ LSNT1 pages 79 -- 71

² LSNT1 pages 83 -- 81

³ LSNT1 pages 93 -- 91

⁴ LSNT 1 pages 99 -- 97

⁵ in the letter of 2 July 2003 "Church" is said to be the Uniting Church in Australia Property Trust

respect to Lot 2280 Town of Darwin (the Mitchell Centre)."⁶

- 10.2 "33.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 (the Woolworths development) to Randazzo for its development (the Mitchell Centre)."⁷

In the extracts above and below the name of each property has been added in brackets.

Letter of 15 September 2003⁸ (in paragraph 5):

- 10.3 "(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 (the Mitchell Centre)."

- 10.4 "(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."

⁶ LSNT 1 page 76

⁷ LSNT 1 page 74

⁸ LSNT 1 page 92

10.5 "(c) Cridlands used the above information to Randazzo Investment'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 Randazzo Investments to negotiate with Coles and obtain a financial advantage. It also allowed Randazzo to maximize the rental it obtained from Coles."

10.6 "(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 the Mitchell Centre Development...".

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

Letter of 20 November 2003⁹:

10.8 "Mr Richard Giles 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

⁹ LSNT 1 page 99

him. Similarly the conduct set out in my letter dated 15 September are attributed to him (sic)."¹⁰

- 10.9 "Ms Christopher acted on behalf of the Church with respect to Lot 7118 the CBD Plaza. She was involved in the matter up to about March 2001. The specific instances of conduct attributed to Cridlands is (sic) to be attributed to Ms Christopher until she ceased involvement with the file."
- 10.10 "(Ms Christopher) is guilty of conduct set out in paragraphs A to L and the particulars set out in paragraphs 20 to 57 with the exception paragraph (sic) 33, 49 and 56 in my letter dated 2 July 2003.¹¹ She is also guilty of the conduct set out in paragraphs 5(a) and 8 of my letter dated 15 September 2003."
- 10.11 Ms Maynard acted on behalf of the Church with respect to Lot 7118, CBD Plaza after March 2001. She was involved with the matter relating to Lot 2280. Specific incidences of conduct attributed to Cridlands is (sic) to be attributed to Ms Maynard during her involvement."
- 10.12 Ms Maynard provided legal advice to the Church with respect to the specialty shops leases within the CBD Plaza in Lot 7118. She was therefore privy to commercially sensitive information set out in

¹⁰ LSNT 1 page 99

¹¹ LSNT 1 page 99 -- 98

paragraph 5(b) to (g) in my letter dated 15 September 2003.

11. All these allegations are set out in the Disciplinary Application in paragraphs 4 and 5 and the meaning to be derived from those allegations is contained in paragraphs 6, 7 and 8 of the Disciplinary Application.

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. These are 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.

"It is well settled that a solicitor has a fiduciary duty to his client. That duty carries with it two presently relevant responsibilities. The first is the obligation to avoid any conflict between his duty to his client and his own interests - he must not make a profit, or secure a benefit, at his client's expense. The second arises when he endeavours to serve two masters and requires him to make full disclosure to both.¹²"

The allegations by the respondent 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

¹² Clark v Barter (1989) NSW Conv R 55-483 Clarke JA at 58,504

of the client. The Law Society says that this allegation amounts to an allegation of fraud.

“Fraud” is defined in the Macquarie Dictionary¹³ as:

- “1. deceit, trickery, sharp practice, or breach of confidence, by which it is sought to gain some unfair or dishonest advantage.
 2. a particular instance of such deceit or trickery: *election frauds*.
 3. any deception, artifice, or trick.
 4. someone who makes deceitful pretences; impostor.
 5. *Law*
 - a. (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.
 - b. (in equity) violation, intentional or otherwise, of the rules of fair dealing.
- [Middle English *fraude*, from Old French, from Latin *fraus* cheating, deceit]”

The conduct complained of fits within the first definition and within the fifth common law and equitable definition.

If the allegations made by the respondent were established the likelihood would be that the three practitioners would have been found to have breached their fiduciary duty to the Uniting Church of Australia and would have been called to account in such a way that their permission to continue to practise in the profession would be put at serious risk.

13. It is asserted in the Disciplinary Application that a legal practitioner ought not make allegations of this sort unless that practitioner had formed the considered view that there was evidentiary material capable of supporting the allegations and had obtained specific instructions from the practitioner's client to

¹³ Online

make those allegations¹⁴. If a practitioner failed to follow that course of conduct then, it was alleged, the practitioner was guilty of professional misconduct. As will be seen, the respondent denies that she failed to obtain the requisite instructions but admits that in some respects the allegations were not supported by evidentiary material.

14. Leaving aside two technical arguments raised in the respondent's response concerning the correct section under which the Law Society should have proceeded and complaints arising from the failure of the respondent to withdraw the allegations made by her (which will be dealt with later), the 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), denies that the respondent intended the allegations to have the meaning so derived and that the professional obligations described in paragraphs 11 and 12 of the Disciplinary Application were "inappropriately paraphrased".
15. By letter dated 1 December 2008 the Law Society sought admissions in relation to certain facts and documents. A response was provided by the respondent's counsel via e-mail dated 6 March 2009.
16. It is useful to set out the facts and/or documents denied and those admitted:

¹⁴ paragraph 11 of the Disciplinary Application

16.1 The respondent admits sending the letter of 2 July 2003 and the complaint of 13 August 2003, but¹⁵:-

16.1.1 The respondent denies that at the time of sending the letter of 2 July 2003 and the complaint of 13 August 2003 she did not have instructions to allege nor had not seen supporting evidentiary material that Cridlands, while drafting a deed affecting the development by Randazzo of land in the Mitchell Centre, used confidential and commercially sensitive knowledge gained by it as the solicitors for the Uniting Church in Australia Property Trust prejudicially to the interests of the Property Trust.

16.1.2 The respondent denies that at the time of sending the letter of 2 July 2003 and the complaint of 13 August 2003 she did not have instructions to assert nor had not seen supporting evidentiary material that Cridlands, whilst acting for the Property Trust, had used and passed on to Randazzo confidential and commercially sensitive information gained by it as the solicitors for the Uniting Church in Australia Property Trust relating to bids received by the Property Trust from prospective anchor tenants for the Woolworths development.

¹⁵ Paragraphs 3 -10 of the request for admissions

- 16.2 The respondent admits sending a letter to the Law Society dated 15 September 2003, but¹⁶:-
- 16.2.1 The respondent does not admit that at the time she sent that letter she did not have instructions to assert that Cridlands used and passed on to Randazzo commercially sensitive information relating to bids received by the Property Trust from prospective anchor tenants for the Woolworths development.
- 16.2.2 The respondent does admit that at the time she sent that letter she did not have evidentiary material capable of supporting the allegation that commercially sensitive information had been used by Cridlands to the advantage of Randazzo.
- 16.2.3 The respondent denies that she did not have instructions to make a further allegation to the effect that Cridlands had secured itself a lease from Randazzo at the Mitchell Centre by using confidential information and/or providing that information to Randazzo at the time she sent the letter of 15 September 2003.

¹⁶ Paragraphs 11 - 15 of the request for admissions

16.2.4 The respondent admits 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.

16.3 The respondent admits sending a letter to the Law Society dated 20 November 2003¹⁷, but:

16.3.1 The respondent denies that she was not instructed to make the specific allegations against the three practitioners.

16.3.2 The respondent admits that she did not have the evidentiary material to support those allegations against the three practitioners.

17. The case against the respondent 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 and nor could the respondent have objectively formed the view that the respondent was privy to evidence that would have substantiated those allegations.

¹⁷ Paragraphs 16 – 18 of the request for admissions.

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.

19. Mr Davis, the previous General Secretary of the Northern Synod of the Uniting Church, gave evidence that he had been approached by Richard Giles, with whom he was friendly, concerning the complaint that had been made by the respondent and was asked by Mr Giles to see if he could bring the complaint to an end. As a result, Mr Davis made his own enquiries within the Church, including inspecting documents and speaking to Mr John McLaren and Ms Julie Watts and caused the allegations to be withdrawn and the complaint to be referred to a conciliation conference where it was resolved. Mr Davis said that he was unable to find any documentation within the records of the Church which identified and particularised the conduct complained of or which contained instructions from the Church to make the complaint against the practitioners and Cridlands. In cross-examination a letter from Mr McLaren to the Law Society dated 24 August 2005 was brought to Mr Davis' attention and he said that he had not seen that letter at the time of his searches of the Church records. It appears, then, that the only documentation capable of supporting the complaints made by the respondent postdated the complaint. It is significant that Mr Davis was not able to obtain from Mr McLaren or Ms Watts any substantiation of the complaints when determining whether there were instructions to make a complaint on some reasonable evidence.

20. The other witness was Mr Johnson, who is the current holder of the position previously held by Mr Davis, and his evidence

extended only to the provision of copies of the minutes of the Property Trust, none of which contain reference to the allegations made against either Cridlands or the three practitioners.

21. The respondent did not give evidence, and she did not call any witnesses. Mr John McLaren was present in the Tribunal for the hearing but did not give evidence, and neither did Ms Watts. The only evidence tendered by the respondent was the letter from Mr McLaren to the Law Society of 24 August 2005 that complained about the manner in which the original complaint against Cridlands had been resolved. That letter was admitted by the Tribunal into evidence, but only as evidence that it had been sent and not as to the matters contained within it. The respondent's file concerning the complaint was tendered as part of the case of the Law Society.
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.
23. There is one element of positive evidence that appears to impact on this question and that is that the common seal of the Property Trust was affixed to the 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 enquiries about her authority to make the complaints.

24. 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 persuasive indicia that the respondent could not establish that she had the authority of her client to make the allegations in the complaints.
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. Such an entry states, in the heading:-

“26/10/2 - 3.24 -6.00 taking instructions from John McLaren & drafting complaint to Law Society”¹⁸

and another such entry was:-

21/5/3 – 3.48 -5.18 – Taking instructions from J. McL”¹⁹

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.

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.

¹⁸ Respondent's file page 55

¹⁹ Respondent's file page 67

28. The next matter that is required to be determined is whether the respondent had access to any evidence that supported the allegations made against the three practitioners
29. In this regard it should be noted that the respondent denies that she did not have access to evidence concerning the use of the confidential commercially sensitive knowledge to the disadvantage of the Property Trust or that confidential and commercially sensitive information concerning the bids received by the Property Trust from prospective anchor tenants for the Woolworths development were passed on to Randazzo as alleged in the letter of 3 July 2003²⁰.
30. The respondent does not admit that she did not have access to evidence supporting the allegations that commercially sensitive information had been used by Cridlands to the advantage of Randazzo²¹, but admits that she did not have any evidentiary material supporting an allegation (in the letter of 15 September 2003) that confidential information had been used by Cridlands to assist in obtaining a lease of the office premises in the Mitchell Centre.²²
31. The respondent admits that she did not have evidentiary material to support the allegations made against the three practitioners in the letter of 20 November 2003²³.
32. Again, the Tribunal has not been assisted by any evidence from the respondent that demonstrates what information or evidence

²⁰ 16.1.1 and 16.1.2 (above)

²¹ 16.2.2 (above)

²² 16.2.4 (above)

²³ 16.3.2 (above)

she relied on in formulating the complaints against the three practitioners. The non-admission concerning the use of commercially sensitive information by Cridlands to the advantage of Randazzo must, without support of any evidence from her, be resolved against the respondent.

33. It is difficult to reconcile the denials concerning the allegations made in the letter of 2 July 2003 with the admission that the respondent did not have evidentiary material to support the allegations made against the three practitioners in the letter of 20 November 2003. The denials, without the support of any evidence and contradicted by the later admissions, must be resolved against the respondent.
34. There was a telephone conference between the respondent and Ms Julie Watts on 8 August 2003 and the contents were noted at page 157 of the respondent's file. It appears that Ms Watts had discussed this matter with John McLaren and Ms Watts was passing on to the respondent that John McLaren had suggested to her that the appropriate penalty for the three practitioners was an admonishment and a fine. In particular there is the following note at the bottom of that page:

"John felt if it went to 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."

35. It is significant that this note records a conversation that postdates the initial letter of complaint but predates the formal complaint to the Law Society of 13 August 2003. Without explanation from the respondent, “concrete proof” must mean any proof, or any provable evidence, of the allegations. Notwithstanding this note, the respondent continued to make the complaints against the three practitioners and, instead of advising her client that the complaints should be withdrawn from lack of evidence, seems to have accepted that that it was somehow sufficient to reflect the inability to prove the allegations by asking for a lesser penalty. In support of this view it is to be noted that the suggestion in the file note of 8 August 2003 that admonishment and fine would be an appropriate penalty was picked up in the Property Trust’s formal complaint dated 13 August 2003.
36. It is unlikely that there was “concrete proof” at the time of the letter of 2 July 2003 or at any other time. There is no indication that any steps had been taken to identify the evidence that could have been relied on to prove the allegations. We can only conclude that the respondent knew before she wrote the later letters that she was unable to produce any evidence of the allegations. Consequently, the respondent knew at the times she made the further allegations that she was not able to produce any evidence in support of those allegations.
37. The Tribunal must determine whether there was any ethical or other obligation on the respondent to form the considered view that there was evidentiary material capable of supporting the sort of allegations that were to be made and to obtain specific

instructions from the respondent's client to make those allegations.

38. The Law Society relies on 2 clauses of the Rules of Professional Conduct and Practice ("Conduct Rules") and the decisions of *Clyne v NSW Bar Association*²⁴ and *Flower & Hart v White Industries*²⁵ to establish that there is an ethical requirement upon a practitioner to take those steps before embarking on a complaint and that not do so amounts to professional misconduct.

39. Rule 12 of the Conduct Rules states:

"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;
- 12.2 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."

²⁴ (1960) 104 CLR 186

²⁵ (1999) 87 FCR 134

40. Rule 17.21 of the Conduct Rules states:

“Responsible use of Privilege

A practitioner must, when exercising the forensic judgements called for throughout a case, take care to ensure that decisions by the practitioner or on the practitioner’s advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:

- (a) are reasonably justified by the material then available to the practitioner;
- (b) are appropriate for the robust advancement of the client’s case on its merits;
- (c) are not made principally in order to harass or embarrass the person;
- (d) are not made principally in order to gain some collateral advantage for the client or the practitioner or the instructing solicitor out of court.

41. Rule 17 is headed “Advocacy Rules” and has an explanatory note to the effect that it applies to legal practitioners acting as advocates, but not barristers.

42. At the hearing Ms Kelly relied upon *Clyne v NSW Bar Association* where the High Court considered there are rules governing the conduct of the profession that are reduced to writing, and similar rules which are not in writing, but express a “generally accepted

standard of common decency and common fairness²⁶". One of those generally accepted unwritten rules preserves obligations that arise in return for the absolute privilege that protects a member of the Bar in relation to a defamatory statement made when appearing in court. The rule is that "it is essential that the privilege, and the power of doing harm which it confers, should not be abused."²⁷

43. Such obligations arise in other areas where public policy dictates that absolute privilege protects those entitled to exercise freedom of speech within a system, such as Parliament. Similarly, where qualified privilege provides protection, that protection can be lost where malice is proved²⁸. Malice is generally proved by the demonstration of an intention to harm and the absence of fairness.
44. The NSW Court of Appeal has decided in *Ford v Nagle & Ors* [2004] NSWCA 33 that the decision in *Clyne* concerned the professional conduct of barristers, speaking in court. The Court of Appeal went on to say something more apposite to the present case (at para 31); "And legal practitioners have a range of professional obligations touching their role in the preparation of court process. If, for example, they assist in the preparation of a pleading raising fraud they must take care to have a presently available appropriate evidentiary foundation, for alleging and pleading fraud."

²⁶ At 200.2

²⁷ At 200.9

²⁸ *Stephens v WA Newspapers* (1994) 182 CLR 211 at 238.

45. Both parties allowed that the complaint to the Law Society was a complaint to a quasi-judicial body and was therefore an occasion where absolute privilege arose. If that were not so, the complaint must have given rise to an occasion of qualified privilege as the Law Society had an obligation pursuant to law to receive and deal with the complaint²⁹.
46. In *Minister Administering The Crown Lands (Consolidation) Act and Western Lands Act and Others v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA at 203-204 the Court dealt with the legal and professional requirements in pleading fraud:
- “In the pleading of fraud, some requirements of the law are clear beyond argument. These requirements are not only rules of pleading and practice established by decisions of the courts. They are rules of ethical conduct binding on members of the legal profession. It is a serious matter to allege fraud against a party in pleadings to which attach the privileges incidental to court proceedings. Reports of such allegations may be recounted in the community and through the public media. They may do great harm to a party before a word of evidence has been offered and submitted to the searching scrutiny of cross-examination or to rebuttal. It is for this reason, amongst others, that legal practitioners must take care to have specific instructions and an appropriate evidentiary foundation, direct or inferred, for alleging and pleading fraud. We say inferred, because it will sometimes be impossible to prove fraud by direct evidence. The tribunal of fact may be invited to draw an irresistible inference of fraud from the facts proved. Of its nature, fraud is often

²⁹ *Adam v Ward* (1917) AC 309 (at 334) per Lord Atkinson

perpetrated covertly. The perpetrators of fraud will often take pains to cover their tracks.

Professional discipline may follow if allegations of fraud are made where the foregoing conditions are not satisfied. By such means, courts protect their process from the abuse which would follow from the too ready assertion of fraud against a party, in circumstances where it could not be proved to the high standard required of such allegations: cf *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 and *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) 10 Ch App 515 at 530.”

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:

“court” means any body described as such and all other tribunals exercising judicial, or quasi-judicial, functions, and includes professional disciplinary tribunals, industrial and administrative tribunals, statutory or Parliamentary investigations and inquiries, Royal Commissions, arbitrations and mediations.”

49. Rule 17 of the Conduct Rules relates to the presentation of matters to a determining body and to that extent may not be apposite in this case as there was no presentation apart from correspondence. Ms Kelly SC submitted that acting as an advocate could extend to the formulation of documents intended to initiate a matter, such as the complaint in this case. The contrary was submitted by Mr Waters QC who maintained that the reference to “advocates” meant the presentation of a case in a hearing. There is no need to resolve that impasse because we have found that Rule 12 of the Conduct Rules applies in this instance.

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.

51. It was unfair and improper for the respondent to make the complaint when she knew that there was no evidence to support it 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 effect of inveigling the Law Society to accept the allegations without proof or for the practitioners to concede the allegations and reduced penalty against whatever eventuality they might have feared, such as the costs to be incurred in defending the complaint. By analogy:

“It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that he has, and definitely intends to adduce, evidence to support them.³⁰”

52. Mr Waters QC submitted that the absolute privilege that extended to the respondent protected her from this complaint. He postulates that because that protection exists it must be specifically withdrawn in some authoritative manner. This misstates the position. The obligation of the practitioner to comply with certain conduct runs parallel with the existence of the privilege. The privilege only protects the respondent from claims in defamation: it does not serve to make her invulnerable to any criticism of her conduct.

³⁰ *Clyne v NSW Bar Association* at 201.2

53. If there was some merit in the submission of Mr Waters QC, Rule 12 of the Conduct Rules is a sufficient revocation of the protection.
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.
55. There were three charges of professional misconduct in respect of the respondent. Paragraph 13 of the Disciplinary Application asserts that the respondent was guilty of professional misconduct in respect of making the complaint and the allegations contained in supporting letters. Paragraph 16 of the Disciplinary Application asserts that the respondent was further guilty of professional misconduct by maintaining the complaint and the allegations after she became aware that Cridlands strenuously denied the complaint and the allegations in December 2003 and paragraph 18 made the same charge from August 2004 when the respondent became aware that Cridlands considered that the complaints and allegations amounted to an assertion of fraud.
56. The Tribunal does not consider that the maintenance of the complaint and allegations amounts to separate instances of conduct that might attract a charge of professional misconduct in this case. The LPA does define conduct as including an omission in section 462. To fail to withdraw an allegation may be unsatisfactory conduct if the practitioner believed that there were grounds upon which an allegation of fraud could be made and then fails to withdraw the allegation after becoming aware of

convincing evidence that suggested that there was no real basis for that allegation. In this case, however, nothing really changed: the respondent had no grounds to believe that the allegation was supported by evidence at any stage and the continuation and expansion of the allegations speak to the seriousness of the initiating and continuing conduct rather than constituting a new course of conduct. The respondent knew, or ought to have known, the seriousness of the allegations made against the practitioners and that those allegations amounted to fraud. It would have come as no surprise to her that the allegations would be defended, as she knew that there was no evidence to support them.

57. Mr Waters QC submitted that the Disciplinary Application had been initiated under the wrong section of the LPA as the Disciplinary Application is said to be made pursuant to section 496 LPA and that section requires that after completing an investigation of a complaint against an Australian legal practitioner, the Law Society must start proceedings in the Disciplinary Tribunal, dismiss the complaint or take action under section 499 (reprimand or fine the practitioner). Section 515 LPA, said by Mr Waters QC to be the appropriate section, permits the Law Society to start proceedings in the Disciplinary Tribunal.
58. The Disciplinary Application is headed "Under s515 Legal Profession Act" and in the recital claims to make a charge pursuant to section 496 LPA and Regulation 96A of the *Legal Profession Regulations*.

59. The Law Society “must start” proceedings in the Tribunal if it is satisfied that there is a reasonable likelihood that the practitioner will be found by the Tribunal to have engaged in misconduct³¹ .
60. Section 515 LPA says that proceedings before the Tribunal by a disciplinary application in relation to the whole or part of a complaint may be started by the Law Society.
61. However, in this case the investigation into the practitioner’s professional conduct did predate the operation of the LPA, and is therefore subject to section 745(2) LPA which directs that an investigation started before the commencement date must be completed under the former Act as if that Act had not been repealed.
62. Regulation 96A is in similar terms to section 496 LPA and requires that if, at the completion of an investigation commenced before the commencement date of the LPA, the Law Society would have been entitled to make a charge under section 50 of the old Act, it must commence proceedings under Chapter 4 LPA.
63. Consequently, the obligation to bring a charge comes from Regulation 96A LPA and section 50 of the former Act, and the method from section 515 LPA. The complaint is therefore incorrectly formulated as a charge emanating from section 496 LPA brought under section 515 LPA.
64. Mr Waters QC did not make any submissions to the effect that the respondent was prejudiced in any way by the asserted


³¹ S496 (2)

misdescription of the source of the power to make the complaint. The Tribunal considers that the error asserted by Mr Waters QC is a procedural lapse which is to be disregarded pursuant to the provisions of section 524 LPA.

65. The Tribunal finds that the respondent engaged in professional misconduct in making the allegations against the practitioners for the reasons stated above.
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

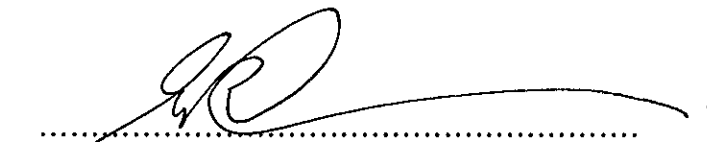
in the course of so doing expanded upon the conduct complained of. Fourthly, the allegations made by the respondent were to accuse the three solicitors of a very serious breach of ethical conduct amounting to fraudulent conduct. Lastly, the respondent had ample opportunity to withdraw the allegations and chose not to do so.

67. The Tribunal will hear from the parties concerning any orders it might make pursuant to section 525 LPA. To that end, the parties are directed to contact the Registrar to arrange a directions conference to be held before the Chairman alone, or to set a date for further submissions before the Tribunal.



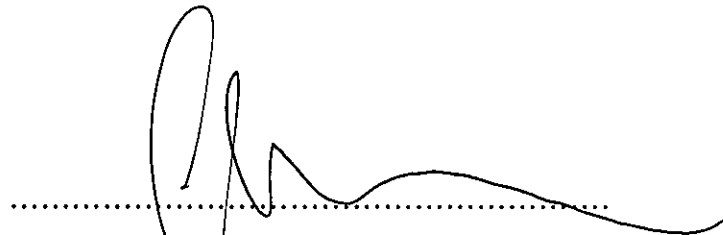
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IAN MORRIS



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EVE ROBINSON



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JOHN STEWART