[2012] WASCA 214

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE -v- DETATA [2012] WASCA 214
CORAM	**:**	MARTIN CJ PULLIN JA MURPHY JA
HEARD	**:**	13 AUGUST 2012
DELIVERED	**:**	26 OCTOBER 2012
FILE NO/S	**:**	CACV 146 of 2011
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Appellant AND MARK ANTHONY DETATA Respondent

ON APPEAL FROM:

Jurisdiction	**:**	STATE ADMINISTRATIVE TRIBUNAL OF WESTERN AUSTRALIA
Coram	**:**	JUDGE T SHARP (DEPUTY PRESIDENT) MS S GILLETT (MEMBER) MR C PHILLIPS (SENIOR SESSIONAL MEMBER)
Citation	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and DETATA [2011] WASAT 91 (S)
File No	**:**	VR 153 of 2010

Catchwords:

Legal practitioners - Disciplinary hearings - Professional misconduct - Breach of undertaking - Whether penalty imposed by the Tribunal manifestly inadequate - Importance of legal undertakings - Penalty overturned and fine imposed

Legislation:

State Administrative Tribunal Act 2004 (WA), s 77, s 105

Result:

Leave to appeal refused in respect of ground 1
Leave to appeal granted in respect of ground 2
Appeal allowed
Orders of the State Administrative Tribunal in [2011] WASAT 91(S) be set aside save for the order in respect of costs
A fine of $10,000 be imposed on the practitioner

Category: A

Representation:

Counsel:

Appellant	:	Mr P D Quinlan SC & Ms P Le Miere
Respondent	:	Mr M M Mony de Kerloy

Solicitors:

Appellant	:	Legal Profession Complaints Committee
Respondent	:	Mony de Kerloy

Case(s) referred to in judgment(s):

Bedford v Luton [2009] NZLCRO 72
Bhanabhai v Auckland District Law Society [2009] NZHC 415
Council of the Law Society of New South Wales v Panopoulos [2010] NSWADT 208
Dinsdale v The Queen (2000) 202 CLR 321
House v The King (1936) 55 CLR 499

In the Matter of a Solicitor 'L' (Unreported, VSC, LPA 3 of 1989, 17 - 21 June 1989)
Law Society of New South Wales v Hinde [2005] NSWADT 199
Law Society of New South Wales v Martin [2002] NSWADT 27
Law Society of New South Wales v Waterhouse [2002] NSWADT 204
Legal Practitioners Complaints Committee v Pepe [2009] WASC 39
Legal Profession Complaints Committee and Detata [2011] WASAT 91
Legal Profession Complaints Committee and Detata [2011] WASAT 91(S)
Legal Profession Complaints Committee and Leask [2010] WASAT 133
Legal Profession Complaints Committee v Masten [2011] WASC 71
Legal Services Commissioner v Farnham [2009] LPT 4 (Qld)
Legal Services Commissioner v Piper [2006] NSWADT 12
Martin v Crimes Compensation Tribunal & State of Victoria (1997) 91 A Crim R 301
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Phillips v The Estate Agents Board [1998] VR 179
Re a Solicitor [1966] 1 WLR 1604
Re Gray [1892] 2 QB 440
Re Maraj (a practitioner) (1995) 15 WAR 12
Real Estate & Business Agents Supervisory Board v Landa [2009] WASCA 191
Rubik Financial Ltd v Herskope [2010] WASC 343
Transport Accident Commission v O'Reilly [1998] VSCA 106; [1998] 2 VR 436
Wade v Licardy (1993) 33 NSWLR 1
Workington v Sheffield [2009] NZLCRO 55
Ziems v Prothonotary of the Supreme Court of New South Wales [1957] HCA 46; (1957) 97 CLR 279

MARTIN CJ:

Summary

1 The Legal Profession Complaints Committee (the Committee) applies for leave to appeal from the decision of the State Administrative Tribunal (the Tribunal) with respect to the penalty imposed upon Mark Anthony Detata, a legal practitioner, following a finding of professional misconduct: see ***Legal Profession Complaints Committee and Detata*** [2011] WASAT 91(S) (***Penalty decision***). The Tribunal found that Mr Detata had breached an undertaking which he gave to hold funds in the trust account of the firm by which he was employed as security for a prospective claim for damages by another party. The Tribunal reprimanded Mr Detata, imposed a condition upon his practice certificate restricting him from practising other than in the employment and supervision of another practitioner for a period of two years, and directed that he pay the Committee's costs fixed in an amount of $10,000.

2 For the reasons which follow, the Committee should be granted leave to appeal on ground 2, the appeal on that ground should be allowed, the orders of the Tribunal with respect to penalty (but not costs) set aside, and in place of those orders Mr Detata should be ordered to pay a fine of $10,000.

The Tribunal's finding of misconduct

3 The Tribunal found that Mr Detata was guilty of professional misconduct by reason of the following facts and circumstances, none of which are challenged on appeal (see ***Legal Profession Complaints Committee and Detata*** [2011] WASAT 91 [5] - [35]).

4 Mr Detata was employed as a solicitor by a small private law firm. During 2008 he was acting on behalf of Mr Memet Demiroski in connection with a dispute arising from the sale of a business by Mr Demiroski to Mr Leslie Faulds. Mr Faulds alleged that the transaction was induced by Mr Demiroski's fraud, and that by reason of the fraud he sustained losses, being at least the amount which he paid for the business, namely, $75,000. Another practitioner was acting for Mr Demiroski in relation to criminal charges brought against him arising from the sale of the business.

5 On 2 December 2008, Mr Demiroski pleaded guilty to two counts of fraud arising from the sale of the business. At the time of entry of the plea, the judge hearing the case observed that the issue of reparation was

going to be a significant aspect of the sentencing process which would follow. He suggested that the provision of some sort of security to Mr Faulds in respect of his claim for damages would be a significant factor in the sentencing process.

6 Mr Demiroski's wife owned land which was subject to a contract of sale. She caused $190,000 arising from the sale of the land to be paid into the trust account of the firm which employed Mr Detata.

7 In correspondence between the practitioner acting for Mr Faulds, and the practitioner acting for Mr Demiroski in relation to the criminal proceedings, the practitioner acting for Mr Faulds noted the payment of $190,000 into trust and expressed a concern that it would not provide any security for his client, given that the land which had been sold to generate the funds was owned by Mrs Demiroski, not Mr Demiroski, and that Mrs Demiroski had no liability to Mr Faulds. For that reason, he requested the provision of further security by way of Mrs Demiroski's agreement to indemnify Mr Demiroski in relation to his civil liability to Mr Faulds, and the grant of a charge over her interest in the funds in the trust account to secure payment of any liability which Mr Demiroski was found to have to Mr Faulds.

8 It seems that this letter was also provided to Mr Detata. He replied to the practitioner acting for Mr Faulds by a letter dated 9 December 2008 in which he stated:

> Mrs Demiroski has signed an unequivocal agreement to pay the sum of $190,000 into our trust account from the sale of the Property which sum would only be released after agreement between Mrs Demiroski and your client or Court Order. We would also formally undertake not to release any monies from trust absent agreement between Mrs Demiroski and your client. This proposal should afford your client the security he requires [16].

9 The practitioner acting for Mr Faulds replied in terms to the effect that he did not consider the undertaking provided in that letter to adequately protect his client's interests. In response, Mr Detata wrote again to the practitioner acting for Mr Faulds, also by letter dated 9 December 2008. In that letter he wrote:

> We confirm that Mrs Demiroski has signed an unequivocal and unconditional agreement to pay the sum of $190,000 into our trust account from the sale of the Property which sum would only [*sic* be] released after agreement between Mrs Demiroski and your client or Court Order. We would also formally

> undertake not to release any monies from trust absent agreement between Mrs Demiroski and your client.
>
> We should make clear, if it has not been made already clear, that the sum of $190,000 represents monies paid by Mrs Demiroski for the express purpose of meeting any liability of our client to your client.
>
> This proposal affords your client the security he requires [18].

10 Between 8 and 12 January 2009, the practitioner acting for Mr Faulds continued to express his concerns to Mr Detata in relation to the adequacy of the security provided. Mr Detata responded to those concerns by an email which stated, among other things, that:

> (a) the Firm had formally undertaken not to release any of the trust account money 'absent any agreement from' Mr Faulds;
>
> (b) that the trust account money was being held 'pending the issue of payment of monies' to Mr Faulds; and
>
> (c) that the trust account money 'will not be leaving' the firm's trust account without Mr Faulds' agreement [21].

11 At a hearing on 14 January 2009, the sentencing judge set the amount of restitution which would be ordered as part of the sentencing process at the amount of $75,000, and adjourned the hearing to 22 January 2009 to enable Mr Demiroski to make payment of that amount to Mr Faulds.

12 By an email dated 14 January 2009, Mr Demiroski directed Mr Detata to transfer $75,000 to Mr Faulds from the firm's trust account, and then to transfer the balance, less the practitioner's fees, directly to an account nominated by Mrs Demiroski.

13 Shortly after receipt of that email, Mr Detata advised the practitioner acting for Mr Faulds by email that he was authorised to disburse $75,000 from the trust account money, to be paid to the practitioner acting on behalf of Mr Faulds by bank cheque on 16 January 2009. Mr Detata sought confirmation that these arrangements were satisfactory.

14 The practitioner acting for Mr Faulds replied in terms to the effect that the sentencing judge had set the amount of $75,000 as restitution for the purposes of sentencing only, and that the determination of any further liability of Mr Demiroski to Mr Faulds would be a matter for civil litigation, and invited continuing discussions with respect to the balance of Mr Faulds' claim against Mr Demiroski.

15 On 14 January 2009, Mr Detata sent an email to the practitioner acting for Mr Demiroski in relation to the criminal charges, and to Mr Demiroski, advising that he had undertaken not to release funds in the trust account except by agreement or pursuant to court order, and that in the absence of a court order he was concerned about releasing any money from trust other than the $75,000. He reiterated that position in another email to Mr Demiroski later that day.

16 On 20 January 2009, Mrs Demiroski telephoned Mr Detata, reminding him that he did not act on her behalf and asserting that the balance remaining on trust after payment of the amount of $75,000 should be paid to her.

17 At the sentencing hearing held on 22 January 2009, the sentencing judge ordered that Mr Demiroski pay $75,000 to Mr Faulds by way of reparation. A cheque for that amount was handed to Mr Faulds at the hearing. The sentencing judge noted that the order that he had made would not bar further action in respect of Mr Faulds' civil claim against Mr Demiroski but that the amount of the reparation order would be taken into account in any assessment of damages due to Mr Faulds.

18 On 22 January 2009, Mrs Demiroski again requested payment of the balance of the funds on trust. The next day she wrote to Mr Detata requesting that two cheques totalling $15,000 be drawn against funds held in the firm's trust account on her behalf.

19 On 23 January 2009, Mr Detata made a file note to the effect that by reason of the reparation order made by the sentencing judge, Mr Faulds' consent (through his legal practitioner) to payment of the reparation order from the funds held on trust, and Mrs Demiroski's demand for the amount of $15,000, the balance of the funds held on trust, namely $115,000 plus interest, could be paid to Mrs Demiroski. He then authorised the preparation of two cheques totalling $15,000 to be drawn from the funds held on trust, leaving a balance of $100,000 in trust. On 29 January 2009, Mr Detata authorised the payment to Mrs Demiroski of the balance of the funds held in trust, being $100,000 plus interest earned. He did not notify Mr Faulds or the practitioner acting on behalf of Mr Faulds of these payments, or seek their agreement to the release of the funds held on trust other than the $75,000 paid to Mr Faulds.

20 The following month, Mr Detata wrote to the practitioner acting on behalf of Mr Faulds advising that he no longer acted for Mr Demiroski in relation to any matters.

21 The Tribunal noted that the Committee had brought its case on the basis that Mr Detata authorised release of the balance of the funds held in trust either with knowledge that it was a breach of the undertaking which he had given, or with reckless disregard as to whether it was a breach of the undertaking he had given [36]. The Tribunal noted Mr Detata's evidence to the effect that his understanding of the undertaking which he had given was different to the terms in which it was expressed [40] - [42].

22 The Tribunal observed:

> The Practitioner repeatedly stated in his evidence that when he released the balance of the funds in the Trust Account to Mrs Demiroski, he did so on the basis that he believed that his undertaking had been complied with (see, for example T: [33], [23.3.11]). He said that when he gave the undertaking he intended that the 'Court Order' to which he referred in his undertaking was in fact the restitution order made by the sentencing judge in the sum of $75,000 (see, for example T: [33], [23.3.11]).
>
> …
>
> The Practitioner may have convinced himself at some point that his undertaking meant something other than what it said. He stated in his evidence, when asked whether he had formally undertaken not to release any money from the Trust Account absent agreement between Mrs Demiroski and Mr Faulds, that:
>
> > That is in the letter, but my understanding was different.
> >
> > (T: [34], [23.3.11]).
> >
> > He later said:
> >
> > That undertaking - the form of words does not express my understanding of the undertaking.
> >
> > (T: [36], [23.3.11]).
>
> However, there is no reasonable basis upon which the Practitioner could have come to the view that his undertaking meant anything other than what it said. The terms of the Practitioner's undertaking were clear, unambiguous and on any objective view could only have been understood by the recipient as an assurance that all of the relevant money held in the Trust Account was to be available for the satisfaction of a liability claim (which Mr Faulds at some stage alleged exceeded $150,000) and would remain there until Mrs Demiroski and Mr Faulds agreed to its release.
>
> …

> We find that the Practitioner's authorisation of the payment of $115,340.58 to Mrs Demiroski on 23 and 29 January 2009 respectively was made when the Practitioner knew or ought to have known that it was in breach of the undertaking given to Mr Cook and that this failure was deliberate or reckless and not attended by a reasonable explanation.
>
> Undertakings such as the one given by the Practitioner are important in the practise of law and if they are not taken seriously then they become worthless. Mr Cook accepted that undertaking and the breach of it by the Practitioner then resulted in Mr Cook having to explain to his client why that money was no longer available, and more importantly, why Mr Cook had not taken other steps to ensure that whatever civil liability remained outstanding, there would be sufficient funds available to meet it. Mr Cook's answer, of course, has to be that he relied on the Practitioner's undertaking [51], [54] - [56], [63] - [64].

23 I digress to observe that, with respect to the Tribunal, it is unsatisfactory for significant findings of fact made in relation to professional misconduct to be expressed equivocally or in the alternative. The state of mind of Mr Detata at the time he gave the instructions which resulted in the disbursement of the trust funds to Mrs Demiroski was highly significant to the issues before the Tribunal, not least because of its prospective impact upon the penalty properly imposed, and the necessary assessment of whether he was a fit and proper person to remain in practice if found guilty of misconduct. The Tribunal noted the evidence given by Mr Detata as to his subjective belief but failed to state whether it accepted or rejected that evidence. It was, of course, open to the Committee to bring its application against Mr Detata on the basis that he was guilty of professional misconduct either because he deliberately and knowingly breached the terms of the undertaking, or because he acted with reckless disregard as to whether on its true meaning, his actions would amount to a breach of the undertaking. It was nevertheless necessary for the Tribunal to make a determination as to which of those alternative cases had been made out. While it is undoubtedly true that either alternative case, if made out, would amount to professional misconduct, the gravamen of the misconduct is significantly different as between the two alternatives.

The Tribunal's decision with respect to penalty

24 In the ***Penalty decision***, after summarising the submissions made by the Committee and on behalf of Mr Detata, the Tribunal observed:

> The Tribunal notes the previous good record of the Practitioner, that there is no evidence that the Practitioner gained personally from his conduct, and that for the purpose of considering penalty it is appropriate to presume

> that he recklessly, rather than deliberately and knowingly, breached his undertaking [11].

25 No reasons are given by the Tribunal for it being appropriate 'to presume' that Mr Detata was reckless, rather than wilful in relation to the breach of the undertaking. Section 77 of the *State Administrative Tribunal Act 2004* (WA) (the Act) requires the Tribunal to give reasons for a final decision, and further requires those reasons to include the Tribunal's findings on material questions of fact, referring to the evidence or other material on which those findings are based. The statutory scheme under which the Tribunal operates does not permit findings of fact to be made on the basis of a presumption.

26 It may be that the Tribunal has used infelicitous language in its reasons. It is perhaps possible that the Tribunal was endeavouring to express a finding of fact to the effect that Mr Detata was reckless as to whether or not he was acting in breach of his undertaking because it was not satisfied, on the evidence it had received and considered, that he was guilty of wilful and deliberate breach of his undertaking. However, this is mere speculation - a process which would have been avoided if the Tribunal had complied with the statutory obligation to set out the findings of fact upon which it was proceeding.

27 The ambiguity of the Tribunal's finding on the critical question of Mr Detata's mental state at the time he authorised disbursement of the trust funds adversely affected the arguments advanced on appeal. On behalf of the Committee, it was submitted that penalty should be assessed on the basis that Mr Detata's breach was either deliberate or reckless, reverting to the language of the Tribunal's reasons for its finding of professional misconduct. On behalf of Mr Detata, it was submitted that he did not act deliberately, knowingly or dishonestly, but had a subjective belief that his undertaking had a particular meaning. This submission was no doubt prompted by the Tribunal's equivocation in relation to the evidence given by Mr Detata to the effect that his subjective belief was to the effect that he was not breaching his undertaking by authorising disbursement of the trust fund.

28 It is clear from the passage of the Tribunal's reasons relating to penalty that it proceeded to impose penalty on the basis that Mr Detata was reckless with respect to the question of whether his authorisation of the disbursement of the trust funds was a breach of the undertaking which he had given, rather than with actual knowledge that it would constitute a breach, albeit that the Tribunal appears to have based this approach on a

presumption. The Committee has not challenged that aspect of the Tribunal's decision with respect to penalty in its grounds of appeal, nor has Mr Detata filed a Notice of Contention to the effect that the Tribunal's decision with respect to penalty should be upheld on grounds other than those enunciated by the Tribunal. It follows that this court should proceed to deal with the penalty on the same basis as the Tribunal - namely, that Mr Detata's breach of his undertaking was reckless rather than wilful.

29 In the ***Penalty decision***, the Tribunal made the following observations with respect to the principles to be applied in the imposition of penalty:

> The applicable principles are well settled and not in dispute between the parties. The object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession rather than punishment. The effective administration of justice depends on the honesty and reliability of practitioners. The penalty should act as a deterrent but should also reassure the public that professional misconduct on the part of practitioners will not be tolerated [4].

30 After referring to the particular circumstances of the misconduct (in terms which continue the Tribunal's equivocation on the question of Mr Detata's subjective state of mind), the Tribunal held:

> It is critical to the administration of justice that practitioners can be relied upon to do what they say they are going to do.
>
> Of course, the consequences of the Tribunal's finding of professional misconduct against the Practitioner are going to impact on the Practitioner's future and will also bring home to the Practitioner the seriousness of his misconduct. The Tribunal also considers that it is appropriate to take account of the Practitioner's personal circumstances. The Tribunal has formed the view that a period of suspension or a fine (particularly in light of the Tribunal's decision as to costs below) would cause the Practitioner unnecessary hardship.
>
> In the circumstances the Tribunal has determined that the Practitioner should be reprimanded and should undertake 24 months' practice employed by and under supervision of a practitioner approved by the Legal Practice Board and who has no less than five years post-admission experience [15] - [17].

31 Further, as I have noted, the Tribunal ordered that Mr Detata pay a sum of $10,000 by way of contribution to the costs incurred by the Committee.

The grounds of appeal

32 There are two grounds of appeal:

> 1. The Tribunal erred in law in failing to take into account a consideration which it was bound to take into account, namely, that the appropriate disciplinary outcome for the respondent's professional misconduct, by breaching an undertaking to another practitioner, was to be determined not for punitive purposes but for the purposes of the maintenance of proper standards in the legal profession and for protection of the public in their dealings with lawyers.
>
> 2. Further, and alternatively, the Tribunal erred in law by making disciplinary orders that were manifestly inadequate, in the sense that no reasonable tribunal could have imposed that outcome in the exercise of its discretion.

33 Various particulars are given in support of ground 2. They include assertions to the effect that the reasonableness of the penalty imposed upon Mr Detata should be assessed on the basis that his breach of the undertaking was either deliberate or reckless. For the reasons already given, argument based upon those portions of the particulars must be rejected. It is unnecessary to set out the particulars given in support of ground 2 in these reasons, as it is clear from the argument advanced in support of the ground that in essence it asserts that the penalty imposed by the Tribunal was manifestly inadequate, in the sense in which that term is used in the context of appeals against sentences imposed following conviction for criminal offences.

Are the grounds within jurisdiction?

34 Subject to an exception which is not applicable to this case, an appeal from the Tribunal to this court only lies on a question of law (s 105 of the Act). In written submissions filed on behalf of Mr Detata, it was asserted that the grounds of appeal did not constitute a question of law, with the result that the appeal did not lie within the jurisdiction of this court. Reliance was placed upon a line of Victorian authorities to the effect that the question of whether an administrative tribunal erred by making a manifestly excessive or inadequate award, or imposing a manifestly excessive or inadequate penalty does not give rise to a question of law - see ***Martin v Crimes Compensation Tribunal & State of Victoria*** (1997) 91 A Crim R 301; ***Transport Accident Commission v O'Reilly*** [1998] VSCA 106; [1998] 2 VR 436; ***Phillips v The Estate Agents Board*** [1998] VR 179.

35 However, there is a decision of this court to contrary effect - see ***Real Estate & Business Agents Supervisory Board v Landa*** [2009] WASCA 191. That case was concerned with the scope of the avenue of appeal from the Tribunal to this court created by s 105 of the SAT Act. If Mr Detata had pressed the submission to the effect that the decision in ***Landa*** should not be followed, and instead the Victorian line of authority adopted, the usual practice would have been to constitute a court of five judges in order to consider whether the prior decision of this court in ***Landa*** should be overturned. However, during oral argument, counsel for Mr Detata expressly abandoned the submission to the effect that the appeal was outside the jurisdiction of the court, and accepted that the court should proceed in accordance with the principles enunciated in ***Landa*** (ts 23 - 24). In those circumstances, any issue with respect to the correctness of the decision in ***Landa*** must await determination on some other occasion on which the issue is squarely joined.

Leave to appeal

36 Appeals to this court from the Tribunal can only be brought with the grant of the leave of this court (s 105 of the Act). The principles relating to the grant of leave are well settled and conveniently set out in ***Paridis v Settlement Agents Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 [16] - [18]. It is unnecessary to repeat those principles. In this case the question of whether there should be a grant of leave is inextricably tied up with the merits of the appeal. I will return to the issue of leave after considering those merits.

Ground 1

37 This ground is set out above [32]. It is well established that the jurisdiction of the Tribunal and of the Supreme Court to discipline practitioners is exercised not for the purpose of punishing the practitioner concerned, but for the protection of the public and the reputation and standards of the legal profession: ***Re Maraj (a practitioner)*** (1995) 15 WAR 12, 25; ***Ziems v Prothonotary of the Supreme Court of New South Wales*** [1957] HCA 46; (1957) 97 CLR 279, 286; ***Legal Practitioners Complaints Committee v Pepe*** [2009] WASC 39 [5] - [12].

38 The fundamental difficulty with this ground of appeal is that the Tribunal expressly referred to this principle in its reasons. For this reason, it is difficult, if not impossible, to accept that the Tribunal failed to take account of this consideration.

39 There is a fundamental distinction between a decision-maker failing to take account of a consideration which the decision-maker is required to take into account, as a matter of construction of the conditions attending the exercise of the decision-making power, and an allegation that the decision-maker has failed to give adequate or appropriate weight to a relevant consideration: see ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** [1986] HCA 40; (1986) 162 CLR 24, 39 - 41 (Mason J). In substance, the argument advanced in support of ground 1 was to the effect that the Tribunal failed to give sufficient weight to the protection of the public and the maintenance of proper standards in the legal profession, and gave undue weight to considerations personal to the practitioner. As expressed, ground 1 does give rise to a question of law, but as developed in argument, it does not. As expressed, the ground must fail, because there is an express reference within the reasons of the Tribunal to the consideration which it is said to have ignored. I would not grant leave to appeal in respect of ground 1.

Ground 2

40 As I have already noted, ground 2, properly construed, does not assert express error by the Tribunal, but rather asserts implied error of the kind identified in ***House v The King*** (1936) 55 CLR 499, 504 - 505 (Dixon, Evatt & McTiernan JJ), to be inferred from the manifest inadequacy of the penalty imposed (see also ***Dinsdale v The Queen*** (2000) 202 CLR 321 [6] (Gleeson CJ & Hayne J)).

41 In assessing the adequacy of the penalty imposed by the Tribunal, the order for costs should be put to one side. The costs incurred by the Committee were no doubt magnified substantially by Mr Detata's failure to accept that he was guilty of professional misconduct, notwithstanding the clear and indisputable objective evidence to that effect. While Mr Detata was, of course, entitled to put the Committee to proof of the allegations made against him, he cannot rely upon the fact that costs were ordered against him as a consequence of that stance in mitigation of the penalty properly imposed for his misconduct.

42 The penalty imposed by the Tribunal had two limbs. The first was a reprimand. A reprimand cannot and should not be viewed as the equivalent of no penalty at all. Other legal practitioners and members of the community generally would properly regard the imposition of a reprimand as a significant admonition of Mr Detata's misconduct. However, it must also be observed that a reprimand is at the lower end of the range of penalties available to the Tribunal.

43 The second limb of the penalty imposed by the Tribunal was the imposition of a condition to the effect that Mr Detata practise only as an employee and under the supervision of another practitioner for a period of two years. No reasons were given by the Tribunal for the imposition of this condition. It is difficult to deduce any reason for the imposition of such a condition from the circumstances of the case. It is relatively easy to imagine circumstances in which the imposition of such a condition would be appropriate. An obvious example concerns a practitioner who, while practising on his own account, acted imprudently or inappropriately, such that it was concluded that he or she was in need of supervision for a period. However, in this case, at the time of Mr Detata's misconduct he was in employment and subject to supervision; neither of those circumstances prevented his misconduct. Further, the condition has no direct relevance to the misconduct established. That misconduct related to the authorisation of disbursement of funds from the firm's trust account. If the Tribunal had imposed a condition with respect to Mr Detata's authority to deal with funds held on trust, the reason for the imposition of the condition might fairly have been deduced. However, the condition imposed is not a condition of that kind.

44 It is difficult to see how the Tribunal could have regarded the imposition of such a condition as any form of penalty to Mr Detata. On the evidence before the Tribunal, he had never practised in any capacity other than as an employed solicitor. There was no evidence before the Tribunal to sustain any conclusion to the effect that Mr Detata had any intention of practising in any other capacity in the foreseeable future.

45 For these reasons, in the absence of any explanation by the Tribunal for the imposition of the condition on Mr Detata's practising certificate, it does not appear to me that this aspect of the Tribunal's orders imposed any penalty upon him, or served any other identifiable purpose.

46 As I have noted, the Tribunal also observed that taking account of Mr Detata's personal circumstances, it was of the view that a period of suspension or a fine would cause him unnecessary hardship. However, no reasons for that view are expressed, nor are any findings of fact with respect to Mr Detata's personal circumstances enunciated in the reasons of the Tribunal. This is, with respect, another unsatisfactory aspect of the reasons given by the Tribunal. During the hearing of the appeal we were advised by counsel for both parties that there was little or no evidence before the Tribunal as to Mr Detata's personal circumstances, and essentially no evidence as to his financial circumstances (ts 25, 31). Assuming that to be correct, it is difficult to see the basis for the

Tribunal's view that a period of suspension or a fine would cause Mr Detata unnecessary hardship.

47 Having regard to the deficiencies in both the reasons of the Tribunal and the evidence before the Tribunal on this topic, the court provided Mr Detata with the opportunity to adduce evidence with respect to his financial circumstances. After an apparent misunderstanding between Mr Detata and his legal representatives on that topic, the court was provided with an affidavit sworn by Mr Detata which purported to address that issue, sworn 27 August 2012. However, it is manifestly deficient. No evidence is provided as to Mr Detata's current income, although it can be inferred that it exceeds $80,000 per annum as the affidavit records that prior to his current employment, he had not earned more than that amount. The affidavit contains a number of assertions of a general character in relation to Mr Detata's net disposable income, and endeavours to create a sense of straitened financial circumstances. However, the generality with which these matters are addressed in the affidavit, and the conspicuous failure to state Mr Detata's current income, does not provide the court with any sound basis to assess the impact of a fine or suspension. In any event, it must be borne in mind that because the dominant purpose of the disciplinary regulation of the legal profession is the protection of the public by the maintenance of proper standards within the profession - the impact which an appropriate penalty would have upon a practitioner guilty of misconduct, and personal hardship to a practitioner are necessarily secondary considerations: see ***Legal Profession Complaints Committee v Masten*** [2011] WASC 71 [29]; ***Legal Profession Complaints Committee and Leask*** [2010] WASAT 133 [54].

The importance of legal practitioners performing their undertakings

48 The importance of legal practitioners performing their undertakings cannot be overstated. The practice of giving, and relying upon, undertakings given by legal practitioners is widespread and serves an important public purpose. The circumstances in which undertakings are given and relied upon are many and varied. In some cases an undertaking will be proffered and received as a substitute for strict or timely performance of an obligation, perhaps arising under a contract or under a statutory provision. In other cases, the undertaking might be given in order to provide a form of security to the person to whom it is proffered - for example, an undertaking that an executed document will be held in escrow until certain conditions are met, or that legal proceedings will not be instituted if certain conditions are met, or that funds or other property will be retained by the practitioner until certain conditions are met. In all

of these circumstances, the usual effect of the proffer and acceptance of the undertaking will be to obviate the need to commence or to continue legal proceedings. This serves the public interest by preserving the limited resources of the parties and the courts.

49 Undertakings will often be proffered and received in the course of legal proceedings - for example, in relation to interlocutory procedures. The provision of undertakings in those circumstances serves the public interest by reducing or averting interlocutory disputes.

50 Undertakings by legal practitioners are a common feature of commercial and property transactions in which legal practitioners are engaged. In some cases, a party might complete a transaction before all relevant conditions are satisfied in reliance upon an undertaking by a practitioner to the effect that he or she will cause a particular condition to be satisfied. In this context, the proffer and acceptance of undertakings by legal practitioners improves the efficiency and expedition of commercial and property transactions and thereby serves to lubricate the wheels of commerce, trade and finance: see ***Rubik Financial Ltd v Herskope*** [2010] WASC 343; ***In the Matter of a Solicitor 'L'*** (Unreported, VSC, LPA 3 of 1989, 17 - 21 June 1989).

51 Undertakings can only serve these purposes and thereby further the public interest if they are accepted and relied upon. In some circumstances, a practitioner may proffer an undertaking in terms which makes it clear that the undertaking is only that of the client and not the practitioner. In such a case, the obligation of performance will fall upon the client, not the practitioner. However, this is not such a case. In this case, the undertaking was expressly and unequivocally given in terms which bound both Mr Detata's client, Mr Detata and the firm by which he was employed.

52 The proffer of an undertaking binding upon a legal practitioner and his or her firm can be expected to enhance the reliability of the undertaking, and thereby the prospect that it will be accepted and relied upon by the party to whom it is proffered. In this way, the proffer of an undertaking binding upon a legal practitioner enhances the achievement of the various purposes to which I have referred, and thereby enhances the public interest. It is therefore vital that legal practitioners perform their undertakings, regardless of whether the undertaking was proffered in error or oversight, irrespective of any change in circumstances, no matter how radical, and irrespective of any hardship to the legal practitioner

concerned (see ***Bhanabhai v Auckland District Law Society*** [2009] NZHC 415 [59] - [64] (Priestley, Heath and Winkelmann JJ).

53 Further, it is vital for the maintenance of public confidence in the integrity of the legal profession and its practitioners, and for the maintenance of the confidence which practitioners have in dealing with each other, that performance of their undertakings be enforced: see (***Rubik Financial Ltd***).

54 For these reasons, the obligation of a legal practitioner to perform his or her undertaking is a solemn obligation of the utmost importance. Failure to perform that obligation will generally be regarded as professional misconduct, and depending on the circumstances, will often be regarded as serious professional misconduct.

55 The reasons given by the Tribunal did not suggest that it took any different view of the importance of the undertaking given by Mr Detata in this case. In the reasons given for its finding of professional misconduct, the Tribunal assessed the impact of his failure to comply with his undertaking [64]. Further, in the ***Penalty decision***, the Tribunal observed:

> It is critical to the administration of justice that practitioners can be relied upon to do what they say they are going to do [15].

56 Accordingly, the reasons given by the Tribunal do not support a conclusion that there was express error by failing to take proper account of the significance of Mr Detata's failure to honour his undertaking. Rather, the question is whether error can be inferred on the basis that the Tribunal imposed a penalty which was so inadequate as to be outside the range of a sound discretionary judgment reasonably open to the Tribunal on the facts which it had found.

Manifest inadequacy

57 Before the Tribunal and again during the appeal reference was made by counsel on behalf of Mr Detata to a number of cases in other jurisdictions in which differing penalties were imposed for professional misconduct in the form of failure to perform an undertaking (see ***Law Society of New South Wales v Hinde*** [2005] NSWADT 199; ***Law Society of New South Wales v Martin*** [2002] NSWADT 27; ***Legal Services Commissioner v Farnham*** [2009] LPT 4 (Qld); ***Council of the Law Society of New South Wales v Panopoulos*** [2010] NSWADT 208; ***Legal Services Commissioner v Piper*** [2006] NSWADT 12; ***Law Society of***

New South Wales v Waterhouse [2002] NSWADT 204; ***Workington v Sheffield*** [2009] NZLCRO 55; ***Bedford v Luton*** [2009] NZLCRO 72).

58 On appeal, these cases were relied upon to support the proposition that the penalty imposed by the Tribunal in this case was within the range reasonably available to it, given that in some of those cases either no fine was imposed, or in a number of those cases, a relatively modest fine (of between $500 and $3,000) was imposed.

59 These cases provide little assistance. As might be expected, the cases cover a broad range of circumstances in which undertakings were given by practitioners, and an equally broad range of circumstances in which they were breached, with differing consequences. The breadth of the range of circumstances in which undertakings are proffered by legal practitioners is such that it is neither desirable nor possible to postulate any general proposition with respect to the appropriate penalty imposed for professional misconduct in the form of failure to perform such an undertaking. Understandably, the cases cited on behalf of Mr Detata and which I have listed can generally be regarded as cases at the less serious end of the spectrum of cases involving breach of undertakings by practitioners. It is not hard to imagine cases at the other end of the spectrum in which a wilful breach of a serious undertaking upon which a person has relied to their substantial detriment might reveal such a defect in character or in the appreciation of the role and obligations of a legal practitioner as to lead to the conclusion that the practitioner is not a fit and proper person to remain on the roll. The appropriate penalty to be imposed in any particular case will naturally depend upon the evaluation of the particular facts and circumstances in the context of the general importance of legal practitioners performing undertakings which they have given.

60 I have set out the relevant facts and circumstances of this case to the extent that they were found by the Tribunal. The following aspects of those facts and circumstances are pertinent to the evaluation of the seriousness of Mr Detata's misconduct.

61 The terms of the undertaking given by Mr Detata were clear and unambiguous. There is no doubt that these terms were known to Mr Detata, as he communicated with the practitioner representing Mr Faulds and his clients in terms which establish his awareness of the undertaking he had given. Nor is there any doubt that the undertaking was given on behalf of Mr Detata, the firm by which he was employed, and his client.

62 The undertaking was proffered for the purpose of obtaining a benefit for Mr Detata's client in the form of a discount in the sentence imposed upon him because of reparation in the form of the payment of $75,000, undertaken at the time of sentence. However, once that benefit had been obtained, Mr Detata breached the undertaking previously given, thereby leaving Mr Faulds without any security for any additional damages he might have been awarded in any further civil claim against Mr Detata's client.

63 The Tribunal proceeded on the basis that Mr Detata had a reckless disregard for the undertaking at the time he caused its breach. I take this to mean that Mr Detata, knowing that he gave the undertaking, was entirely indifferent as to whether on its true meaning, his authorisation of the disbursement of the funds to Mrs Demiroski was in breach of the undertaking.

64 The Tribunal made no finding to the effect that Mr Detata was remorseful, nor does there appear to have been any evidence capable of sustaining such a finding. To the contrary, Mr Detata denied that he was guilty of professional misconduct and gave an explanation for his behaviour which the Tribunal found provided no reasonable justification for it.

65 In my view, these considerations point inexorably to the conclusion that Mr Detata's misconduct cannot be regarded as being at the lower end of the range of seriousness of cases involving breach of an undertaking. The undertaking involved a substantial amount of funds. It was given in a context in which it was plainly of importance to the party to whom it was proffered. It was breached without reasonable justification or excuse.

66 For the reasons I have given, the Tribunal's imposition of a condition on Mr Detata's practising certificate was, in effect, no penalty at all. The order for costs should properly be regarded as the consequence of the stance which Mr Detata adopted, and not as a component of the penalty applied. The penalty effectively imposed by the Tribunal was that of a reprimand. Given the circumstances of Mr Detata's misconduct, that penalty was manifestly inadequate, and outside the range of a sound discretionary judgment reasonably open to the Tribunal on the facts which it had found.

67 It is appropriate to now return to the question of leave to appeal in the light of this conclusion. Leave should be granted if it is in the interests of justice (see ***Paridis***). The inadequacy of the penalty imposed

upon Mr Detata is such that it would not be in the interests of justice, in this particular case, for the penalty to be allowed to stand. Further, there is a risk that if the inadequate penalty imposed were allowed to stand, it would undermine the importance of the maintenance of proper standards of professional conduct within the legal profession, and in particular, the importance of legal practitioners performing undertakings given by them.

68 For these reasons, I would grant leave to appeal in respect of ground 2, and uphold that ground. The orders made by the Tribunal with respect to penalty should be set aside - the reprimand because it is inadequate, and the condition attached to the practising certificate because it serves no useful purpose. The order as to costs should be left undisturbed.

69 It would be open to the court to remit the matter to the Tribunal for reconsideration in the light of these reasons. In cases of professional regulation where the Tribunal has greater experience in the regulation of the relevant profession than the court, that will often be the more appropriate course. However, the considerations pertinent to the regulation of the legal profession are well known to the court, which has a significant role to play in the regulation of that profession. Given that the proceedings against Mr Detata have already been somewhat protracted, there is no particular advantage in remitting the question of penalty to the Tribunal for further consideration. Instead, the court should exercise the power to substitute its decision as to penalty for that of the Tribunal (s 105(9)(b) of the Act).

70 Taking into account all relevant considerations, in my view, the appropriate penalty to be imposed in this case is a significant fine, which I would fix in an amount of $10,000. As that fine is sufficient to publicly denounce the practitioner's misconduct, it is unnecessary to reprimand the practitioner as well.

Conclusion

71 For these reasons, I would refuse to grant leave in respect of ground 1 of the appeal. However, I would grant leave in respect of ground 2 and uphold that ground of appeal, and set aside the orders made by the Tribunal save for the order with respect to costs. In lieu of the orders set aside, I would order that Mr Detata pay a fine of $10,000. I would invite submissions from the parties as to the costs of the appeal.

72 **PULLIN JA**: I agree with the reasons of the Chief Justice and add the following observations.

73 The respondent, in his capacity as a lawyer and an officer of the court, informed the practitioner acting for Mr Faulds that Mrs Demiroski had signed 'an unequivocal agreement' to pay the sum of $190,000 'into our trust account ... which sum would only be released after agreement between Mrs Demiroski and your client or court order'.

74 This was followed by the respondent's undertaking which read:

> We [in context the respondent] also formally undertake not to release any monies from trust absent agreement between Mrs Demiroski and your client.

75 In context, it meant that all of the $190,000 would remain in trust until agreement was reached between Mrs Demiroski and Mr Faulds to allow any part of it to be released.

76 Part of the money ($75,000), was released from the trust account with the agreement of Mr Faulds. There was no agreement by Mr Faulds to the release of any other money. Subsequently, in breach of the undertaking, the respondent received a request from Mrs Demiroski to release the balance. Without informing Mr Faulds or the practitioner acting for Mr Faulds, the respondent authorised the payment to Mrs Demiroski of the balance of the funds held in trust.

77 In proceedings of the kind commenced by the appellant, the concern is for the protection of the public by the maintenance of proper standards within the profession or, as Lord Escher put it in ***Re Gray*** [1892] 2 QB 440 of 'enforcing honourable conduct on the part of the court's own officers' (443).

78 An undertaking does not have to be given to the court before its breach may be dealt with in disciplinary proceedings. A practitioner who breaches an undertaking given in his capacity as a practitioner to another solicitor may be dealt with in disciplinary proceedings: ***Wade v Licardy*** (1993) 33 NSWLR 1, 6 and ***Re a Solicitor*** [1966] 1 WLR 1604 (an undertaking by a solicitor to a bank). In enforcing undertakings the court is not guided by considerations of contract, but aims instead at securing honesty of conduct in its officers: ***Re a Solicitor*** citing *Cordery on Solicitors* (5th ed) 159.

79 In this case the reckless disregard of the terms of the undertaking justified a fine. I agree that the Tribunal erred in the way that the Chief Justice has indicated, agree that the court should exercise its power to

substitute its decision as to penalty and agree that the fine should be fixed in an amount of $10,000.

80 **MURPHY JA**: I agree with the Chief Justice.