JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
CITATION	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE and GINBEY [2023] WASAT 113 (S)
MEMBER	**:**	JUDGE K GLANCY, SUPPLEMENTARY PRESIDENT MS P LE MIERE, SENIOR MEMBER MR R POVEY, MEMBER
HEARD	**:**	DETERMINED ON THE DOCUMENTS
DELIVERED	**:**	22 MARCH 2024
FILE NO/S	**:**	VR 80 of 2022
BETWEEN	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE Applicant AND HOWARD JOHN GINBEY Respondent

Catchwords:

Vocational regulation - Legal practitioners - Professional misconduct - Practitioner misappropriated estate funds into personal accounts, failed to comply with notices and summonses issued by the Applicant, invoiced and received payments from clients' for work not performed, failed to operate a trust account and failed to deliver legal services diligently or at all - Penalty and costs - Report to Supreme Court with recommendation that name of practitioner be removed from roll of practitioners - Order that practitioner pay applicant's costs fixed at $18,537.59 - Compensation application by clients in the C Matter - Failure to provide required information to Tribunal - Application dismissed

Legislation:

Legal Profession Act 2008 (WA) s 403(1), s 438, s 439, s 440, s 441, s 448, s 449
State Administrative Tribunal Act 2004 (WA) s 60(2), s 87

Result:

The Tribunal to make and transmit a report to the Supreme Court (full bench) with a recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008* (WA)

The practitioner to pay the applicant's costs fixed at $18,537.59

Compensation application dismissed

Category: B

Representation:

Counsel:

Applicant	:	C R Bailey
Respondent	:	No appearance

Solicitors:

Applicant	:	Legal Services and Complaints Committee
Respondent	:	No appearance

Cases referred to in decision:

Khosa v Legal Profession Complaints Committee [2017] WASCA 192
Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115
Law Society of New South Wales v Sullivan [2000] NSWADT 167
Legal Practitioners Complaints Committee v De Alwis [2006] WASCA 198
Legal Profession Complaints Committee and Lourey [No 2] [2023] WASAT 77
Legal Services and Complaints Committee and Ginbey [2023] WASAT 113
Legal Services Commission v Turner [2012] VSC 394
Marvelle Investments Pty Ltd and Argyle Holdings Pty Ltd [2010] WASAT 125 (S)
Medical Board of Australia and Tan [2022] WASAT 57 (S)
Motor Vehicle Industry Board and Dawson (2006) 41 SR (WA) 343; [2006] WASAT 8
Nesci-Lawrence as Executor of the Estate v Ginbey [2023] WASC 339
Perth Central Holdings Pty Ltd and Doric Constructions Pty Ltd [2008] WASAT 302
Rae and Prima Homes Nominees Pty Ltd [2020] WASAT 24
re HA O'Donnell (1895) 12 WN (NSW) 42
Western Australian Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA 32
Young v Legal Profession Complaints Committee [2022] WASCA 52

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 These reasons deal primarily with the question of the penalty which we are to impose upon Mr Ginbey (**Practitioner**) for the professional misconduct of which we have already found him guilty[1] and with the question of costs of the disciplinary proceeding against him.

2 They also deal with an application for compensation made by the clients in the C Matter.[2]

3 On 14 December 2023, the State Administrative Tribunal (**Tribunal**) made orders reflecting the findings of professional misconduct which we reached in the Liability Reasons which were published on 30 November 2023. The explanation for the time between publishing the Liability Reasons and the making of orders in relation to liability is that, because the Practitioner had not participated in the hearing which led to the findings of professional misconduct, at the time of handing down our Liability Reasons we made orders giving him time to provide any written submissions as to the form our orders should take, and as to the orders we would make programming the matter to hearing as to penalty and costs.

4 The Practitioner did not avail himself of the opportunity to make submissions as to any of those matters. Nevertheless, we are satisfied that he was served with a copy of the judgment and the orders permitting him to be heard in relation to the final orders regarding liability and as to penalty and costs.[3] It would also have been apparent to him from our Liability Reasons that Mr WC and Mr GC, the clients in the C Matter, were seeking compensation under s 448 of the *Legal Profession Act 2008* (WA) (**LP Act**).

5 We are also satisfied that the Practitioner was served with the Applicant's Submissions on Penalty and Costs and its Minute of Proposed Orders, both of which are dated 16 February 2024, and with the affidavit of Mr Francis Hall of 15 February 2024 which was filed in support of the Applicant's costs application.[4] Accordingly, as we did with the liability aspect of the complaint, we have proceeded to

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[1] ***Legal Services and Complaints Committee and Ginbey*** [2023] WASAT 113 (**Liability Reasons**).
[2] The C Matter is dealt with in our Liability Reasons at [160] - [227].
[3] Affidavit of Graeme Robert Coates sworn 5 December 2023.
[4] Affidavit of Xavier Francis Hall sworn 7 March 2024.

determine the outstanding issues of penalty and costs and the question of compensation in the Practitioner's absence.

Determination on the documents

6 We have determined, as we are permitted to do by s 60(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**), that it is appropriate to determine the part of the disciplinary proceeding concerned with penalty and costs on the documents.

7 The documents to which we have had regard are:

(i) the Applicant's submissions on Penalty and Costs dated 16 February 2024;

(ii) the Applicant's Minute of Proposed Orders dated 16 February 2024;

(iii) the affidavit of Mr Francis Hall dated 15 February 2024;

(iv) the Statutory Declaration of Mr WC made 12 January 2024;

(v) the Statutory Declaration of Mr GC made 12 January 2024.

Outcome

8 For the reasons set out below, we have concluded that:

(1) it is appropriate to make and transmit a report on the finding to the Supreme Court (full bench) pursuant to s 438 of the LP Act, with the report to include both a record of the evidence taken at the hearing and a recommendation that the Practitioner be removed from the local roll;

(2) it is appropriate to make an order that the Practitioner pay the Applicant's costs assessed in the sum of $18,537.59. The costs are to be paid to the Legal Practice Board within 30 days of the date of this order or in such other time as may be agreed by the parties; and

(3) the compensation application made by the clients in the C Matter should be dismissed.

Summary of findings on liability

9 The findings on liability are set out in the Liability Reasons. In summary, we found the Practitioner guilty of eight separate instances of professional misconduct. In seven instances, we found that the professional misconduct was of a kind that satisfied both limbs of the ***Kyle v Legal Practitioners' Complaints Committee***[5] test and both limbs of s 403(1) of the LP Act. That is, among other things, the conduct justified a finding that he was not a fit and proper person to engage in legal practice.[6] In the case of the one remaining instance of professional misconduct, we found it satisfied the second limb of the ***Kyle*** test and s 403(1)(a) of the LP Act.[7] That is, we found it was conduct that involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

10 The Practitioner's professional misconduct occurred across three separate client matters. They were the N-N Matter, the C Matter and the Estate of Mrs P Matter. It spanned the period from 2014 to 2019.

Penalty

Applicable legislation and legal principles

11 While the LP Act was repealed on 1 July 2022, the effect of s 37 of the *Interpretation Act 1984* (WA) is that the Tribunal retains the power to deal with this matter pursuant to the LP Act as if it has not been repealed.

12 Section 438(2) of the LP Act provides that if, after it has completed a hearing in relation to a referral in respect of an Australian Legal practitioner, the Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may:

(a) make and transmit a report on the finding to the Supreme Court (full bench); or

(b) make any one or more of the orders specified in s 439, s 440 and s 441 of the LP Act.

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[5] ***Kyle v Legal Practitioners' Complaints Committee*** [1999] WASCA 115 (***Kyle***).
[6] Grounds 1 - 4, 6, 7 and 9. See Liability Reasons at [117], [141], [142], [158], [159], [207], [208], [209], [227], [249] and [271].
[7] Ground 5, see Reasons at [209].

13 Section 439 of the LP Act provides that the Tribunal may make the following orders:

> (a) an order that the practitioner's local practising certificate be suspended for a specified period or cancelled;
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> (b) an order that a local practising certificate not be granted to the practitioner before the end of a specified period;
>
> (c) an order that:
>
> > (i) specified conditions be imposed on the practitioner's practising certificate granted or to be granted under this Act;
> >
> > (ii) the conditions be imposed for a specified time; and
> >
> > (iii) specifies the time (if any) after which the practitioner may apply for the conditions to be amended or removed;
>
> (d) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner.

14 Section 440 of the LP Act empowers the Tribunal to make orders which need to be implemented in another jurisdiction, such as an order recommending that the practitioner's name be removed from an interstate roll. That suite of possible orders is not relevant in the Practitioner's case.

15 Section 441 of the LP Act empowers the Tribunal to make any one or more of the following orders:

> (a) an order that the practitioner pay a fine to the Board of a specified amount not exceeding $25,000;
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> (b) an order that the practitioner undertake and complete a specified course of further legal education;
>
> (c) a compensation order;
>
> (d) an order that the complainant pay the amount of legal costs in dispute or that the amount of legal costs be reduced by a specified amount (not exceeding the amount in dispute);
>
> (e) an order that the practitioner provide specified legal services to the complainant either free of charge or at a specified cost;
>
> (f) an order that the practitioner undertake a specified period of practice under specified supervision;

(g) an order that the practitioner do or refrain from doing something in connection with the practice of law;

(h) an order that the practitioner's practice, or the financial affairs of the practitioner or of the practitioner's practice, be conducted for a specified period in a specified way or subject to specified conditions;

(i) an order that the practitioner's practice be subject to periodic inspection for a specified period;

(j) an order that the practitioner undergo counselling or medical treatment or act in accordance with medical advice given to the practitioner;

(k) an order that the practitioner use the services of an accountant or other financial specialist in connection with the practitioner's practice;

(l) an order that the practitioner seek advice in relation to the management of the practitioner's practice from a specified person;

(m) an order that the practitioner not apply for a local practising certificate before the end of a specified period.

16 The purpose of disciplinary proceedings is not to punish the Practitioner but to ensure the protection of the public and the maintenance of appropriate standards within the profession and the reputation of the profession.[8] The protection of the public includes elements of personal and general deterrence.[9]

17 Where a practitioner's conduct has undermined the reputation of the profession, denunciation of that conduct may be required in order to assure the public that departure from appropriate standards will not be countenanced.[10]

18 The question of the appropriate penalty, and of any fitness to practise for the purpose of penalty orders, is to be determined at the time of the relevant hearing and is not judged at the time of the misconduct.[11]

19 In determining the appropriate penalty to be imposed, the Tribunal has regard to the following non-exhaustive factors:

[8] ***Khosa v Legal Profession Complaints Committee*** [2017] WASCA 192 (***Khosa***) at [188].
[9] ***Khosa*** at [189].
[10] ***Legal Services Commission v Turner*** [2012] VSC 394 at [24].
[11] ***Khosa*** at [195].

(1) the seriousness of the conduct;

(2) any remorse or insight shown by the practitioner;

(3) the need to protect the public from the risk of further misconduct by the practitioner;

(4) the need to ensure that appropriate standards of conduct are maintained by other members of the profession and to protect the public and maintain confidence in the profession by reinforcing professional standards and denouncing transgressions through the imposition of a penalty that serves as general deterrence;

(5) whether the practitioner's conduct can be addressed through further education;

(6) whether the conduct was isolated, such that the Tribunal can be satisfied of the practitioner's worthiness or reliability for the future;

(7) the practitioner's personal circumstances at the time of the conduct and at the time of imposing the penalty;

(8) the practitioner's prior disciplinary record;

(9) whether the practitioner breached any Act, regulations or Code of Conduct; and

(10) whether, if the practitioner is presently considered unfit to practise, the practitioner will once again become fit to practise after a period of time.

20 Where the Tribunal concludes that a practitioner is presently unfit to practise, a choice must be made between suspension or cancellation of a practising certificate on the one hand and striking off, on the other hand. Suspension is appropriate where the Tribunal is satisfied that, at the conclusion of the suspension period, the practitioner will no longer be unfit to practise.[12]

21 Where the present unfitness to practise reveals that the practitioner lacks the character and trustworthiness necessary to discharge the responsibilities of legal practice, or where the practitioner is

[12] ***Khosa*** at [191].

permanently and indefinitely unfit to practise, striking off will ordinarily be the appropriate penalty.[13]

Application of factors in Practitioner's case

Remorse/insight

22 Where a practitioner is remorseful for their misconduct and shows insight into its impropriety, the need for personal deterrence may be diminished. Conversely, a lack of insight and remorse increases the risk of recurrence of the conduct.[14]

23 In this particular case, the Practitioner did not participate in the proceeding and has offered no explanation for his misconduct. Nor has he provided any evidence to suggest that he is in any way remorseful for his misconduct. In the absence of any such evidence, we proceed on the basis that there is no mitigation of penalty arising from remorse.

Seriousness

24 The misuse of client funds has been said to be conduct of the utmost seriousness, generally warranting striking off.[15]

25 The failure to operate a trust account so as to ensure that client's funds were not comingled with his own funds and therefore could only be used in accordance with the client's instructions or returned to the client, was undoubtedly a serious failing. What was worse, however, was that the Practitioner retained his clients' funds without doing any significant part of the work for which he was engaged and refused to return the funds for lengthy period of time or at all despite being asked to do so.[16]

26 The failure to respond to notices and summons issued by the Applicant was also serious misconduct. We have already referred to the obligations of legal practitioners to respond to notices and summonses issued by their regulatory authority.[17] Legal practitioners are expected to uphold the law. The disregard of a statutory direction from the regulatory authority is, as was said in ***Law Society of New***

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[13] ***Khosa*** at [192].
[14] ***Khosa*** at [193].
[15] ***Legal Practitioners Complaints Committee v De Alwis*** [2006] WASCA 198 (***De Alwis***) at [105] - [110].
[16] As found in our Liability Reasons in the C Matter, the money was never repaid. In the N-N Matter, a significant amount of the money was repaid after some four years and in the Estate of Mrs P Matter, the money was repaid after four years.
[17] Liability Reasons at [155]. See also ***Legal Profession Complaints Committee and Lourey [No 2]*** [2023] WASAT 77 at [240] - [243].

South Wales v Sullivan,[18] a prima facie indication of unfitness to practise.

Prior disciplinary history

27 The Practitioner has no prior disciplinary history.[19]

28 The Applicant says that despite that lack of disciplinary history, we ought to have regard to the fact that the Practitioner has been the subject of very serious adverse findings in ***Nesci-Lawrence v Ginbey.***[20] The Applicant submits that the decision is relevant in that it involved the Practitioner diverting to himself an amount in excess of $1.2 million in estate funds from an estate of which he was the executor. As the Applicant itself notes, 'some caution is required in relation to that decision because it was an *ex parte* application for freezing orders and involved no final findings of fact'. In circumstances where the most we can say is that the Practitioner's conduct at around this time referred to in ***Nesci-Lawrence v Ginbey*** seems to have been similar to that involved in some of the misconduct which was found in this disciplinary proceeding, we have decided that it is neither necessary nor appropriate for us to take those findings into account.

Personal deterrence

29 It appears that the Practitioner no longer practises as a legal practitioner. He certainly does not have a current practising certificate.[21] If that position remains, the need for personal deterrence might be said to be reduced. However, the Practitioner remains on the roll of practitioners and we find that in the absence of any explanation for his conduct, we have no confidence that the conduct would not be repeated if he were practising. Accordingly, we consider that the penalty imposed on him for the professional misconduct involved in this matter needs to have some element of personal deterrence.

General deterrence/protection of the public and maintenance of public confidence in the profession and denouncing transgressions

30 The general deterrence which is to be achieved through the imposition of a penalty upon the Practitioner is a significant factor in this case. The use of client funds for one's own purposes is relatively easy to achieve and relatively difficult to detect. The statement of

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[18] ***Law Society of New South Wales v Sullivan*** [2000] NSWADT 167 at [80].
[19] Applicant's Submissions on Penalty and Costs dated 16 February 2024 at [30].
[20] ***Nesci-Lawrence as Executor of the Estate v Ginbey*** [2023] WASC 339**Error! Bookmark not defined.**.
[21] Witness Statement of Mary Tenant at [6].

Simpson J in ***re HA O'Donnell***,[22] which was approved of in ***De Alwis***[23] that:

> [It must be] thoroughly understood by the public and the profession that an attorney who receives money of his client and misappropriates it should not be allowed to remain a single hour the member of an honourable profession, no matter what the amount may be …

speaks to both the seriousness with which the conduct is viewed and the importance of the need to ensure that such conduct is generally deterred.

Fitness to practise

31 We have already found that the conduct in which he engaged, when viewed in its entirety, was conduct which might justify a finding that the Practitioner is unfit to practise.

32 We have also already referred to the fact that the Practitioner does not currently hold a practising certificate.

33 We are satisfied that the Practitioner has demonstrated, by his conduct that he is not presently possessed of the personal characteristics which are required of persons entitled to practise as legal practitioners. Given that he has not offered any explanation for his conduct, we cannot be satisfied that after a period of disqualification from practice or a period of time during which he was not permitted to apply for a local practising certificate, the Practitioner would ever be found to be fit to return to legal practice.

Was the conduct isolated?

34 The Practitioner's conduct cannot be regarded as an isolated act of professional misconduct. It occurred over several years and involved three client matters and generally similar conduct.

Disposition

35 In each of the three client matters, the Practitioner's conduct involved generally similar conduct. While some of the instances of professional misconduct may individually justify the making of a referral for strike off, that must certainly be the case when they are considered in combination. In the circumstances of this case, we find that it is appropriate to impose a global penalty. That approach also

[22] ***re HA O'Donnell*** (1895) 12 WN (NSW) 42 at [43].
[23] ***De Alwis*** at [107].

addresses the fact that the reason for the conduct which was found in relation to Ground 9 is unknown to us.

36 In the circumstances, we have no doubt that the penalty which we consider appropriate to impose is that set out in s 438(2) of the LP Act, being the making and transmission of a report to the Supreme Court (full bench) with a recommendation that the Practitioner's name be removed from the roll of practitioners.

37 The appropriateness of a global penalty is reinforced in our minds by the penalty we have resolved to impose. The significance of this penalty has the result that no other penalty is required.

38 Given that the Practitioner does not presently hold a practising certificate, there is no need for us to make an order under s 438(3) of the LP Act.

Costs

39 The Applicant seeks an order pursuant to s 87(2) of SAT Act that the Practitioner pay its costs fixed in the sum of $18,537.59.

40 Section 87 of the SAT Act relevantly provides as follows:

> (1) Unless otherwise specified in this Act, the enabling Act, or an order of the Tribunal under this section, parties bear their own costs in a proceeding of the Tribunal.
>
> …
>
> (3) The power of the Tribunal to make an order for the payment by a party of the costs of another party includes the power to make an order for the payment of an amount to compensate the other party for any expenses, loss, inconvenience, or embarrassment resulting from the proceeding or the matter because of which the proceeding was brought.

Principles in relation to the award of costs in regulatory proceedings in the Tribunal

41 The starting point in relation to any application for costs in the Tribunal is that, subject to any contrary provision in an enabling Act, the parties to proceedings bear their own costs unless the Tribunal orders otherwise.[24]

[24] SAT Act, s 87(1).

42 However, the Tribunal has a discretion to order a party to pay all or any of the costs of another party.

43 The legal rationale for an order for costs under s 87(2) of the SAT Act is that an order for costs is not to punish the person against whom the order is made, but to compensate or reimburse the person in whose favour it is made. Therefore, even in the statutory context where the presumptive position is that no costs will be ordered, the question is whether, in the particular circumstances of the case, it is fair and reasonable that a party should be reimbursed for the costs it incurred.[25]

44 In vocational regulatory proceedings, where a regulatory body is successful in obtaining relief for misconduct, unprofessional conduct or unsatisfactory professional performance by a respondent, it is common for the Tribunal to order that the respondent pay all or some of the costs of the regulatory body. However, that does not mean that costs inevitably follow the event. The onus is on the party seeking an order in its favour.[26]

45 While the Tribunal's discretion in relation to the award of costs is a wide one, it is to be exercised judiciously and not capriciously.[27]

46 In ***Young v Legal Profession Complaints Committee***,[28] Buss P said:

> The proper exercise of the Tribunal's discretionary power under s 87(2) of the SAT Act to make an award of costs depends, of course, upon all the circumstances of the particular case. Ordinarily, as a matter of fact, the Tribunal will make an award of costs in favour of a regulatory body which is successful in bringing a complaint of misconduct in professional disciplinary proceedings. However, in each case, the discretionary power to make an award of costs must be exercised having regard to the circumstances of the particular case.

47 As the President, Justice Pritchard, recently observed in ***Medical Board of Australia and Tan***,[29] when the Tribunal exercises its discretion to award costs in favour of a regulatory body, it reflects the public policy that regulatory bodies perform functions which promote the public interest, usually with limited resources, and the concern that the financial burden of bringing disciplinary action, if the regulatory

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[25] ***Western Australian Planning Commission v Questdale Holdings Pty Ltd*** [2016] WASCA 32 (***Questdale***) at [51] (Murphy JA, Corboy J agreeing).
[26] ***Questdale*** at [51] (Murphy JA, Corboy J agreeing).
[27] ***Medical Board of Australia and Tan*** [2022] WASAT 57 (S) (***Tan***) at [129].
[28] ***Young v Legal Profession Complaints Committee*** [2022] WASCA 52 at [261].
[29] ***Tan*** at [132].

body has no capacity to recover some or all of its costs, might act as a disincentive to bring such disciplinary action, or to ensure that all allegations against a practitioner are properly and thoroughly presented.

48 In contrast, when a regulatory body is not successful in a disciplinary proceeding, it is common for the Tribunal to refuse to make an order that the regulatory body pay the costs of the respondent. Quite apart from the no costs approach in s 87(1) of the SAT Act, the Tribunal is informed by the public policy consideration that the prospect of a costs order may dissuade or inhibit regulatory bodies from commencing proceedings that should be commenced and maintained in the public interest, despite the fact that success cannot be guaranteed.

49 It is for that reason that the Tribunal's general approach is that 'unless it can be demonstrated that an application made by a vocational regulatory body lacked any reasonable basis or was not made in good faith, costs should not be awarded against [that body] simply because the application was not successful'.[30]

50 Considerations such as whether a party has acted unreasonably or inappropriately in its conduct of the proceedings, has conducted itself in a way that has unnecessarily prolonged the hearing or has been capricious or whether the proceedings in some way amount to an abuse of process, are factors which may give rise to an exercise of the general discretion to award costs.

51 Having determined that it is appropriate to make an order that one party pay some or all of another party's costs, the Tribunal must make an assessment of the costs to be paid. An assessment of costs should be approached in a broad fashion and should not descend into an inquiry into small items of expenditure.[31] Although the assessment of costs involves a relatively broad and robust approach, the Tribunal must be satisfied that the costs claimed are reasonable and necessary.[32] The Tribunal must also be satisfied that the costs claimed are not excessive.[33] Furthermore, the Tribunal must explain why an award of costs is reasonable, and if so, in what amount.

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[30] ***Tan*** at [133]; citing with approval ***Motor Vehicle Industry Board and Dawson*** (2006) 41 SR (WA) 343; [2006] WASAT 8 at [47].
[31] ***Tan*** at [136]; citing with approval ***Perth Central Holdings Pty Ltd and Doric Constructions Pty Ltd*** [2008] WASAT 302 at [67].
[32] ***Tan*** at [137]; citing with approval ***Marvelle Investments Pty Ltd and Argyle Holdings Pty Ltd*** [2010] WASAT 125 (S) at [48] - [49].
[33] ***Tan*** at [137]; citing with approval ***Rae and Prima Homes Nominees Pty Ltd*** [2020] WASAT 24 at [69].

Disposition

52 Having regard to the policy considerations set out above, the fact that the Applicant made good its allegations that the Practitioner engaged in professional misconduct in his dealings with the three sets of clients and our view that there was nothing in the Applicant's conduct of the proceedings that we regard to have been unreasonable or which in our view unnecessarily delayed the resolution of this matter, we are satisfied that it is appropriate that the Practitioner should be ordered to pay the Applicant's reasonable costs of the proceeding.

53 As to the amount of costs claimed, the Applicant is entitled to recover the costs of its employed solicitors at scale. The Applicant submitted that it is content for the Tribunal to determine and fix a reasonable amount based on the modest amounts claimed in its submissions, and identified in the affidavit of Mr Francis Hall affirmed on 15 February 2024.

54 The disbursements incurred are deposed to in Mr Hall's affidavit. They total the sum of $1,356.69 for filing fees and the engagement of process servers. We are satisfied that the respondent should pay those disbursements.

55 The Applicant seeks costs of $8,558 for the costs of a senior practitioner attending two directions hearings and for one day's preparation for and one day's attendance at the hearing of this matter at scale rates. We are satisfied that those costs are reasonable and ought to be paid by the Practitioner.

56 The Applicant also seeks costs in the amount of $8,622.90 for the general conduct of the matter. That encompasses the costs involved in the drafting of the application itself, drafting of written submissions on penalty, the preparation of affidavits and witness statements and the proofing and corresponding with witnesses and summonsing witnesses and the preparation of the bundle of documents used at the hearing. All that work, bar the preparation of an affidavit in support of the submissions on costs and penalty was said to have been undertaken by a senior practitioner and is charged at the costs of $429 per hour. The Applicant also seeks the cost of the preparation of the affidavit at the junior practitioner rate of $341 per hour. Taking a broad-brush approach to the matter, we are satisfied that the work undertaken was reasonable and the costs associated with it are also reasonable bearing in mind the complexity of the matter.

57 Accordingly, we will make an order that the Practitioner pay the Applicant's costs of the proceedings in the amount of $18,537.59.

Compensation application

58 On 14 December 2023, we ordered the clients in the C Matter to file and serve an application for compensation under s 448 of the LP Act and any affidavit or affidavits addressing the issues to which the Tribunal must have regard under s 448 and s 449 of the LP Act together with any submissions upon which they intend to rely if they wished to proceed with the application for compensation which had been made orally by Mr WC in the course of the liability hearing.

59 We did so because:

(i) only Mr WC had given evidence and indicated he wanted compensation but he had only paid half of the amount paid to the Practitioner in connection with the C Matter. We wanted to ascertain whether his brother, Mr GC, also wished to seek compensation;

(ii) we were of the view that a separate application for compensation needed to be made; and

(iii) we needed to be satisfied that the prerequisite to the making of a compensation order identified in s 449 of the LP Act had been met in this case.

60 Mr WC and Mr GC each filed a statutory declaration in identical terms. They state that they are seeking 'the maximum compensation under s 448 of the LP Act as compensation for hundreds of hours of lost time and personal stress in locating the only will and testament to finalise our late father's estate'.

61 It appears that the declaration was witnessed by a family member. That is something which is to be avoided but not fatal to the making of the declaration.

62 The making of a statutory declaration is not the appropriate way to make a compensation application. It should have been lodged in the proper form. Despite that, we are prepared to treat the statutory declaration as a formal application for compensation given Mr WC and Mr GC are not lawyers.

63 However, there is no evidence before us to indicate that the statutory declarations were served on the Practitioner as required by our orders. Consequently, the Practitioner may be unaware that the compensation application foreshadowed in the hearing and our orders of 14 December 2023 was being made.

64 Additionally, neither Mr WC or Mr GC have addressed in their statutory declarations the question of whether they have received or are entitled to receive:

(a) compensation under an order that has been made by a court; or

(b) compensation from the Guarantee Fund or from a fidelity fund of any jurisdiction; or

(c) whether they have made a claim for compensation from the Guarantee Fund or any fidelity fund.

65 Those are matters to which the Tribunal must have regard under s 449 of the LP Act because a compensation order cannot be made in respect of any loss for which the applicant has received or is entitled to receive:

(a) compensation received or receivable under an order that has been made by a court; or

(b) compensation paid or payable from the Guarantee Fund or from a fidelity fund of any jurisdiction, where a relevant claim for payment from the fund has been made or determined.

66 Given that Mr WC and Mr GC were specifically directed to those issues in our Liability Reasons and in the orders, we think it appropriate to bring an end to this matter by dismissing the application on the basis that we are not satisfied that the preconditions to the making of a compensation claim have been met.

67 We understand the frustration that this decision may cause Mr WC and Mr GC. However, we note that our decision to refuse the application would not itself preclude them from making an application to the Guarantee Fund.

Orders

68 As a consequence of the findings which we have made above, we will make the following orders:

The Tribunal orders:

1. Pursuant to s 438(2)(a) and s 438(2)(b) of the *Legal Profession Act 2008* (WA), the Tribunal is to make and transmit a report to the Supreme Court (full bench) with:

   (a) a record of the evidence taken at the hearing; and

   (b) a recommendation that the name of the Practitioner be removed from the roll of practitioners.

2. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA), the Practitioner pay the Applicant's costs fixed in the sum of $18,537.59, such costs to be paid to the Legal Practice Board within 30 days of this order or as otherwise agreed between the parties.

3. The application for compensation under s 448 of the *Legal Practitioner's Act 2008* (WA) made by Mr WC and Mr GC are dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS
Associate to the Honourable Justice Glancy

22 MARCH 2024