[2014] WASAT 57

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and AMSDEN [2014] WASAT 57
MEMBER	**:**	JUDGE D R PARRY (DEPUTY PRESIDENT) MR H DEMBO (SENIOR SESSIONAL MEMBER) MS K KEMP (SESSIONAL MEMBER)
HEARD	**:**	25 AND 26 MARCH 2014
DELIVERED	**:**	22 MAY 2014
FILE NO/S	**:**	VR 156 of 2013
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND CHARLENE SHEILA AMSDEN Respondent

Catchwords:

Vocational regulation - Legal practitioners - Professional misconduct - Practitioner demanded payment and threatened and commenced proceeding for payment by owner of other unit in practitioner's strata complex of legal fees and disbursements incurred by practitioner in seeking removal of air conditioner from external wall of other owner's strata unit - Making demand for payment where there is no liability to make payment - Threat to commence and commencement of legal proceeding lacking any legal foundation - Abuse of process - Whether it is a defence that practitioner made demand for payment and

threatened and commenced proceeding in her personal capacity - Whether defence of honest mistake of law is available - Whether practitioner made an honest mistake that other owner had liability to pay and that practitioner had a cause of action against other owner - Breach of *Legal Profession Conduct Rules 2010* (WA) - Diminishing public confidence in the administration of justice - Bringing the legal profession into disrepute - Attempting to further practitioner's interests by unfair means

Legislation:

Legal Profession Act 2008 (WA), s 402, s 403, s 403(1), s 410(1)(c), s 426, s 428, s 428(1), s 438, s 438(1), s 442
Legal Profession Conduct Rules 2010 (WA), r 4(2), r 6(2), r 6(2)(b), r 6(2)(c), r 16(1), r 18(1)
Magistrates Court (Civil Proceedings) Act 2004 (WA), s 26, s 30(2), s 30(4)
State Administrative Tribunal Act 2004 (WA), s 54(1), s 54(3)
Strata Titles Act 1985 (WA), s 35, s 35(1)(a), s 35(1)(b), s 42(7), s 83(1)

Result:

Findings of professional misconduct

Summary of Tribunal's decision:

The Legal Profession Complaints Committee (Committee) alleged that Ms Charlene Sheila Amsden (practitioner) engaged in professional misconduct in demanding payment of $2,022 from Mr A and Ms A and in commencing and prosecuting a minor case claim in the Magistrates Court for that amount against them. Mr A and Ms A owned a strata unit in a complex in which the practitioner owned the other two units and managed the strata company. The amount demanded and claimed by the practitioner was for legal fees and disbursements incurred by her in seeking the removal of an air conditioning unit that Mr A and Ms A had installed above common property without the approval of the strata company.

Mr and Ms A had no existing liability to pay the amount the practitioner demanded from them. The practitioner had no cause of action, the Magistrates Court proceeding lacked any legal foundation, and the proceeding was therefore an abuse of the Court's process.

The Tribunal determined that the practitioner engaged in professional misconduct as alleged by the Committee. The conduct involved the breach of duties of fairness which the practitioner owed to Mr A and Ms A not to demand payment from them when they were under no existing liability to make payment

and not to bring legal proceedings against them which were without any founding cause of action, and the breach of a duty to the Court not to commence and prosecute proceedings which involve an abuse of the Court's process. The Tribunal determined that the practitioner's conduct would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence and is sufficiently serious to constitute professional misconduct under the *Legal Profession Act 2008* (WA) (LP Act).

The Tribunal also determined that the practitioner's conduct involved the breach of various conduct rules, including a rule that a practitioner must not engage in conduct which may be prejudicial to, or diminish public confidence in, the administration of justice, or which may bring the profession into disrepute. The Tribunal found that, in the circumstances of the case, the breach of the rules is sufficiently serious to constitute professional misconduct under the LP Act.

The Tribunal rejected the practitioner's contentions that she did not engage in professional misconduct, because she acted in a personal capacity, she honestly, but mistakenly believed that she had a legitimate claim and cause of action, and that the demand and Magistrates Court proceeding concerned an area in respect of which she had no knowledge or experience. The relevant duties of fairness and propriety were binding on the practitioner whether acting for a client or representing herself. An honest mistake of law is not a defence to an allegation of professional misconduct or unsatisfactory professional conduct and, in any case, the Tribunal did not accept the practitioner's evidence that she honestly, but mistakenly, believed that she had a right to demand payment and commence and prosecute the Magistrates Court proceeding. Finally, the Tribunal found that it was not correct that the practitioner had no knowledge or experience in relation to strata obligations and that, in any case, the practitioner was bound by the duties of fairness and propriety not to make the demand and not to commence and prosecute the Magistrates Court proceeding.

The Tribunal made programming orders for the determination of the issues of penalty and costs.

Category: B

Representation:

Counsel:

Applicant	:	Ms KF Banks-Smith SC with Ms PE Le Miere
Respondent	:	In person

Solicitors:

Applicant	:	Law Complaints Officer
Respondent	:	N/A

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

Briginshaw v Briginshaw (1938) 60 CLR 336
Chamberlain v Law Society of the Australian Capital Territory (1993) 43 FCR 148
Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115; (1999) 21 WAR 56
Legal Practitioners Complaints Committee and Segler [2009] WASAT 205
Legal Profession Complaints Committee and A Legal Practitioner [2013] WASAT 37
Legal Profession Complaints Committee and Amsden [2013] WASAT 201
Legal Profession Complaints Committee and Caine [2010] WASAT 178
Legal Profession Complaints Committee and in de Braekt [2012] WASAT 58; (2012) 80 SR (WA) 134

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The Legal Profession Complaints Committee (Committee) alleges that Ms Charlene Sheila Amsden (practitioner) engaged in professional misconduct, between December 2011 and June 2012, in demanding payment of $2,022 from Mr A and Ms A and in commencing and prosecuting a minor case claim in the Magistrates Court of Western Australia (Civil Jurisdiction) for that amount against them. Mr A and Ms A owned one of the three strata units in a strata complex in which the practitioner owned the other two units and managed the strata company. The sum demanded by the practitioner from Mr A and Ms A and subsequently claimed by her from them in the Magistrates Court proceeding comprised legal fees and disbursements of $1,956 which the practitioner paid to Butcher Paull & Calder (BPC) for a letter demanding that Mr A and Ms A remove an air conditioning unit from the exterior wall of their strata unit, and $66 which the practitioner paid as the application fee for the commencement of a proceeding in the State Administrative Tribunal (SAT or Tribunal) against Mr A and Ms A under s 83(1) of the *Strata Titles Act 1985* (WA) (ST Act) seeking an order for the removal of the air conditioning unit.

2 The Committee contends (and the practitioner, in effect, concedes) that Mr A and Ms A had no existing liability to pay the amount demanded by the practitioner and that the Magistrates Court proceeding lacked any legal foundation. The Committee contends that, in these circumstances, the practitioner's conduct in demanding payment from Mr A and Ms A and in commencing and prosecuting the Magistrates Court proceeding against them constitutes professional misconduct, within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) (LP Act), in that it:

a) would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence; or

b) to a substantial degree, fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence; and, further, or in the alternative

c) comprised a breach of r 6(2)(b) and r 6(2)(c) and/or r 16(1) of the *Legal Profession Conduct Rules*

> *2010* (WA) (Conduct Rules) and was 'contrary to the intent of' r 18(1) of the Conduct Rules.

3 Rules 6(2)(b) and 6(2)(c) of the Conduct Rules state that a legal practitioner 'must not engage in conduct, in the course of providing legal services or otherwise, which … may be prejudicial to, or diminish public confidence in, the administration of justice; or … may bring the profession into disrepute'. Rule 16(1) of the Conduct Rules states that a legal practitioner 'must not attempt to further a client's matter by unfair or dishonest means'. Rule 18(1) of the Conduct Rules states that a legal practitioner 'must not, in a letter of demand for debt written on behalf of a client to another person, claim costs from the other person unless the client has a right to recover those costs'. Rule 4(2) of the Conduct Rules states that '[a] breach of these rules may constitute unsatisfactory professional conduct or professional misconduct'.

4 The Committee commenced this proceeding against the practitioner on 9 August 2013. In her witness statement dated 15 November 2013 (which was admitted together with her undated 'additional witness statement' filed on 14 March 2014 as her evidence in chief) the practitioner gave evidence that, until she engaged solicitors in late September 2013, she was of the 'belief' that she had a legal right to seek recovery of the amount of $2,022 from Mr A and Ms A in consequence of s 35(1)(a) and (b) and s 42(7) of the ST Act and a statement in the letter from BPC to Mr A and Ms A. The practitioner gave evidence that her solicitors (who ceased to act for her prior to the final hearing) 'have since provided me with advice that I was mistaken in my interpretation of those provisions of the ST Act and that I was mistaken as to my entitlement to seek recovery of the costs in the manner I did'. The practitioner gave evidence that 'I accept my solicitor's advice' and 'I accept I was mistaken in relation to both those matters'. The practitioner also gave evidence that:

> I now know that the [Magistrates Court] Claim had no prospects of succeeding, but I did not know this at the time of issuing the Letter of Demand or making the Claim.

5 Nevertheless, in her Amended Response to the Committee's Amended Grounds and Statement of Facts (Amended Response) dated 29 October 2013, the practitioner denies that she engaged in professional misconduct because:

> a) in demanding payment and in commencing and prosecuting the Magistrates Court proceeding, the practitioner 'was acting in her personal capacity and was

not acting in her capacity as a legal practitioner or engaged in the course of legal practice';

b) the demand was made and the Magistrates Court proceeding was brought by the practitioner 'honestly but mistakenly relying on s 35(1)(a) and (b) and s 42(7) of the [ST Act]' (and on a statement in the letter by BPC to Mr A and Ms A); and

c) the demand and Magistrates Court proceeding 'concerned an area of law in respect of which [the practitioner] had no knowledge or experience'.

6 For reasons which we will give after reviewing the factual background, we have determined that in making the demand for payment from Mr A and Ms A, when they were under no existing liability to make payment, and in threatening to commence and in commencing the Magistrates Court proceeding, which lacked any legal foundation, against them, the practitioner engaged in professional misconduct under the LP Act. By her conduct, the practitioner breached duties of fairness and propriety which she owed to Mr A and Mrs A and to the Magistrates Court as a legal practitioner engaged in a legal dispute and in a legal proceeding. The practitioner's contentions referred to in the preceding paragraph (and other matters raised by her during the hearing) do not provide a relevant defence for her conduct.

Factual background

7 The facts of this case are largely not in dispute. We make the following findings.

Practitioner's legal experience

8 The practitioner is an experienced criminal lawyer, having practised solely in the area of criminal law since her admission to legal practice 29 years ago. Throughout most of that period, until April 2012, the practitioner was employed in the criminal law section of Legal Aid WA (Legal Aid). While the practitioner was employed by Legal Aid, she was exempted from the requirement of compulsory professional indemnity insurance on the basis of her declaration that she undertook (as she said in her first witness statement) 'not to practice [sic] as a legal practitioner other than in the course of my employment with the employer'. Since April 2012, the practitioner has been in sole practice as a criminal defence lawyer.

9 The practitioner has only participated in civil litigation in three matters, in each case in her personal capacity and on her own behalf. The practitioner has never engaged in legal practice, whether by providing legal advice, legal representation or otherwise to any person in relation to any civil law matter. The three civil proceedings in which the practitioner has participated in her personal capacity on her own behalf were an application made by a previous owner of the third unit in the strata complex in which the practitioner owns two units against the practitioner in the Tribunal under the ST Act, the application by the practitioner against Mr A and Ms A in the Tribunal under the ST Act in which the practitioner sought an order for removal of the air conditioning unit, and the Magistrates Court proceeding which the practitioner commenced and prosecuted against Mr A and Ms A for payment of the amount of $2,022.

Strata complex

10 As noted earlier, the practitioner owns two of the three units in a strata complex. She resides in one unit and rents out the other. Between 31 August 2010 and 13 December 2013, Mr A and Ms A owned the third unit in the strata complex.

11 The strata complex is managed by a strata company. The strata company was formerly managed by a professional strata manager. The practitioner was appointed to manage the strata company at the Annual General Meeting of the strata company held on 20 January 2011.

Air conditioning unit

12 On or about 31 August 2010, Mr A and Ms A arranged for an air conditioning unit to be attached by brackets to the eastern exterior wall of their unit in the strata complex. The air conditioning unit for Mr A and Ms A's strata unit was previously located on the roof of their unit, but had been damaged in a severe hail storm in March 2010. The new air conditioning unit protruded into the air space of the common property of the strata complex and a shared right-of-way in respect of which there was an easement for the benefit of an adjoining property. Mr A and Ms A did not seek approval from the strata company to install the air conditioning unit on the eastern exterior wall of their strata unit.

13 At the Annual General Meeting of the owners of the strata company on 20 January 2011, the practitioner raised the issue of the air conditioning unit having been installed on the eastern wall of Mr A and Ms A's unit, rather than on the roof. In February 2011, the practitioner decided that she would seek legal advice in relation to the

installation of the air conditioning unit. On 9 February 2011, the practitioner had a telephone conversation with Mr Greg Vellacott of BPC to make inquiries in relation to the legal position concerning the air conditioning unit. On 15 February 2011, the practitioner met with Mr Vellacott at his office to discuss the matter.

BPC letter

14 On 16 February 2011, Mr Vellacott emailed to the practitioner a draft letter to Mr A and Ms A requesting that the practitioner 'amend/suggest changes if there is anything that I have misconstrued or misunderstood'. On 17 February 2011, the practitioner emailed Mr Vellacott instructing him to make some amendments to the draft letter and to then send it to Mr A and Ms A.

15 Mr Vellacott then amended the draft letter and sent the letter to Mr A and Ms A on 17 February 2011 in the following terms:

> Dear [Mr A and Ms A],
>
> **Dispute relating to position of airconditioning unit at [address]**
>
> We are the solicitors for Sheila Amsden.
>
> Sheila Amsden is the owner of Units 1 and 2, [address] and she also manages the affairs of the strata company that has oversight of the complex of 3 Units that form the strata plan known as [name of Strata Plan].
>
> We note that you are the co-owners of Unit 3, [address].
>
> We are instructed that the severe hailstorm that battered Perth and suburbs in March 2010 damaged the airconditioning unit that then sat atop the roof of your Unit and that the airconditioning unit was then replaced pursuant to an insurance claim made on the strata company's insurance policy.
>
> We are further instructed that at your direction, and without approval from the strata company, the replacement airconditioning unit was installed on the eastern wall of your Unit. The airconditioning unit protrudes from the eastern wall of your Unit into an area of common property on the strata plan.
>
> Under the *Strata Titles Act 1985* as amended ("the Act") a proprietor, occupier or other resident of a lot shall not obstruct lawful use of common property by any person (Schedule 2 by-law).
>
> We understand that the common area into which the airconditioning unit protrudes is a driveway that is used for access to and from the units at [address]. The protrusion of the airconditioning unit amounts to an

> obstruction to lawful use of the common property in that it prevents access to and from the properties not owned by you.
>
> Furthermore, we also understand that the same driveway forms part of a registered easement that provides for unrestricted access to other properties that are situated at [address of adjoining property].
>
> The easement grants full, unhindered and unobstructed rights of access at all times over that part of the driveway in favour of the owners and other resident at [address of adjoining property] entitled to use the same.
>
> We are instructed to demand that at your cost you now attend to the relocation of the airconditioning unit to another location on your property where it does not interfere with common property or easement rights of other parties.
>
> Such relocation should take place within one (1) month after the date of this letter failing which our client reserves all her rights to take all such action at law against you to have the airconditioning unit relocated (including, without limitation, the bringing of an application to the State Administrative Tribunal for relevant orders).
>
> Our client also reserves her rights in respect of seeking recovery of legal and other expenses incurred by her in seeking your adherence to the Act and the obligations otherwise imposed upon you by law.
>
> We suggest that if you have any questions arising from this letter you should promptly seek your own legal advice.
>
> Yours faithfully
>
> [Signature]
>
> **BUTCHER PAULL & CALDER**
> Per: Senior Associate

16 On or about 22 February 2011, BPC rendered an account for $2,396 to the practitioner, being BPC's professional fees and disbursements for acting for the practitioner against Mr A and Ms A in relation to the air conditioning unit. After the practitioner contacted the Committee in relation to BPC's account, the Committee negotiated with BPC and BPC and the practitioner agreed to the payment of $1,956 in satisfaction of BPC's account.

17 On 12 March 2011, Mr A and Ms A responded to BPC's letter dated 17 February 2011, stating that they intended to apply for retrospective approval from the strata company for the installation of the air conditioning unit.

18 On 21 March 2011, the practitioner paid $1,956 to BPC in settlement of BPC's account.

SAT proceeding

19 On 30 March 2011, the practitioner commenced a proceeding against Mr A and Ms A in the Tribunal under s 83(1) of the ST Act in which she sought an order for the removal of the air conditioning unit. In answer to the question on the SAT Application as to whether the practitioner had a lawyer or other representative, the practitioner ticked the 'No' box and wrote 'I am a certified lawyer'. In an affidavit dated 30 March 2011, which the practitioner filed in support of the SAT application, the practitioner identified herself as a 'Solicitor/Barrister'.

20 At a directions hearing on 21 April 2011, the matter was referred for mediation. At the mediation on 31 May 2011, the practitioner and Mr A and Ms A agreed to settle the proceeding on the basis that Mr A and Ms A would remove the air conditioning unit from the eastern external wall of their strata unit and relocate it to the roof of their strata unit, and the practitioner would seek leave to withdraw the application.

21 On 8 July 2011, the practitioner sought leave to withdraw the application and on 12 July 2011 the Tribunal granted leave for the withdrawal of the application. No order as to costs was made by the Tribunal in the proceeding and, indeed, the practitioner gave evidence in this proceeding that, at the time when she made the application to the Tribunal, she 'was aware that even if I was successful against [Mr A and Ms A] in the SAT Proceedings, I would not be entitled to an award of costs from the SAT in my favour' and '[f]or this reason, when I sought leave to withdraw the SAT Application, I did not seek any cost order from the SAT against [Mr A and Ms A]'.

Letter of demand

22 In December 2011, the practitioner became aware that Mr A and Ms A had sold their unit in the strata complex and that settlement of the sale would occur shortly. On 8 December 2011, the practitioner wrote to Mr A and Ms A as follows:

> Dear [Mr A and Ms A]
>
> CLAIM FOAR [sic] REIMBURSEMENT OF LEGAL FEES AND RELATED EXPENSES

> I attach a copy of a letter I sent to the settlement agent on 6 December 2011.
>
> I claim from you the amount of $2022.00, being the amount I expended in ensuring you complied with the Strata Titles Act 1985 as amended.
>
> This represents the amount I paid Butcher Paull & Calder (and I refer you to the penultimate paragraph of their letter to you of 17 February 2011) plus the filing fee of $66.00 which I paid to the State Administrative Tribunal in the proceedings which ensued.
>
> I attach proof of payment in each case.
>
> Please let me have payment of this amount within fourteen days of the date of this letter. I intend to issue proceedings without further notice should payment not be received.
>
> Yours faithfully,
>
> [Signature]
>
> Copy letter 6/12/11
> Account/Bank cheque 18/3/11
> SAT Receipt 30/3/11

23 Although she did not say so in either of her witness statements filed in this proceeding or in her correspondence with the Committee in relation to the allegations which are now the subject of this proceeding, in the course of cross-examination the practitioner said that her letter of demand dated 8 December 2011 was in fact drafted by another lawyer, whose name she did not know, from 'Minor assistance that's offered through Legal Aid' (T:57.8; 25.03.14).

24 Mr A and Ms A did not pay the practitioner the amount of $2,022 which she demanded, or any other amount. However, on 22 December 2011, Mr A and Ms A wrote and left a letter in the practitioner's letterbox in which they said that the practitioner's '14 day deadline is unreasonably short for us to consult a lawyer at this time of year' and proposed 'an extension of time until 15 February 2012'.

Magistrates Court proceeding

25 At approximately at 9 am on 22 December 2011, the practitioner commenced a minor case claim against Mr A and Ms A in the Magistrates Court of Western Australia (Civil Jurisdiction) at Perth in which she claimed the amount of $2,022 which she said in the Minor Case Claim form was:

> A CLAIM FOR EXPENDITURE ON LEGAL FEES AND STATE ADMINISTRATIVE TRIBUNAL TO SECURE THE DEFENDANTS, BEING CO-OWNERS OF PROPERTY 3/[address], COMPLIED WITH THE BY-LAWS OF THE STRATA TITLES ACT 1985 AS AMENDED.

26 In the practitioner's Amended Response and in cross-examination in this proceeding, the practitioner conceded that she commenced the Magistrates Court proceeding on the last day permitted for payment by Mr A and Ms A under the practitioner's letter of demand dated 8 December 2011. Given that the practitioner's letter demanded payment 'within fourteen days of the date of this letter', we are unsure as to whether the practitioner's concession that the 14 day period expired on 22 December 2011 (rather than on 21 December 2011) was correctly made. However, nothing turns on whether the practitioner's self-imposed deadline for payment expired on 21 or 22 December 2011. For reasons set out below, we find that the practitioner engaged in professional misconduct under the LP Act, even assuming that her self-imposed deadline for payment under her letter of demand expired on 21 December 2011, rather than on 22 December 2011.

27 The Magistrates Court proceeding was a 'minor case' within the meaning of s 26 of the *Magistrates Court (Civil Proceedings) Act 2004* (WA) (Civil Proceedings Act). Under s 30(2) and s 30(4) of the Civil Proceedings Act, the parties to the Magistrates Court proceeding could only be represented by a legal practitioner with the leave of the Court. No such leave was sought or granted in the Magistrates Court proceeding.

28 On 14 June 2012, the Magistrates Court proceeding came on for hearing before his Honour Magistrate Cockram. The hearing was attended by the practitioner and Mr A and Ms A. After hearing from the practitioner, his Honour dismissed the proceeding. The following exchange between Magistrate Cockram and the practitioner indicates the Court's reasons for dismissing the proceeding:

> **HIS HONOUR:** Okay. I think the problem I have here is that having chosen to go to SAT then SAT seems to me to have been the jurisdiction where the issue of what cost you should recover in relation to Butcher Calder should have been resolved. I don't see how you can go to SAT and resolve the conflict but then come here and seek to recover the preparatory costs involved in doing that. This is a no-cost jurisdiction as well.
>
> **AMSDEN, MS:** I understand that.

HIS HONOUR: My suspicion is that you had two choices - perhaps you had more. You had a choice to go to SAT. You could have, I suspect, brought an action in this court seeking the costs to rectify what you said was the wrong done by the defendants and if that were under $10,000 as I suspect it would have been, you wouldn't have got these costs here either because this is a no-cost jurisdiction so I don't see how you can instruct a solicitor in relation to the issue which you then took to SAT, have it resolved at SAT and then seek to bring a separate action here for the costs involved in the problem which ultimately was resolved by SAT.

It seems to me having selected that jurisdiction which seemingly you were entitled to do that the issue which you raise in this court is an issue which had to be resolved in that jurisdiction. It was seized of that issue and this particular question. I don't know what they would have done about that but that was where I suspect this claim had to be resolved.

I struggle to see how you can split it between that jurisdiction and that jurisdiction, and again noting that if you had brought the claim in this jurisdiction if it was under 10 grand, you wouldn't have got these costs either.

AMSDEN, MS: Your Honour, taking that view, these costs were involved in an attempt to have a resolution to the matter without going to SAT.

HIS HONOUR: But the matter which you ultimately took to SAT, the airconditioner.

AMSDEN, MS: Yes.

HIS HONOUR: That's where this issue needed to be resolved.

AMSDEN, MS: And again, SAT requires and my understanding is they require you to outline what steps had been taken prior to taking a matter to that - so these were steps that the reason why it went to SAT was the failed ability to have it resolved prior.

HIS HONOUR: Okay, I'm not criticising you for going to SAT but what I'm saying is that having gone to SAT, you elected that jurisdiction to resolve this problem between the three of you and that is where this issue in relation to costs that you incurred needed to be resolved as well.

AMSDEN, MS: The cost issue never arose in the application to SAT.

HIS HONOUR: That's a matter for the parties. I can't control what you or SAT did in relation to that. I'm not saying that SAT would have given you these costs. My understanding is that it may not have.

AMSDEN, MS: No.

> **HIS HONOUR:** That's another reason it seems to me that you can't come here. Seemingly, you're going through a back door to try and get here what you couldn't get in SAT.
>
> **AMSDEN, MS:** There was no application for costs.
>
> **HIS HONOUR:** That's my fundamental point. That's where the application should have been made. If you're going to seek costs in relation to this issue which was resolved through SAT, then that's where you needed to ask for your costs.
>
> **AMSDEN, MS:** Those costs would not have been awarded in SAT. The only costs that were awarded in SAT and I can indicate the prior matters in 2006, 2007 were because the application had been brought by the then-proprietors with no legal standing. Now that was a matter that SAT considered that costs that strata company had been put to were payable and indeed they were.
>
> **HIS HONOUR:** Okay. I'm not an expert on SAT but hearing you say from the bar table that you would not have got these costs in the SAT proceedings just strengthens my view that you shouldn't be here either because you chose SAT as the jurisdiction to resolve this issue, therefore within the control of SAT for associated matters such as the costs. Again, I just repeated it, had you brought a claim in this court for the costs to rectify, to move the unit and I suspect that would have been under $10,000, the cost of doing that - is that a fair assumption?
>
> **AMSDEN, MS:** I'm not sure what those costs were.
>
> **HIS HONOUR:** Okay, well, I'm going to work on the basis it wouldn't have cost you more than $10,000 to relocate an airconditioner - a starting point is you wouldn't have got these costs here either because this is also, as a starting point, a no-cost jurisdiction. Putting that to one side, my basic point is that having chosen to go to SAT to address the problem, that's the jurisdiction which had the power to deal with the question of costs and I don't accept that you can split the claim effectively between SAT and this court.

Complaint about practitioner

29 On 15 June 2012, the day after the Magistrates Court proceeding was dismissed by Magistrate Cockram, Mr A made a complaint about the practitioner to the Committee under s 410(1)(e) of the LP Act. That provision enables a complaint about an Australian legal practitioner to be made by 'any … person who has or had a direct personal interest in the matters alleged in the complaint'. The first matter raised in Mr A's letter of complaint was the practitioner's Magistrates Court proceeding 'attempting to force us to pay her legal fees, filing, service fees and SAT costs'.

30 On 12 March 2013, the Committee offered the practitioner a summary conclusion of the complaint procedure under s 426 of the LP Act on the basis of a proposed 'Ground of Unsatisfactory Professional Conduct', rather than a finding of professional misconduct. However, on 15 March 2013, the practitioner wrote to the Committee stating that she did not consent to having the matter dealt with under s 426 of the LP Act and requesting the Committee to refer the matter to the Tribunal.

Professional disciplinary proceeding

31 On 9 August 2013, the Committee commenced this proceeding under s 428(1) of the LP Act seeking an order from the Tribunal that the practitioner 'has engaged in professional misconduct pursuant to s 438(1) of the Legal Profession Act 2008'.

32 At a directions hearing on 17 September 2013, the Tribunal directed the practitioner to file and serve a Response to the grounds of the Application by 1 October 2013, referred the matter to a compulsory conference on 16 October 2013, and made programming orders for the final hearing of the matter on 26 November 2013.

33 At the compulsory conference on 16 October 2013, the Tribunal granted leave to the Committee to file and serve an Amended Application by 23 October 2013 and directed the practitioner to file and serve an Amended Response by 28 October 2013. The Committee subsequently filed its Amended Application on 23 October 2013 and the practitioner filed her Amended Response on 29 October 2013.

34 At the commencement of the scheduled final hearing on 26 November 2013, counsel for the practitioner raised two preliminary issues. After hearing the parties' submissions, the Tribunal (as originally constituted) decided the preliminary issues and gave oral reasons after a short adjournment: see ***Legal Profession Complaints Committee and Amsden*** [2013] WASAT 201.

35 The first preliminary issue related to the jurisdiction of the Tribunal. The practitioner alleged that 'the matter' that has been referred by the Committee to the Tribunal, within the meaning of and under s 428 of the LP Act, is a matter limited or restricted by the resolution of the Committee that it made in the context of its proposal to the practitioner to deal with the matter in the Committee's summary jurisdiction. The Tribunal determined that the matter that has been referred to it is not restricted or limited by the Committee's resolution and that, consequently, it is open to the Committee to seek a finding that the practitioner engaged

in professional misconduct, rather than unsatisfactory professional conduct, under the LP Act.

36 The second preliminary issue involved the practitioner's contention that aspects of the Amended Application were not contemplated in 'the matter' referred to the Tribunal. The Tribunal determined that the impugned paragraphs of the Amended Application were contemplated by the matter.

37 After the Tribunal determined the preliminary issues, it discussed with counsel for the parties whether the matter should be referred for mediation. The Tribunal referred the matter for mediation pursuant to s 54(1) and s 54(3) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), to commence at 2.30 pm on the same day before Senior Member Spillane (who was a member of the Tribunal as originally constituted for the hearing of this proceeding). Section 54(3) of the SAT Act enables the Tribunal to refer a matter for mediation 'with or without the consent of the parties'. The Tribunal also directed that, if a further hearing date was required, the hearing would be listed administratively upon being provided with the parties' available dates during the first quarter of 2014.

38 The proceeding was ultimately listed for final hearing on 25 and 26 March 2014 before the Tribunal reconstituted so as to substitute Senior Sessional Member Dembo for Senior Member Spillane.

Did the practitioner engage in professional misconduct?

39 The Committee has brought this proceeding against the practitioner under s 438(1) of the LP Act. Section 438(1) of the LP Act confers jurisdiction upon the Tribunal to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct. The Committee bears the onus of proving its allegations of professional misconduct against the practitioner. The civil standard of proof ('on a balance of probabilities') applies together with the ***Briginshaw*** approach (see ***Briginshaw v Briginshaw*** (1938) 60 CLR 336) which requires cogent evidence to be adduced and for the Tribunal to feel an actual persuasion of the occurrence or existence of relevant facts before it can find the practitioner guilty of professional misconduct (or unsatisfactory professional conduct). Section 442 of the LP Act provides that the Tribunal may find a person guilty of unsatisfactory professional conduct even though the referral by the Committee alleges professional misconduct.

40 Section 402 and s 403 of the LP Act provide inclusive definitions of the key concepts of 'unsatisfactory professional conduct' and 'professional misconduct'. Section 402 of the LP Act states as follows:

> For the purposes of this Act -
>
> '**unsatisfactory professional conduct**' includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

41 Section 403 of the LP Act states as follows:

> (1) For the purposes of this Act -
>
> '**professional misconduct**' includes -
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
>
> (2) For the purpose of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission or for the grant or renewal of a local practising certificate.

42 The definition of 'professional misconduct' in s 403(1) of the LP Act is not an exhaustive statement of that term for the purposes of the LP Act: ***Legal Practitioners Complaints Committee and Segler*** [2009] WASAT 205 at [97]. In particular, conduct which constitutes unprofessional conduct at common law (sometimes expressed as 'professional misconduct', sometimes signifying more serious misconduct) can constitute professional misconduct (or unsatisfactory professional conduct) under the LP Act: ***Legal Profession Complaints Committee and Caine*** [2010] WASAT 178; ***Legal Profession Complaints Committee and in de Braekt*** [2012] WASAT 58; (2012) 80 SR (WA) 134; ***Legal Profession Complaints Committee and A Legal Practitioner*** [2013] WASAT 37 (***A Legal Practitioner***).

43 The common law concept of unprofessional conduct was restated by Parker J (with whom Ipp and Steytler JJ agreed) in ***Kyle v Legal Practitioners' Complaints Committee*** [1999] WASCA 115; (1999) 21 WAR 56 (***Kyle***) as follows:

> … This Court has long accepted and applied, in this context, the understanding of the notion of unprofessional conduct which was expressed by the Full Court of the South Australian Supreme Court in *Re a Practitioner of the Supreme Court* [1927] SASR 58: see, eg, *Re a Practitioner* (unreported, Supreme Court, WA, Full Court, Library No 4989, 18 July 1983). It was usefully summarised (at 3) by the Full Court as conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, or that, to a substantial degree, fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence. The first limb of this summary includes, but is not confined to, conduct which occurs in the course of legal practice. The other limb necessarily relates to conduct in the course of legal practice because of the reference to 'professional conduct'. While the words should not be taken as necessarily an exhaustive or codified statement, the essence of the notion of unprofessional conduct is usefully revealed in these decisions.

44 The Committee contends that the practitioner's conduct constitutes professional misconduct under the LP Act as it falls within one or the other limb of the restatement of the common law concept of unprofessional conduct in ***Kyle*** and because it comprised a breach of r 6(2)(b) and r 6(2)(c) and/or r 16(1) of the Conduct Rules and was contrary to the intent of r 18(1) of the Conduct Rules.

45 Since receiving legal advice, the practitioner concedes (correctly) that she had no entitlement to seek recovery of BPC's fees and disbursements and the filing fee in the SAT proceeding from Mr A and Ms A and that the Magistrates Court proceeding had no prospects of success. The practitioner, in effect, concedes (correctly) that Mr A and Ms A were under no existing liability to pay the amount that the practitioner demanded that they pay in her letter dated 8 December 2011 and that the Magistrates Court proceeding lacked any legal foundation. These concessions were correctly made, because, plainly, the practitioner had no contractual, statutory or other basis (such as an order of a relevant court or tribunal) upon which to demand payment from Mr A and Ms A and to found a cause of action for the Magistrates Court proceeding against them.

46 As Professor GE Dal Pont observes in *Lawyers' Professional Responsibility* (Lawbook Co., 5th edition, 2013) at [21.230], a lawyer must not 'in any communication with another person on a client's behalf,

demand the payment, and any costs, to the lawyer in the absence of any existing liability owed by the person to the lawyer's client'. In our view, the ethical obligation upon a lawyer not to demand payment from a person in the absence of an existing liability to pay is no less the case where the lawyer demands payment on behalf of himself or herself, rather than on behalf of a client. Indeed, the case of misconduct is arguably all the stronger when it is the practitioner's own position which he or she seeks to advance by such an unfair and improper demand: cf ***A Legal Practitioner*** at [28].

47 Furthermore, as Professor Dal Pont observes at [17.205], '[t]he lawyer's pivotal role in the administration of justice … dictates that he or she should eschew conduct that is an abuse of process, irrespective of the motivation for doing so' and:

> Lawyers who foster or are involved in an abuse of process may be subject to disciplinary proceedings, and may have costs awarded against them personally. (Citations omitted)

48 As Professor Dal Pont observes at [17.250]:

> For a lawyer to institute civil proceedings lacking any legal foundation is an abuse of court processes because it squanders valuable court time and resources, and causes unnecessary discomfort, cost and inconvenience to the opposing party. (Citations omitted)

49 In our view, the practitioner's conduct in demanding payment of the amount of $2,022 from Mr A and Ms A, when they were under no existing liability to pay that amount, and in commencing and prosecuting the Magistrates Court proceeding, in circumstances where she had no cause of action, the proceeding lacked any legal foundation and was therefore an abuse of the Court's process, would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence, within the first limb of the restatement of the common law concept of unprofessional conduct in ***Kyle***, and constitutes professional misconduct under the LP Act. The practitioner's conduct involved the breach of duties of fairness to Mr A and Ms A not to demand payment from them when they had no existing liability to make payment and not to bring legal proceedings against them when she had no founding cause of action, and the breach of a duty of propriety to the Court not to commence and prosecute proceedings which involve an abuse of process. The practitioner's conduct was grossly unfair to Mr A and Ms A and wasted valuable court time and resources.

50 Moreover, the letter of demand and the Magistrates Court proceeding was clearly intended to apply inappropriate and improper pressure on Mr A and Ms A to pay the amount of $2,022. Although the practitioner did not write the letter of demand on her professional letterhead, Mr A and Ms A knew that the practitioner is a lawyer, because the practitioner said so in the documents she filed in the proceeding she commenced against Mr A and Ms A under the ST Act. Indeed, in a letter that Mr A and Ms A wrote to the practitioner on 4 April 2011, they said that '[y]ou have used your majority ownership of 2 of the 3 lots *and your knowledge as a lawyer* to bully and disadvantage us since buying unit 3 on 2 May 2006' (emphasis added).

51 The clear implication to Mr A and Ms A from the letter of demand written to them by a lawyer was that Mr A and Ms A had an obligation to pay the practitioner the sum demanded. Similarly, the clear implication to Mr A and Ms A from the commencement of legal proceedings against them by a lawyer was that they had an obligation to pay the amount claimed in the proceeding. And, indeed, the practitioner gave evidence in this proceeding that, before the Magistrates Court proceeding was listed for hearing, Mr A 'made an offer to settle for an amount less the cost of private repairs he had done at the property that he said I was responsible for causing', although the practitioner 'refused his offer'.

52 In our view, the practitioner's conduct in demanding payment and in commencing and prosecuting the Magistrates Court proceeding also involved a breach of r 6(2)(b) and r 6(2)(c), r 16(1) and r 18(1) of the Conduct Rules and, in the circumstances of this case, the breach of those rules is sufficiently serious to constitute professional misconduct under the LP Act.

53 Rule 6(2) of the Conduct Rules states, in part, as follows:

> A practitioner must not engage in conduct, in the course of providing legal services or otherwise, which -
>
> …
>
> (b) may be prejudicial to, or diminish public confidence in, the administration of justice; or
>
> (c) may bring the profession into disrepute.

54 Although it is arguable that the practitioner did not engage in the conduct the subject of this proceeding 'in the course of providing legal services', r 6(2) of the Conduct Rules also precludes conduct falling

within the scope of the paragraphs of the rule carried out by a practitioner 'otherwise' than in the course of providing legal services. In our view, the practitioner's conduct in demanding payment and in commencing and prosecuting the Magistrates Court proceeding against Mr A and Ms A was prejudicial to, and diminished public confidence in, the administration of justice, and had the effect of bringing the legal profession into disrepute, because:

- it could be inferred from the practitioner's conduct that she is not competent;
- the practitioner's conduct gives rise to an apprehension that legal practitioners are willing to make demands and issue court proceedings in circumstances where it cannot be justified;
- the practitioner's conduct caused Mr A and Ms A unnecessary discomfort and inconvenience in having to address and respond to the practitioner's demand and claim before it was heard and dismissed; and
- the practitioner's conduct caused the Magistrates Court to waste its valuable time and resources in dealing with her claim which involved an abuse of process.

55 Indeed, for a lawyer to commence a legal proceeding, to advance his or her own interest, which involves an abuse of court process constitutes a very serious breach of r 6(2) of the Conduct Rules. It reflects most adversely on the propriety of the legal profession as a whole.

56 Rule 16(1) of the Conduct Rules states as follows:

> A practitioner must not attempt to further a client's matter by unfair or dishonest means.

57 Rule 18(1) of the Conduct Rules states as follows:

> A practitioner must not, in a letter of demand for debt written on behalf of a client to another person, claim costs from the other person unless the client has a right to recover those costs.

58 Although the practitioner was acting in a personal capacity, both in issuing the letter of demand and in commencing and prosecuting the Magistrates Court proceeding, she was, in effect, her own 'client' for the purposes of these rules. For reasons set out earlier, the practitioner

attempted to further her matter against Mr A and Ms A by 'unfair … means' (contrary to r 16(1) of the Conduct Rules; the Committee does not allege that the means were 'dishonest'). For reasons set out earlier, in her letter of demand dated 8 December 2011, the practitioner claimed costs from Mr A and Ms A when she had no right to recover those costs (contrary to r 18(1) of the Conduct Rules). Moreover, in our view, the fundamental intent of r 16(1) and r 18(1) of the Conduct Rules is to ensure that lawyers act fairly and appropriately in relation to legal matters and proceedings in which they are involved. In our view, it would be contrary to the intent of the Conduct Rules for a lawyer to be subject to the stated ethical requirements when acting for another person, but not when acting for themselves. Indeed, as the Tribunal observed in ***A Legal Practitioner*** at [28]:

> The case is all the stronger when it is the practitioner's own case which he [or she] is seeking to advance by such means.

Does the practitioner have a defence to a finding of professional misconduct?

59 As noted earlier, by her Amended Response, the practitioner denies that she engaged in professional misconduct for three reasons. The first reason is that, when she made the demand for payment and commenced and prosecuted the Magistrates Court proceeding, she 'was acting in her personal capacity and was not acting in her capacity as a legal practitioner or engaged in the course of legal practice'. The practitioner gave the following evidence in her additional witness statement:

> In March 2011 and May 2011 in the SAT and December 2011 in the Magistrates Court, I was not engaged in the practice of law as either a barrister or solicitor. I was, as I am lawfully entitled to do, exercising my rights and responsibilities as a private citizen acting reasonably.

60 The practitioner emphasised that, because the Magistrates Court proceeding was a 'minor case' under s 26 of the Civil Proceedings Act, neither party could be legally represented without leave, and leave was not sought or granted. She also emphasised that at the time when she issued the demand and commenced the Magistrates Court proceeding (and until she ceased employment with Legal Aid in April 2012) she was subject to an undertaking not to practise as a legal practitioner other than in the course of her employment with her employer.

61 However, as senior counsel for the Committee said in opening, the Committee does not assert that the practitioner was 'acting as a lawyer' when she made the demand and commenced and conducted the Magistrates Court proceeding. As senior counsel said:

> That's not a real issue. This complaint has always been brought on the basis that the [practitioner] was acting in her personal capacity. But she is a lawyer; hence, the umbrella requirements of conduct still apply. (T:9.6; 25.03.14)

62 In ***Chamberlain v Law Society of the Australian Capital Territory*** (1993) 43 FCR 148 Lockhart J observed at 163 as follows:

> It is well established … that unprofessional conduct on the part of a legal practitioner may extend to conduct in his private capacity.

63 In particular, a legal practitioner may be guilty of professional misconduct (or unsatisfactory professional conduct) when acting for himself or herself in legal proceedings: ***A Legal Practitioner*** at [14]. This can be the case even if the practitioner is a specialist in another area of legal practice and has no or limited experience in the jurisdiction in which he or she is engaged: ***A Legal Practitioner*** at [15].

64 In the circumstances of this case, the practitioner's conduct involved a breach of a duty of fairness not to demand payment from Mr A and Ms A, when they had no existing liability to make payment, and a duty of fairness to Mr A and Ms A and a duty of propriety to the Court not to commence and prosecute a legal proceeding which involves an abuse of process. These fundamental duties are binding upon a legal practitioner, whether acting for a client or representing himself or herself in a private dispute or private litigation.

65 The second reason given in the Amended Response as to why the practitioner denies that she engaged in professional misconduct is that she 'honestly but mistakenly' believed that she demanded payment and commenced and prosecuted the Magistrates Court proceeding on the basis of s 35(1)(a) and (b) and s 42(7) of the ST Act and a statement made by Mr Vellacott in the letter from BPC to Mr A and Ms A dated 17 February 2011.

66 The practitioner gave the following evidence in her first witness statement:

> When writing the Letter of Demand and in subsequently issuing the Claim I genuinely believed that I had a legitimate claim. This is because I relied upon the penultimate paragraph of the BPC Letter which stated:
>
> > 'Our client also reserves her rights in respect of seeking recovery of legal and other expenses incurred by her in seeking the [sic] your adherence to the Act and the obligations otherwise imposed upon you by law[.]'

I believed that in incorporating this statement in the BPC Letter Mr Vellacott was of the view that I had a legal right to seek recovery of the amount I had expended in ensuring that WDA complied with the *ST Act.* I relied upon this assertion as legal advice that I had such a legal right.

Mr Vellacott did not provide me with legal advice on the causes of action available to me to recover those costs, but I honestly and genuinely believed at the time of making the Letter of Demand and issuing the Claim, that this right arose by operation of section 35(1)(a) and (b) and section 42(7) of the *ST Act.*

Section 35(1)(a) and (b) of the ST Act provides:

> '**35. Duties of strata companies**
>
> (1) A strata company shall -
>
> (a) enforce the by-laws; and
>
> (b) control and manage the common property for the benefit of all the proprietors …'

Section 42(7) of the ST Act provides[:]

> '**42. By-laws**
>
> (1) - (6)
>
> (7) A proprietor or mortgagee in possession of a lot shall take all steps that are reasonable in the circumstances to ensure that every occupier or other resident of that lot complies with the by-laws for the time being in force.
> Penalty: $400.'

I was aware that the standard by-laws imposed by virtue of section 42, restricted the use of common property in that it could only be used in a manner which did not unreasonably interfere with the use and enjoyment thereof by other proprietors, occupiers, residents or their visitors (Sch 1, by-law 1(2)(a)). Similarly a proprietor could not obstruct the lawful use of common property by any person (Sch 2, by-law 2).

On the basis of sections 35 and 42 of the *ST Act* and those provisions of the by-laws, I believed that:

(a) it was permissible for me as the manager of the Strata Company, to take steps to recover the amount I had expended in ensuring that WDA complied with the *ST Act*;

(b) the costs incurred in having Butcher Paull & Calder draft the BPC Letter were reasonably recoverable, because the BPC Letter

> was an attempt to resolve the matter to avoid any subsequent application needing to be made to the SAT; and
>
> (c) the filing fee for the SAT application was recoverable as a disbursement, especially in light of the fact that WDA consented to removing the Air Conditioner and orders were made by the SAT in those terms.
>
> Until I engaged solicitors in late September 2013, I maintained the beliefs described above. However, my solicitors have since provided me with advice that I was mistaken in my interpretation of those provisions of the *ST Act* and that I was mistaken as to my entitlement to seek recovery of the costs in the manner I did. I accept my solicitor's advice. I accept I was mistaken in relation to both those matters.
>
> I sent the Letter of Demand and made the Claim in the belief that I had a legal entitlement to do so. I did not send the Letter of Demand and make the Claim knowing (or even contemplating) that there was no proper basis for me to do so. I did not send the letter of demand to induce or pressure WDA to make payment knowing that there was no proper basis upon which the letter of demand was issued.
>
> I now know that the Claim had no prospects of succeeding, but I did not know this at the time of issuing the Letter of Demand or making the Claim.

67 In her additional witness statement, the practitioner also gave the following evidence:

> I understood that my 'right' to recover the costs of compliance with the obligations imposed by law was as a debt payable by a non-compliant owner because of the non-negotiable obligation on a strata company to 'enforce the by-laws' pursuant to s. 35 of the ST [Act]. I relied on what Mr. Vellacott told me and the clear and unequivocal statement contained in both his draft and final letter to [Mr A].

68 However, an honest mistake of law is not a defence to an allegation of professional misconduct or unsatisfactory professional conduct under the LP Act. Even if we were to accept the practitioner's evidence on this point, that would not have excused her conduct. She was bound by the fundamental duties of fairness and propriety to which we have referred.

69 Furthermore, and in any case, we do not accept the practitioner's evidence that she honestly, but mistakenly, believed that she had a right to demand payment and commence and prosecute the Magistrates Court proceeding on the basis of s 35(1)(a) and (b) and s 42(7) of the ST Act (and the penultimate paragraph in Mr Vellacott's letter).

70 Section 35(1)(a) and (b) and s 42(7) of the ST Act are set out in the extract from the practitioner's evidence above. Under cross-examination, the practitioner conceded that s 35 of the ST Act was inapplicable, because she was demanding and seeking payment from Mr A and Ms A personally and not on behalf of the strata company:

> But on its face you would agree, would you not, Ms Amsden, that section 35 doesn't give you any personal power. Would you agree with that proposition?---I wasn't expecting to use any power conveyed by the Strata Titles Act. It was a personal matter.
> (T:67.7; 25.03.14)

71 The practitioner also conceded in cross-examination that s 42 of the ST Act was inapplicable:

> And you also refer to section 42 of the Strata Titles Act. And, again, you have - - -?---That's not really applicable, because that means that his partner or tenant or whatever should have taken steps to make sure that the bylaws were complied with.
>
> All right. So you don't rely on - - -?---Not relevant to me.
>
> You don't rely on section 42?---No. It's there, but, I mean, that's the owner's problem.
>
> Right. You don't rely on that as giving you the personal right to recover your solicitor/client costs?---No.
> (T:67.9-68.2; 25.03.14)

72 It appears from the practitioner's evidence in the extracts from her witness statements set out above that her position in her evidence in chief was that the reference in the penultimate paragraph of the BPC letter was to a right to seek recovery of costs under s 35(1)(a) and (b) and s 42(7) of the ST Act. Given the practitioner's concessions under cross-examination that s 35(1)(a) and (b) and s 42(7) of the ST Act were not, in fact, applicable to the circumstances of her demand and claim, the penultimate paragraph in the BPC letter could not have formed the basis of an honest, but mistaken belief that she could demand and seek payment from Mr A and Ms A of the fees and disbursements that she paid to BPC and the filing fee in the SAT proceeding. In any case, the penultimate paragraph in the BPC letter is a standard reservation of rights clause and, as the practitioner conceded under cross-examination, the 'letter says nothing about what those rights may or may not be' (T:64.4; 25.03.14). The practitioner also conceded under cross-examination that she did not seek any advice with respect to her ability to claim pre-ligitation costs. She gave the following evidence:

> You didn't seek any advice with respect to your ability to claim pre-litigation costs, did you?---I could not seek any advice from any source, other than minor assistance to write a letter of demand. I could never seek advice on the basis of a quality letter written by a competent practitioner that I paid almost $2000 for.
>
> My question was this, Ms Amsden. Did you ever ask anyone whether or not you were entitled to recover solicitor/client costs?---No. I relied on what had been told to me by Mr Vellacott and what he wrote in the letter.
>
> So the answer is, no, you didn't ask?---No, I didn't.
>
> Right. And you didn't ask anyone whether you were entitled - well, you didn't ask any lawyer whether you were entitled to recover the costs of issuing a demand, a letter of demand. Yes or no. Did you - - -?---I don't understand the question.
>
> I will ask it again. Did you ever seek any advice from a lawyer as to whether or not you were entitled to seek to recover the costs of issuing a letter of demand from Mr Andrews?---There were no cost associated with issuing the letter of demand to Mr Andrews.
>
> I'm referring here to the letter of demand that was issued by Butcher Paull & Calder that was the subject of your invoice. Did you ever ask a lawyer for advice as to whether or not you were entitled to recover the costs, the subject of that invoice, and which were therefore solicitor and client costs from Mr Andrews?---No. I relied on what I had been told and what was contained in the letter.
>
> So you didn't ask for advice - - -?---I didn't ask.
>
> Thank you?---It would be unusual to seek advice from another lawyer on the basis of what a lawyer had already told you and written.
>
> If you have any questions about that advice though, it would not be at all unusual to ask, would it?---No. It would be very unusual to ask when you've paid almost $2000 for the whole file that was there.
> (T:64.5-65.4; 25.03.14)

73 Furthermore, contrary to the practitioner's evidence in chief, there was no 'clear and unequivocal statement' in the BPC letter that the practitioner had a right to recover the costs of compliance with the obligations imposed by law as a debt payable by a non-compliant owner. The BPC letter says nothing of the sort.

74 Finally on this point, although the practitioner said in her evidence in chief that she relied on what Mr Vellacott 'told me', she gave no detailed evidence of what she says Mr Vellacott in fact told her, and

she conceded in cross-examination that what Mr Vellacott told her was what he wrote in the BPC letter (and nothing more):

> So when you say it was explained to you by Mr Vellacott, just so that I've got this right, what you're really saying is that you rely totally on what is contained in that letter; is that right?---That's right.
>
> Or are you suggesting there's some other explanation?---No. I - - -
>
> That's the explanation upon which you rely?---I relied on what he said and what he wrote in the letter as being correct.
> (T:62.2-.4; 25.03.14)

75 In her opening at the hearing and in her additional witness statement filed on 14 March 2014, the practitioner also referred to two matters which could potentially be relevant to whether she honestly, but mistakenly believed that she could demand payment and commence and prosecute the Magistrates Court proceeding. During the course of her opening, the practitioner said that she sought and obtained 'minor assistance on legal matters that is offered to assist people to write a letter and to look at further progress' (T:48.9; 25.03.14). The practitioner did not refer to having obtained 'minor assistance' previously in the proceeding or in her correspondence with the Committee in relation to the allegations which are now the subject of this proceeding. The practitioner was cross-examined about this and gave the following evidence in cross-examination:

> Who drafted that letter?---It was part of the minor assistance that is offered through Legal Aid, and the document that the letter - well, the information that the letter was based on was Mr Vellacott's letter that we have already referred to, 16 February 2011.
>
> So, the letter of 8 December 2011 was not drafted by you but was drafted by, you have said, another lawyer and you are telling the court that that other lawyer was somebody from the Magistrates Court from the legal assistance. Can you just clarify who wrote it?---Minor assistance that's offered through Legal Aid.
>
> Who drafted the letter?---I don't know.
>
> Can we turn to page 214, paragraph 69:
>
> > The letter of demand on 8 December 2011 was drafted by a lawyer and the legal advice given to me regarding recovery of money expended by me in regard to [Mr A's and Ms A's] actions was from qualified, experienced and ethical legal practitioners and/or strata consultants.

> So, you are writing here to the LPCC and you are telling them that the letter of demand of 8 December 2011 was drafted by another lawyer. Is that right?---Yes.
>
> And that you had legal advice about the recovery of money expended by you?---That was a referral that if it wasn't paid within 14 days, the minor case claim in the Magistrates Court was available, and that was the very first time that I heard anything about minor case claim in the Magistrates Court.
>
> So, when you are referring to advice from qualified, experienced and ethical legal practitioners and you are telling the LPCC that you are relying on that advice, which particular advice with respect to regarding recovery of money expended by you in regard to [Mr A's and Ms A's] actions, which particular advice are you referring to? Is that the letter that you - - -?---Greg Vellacott.
>
> And that is the only advice you are referring to?---That's it, and that was followed up when the letter was drafted with - there was procedure available in the Magistrates Court for a minor case claim.
>
> Now, you haven't mentioned that anywhere in your witness statements, have you - - -?---No.
>
> - - - nor in your correspondence to the LPCC, have you, that you took advice from somewhere? You now say you took advice from somewhere else but you have never mentioned that before, have you?---It was minor assistance which helps people, not lawyers necessarily, but people with drafting documents.
>
> (T:57.6-58.6; 25.03.14)

76 The cross-examination therefore revealed that the practitioner did not obtain legal advice from the 'minor assistance' facility, but rather merely assistance in drafting the letter of demand.

77 In her additional witness statement, the practitioner said that her application to the Magistrates Court was 'carefully vetted by a court employee before it was accepted' and that a Registrar conducted a pre-trial hearing at which he also 'vetted' her claim and, indeed, 'accepted my claim as a debt'. The practitioner also said:

> At no time was there any indication between December 2011 and 12 June 2012 from the Magistrates Court that my claim was unworthy or inappropriate. There has never been any indication by the court that my claim was 'an abuse of process'. I believe that it was categorised as a personal debt and I believe that is the context in which the Registrar Mr Miles conducted the pre-trial hearing.

78 The practitioner's evidence on this point contained a great deal of conjecture on her part. However, even accepting that the practitioner's application to the Magistrates Court was 'vetted' and 'accepted' by court officers prior to the hearing before his Honour Magistrate Cockram on 14 June 2012, the fact is that the proceeding was an abuse of process, because the practitioner did not have a cause of action against Mr A and Ms A and the proceeding lacked any legal foundation. The fact that the proceeding was only rejected at the hearing before the Magistrate could not possibly give rise to an honest, but mistaken belief that the practitioner had a cause of action.

79 The third reason given in the Amended Response as to why the practitioner denies that she engaged in professional misconduct is that 'the demand and Claim concerned an area of law in respect of which she had no knowledge or experience'. In opening, the practitioner said that:

> As a public officer and a person who was very experienced in criminal law *and marginally aware of strata obligations*, I completely trusted what Mr Vellacott said and did. (T:42.6; 25.03.14) (Emphasis added)

80 Although the practitioner had no experience in conducting civil proceedings in the Magistrates Court, it is not correct that the demand and claim concerned an area of law in respect of which the practitioner had 'no knowledge or experience' or that she was only 'marginally aware' of strata obligations. In a letter to Mr Vellacott dated 24 February 2011, the practitioner said that 'I am familiar with the Strata Titles Act, the SAT and its procedure'. At the Annual General Meeting of the owners of the strata company held on 20 January 2011, the practitioner said that she would manage the strata company, rather than placing that function with an external manager:

> Because really that's the sensible thing to do. I have the skills. I've got the organisation, I've got the knowledge …

81 It is also apparent from the transcript of the directions hearing on 21 April 2011 in the proceeding brought by the practitioner against Mr A and Ms A under s 83(1) of the ST Act and from the transcript of the hearing before Magistrate Cockram in the Magistrates Court proceeding on 14 June 2012 that the practitioner was quite familiar with the ST Act and with strata obligations.

82 However, and in any case, even if the practitioner had no knowledge or experience in relation to strata matters, that would not provide a defence or excuse for her conduct in this case. The practitioner, although

making the demand and commencing and prosecuting the Magistrates Court proceeding in a personal capacity, was nevertheless a legal practitioner and was bound by the fundamental duty of fairness to Mr A and Ms A not to demand payment, when they were under no liability to make payment, and the fundamental duties of fairness to Mr A and Ms A and propriety to the Court not to commence and prosecute a proceeding which involves an abuse of process.

Practitioner's other 'questions of law'

83 In the practitioner's opening, she 'requested four questions of law be considered and the subject of a finding by the SAT', namely:

> a. Was an application for costs in the SAT appropriate as stated in the [Committee's] final finding in paragraph 12 & 13 of the [Committee's] original 'Grounds of Unprofessional [sic - Unsatisfactory Professional] Conduct'?
>
> b. If no, on what basis could an otherwise competent and diligent practitioner be expected to agree to a summary conclusion of 'the matter' before the [Committee] based on a false statement?
>
> c. Is the process of amendment to the original application and new allegations raised as a result of compliance with SAT orders fair process in SAT procedure?
>
> d. Is the [Committee] excluded for [sic] honest, fair and ethical conduct expected of lawyers in pursuing disciplinary proceedings?

84 None of these so-called 'questions of law' were identified in the practitioner's Amended Response or in her first witness statement which were prepared and filed at a time when she was represented by solicitors and counsel.

85 Questions (a) and (b) are misconceived, because the 'Ground of Unsatisfactory Professional Conduct' was prepared by the Committee in the context of its proposal to the practitioner for summary conclusion of the complaint procedure under s 426 of the LP Act (which did not occur, because the practitioner would not consent to it), paragraphs 12 and 13 of that document do not form part of the Committee's Amended Application in this proceeding, and the Tribunal has no role in relation to summary conclusion of a complaint under s 426 of the LP Act.

86 In relation to question (c), as noted earlier, at the compulsory conference on 16 October 2013, the Committee was given leave to file and serve an Amended Application by 23 October 2013 and the

practitioner was directed to file and serve an Amended Response by 28 October 2013. The Amended Application was filed by the Committee on 23 October 2013, in accordance with that leave, and the practitioner subsequently filed an Amended Response. At the hearing on 26 November 2013, the Tribunal heard and determined two preliminary issues, including a contention that aspects of the Amended Application were not contemplated in the matter referred to the Tribunal. The practitioner was given every reasonable opportunity to respond to the allegations raised in the Amended Application. The process of amendment of the original Application and matters raised in the Amended Application, and indeed the conduct of the proceeding generally, has involved 'fair process in SAT procedure'.

87 Question (d) and certain related allegations made by the practitioner against three senior members and a legal representative of the Committee in her additional witness statement (after the practitioner was no longer represented by solicitors and counsel) are scandalous, without foundation and relevantly misconceived. They deserve no further comment.

Committee's application for an 'incidental' finding of dishonesty

88 The Committee requested an 'incidental' finding that the practitioner sought to deliberately mislead it in correspondence which she wrote in relation to the investigation of Mr A's complaint. The practitioner said in correspondence that the letter of demand dated 8 December 2011 to Mr A and Ms A was 'drafted by another lawyer' and 'prepared after advice'. When the Committee asked the practitioner to provide a copy of the 'advice', the practitioner said that it was contained in the penultimate paragraph of the letter from BPC to Mr A and Ms A dated 17 February 2011.

89 In her first witness statement in this proceeding, the practitioner said on two occasions, that *she* wrote the letter of demand and that she considered the penultimate paragraph of the letter from BPC to Mr A and Ms A to be 'advice'. However, as noted earlier, in cross-examination, the practitioner said that the letter of demand was drafted by a lawyer from 'minor assistance that is offered through Legal Aid' (T:57.8; 25.03.14). The practitioner maintained that, although the letter of demand was drafted by another lawyer, she wrote it.

90 In our view, it would be inappropriate to determine, as an 'incidental' finding in this proceeding, that the practitioner sought to mislead the Committee in its investigation. Such an allegation is a serious and substantive allegation of professional misconduct in its own right.

In fairness to the practitioner, if it is alleged that she sought to mislead the Committee in its investigation, then that allegation should be made in a substantive application to the Tribunal which the practitioner can respond to.

91 However, and in any case, we are not comfortably satisfied, in according with the ***Briginshaw*** approach, that the practitioner sought to mislead the Committee by her statement in correspondence that the letter of demand was 'drafted by another lawyer' and 'prepared after advice'. The practitioner's evidence to the Tribunal was that the letter was in fact 'drafted' by a lawyer from the 'minor assistance' facility but 'written' by her. This is generally consistent with her statements in her correspondence with the Committee. It appears that, having obtained a 'draft' of the letter from a lawyer at the 'minor assistance' facility of Legal Aid, the practitioner then typed it, signed it and sent it to Mr A and Ms A. In that sense, she 'wrote' the letter of demand, even though it was 'drafted' by another lawyer. Although the penultimate paragraph of the BPC letter is not 'advice' that the practitioner had a legal entitlement to demand payment of $2,022 from Mr A and Ms A or that she had an arguable cause of action so as to commence and prosecute proceedings for payment of that amount by them, we do not feel an actual persuasion on the evidence that the practitioner sought to deliberately mislead the Committee into thinking that she had any other 'advice' beyond the penultimate paragraph in the BPC letter.

Conclusion

92 We have determined that the practitioner engaged in professional misconduct under the LP Act in demanding payment from Mr A and Ms A of an amount of $2,022 and in commencing and prosecuting the Magistrates Court proceeding against them for payment of that amount. Her conduct involved the breach of duties of fairness which she owed to Mr A and Ms A not to demand payment from them when they were under no existing liability to make payment and not to bring legal proceedings against them when she had no founding cause of action, and the breach of a duty of propriety which she owed to the Court not to commence and prosecute proceedings which involve an abuse of the Court's process. The practitioner's conduct would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence and is sufficiently serious to constitute professional misconduct under the LP Act. The practitioner's conduct also involved a breach of r 6(2)(b) and r 6(2)(c), r 16(1) and r 18(1) of the Conduct Rules and, in the

circumstances of this case, the breach of those rules is sufficiently serious to constitute professional misconduct under the LP Act.

93 The matter should now proceed to consideration of the appropriate professional disciplinary consequence of the practitioner's conduct, and the issue of costs.

Orders

94 The Tribunal makes the following orders:

1. The Tribunal finds that, between December 2011 and June 2012, the respondent engaged in professional misconduct in that her conduct in demanding payment from Mr A and Ms A of an amount of $2,022 and in commencing and prosecuting a minor case claim against Mr A and Ms A in the Magistrates Court of Western Australia (Civil Jurisdiction) at Perth for payment of the amount of $2,022:
   (a) would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence; and
   (b) comprised a breach of r 6(2)(b) and r 6(2)(c), r 16(1) and r 18(1) of the *Legal Profession Conduct Rules 2010* (WA).
2. By 12 June 2014 the applicant is to file and serve its submissions in relation to penalty and costs together with a schedule of the amount of costs and disbursements it seeks and supporting accounts.
3. By 3 July 2014 the respondent is to file and serve her submissions in relation to penalty and costs and any character references on which she relies.
4. By 10 July 2014 the applicant is to file and serve a statement of the names of the authors of any character references filed in accordance with the preceding order who are required for cross-examination at the hearing in relation to penalty and costs.
5. The issues of penalty and costs are listed for hearing to commence at 10 am on 22 July 2014 for half a day.

I certify that this and the preceding [94] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUDGE D R PARRY, DEPUTY PRESIDENT