JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
STREAM	:	VOCATIONAL REGULATION
ACT	:	LEGAL PROFESSION ACT 2008 (WA)
CITATION	:	LEGAL PROFESSION COMPLAINTS COMMITTEE and CHIN [2012] WASAT 77
MEMBER	:	JUDGE T SHARP (DEPUTY PRESIDENT) MR J MANSVELD (MEMBER) MR M ODES QC (SENIOR SESSIONAL MEMBER)
HEARD	:	11, 12 & 13 OCTOBER 2011
DELIVERED	:	24 APRIL 2012
FILE NO/S	:	VR 87 of 2009
BETWEEN	:	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND NI KOK CHIN Respondent

Catchwords:

Legal practitioner - Professional misconduct - Unsatisfactory professional conduct - Substantial failure to reach or maintain a reasonable standard of competence and diligence - Dishonest conduct - Conduct which a member of the public is entitled to expect

Legislation:

Legal Practice Act 2003 (WA), s 3, s 137, s 137(2), s 137(a), s 138, s 231, s 232
Legal Profession Act 2008 (WA), s 403(i)(a), s 442, s 622(2)

Books

Y Ross, P MacFarlane: *Lawyers' Responsibility and Accountability* (2nd ed, 2002)
A Lamb, J Littrich: *Lawyers in Australia* (2nd ed, 2011)

Result:

Practitioner guilty of professional misconduct and unsatisfactory professional conduct

Category: B

Representation:

Counsel:

Applicant	:	Ms RVC Fogliani with Mr R Fletcher
Respondent	:	Self-represented

Solicitors:

Applicant	:	Legal Profession Complaints Committee
Respondent	:	N/A

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

Blackwell v Barroile Pty Ltd & Others (1994) 123 ALR 8
Bride v Freehill, Hollingdale & Page [1996] ANZ ConvR 593
Callachor v Black [2000] NSWCA 47
Chin and West Australian Legal Practice Board [2008] WASAT 252
Commonwealth Bank of Australia and Another v Smith and Another (1991) 102 ALR 453
Fox v Everingham & Another (1983) 50 ALR 337
Law Society (NSW) v Harvey [1976] 2 NSWLR 154
Law Society (NSW) v Moulton [1981] 2 NSWLR 736
Legal Practitioners Complaints Committee and Lee-Steere [2010] WASAT 189
Legal Profession Complaints Committee and Chin [2009] WASAT 219
Legal Profession Complaints Committee and Vogt [2009] WASAT 125
Maguire & Tansey v Makaronis (1997) 144 ALR 729
R v Magistrates' Court at Lilydale; Ex parte Ciccone - [1973] VR 122
Re JRL; Ex parte CJL (1986) 161 CLR 342
Re President of the State Administrative Tribunal of Western Australia (SAT), Justice Chaney; Ex Parte Chin [2010] WASC 89
Rogers and Whitaker (1992) 175 CLR 479

Rosenberg v Percival (2001) 178 ALR 577
Spunter Pty Ltd v Hall [No 2] [2007] WASC 239
Trade Practices Commission v CC (NSW) Pty Ltd (No 3) (1994) 125 ALR 94
Yamagi and Westpac Banking Corporation and Others (No 1) 115 ALR 235

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The Legal Profession Complaints Committee brought a number of complaints of professional misconduct and unsatisfactory professional conduct against a practitioner, Mr Ni Kok Chin, occurring over a period from 2004 to 2006. The complaints included acting for his son where a conflict of interest could have arisen, failing to treat professional colleagues with fairness and courtesy, failing to act in accordance with a client's instructions, altering a written costs agreement after it was signed by a client, charging a client in excess of an agreed amount, using intemperate and offensive language in a letter to a client, attempting to subvert the jurisdiction of the Committee, communicating directly with a judicial officer without first advising or notifying the solicitors for the other party, making written allegations of improper conduct against a third party without a reasonable or proper basis for doing so and failing to maintain a trust account and failing to render accounts in respect of legal services.

2 The Tribunal found the practitioner guilty of professional misconduct and unsatisfactory professional conduct.

Introduction

3 Mr Ni Kok Chin (**Practitioner**) faces the Tribunal on complaints of professional misconduct and unsatisfactory professional conduct brought by the Legal Profession Complaints Committee (**Committee**) in an application dated 30 June 2009. The Committee was represented by Ms Fogliani assisted by Mr R Fletcher while the Practitioner was self-represented.

Preliminary issue

4 At the commencement of the proceedings the Practitioner raised a preliminary point of *res judicata* in relation to the complaints brought and he applied to the Tribunal for their dismissal on that ground. He argued that in pursuing the complaints in these proceedings, the Committee was acting in a vexatious manner and that it was abusing the process of Court. In this regard, he has alleged at page 6 of his response dated 28 August 2009 (**Response**) that 'this is yet another malicious re-persecution of the respondent by the applicant in these proceedings with the particulars of malice being clearly shown in the grounds of appeal in CACV 105 of 2008'.

5 After hearing argument on the *res judicata* point, the Tribunal dismissed the application. The basis of the dismissal was that the *res judicata* point had been argued and had been dismissed in these very proceedings on a previous occasion before the President of the Tribunal in 2009; see ***Legal Profession Complaints Committee and Chin*** [2009] WASAT 219.

6 The Practitioner applied for leave to appeal against the judgment of Chaney J and the matter was heard in the Supreme Court of Appeal by Heenan J who dismissed the application; see ***Re President of the State Administrative Tribunal of Western Australia (SAT), Justice Chaney; Ex Parte Chin*** [2010] WASC 89 at [8 - 9], [18].

7 Before the Tribunal, the Practitioner further argued that Chaney J had erred in dealing with the argument placed before him and had failed to deal with several issues. To that extent, it was now open to him - so he contended - to argue those undecided issues before us.

8 In his ex tempore judgment, the presiding judge in these proceedings held that the so-called unresolved issues should have been argued in the appeal before Heenan J and that it was not open to this Tribunal to act as a Court of Appeal in order to set aside or deal with the alleged oversight or errors in the Tribunal before its President.

9 It should also be noted that at a later stage of the hearing, the Practitioner referred the Tribunal to a consent order dated 25 September 2007 issued by Steytler P in the Court of Appeal of Western Australia in proceedings between the Practitioner and the Legal Practice Board of Western Australia (**Board**). By consent, President Steytler ordered that 'the decision of the State Administrative Tribunal made 12 September 2006 in VR 137/2006 be set aside'.

10 Although this argument should have been raised as a preliminary point, the Tribunal permitted the Practitioner to canvas this contention, the Committee raising no objection.

11 The Practitioner argued that the identical complaints were the subject matter of the above decision and that the effect of the consent order setting that decision aside was to preclude them from being canvassed in these proceedings.

12 It appears that the Board in VR 137/2006 decided, on the basis of complaints made substantially similar to those presently before us, to attach certain conditions on the practising certificate of the Practitioner

which imposed restrictions on his ability to practise. The Practitioner in VR 137/2006 challenged the Board's authority to impose such conditions. The dispute, relating solely to the Board's power, came before the Tribunal presided over by the then Deputy President Eckert, which rejected the Practitioner's challenge to the Board's authority. The Practitioner appealed the decision but because there had not been a proper delegation of authority to the Professional Affairs Committee which imposed the conditions on behalf of the Board, the latter consented to the decision of the Board being set aside; see ***Chin and West Australian Legal Practice Board*** [2008] WASAT 252 at [6 - 7] (***Chin***). Restrictions to his practice were re-imposed by the Board subsequently, which the Practitioner again sought to set aside on review to the Tribunal but without success; see ***Chin***.

13 It will therefore be seen that the proceedings giving rise to the consent order upon which the Practitioner relied before us were totally unrelated to a consideration of complaints against him. The issue before the Tribunal in the earlier proceedings concerned the power of the Board to impose restrictions on the ability to practise, an issue which we are not required to consider.

14 We accordingly reject the Practitioner's argument that the consent order had the effect contended for by him.

Background

15 The Practitioner was admitted to legal practice in Western Australia on 19 December 2003. Between the latter date and 6 February 2005, he was an employed practitioner in the firm of V Ozich & Co. Between 6 February 2005 and 12 September 2006, he practised as a sole practitioner. It was thereafter that the Board imposed conditions on his practising certificate restricting him to practise only as an employed solicitor in a legal firm approved by the Board, referred to above.

16 Although the complaints against the Practitioner are varied, much of the factual background relating to each is common ground. The response of the Practitioner to most of the allegations is therefore largely one of confession and avoidance. The pleadings, particularly the response, are prolix. Much evidence is pleaded in the response. To set out the pleadings in full would unduly burden these reasons. We therefore propose to refer to the salient issues only to the extent necessary to deal with the various arguments raised before us. Certain issues raised in the response were not canvassed in evidence or in argument but we nevertheless propose to deal with them too. We have also found it more

convenient to deal with each complaint separately. The evidence led before us was, at the request of the Practitioner and agreed to by the Committee, adduced in the order of each complaint, at the hearing.

17 A bundle of documents, (**Exhibit 1**) containing 331 pages was handed in by the Committee at the start of the hearing. Supplementary material (**Exhibit 1A**) was produced and handed in later.

Applicable legislation

18 The conduct complained about by the Committee occurred between 2004 and 2006, when the *Legal Practice Act 2003* (WA) (**LP Act 2003**) was in force. The LP Act 2003 was repealed by the *Legal Profession Act 2008* (WA) (**LP Act**) which commenced operation on 1 March 2009, before the disciplinary proceedings were commenced. Under s 622(2) of the LP Act, the LP Act applies to conduct consisting of a contravention of the LP Act 2003 as if the conduct consisted of a contravention of the LP Act. Accordingly, the LP Act applies to the alleged conduct complained about.

Complaint A - Century Lunch Bar

19 On or about 30 July 2004, Mr Paul Chin, (**the Practitioner's son**) purchased the Century Lunch Bar (**Business**) in Malaga, Western Australia from Mr Kim Wiles and Ms Amanda Horgan (**Vendors**) for the purchase price of $45,000. The written agreement was prepared by the Practitioner, who witnessed the signature of both parties. He was named as the representative for both parties for the purposes of the settlement of the agreement (**Exhibit 1, page 9 - 10**).

20 The agreement reflects the Practitioner's son as the purchaser. The Committee has alleged that the actual purchasers of the Business were the Practitioner and his wife. The Practitioner (**Response page 11, para 7**) pleads that that statement is correct but then, paradoxically, goes on to contend that the intended purchaser was his son. The Practitioner's evidence on this point merely confounds the situation further by stating that his son was the purchaser and then at another point states that the purchasers were in fact his wife and himself.

21 In its closing submissions, the Committee has accepted that the son in fact purchased the Business, despite the apparent contradictions. On balance, we feel that that concession made by the Committee was correct and we proceed to deal with the complaint on the basis that the written agreement correctly reflected the Practitioner's son as the purchaser.

22 The Committee further alleges that at the time of the purchase, the Practitioner's son was, to the Practitioner's knowledge, suffering a disability, namely a psychiatric illness. In his response, the Practitioner denied the allegation, stating that his son 'was already cured of his temporary mental aberration caused by intoxication of [sic] marijuana. He had no history of mental illness. He had obtained rehabilitation whilst incarcerated at the Swan View Adult Mental Health Centre for about a month. He was running the Victoria Road Lunch Bar for four years until he became addicted to marijuana and had to sell his business. He purchased the Business after he was certified fit to start a new business; (**Response page 11, para 6**). Nothing turns on this difference in light of the acceptance by the Committee in its submissions that the son was the purchaser of the Business.

23 What is common ground, however, is that the finance for the purchase was provided by the Practitioner and his wife. Thus, the Practitioner acted in the transaction as the legal representative for both parties and as the creditor of his son, being the lender of the capital to finance the transaction.

24 In August 2004, the Practitioner's wife and son attended a week long trial period in the Business prior to settlement, during which period the Practitioner had the opportunity to assess its profitability.

25 On 6 September 2004, the Practitioner wrote to the vendors stating that he acted for his son, alleging a misrepresentation of the profitability of the Business; (**Exhibit 1, page 13 - 14**). The Committee alleges that at the time of writing the letter:

> … the practitioner knew that, or acted in reckless disregard of whether:
>
> (i) his own personal and financial interests conflicted with the interests of his son;
>
> (ii) doing so was in conflict with his being the vendors' representative in relation to the sale of the business; and
>
> (iii) he was a likely witness in relation to any dispute in relation to the sale of the business.

(Statement of Facts and Contentions (**SFC**) included in the Committee's application (**SFC page 5, para 11**)).

26 The response of the Practitioner is that there was no conflict of interest. He alleges that his mandate for the vendors was limited to the settlement of the transaction and that he did not act for them in the

ensuing litigation. He alleges that the vendors consented in writing to his acting on their behalf; **Response page 6, para (i)(c) and (d); page 11, para 5**.

27 The Practitioner produced a handwritten document dated 28 July 2004 (i.e., two days prior to the agreement of sale) which he drafted and which he refers to in the Response as 'a Statement of Informed Consent' (**Exhibit 3**). The document bears the signatures of the vendors, the relevant portion of which reads as follows:

> I will not accept any other offer other than Mr Nicholas Ni Kok Chin before 2 pm Friday 30-7-04. I appoint Mr Nicholas Ni Kok Chin as my solicitor for the settlement of this sale of business transaction. The agreed fee is $400 (Four Hundred Dollars). Turnover as (sic) fixtures supplied between $2800 - $5000 including credit bookups …'.

28 The Practitioner alleges that this document 'implicitly exonerates him from liability as solicitor for any conflict of interest for acting as the legal representative of both vendors and purchaser that is limited only to the settlement of the sale and purchase of the business'; (**Response page 11, para 5**).

29 Although the document is referred to in the pleadings as a 'Statement of Informed Consent', there is nothing in it, nor in the evidence given by the Practitioner, to indicate that the consent was indeed 'informed'. As stated in ***Trade Practices Commission v CC (NSW) Pty Ltd (No 3)*** (1994) 125 ALR 94 at 105:

> [T]he conflict is so acute that mere disclosure to the parties of the conflict and authorisation that the conflict continue even where the parties are given the opportunity to seek independent legal advice on the question of authorisation, can not solve the problem. Mere consent of the parties to the continuation of a conflict is not enough. There must be informed consent in the real sense of those words …. . (per Hill J at [105]). See also ***Commonwealth Bank of Australia v Smith*** (1991) 102 ALR 453 at [477-8].

30 In ***Law Society (NSW) v Harvey*** **[1976]** 2 NSWLR 154 at [171], Street CJ expanded on the nature and extent of the disclosure required to be made in the following terms:

> It must be a conscientious disclosure of all material circumstances, and everything known to him relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice. To disclose less than all that is material may positively mislead.

31 There is no suggestion in the evidence before us that the Practitioner ever informed the vendors of the risk of appointing him, as the father of the purchaser or financier of the purchaser as their solicitor (cf ***Rogers and Whitaker*** (1992) 175 CLR 479 at 459, 492; ***Rosenberg v Percival*** (2001) 178 ALR 577 and the cases there cited). Nor is there anything in the document which in our view impliedly exonerates the Practitioner from liability for a conflict of interest situation.

32 What is significant is that the document contains a statement of turnover which formed the basis of the later action for misrepresentation by the purchaser against the vendors. As the author of the document which contained the alleged turnover representation, the Practitioner placed himself in a most obvious conflict of interest situation, certainly vis-a-vis the vendors for whom he was acting at that stage and vis-a-vis his son to whom he had lent the finance to purchase what turned out to be an unviable business.

33 The representation of turnover was made directly to him prior to settlement as agent of the purchaser, which exposed him as a possible and central witness in any action against the vendors. Moreover, his ability to recover the money lent to his son for the purchase was compromised when the Business was not as profitable as it was represented to be. That in itself triggered a conflict of interest situation notwithstanding his protestations that he would never sue his son. The mere potential of conflict disqualifies, whether or not that conflict materialises.

34 In our view, the fact that he was only mandated to represent the vendors until settlement does not alter the situation. As stated above, there was a trial period of seven days before settlement to enable the purchaser to assess the profitability of the Business. During that period, there were a number of scenarios which could have triggered a conflict of interest. Had the alleged misrepresentations manifested themselves during the trial period, the Practitioner might well have decided not to lend the finance to his son, thereby creating a conflict of interest with him. That scenario would automatically create a conflict with the vendors. How could he then represent the interests of the vendors if the sale fell through for that reason? Similarly, if his son, the purchaser, decided during the trial period not to proceed with the sale, how could he possibly have protected the interests of the vendors?

35 In fact, it was prior to settlement that the misrepresentation giving rise to the litigation was made to him. As stated above, he was at that stage acting for both parties. For him thereafter to act for his son in

litigation based on a representation made to him at a time when he was acting for both parties was both untenable and improper.

36 The appointment of a solicitor by a client creates a fiduciary relationship between them. As the fiduciary, the solicitor is required to employ his knowledge, skill and expertise exclusively in the interests of his client. The solicitor's obligation is aptly put by the Full Court of the Federal Court in ***Commonwealth Bank of Australia and Another v Smith and Another*** (1991) 102 ALR 453 at 477 in the following terms:

> Not only must the fiduciary avoid, without informed consent, placing himself in a position of conflict between duty and personal interest, but he must eschew conflicting engagements. The reason is that, by reason of multiple engagements, the fiduciary may be unable to discharge adequately the one without conflicting with his obligation in the other. Thus, it has been said, after ample citation of authority, that where an adviser in a sale is also the undisclosed adviser of the purchaser, an actual conflict of duties arises.
>
> …
>
> In such a case, it is not to the point that the fiduciary himself may not stand to profit from the transaction he brings about between the parties. The prohibition is not against the making of a profit … but of the avoidance of conflict of duties, … .

37 At 478, the Full Court, in a much earlier decision, referred to 'various courts in a number of jurisdictions [which] have decried the practice of the one solicitor acting for both vendor and purchaser', declaring it to be 'an undesirable practice [which] ought not to be permitted'. (See also ***Fox v Everingham & Another*** (1983) 50 ALR 337 at 345).

38 In ***Blackwell v Barroile Pty Ltd & Others*** (1994) 123 ALR 8 at 93, the Full Court said that the 'obligation to provide a client with professional advice and skill uncompromised by the performance of a like duty to another whose interests conflict with those of the client, … is an ethical ruling of long standing which goes to the core of the solicitor-client relationship, the maintenance and protection of which is a matter of public interest reflected in the doctrine of professional privilege. It is central to the preservation of public confidence in the administration of justice'.

39 A conflict of interest has in previous cases arisen in a number of differing situations, all of which have been eschewed by the courts. These include a solicitor acting for both parties to a transaction (***Bride v Freehill, Hollingdale & Page*** [1996] ANZ ConvR 593 [Ext] (for mortgagee and purchasers); ***Callachor v Black*** [2000] NSWCA 47

(for both parties to a sale of a business). Similarly, a conflict clearly exists between the interests of a solicitor and his client where the solicitor guaranteed a loan to his client (***Maguire & Tansey v Makaronis*** (1997) 144 ALR 729), or where the solicitor had business dealings with the client (***Law Society (NSW) v Moulton*** [1981] 2 NSWLR 736). See also Y Ross, P MacFarlane: *Lawyers' Responsibility and Accountability* (2nd ed, 2002) (***Ross and MacFarlane***) at [11.7]).

40 Of further relevance to the complaint before us is the conflict arising where the solicitor is a potential witness in relation to a contentious issue ***(Yamagi and Westpac Banking Corporation and Others (No 1)*** 115 ALR 235; ***Ross and MacFarlane*** at [11.14]. In the present case, the possibility of the Practitioner becoming a witness in relation to a contentious issue was not only real but in fact eventuated when his son sued the purchasers for allegedly misrepresenting the profitability of the Business, the representation having been made to the Practitioner who recorded it in writing prior to settlement at a time when he was still acting for both parties.

41 Finally, the undesirability of a solicitor acting for a member of his family and the need for independent legal advice to the other party need merely be stated without elaboration (see A Lamb, J Littrich; *Lawyers in Australia* (2nd ed, 2011) at [6.50]).

42 Where, as in the present case, the solicitor not only acted for both parties but is also the father and financier of the purchaser, the conflict of his personal, financial and professional interests becomes untenable.

43 In our view, the conflicting interest and the potential therefor were obvious. What is particularly disturbing is that the Practitioner says that he knew that he should not act for the vendors but merely accepted their agreement to act for them without recourse. He has persisted in his denial of any conflict from the time he first wrote to the regulatory body (**Exhibit 1, page 3**), in the **Response (page 6, para (i)(a) - (d); page 11, para 5**), during his evidence and in his final submissions. The failure to conduct himself appropriately in a conflict of interest situation manifests itself again in complaint G in a criminal context, dealt with more fully below.

44 We find that in acting for his son in the dispute in relation to the sale of Century Lunch Bar:

(i) his own personal and financial interests conflicted with those of his son;

(ii) he was in conflict with acting as the vendors' solicitor in relation to that sale; and

(iii) he was a likely witness in relation to a dispute relating to the sale of the Business.

45 We find that his conduct, although not deliberate, manifested such a total lack of appreciation of the legal principles relating to a solicitor's duties in a conflict of interest situation as to involve a substantial failure to reach or maintain a reasonable standard of competence, and as such, constitutes professional misconduct in terms of s 403(i)(a) of the LP Act.

46 There is a second leg to complaint A which arises out of the litigation instituted against the vendors of the Business. Some time after the action was launched, the Practitioner approached and instructed Mr Timothy Thies, a colleague, to act on behalf of his son in that litigation. At that stage, the Practitioner had represented his son and was the solicitor of record who had progressed the action to the discovery stage.

47 On 25 October 2004, he sent an email to Mr Thies in which he referred to a telephone conversation of that date and stated inter alia as follows:

> (a) That you do agree to enter your name as the solicitor representing my son Paul for the District Court Action No 2065 of 2004.
>
> …
>
> (g) I am now in the process of preparing the Discovery Documents - Affidavit verifying List of Documents which will gain you some legal costs according to scales. I want you to avail yourself of the legal costs for this work i.e. for the preparation of the Affidavit and the List of Documents. In the event that we cannot get this sum of money in terms of legal costs from the Defendants, I shall pay you a nominal sum of 25% of the value in terms of the legal costs for this part of the work that I shall be doing for you and getting you to approve of it. Please find an attached copy of this Affidavit.
>
> (h) I do need some form of writing from you signifying that you are agreeing to this before I started putting the Affidavit and change of Solicitors under your name … .
>
> (i) I reiterate that I agree to pay you the nominal sum of 25% of all legal costs that is claimable from the Defendants for every stage of the litigation where your name is on if we cannot claim it from the

> Defendants. If the legal costs are not claimable for some reason, I agree to pay you a nominal sum of 25% of those values from my own pocket … . (**Exhibit 1, page 21**).

48 Mr Thies thereafter acted as solicitor of record until 10 March 2005, when the Practitioner as a result of a dispute with him which is not relevant for the present purposes, filed a notice of change of solicitor for him in the action. (**Exhibit 1, page 54**).

49 The Committee contends that the Practitioner's fee proposal to Mr Thies, that he avail himself of party and party costs in relation to work carried out by the Practitioner, rather than for work actually performed by him, was improper and would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence.

50 The Practitioner's response to that contention both in the pleadings and in evidence is that the offer of the party and party costs to Mr Thies was never made contingent on the outcome of the case; **Response page 11, para 14**; **page 12, para 18**. The lengthy reasons given by the Practitioner for terminating Mr Thies' mandate are not relevant for the present purposes.

51 In our view, the Practitioner's response and evidence on this aspect of the case miss the point. The case against him is not that the arrangement with Mr Thies constituted a contingency fee based on the outcome of the case; what is alleged is that by that arrangement he was offering to pay Mr Thies for work which Mr Thies did not do at the expense of the defendant in the case. In his evidence, the Practitioner sought to explain the arrangement merely as a measure for assessing Mr Thies' fees. We cannot agree with that contention. The arrangement spelt out in **Exhibit 1, page 21** clearly offers to pay Mr Thies for work he did not do, and of part of the party and party costs, at the expense of the defendant.

52 We find that the Practitioner's offer to Mr Thies was improper. It is a proposal which a practitioner of good repute and competence would regard as disgraceful and dishonourable and constitutes, in our view, a substantial failure to reach or maintain a reasonable standard of competence and diligence. We find that the Practitioner is guilty of professional misconduct in relation to the proposal to Mr Thies (cf. ***Legal Profession Complaints Committee and Vogt*** [2009] WASAT 125 at [62]).

Complaint B - Godfrey Virtue & Co

53 Dr Kheng Su Chan (**Client**) was the owner of units 4B and 5B, situated at 46 Mount Street, Perth (**the properties**) and became involved in a dispute with Bellcourt Strata Management in regard to the payment of strata levies for the properties. The Practitioner represented the client while Bellcourt Strata Management was represented by Ms Katherine Whitehead, a solicitor in the employ of Godfrey Virtue and Co (**Godfrey Virtue**).

54 By letter dated 4 January 2005, (**Exhibit 1, pages 69 - 70**) the Practitioner wrote to Ms Whitehead, relevantly in the following terms:

> We act for (the client). We are instructed by our client in the following:
>
> …
>
> (e) … Your firm's conduct towards (the client) since the takeover of the management of the Strata Company SP 25 by the Strata managers … has been anything but (sic) one of a predatory nature towards her. This conduct is consistent with either the implied or explicit intentions of all those who are acting in collusion with your firm in depriving her of being the legitimate owner of those two properties.
>
> (f) Your firm acting through Ms Katherine Whitehead by virtue of its predatory conduct towards our client in taking sides with Bellcourt Strata Management and that conduct has culminated in your threatening to auction off her two properties whilst she has been paying her legitimate dues in accordance with the provisions of the *Strata Titles Act 1985* (WA).
>
> (g) As a fiduciary you and your client have the obligations and duty to act for the general good of that Strata Company SP 25 and not for the majority owners who are oppressive of the minority owner.
>
> (h) The predatory conduct of the Strata Managers towards her backed by you as their legal advisers who have in the past through the so-called and seemingly 'legitimate' court actions obtained large sums of money from her illegitimately. They had managed to defraud her of large sums of money in the form of strata levies which are neither properly imposed nor properly demanded of her in accordance with accepted principles of equity, statute and common law.
>
> (i) She has evidentiary materials from which reasonable conclusions could be drawn that she has been 'outwitted' of sums of money that she should not have to pay to that Strata Company SP 25 at all.

> (j) While acting as solicitors for the Strata Company, you should have been reasonably apprised of the circumstances by which our client had suffered the inequity of having to pay 'legitimately' large sums of money which should not have been due and made payable by her under the circumstances, as all other monies which are properly due and payable by her.
>
> (k) Once having been apprised of the untenable positions your firm has been put into by the Strata manager, your firm should have immediately withdrawn from your client's instructions of continuing to assist the Strata managers in achieving their illegitimate and unconscionable gains from her.
>
> …
>
> (o) Finally, take Notice that the damages and compensation claimable and due to Dr Chan are in the region of $88,000. These damages are due from either Godfrey Virtue, Thomson Paris and Joan A Bellary who either as individuals or are collectively responsible for the tortious act committed upon our client.
>
> We therefore have standing instructions to commence legal proceedings against the following individuals, namely Katherine Whitehead of Godfrey Virtue & Co., Thomson Paris and Joan Bellary either jointly or severally, forthwith ('the letter)**.**

55 The response of Godfrey Virtue to the letter was predictable. The managing partner, Mr Pino Monaco, took the greatest exception to the contents of the letter when, on 5 January 2005, he wrote to the Practitioner's principal referring to the letter as 'most outrageous and ill-informed' constituting unprofessional conduct as well as casting defamatory aspersions on his firm, Ms Whitehead, and others mentioned therein. He called for an immediate withdrawal of the accusations; (**Exhibit 1, pages 71 - 2**).

56 An 'apology' from the Practitioner's firm followed the same day in rather guarded terms; (**Exhibit 1, page 73**). After referring to the letter, the author of the apology, bearing the Practitioner's initials, states:

> Since then, our Mr Chin has received instructions from his principal solicitor Mr V Ozich to apologise to Mr Pino A Monaco of Godfrey Virtue & Co personally for all the allegations as contained in that letter. Our Mr Chin rang Mr Monaco immediately after his receipt of his principal solicitor's instructions and personally spoke to Mr Monaco and personally apologised to him about the contents of the said letter at about 5 pm today.

> We now confirm in writing to you that our Mr Chin apologises unconditionally for the contents of the said letter and withdraws that letter from you with immediate effect.

57 The apology must be viewed in the context of a later letter by the Practitioner dated 10 June 2005 in answer to a letter from the Committee calling for an explanation of his conduct. In that letter (**Exhibit 1, page 76**) the Practitioner informed the Committee that he tendered the apology to Mr Monaco when his principal telephoned him from Europe instructing him to do so. He stated that as a restricted practitioner then, he obeyed his principal's instruction. In the ultimate paragraph of his letter, he stated:

> I have reasons (sic) to believe at all material times that my allegations in the letter of the 4th of January 2005 were true then and they are even truer today.

58 He repeated in evidence that he only apologised because 'his boss' had phoned to ask him to do so, 'I had to apologise' (T:81, 11.10.11).

59 The Practitioner's letter to the Committee contains further allegations against Mr Monaco of misleading and other improper conduct (**Exhibit 1, pages 84 - 85)** but these do not form the subject matter of a complaint against the Practitioner and therefore need not be dealt with by the Tribunal.

60 An ordinary perusal of the letter reveals allegations of the most serious nature against a colleague, allegedly acting in a predatory manner in order to deprive his client of her properties. Ms Whitehead and Godfrey Virtue are accused of using threats against his client and backing the Strata Managers in their efforts to defraud his client and he threatened legal action against them for damages for 'tortious acts' committed upon his client.

61 In the absence of convincing evidence substantiating such allegations, the seriousness of such accusations is patent. They would be outrageous and gratuitously offensive if not supported by objective evidence which would compel a trier of fact to come to no other conclusion. We proceed to examine the evidence given by the Practitioner in support of these allegations.

62 In his evidence, the Practitioner stated there was valid evidence that 'Monaco' was making a fictitious claim for money and referred to a report of a private investigator that demonstrated that the money was not due (T:77, 11.10.11). No such report was produced nor was the unidentified

private investigator called to give evidence to that effect. No documentary evidence supporting the Practitioner's allegations was placed before us.

63 The Practitioner also stated that the basis for the allegations made against 'Monaco' was that the latter had sent a letter to the Board which triggered the complaint against him (T:77-78, 11.10.11). The evidence of the Practitioner on this aspect must be rejected because the letter was written prior to the complaint being made to the Board on 19 January 2005; (**Exhibit 1, page 68**).

64 In cross-examination, it appears that:

(i) the Practitioner's client had informed him that she had received several demands for money which she had paid; and

(ii) the letter was the first communication the Practitioner had with Godfrey Virtue (T:80, 11.10.11).

65 We find it extraordinary that the letter should have been written in the terms set forth above when that was the first communication and that the defence was that the moneys due had been paid. In fact, the Practitioner was unable to explain, in his evidence, why he did not simply state in the letter that the debt had been paid.

66 Apart from the report of the unidentified private investigator, his only other source for his allegations in the letter was his client who was also not called. However, it transpires that she showed him many previous demands made. He believed her implicitly on the basis that 'Dr Chan does not make false accusations' (T:79, 11.10.11).

67 While it is the undoubted duty of a practitioner to carry out the instructions of a client, that duty is not an unbridled one. Where a client informs a practitioner that the opposing party has committed fraud, great care must be taken by that practitioner to satisfy himself that a proper basis for such an allegation has been made. It is certainly not sufficient for the practitioner to accept the say-so of his or her client and to merely repeat that assertion, for to do so would, in our view, constitute misconduct of the most serious kind. Where, as in this case, the allegation of fraud or dishonesty is made by a client against a fellow practitioner, the duty to make extensive precautionary enquiries in order to verify the allegation before levelling an accusation of the kind made in the letter becomes paramount. Moreover, should such investigations fail to satisfy

the practitioner that such a serious allegation can reasonably be made, the practitioner must refuse to make it, notwithstanding the insistence of his client. Should the client persist in requiring the practitioner to make such an allegation in the absence of supporting evidence, the practitioner should refuse to act for that client.

68 In the case before us, no evidence, whether oral or documentary, was adduced which would justify a reasonably competent practitioner making the allegations contained in the letter. The assertion that his client does not make false allegations does not begin to satisfy the duty incumbent on a practitioner. We do not accept the evidence of the Practitioner that there was a report by a private investigator supporting those allegations when neither the nameless investigator was called nor was the alleged report or its contents placed before us.

69 We accordingly find that the Practitioner failed to treat a professional colleague with the utmost fairness and courtesy and that he made allegations of improper conduct against fellow practitioners without a reasonable or proper basis for doing so. We find further that his conduct involved a substantial failure to reach or maintain a reasonable standard of competence and diligence and that he is accordingly guilty of professional misconduct.

Complaint C - Taylor

70 This complaint is similar to the immediately preceding one as it also involves serious allegations of discourtesy to a professional colleague.

71 At all material times, the Practitioner represented Ms Nancy Hall in a Supreme Court action (CIV 1131 of 2006) against Mr Maurice Frederick Law, Ms Cheryl Law and Spunter Pty Ltd (**plaintiffs** or **Spunter**). The plaintiffs were represented by Mr David Taylor.

72 In separate proceedings in the Magistrates Court, Mr Law was the plaintiff in an action against the Practitioner for the sum of $300 which he claimed pursuant to an order for costs made in the above Supreme Court action on 12 June 2006.

73 On 31 July 2006, the Practitioner sent a facsimile (**facsimile**) to Mr Taylor alleging inter alia that Mr Taylor had used 'underhand tactics' in relation to the filing of a writ in the Supreme Court action, implying that he had improperly altered the filing date of the writ.

74 The Practitioner also filed a Summary of Facts Relevant to the Defence in the Magistrates Court action dated 28 July 2006 in which he stated that Mr Taylor or his agent had misled the Court.

75 On 9 August 2006, the Practitioner swore an affidavit in the Magistrates' Court action, referring to the facsimile and stating that Mr Taylor had deliberately misled Registrar Powell on 16 May 2006 (**SFC page 9 - 10, paras 26 - 31**).

76 In his response, the Practitioner has admitted the above allegations save and except in two respects:

(a) he denied he was the solicitor of record in CIV 1131 of 2006. His response in this regard, relevantly reads as follows:

> The practitioners (sic) refused to be embroiled in CIV 1131 of 2006 because of the foul play by Mr David Taylor in falsifying the court records that CIV 1131 of 2006 was filed and served by the compliance date 10.2.2006 when it was only done at the instigation of the practitioner on 16.2.2006 after being alerted by the practitioner on 15.2.2006. The practitioner did not voluntarily enter his memorandum of appearance in VIV 1131 of 2006 but was so induced by barrister Alan Camp to do so upon the importunation (sic) of his client the late Ms Nancy Cloonan Hall. Mr Alan Camp had undertaken to take out the practitioner's name from CIV 1131 of 2006 when the former decided to pull out of the case (**Response page 14, para 27**); and

(b) in regard to the $300 claim in the Magistrates Court action, he states that it 'was a frivolous and vexatious claim induced by the misrepresentation of Mr David Taylor to Registrar Powell ….' (**Response page 14, para 28**).

77 The Practitioner has repeated his assertion of underhand tactics in para 29 of his Response, claiming that the allegation is 'true and beyond doubt'.

78 The Committee contends that the Practitioner had no reasonable or proper basis for making those statements. It contends further that those statements were in the circumstances improper and are reasonably to be regarded as disgraceful or dishonourable by practitioners of good repute and competence (**SFC page 10, para 32**).

79 The Practitioner denies those contentions, alleging that he had a reasonable and proper basis for making the statements attributed to him. A précis of his allegations justifying his conduct is that Ms Hall, in a certain affidavit, attested to the fact that CIV 1131 of 2006 was never filed on 10 February 2006 as claimed by Mr Taylor, that Mr Taylor was involved, through his agent, Mr Patrick O'Brien, in the falsification of the Court records and he swore a false affidavit to that effect, Mr Taylor's conduct in denying him access to the Court before Simmonds J, the latter's expression of doubts as to the veracity of Mr Taylor's affidavit 'but his hands were tied and yet in his judgment he expressed a subconscious desire that the matter be decided again by the Court of Appeal' and that a letter from Registrar Powell to him dated 11 June 2009 stated that the Court fees for the writ of summons of CIV 1131 of 2006 were received by the Court's treasurer only on 16 February 2006 … . (**Response page 14, para 32**).

80 We have had considerable difficulty in understanding and dealing with certain aspects of the Practitioner's response. We have already adverted to the prolixity of his allegations which largely consist of evidence liberally interspersed with conclusions, assumptions and irrelevant, argumentative and emotive matters. Many of the allegations made in the Response were not mentioned, let alone canvassed, in his evidence.

81 The case of the Committee is simple enough. The task confronting us is to determine which of the multiplicity of the Practitioner's allegations are causally related to the Committee's case and if so, whether they reasonably justify the comments made by the Practitioner in relation to the conduct of Mr Taylor.

82 The complaint in effect, boils down to two separate issues; first, the alleged 'underhand tactics' in altering the date of filing of the writ in the Supreme Court action and secondly, misleading Registrar Powell into believing that he was the solicitor of record in the Supreme Court action when - as he alleges - he was not.

83 In relation to the alleged falsification of the writ, the evidence reveals that the writ had to be filed and served on 10 February 2006. The Practitioner has alleged that it was only filed on 16 February 2006 after Mr Taylor was alerted by him the day before that the writ has not been filed timeously and that Mr Taylor had used underhand tactics by improperly falsifying the Court records to indicate that the writ had been

filed on 10 February 2006, or that the alteration of the date on the writ was 'done at the instigation of the Practitioner on 16 February 2006 …'.

84 The writ in question was handed into evidence (**Exhibit 1(B)**). In the middle of the writ appears a date stamp, '10 Feb 2006' while at the right hand bottom of the page, a further stamp bears a date at which the Court fees were assessed as '10 Feb 2006', the zero of the figure '10' having been altered manually, to a '6'.

85 In his cross-examination, the Practitioner claimed that the date stamp, '10 February 2006', appearing twice on the writ was not authentic. His evidence was that 'maybe somebody got an official to put the date of 10 February 2006 on the writ' (T:21, 12.10.11). He deposed further that 'Taylor or his agent caused the stamp to be backdated to 10 February 2006' (T:22, 12.10.11). This evidence is highly speculative and cannot be accepted as a reasonable basis for the serious allegations which were made against Mr Taylor.

86 Similarly, we are unable to accept his evidence that '2 people told me the writ had not been filed' (T:23, 12.10.11). Apart from the fact that the evidence is clearly hearsay, no indication is given as to the identity of the two persons and the circumstances under which such information was forthcoming. The Practitioner's evidence that his client had also told him so, having made several visits to the Registrar's office, is similarly hearsay and vague and is rejected.

87 On the other hand, part of the four document bundle, marked **Exhibit 1(B)**, is a document headed 'Payment Account' issued by the Supreme Court, which reveals that the fee payable for the writ of summons was $654.20 and the 'payment details' were as follows:

Personal cheque - Receipt No SCR 1348 -	10/2/2006	654.00
Cash - Receipt No	10/2/2006	.20
		654.20

88 In elaboration of the date stamps on the writ and in reply to the Practitioner's letter to him, Registrar Powell wrote relevantly as follows:

> You state you have a copy of the writ. In that case you will note it has 2 dates on it:
>
> The first is 10 February 2006 with a notation that the fee was $654.20.

> The second is the assessment which in its original form shows a date of 10 February 2006 and an assessment no. of 201702. That assessment was cancelled after close of business on 10 February 2006 when it was realised by the Court that the cheque tendered for payment was $654.00 and was therefore 20 cents short.
>
> I assume that fact was forwarded to the plaintiff's solicitors because on 16 February 2006 the correct amount was paid; $654 by credit card and 20 cents cash. The assessment stamp date was altered to 16 February 2006 and the new assessment no. 202483 entered on the altered stamp.
>
> The assessment number is given on payment.

89 The assumption made by Registrar Powell above appears to accord with the probabilities. Whatever the actual explanation, what remains clear is that there has been no credible evidence adduced before us to suggest that Mr Taylor altered the date stamp or in any way, whether by himself or that he or his agent instigated its alteration.

90 We accordingly find that the Practitioner had no basis whatever for making the serious allegations that Mr Taylor was guilty of underhand tactics or that Mr Taylor had falsified court documents by improperly altering the filing date of the writ. The fact that he continued to repeat those allegations in his correspondence with the Committee and in the evidence before us accentuates the irresponsible conduct embarked upon by him.

91 It should be noted that our conclusions in relation to the alleged falsification of the dates on the writ accord with the findings of Simmonds J in ***Spunter Pty Ltd v Hall [No 2]*** [2007] WASC 239, before whom the identical allegations were made without success (at para 117).

92 The second aspect of the Taylor complaint relates to the allegation that he (Mr Taylor) had deliberately misled Registrar Powell, by failing to inform him that the Practitioner was not the solicitor of record in the Supreme Court action.

93 The background to this allegation has been set out above where the contents of para 27 of the Practitioner's Response are set out. As we have understood the Practitioner's case, he was persuaded by barrister Alan Camp to enter a memorandum of appearance as the defendant's solicitor in the Supreme Court action, but did not do so voluntarily. Apparently, Mr Camp indicated that he needed to have an instructing solicitor on record in order to appear for Mrs Hall, who prevailed upon the

Practitioner to enter appearance on her behalf, which he did; (**Exhibit 1, page 154**).

94 When Mr Camp decided at a later stage to withdraw from the case, he understood Mr Camp would 'take out the practitioner's name from CIV 1131 of 2006' (**Response page 14, para 27**). Despite this alleged understanding, Mr Camp did not do so.

95 On 2 May 2006, the Practitioner attempted to file a Notice of Ceasing to Act as from 28 March 2006; (**Exhibit 1, page 131**). That document was not accepted for filing for reasons not relevant for present purposes; (**Exhibit 1, page 132**) and he was informed that he remained on record as acting for Ms Hall. He was informed further that if he wished to be removed as solicitor for Ms Hall, he had to make an application to that effect; (**Exhibit 1, page 135**).

96 On 4 May 2006, the Practitioner sent a detailed facsimile to the Registrar indicating a history of his appearance for Ms Hall and indicated he no longer wished to act for her; (**Exhibit 1, page 137**). On 16 May 2006, the Registrar referred to the above facsimile and informed the Practitioner that as of that date he remained on the record as acting for Ms Hall; (**Exhibit 1, page 138**). The Practitioner in a further facsimile dated 16 May 2006 informed the Registrar Powell that he did not agree that he still remained on the record; (**Exhibit 1, page 139**).

97 The Practitioner alleged that it was on 16 May 2006 that Mr Taylor intentionally misled the Registrar by failing to inform him that the Practitioner was not representing Ms Hall. (**Exhibit 1, page 103 para 3**; **page 110 para 9**).

98 Although he deposed in cross-examination that he told Mr Taylor he was never on record as solicitor in the Supreme Court action, the documents referred to above indicate the contrary. He repeated his denial despite what the Registrar had said (T:16-17, 12.10.11).

99 He stated that he was fully aware that the accusations he made against Mr Taylor were serious (T:19, 12.10.11) but persisted in alleging that Mr Taylor was under a duty to inform Registrar Powell that he did not act for the defendant.

100 In light of the Court records and correspondence from the Court, the Practitioner's attitude is perplexing. Moreover, the Tribunal has difficulty in finding any basis for the alleged obligation on Mr Taylor to inform the Registrar as the Practitioner asserts he should have done, particularly in

view of the fact that the Court documents state the contrary. Indeed, it would have been misleading of Mr Taylor to have informed the Registrar that the Practitioner did not represent Ms Hall when the Court records indicated the very opposite.

101 We accordingly find that there was no basis whatsoever for stating that Mr Taylor deliberately misled the Registrar. The seriousness of making such an allegation against a colleague is self-evident.

102 In relation to Complaint C, we find that there was no reasonable basis for the Practitioner's allegations that Mr Taylor had resorted to underhand tactics in falsifying a Court document. Nor was there any basis whatsoever for stating that Mr Taylor deliberately misled Registrar Powell. These allegations were recklessly made and the Practitioner's conduct, as such, involves a substantial failure to reach or maintain a reasonable standard of competence and diligence. We therefore conclude that the Practitioner is guilty of professional misconduct.

Complaint D - Mathias

103 In or about July/August 2004, Ms Mathias (**Client**) approached the Practitioner to prepare a will and trust deed. She also sought his assistance in furthering an insurance claim. Following on from these instructions is a series of complaints which we deal with seriatim below.

(a) Failure to carry out instructions for inclusion in the will

104 In its SFC at para 35, the Committee alleges that in or about July 2004 the Practitioner, at the request of the Client, attended on the Client at her home for the purpose of taking instructions to draft a will. The Client instructed the Practitioner to draft a will which provided, *inter alia,* for:

(i) the appointment of the National Australia Bank as executor and trustee; and

(ii) 60% of the Client's estate to be the subject of a trust and that the joint trustees be the Secretary of the Australian Episcopal Conference of the Roman Catholic Church and an executive director of Oxfam Community Aid Abroad. The trustees were to hold the funds on trust for 5 years and pay all capital accrued after that time to a number of named beneficiaries as specified by the client.

105 The Practitioner denies that the Client provided 'the specificities' (**Response page 15, para 35**). His Response, however, contradicts his statement to the Committee dated 5 October 2004 outlining the history of his relationship with his client, in which he records detailed instructions given by her when the costs agreement referred to below was signed (**Exhibit 1, pages 193 - 194, para 6**).

106 He drafted a will and trust deed which appointed himself as co-executor 'to supervise my Executor which is the Trustee Department of the National Australia Bank …' (**Exhibit 1, page 174**). In cross-examination, he stated that he drafted the will according to the Client's instructions and that it was her suggestion that he should be the Executor (T:42, 12.10.11). The latter is in conflict with what he informed the Committee in a letter in answer to the complaints dated 30 October 2004, in which the suggestion of appointing the Practitioner as Executor came from him (**Exhibit 1, page 191(e)**).

107 The probabilities are that he and not the Client in fact suggested his appointment as Executor and Trustee. This finding is supported by the contents of a Professional Activity Report forwarded to the Client on 23 August 2004, (**Report**). The Report, in the nature of an invoice, describes the work performed by the Practitioner, the time taken to perform the work and the amount charged therefor. The Report (**Exhibit 1, page 214)** contains, inter alia, the following notation:

> (b) Discuss her legal problems of dealing with her then current corporate executor who might mishandle her property when she is no longer living;
>
> (c) Advising that it is possible to appoint a solicitor as the co-executor of her will together with her National Australian Bank so as to introduce a system of checks and balances.

108 We accordingly reject his evidence that the suggestion of his appointment as executor came from the Client. That finding, however, does not necessarily mean that he failed to carry out her instructions.

109 The Client did not give evidence. Her untested version of events is found in her witness statement dated 7 January 2010 (**Exhibit 6**) in which she states that the will drafted for her did not accord with her instructions in that it named him as a joint executor and trustee which she had not instructed him to do, and it did not contain the named beneficiaries specified by her (**Exhibit 6, para 6**).

110 Despite the conflict referred to above, we are unable to find against the Practitioner to the degree of satisfaction necessary in such matters, particularly in light of fact that the Client did not give evidence. Accordingly, we find that the allegation that the Practitioner failed to carry out instructions has not been made out.

(b) Failure to reach reasonable standard of competence in drafting the will and trust deed

111 In preparation for the drafting of the will and trust deed, the Practitioner prepared a 'Memo of Legal Advice' (**Memo**).

112 A perusal of the drafted will, trust deed and the Memo reveals a complex, convoluted set of documents, often difficult to follow. The Memo (**Exhibit 1, pages 197 - 208**) is an 11 page closely-typed document, dealing with a host of issues relating to wills, which were totally unrelated to the client. For example, one and a half pages are devoted to a discussion of testamentary capacity and sanity of a testator with a citation of numerous cases, including quotations from cases, in support of the requirement that a testator must be of sound mind. The Memo goes on to deal *inter alia* as to when a will takes effect and the difference between *inter vivos* gifts and testamentary gifts. None of these issues have been tailored to, or were even remotely relevant to, the needs of the Client; her ability to make a will was never in question, nor were any of the numerous issues raised in the Memo of any practical use to the client.

113 In the Report, the Practitioner records that he informed the client that the Memo 'had taken more than five hours in my research time to prepare and that I was going to charge her for only two hours' (**Exhibit 1, page 215**). The Memo, in our view, is a classic case of over servicing of the Client.

114 The draft will itself purports to permit the testator to alter its terms by merely signing a memorandum which 'references this Will and is associated with a copy of this Will' (**Exhibit 1, page 174**). That this provision in the will does not meet the requirements of a valid codicil should be known to any law student.

115 The above involves a substantial failure to reach or maintain a reasonable standard of competence and diligence. We therefore conclude that the Practitioner is guilty of professional misconduct.

(c) Altering the written costs agreement after it was signed by client

116 On 12 July 2004, the Practitioner drafted a costs agreement in his own handwriting in which the Client appointed him to prepare the will and trust deed for the sum of '$400 payable upon the execution of the deed and the will'. At the end of the document, the following words are added: 'Extra 5 hours at $175 for written legal advice' (**Insertion**).

117 The document was signed by the client and witnessed and dated by the Practitioner (**Exhibit 1, page 213**).

118 A dispute exists as to when and in what circumstances the Insertion was made. The Client states in her Witness Statement that the Insertion did not appear on the document which the Practitioner presented to her and which she signed (**Exhibit 6, para 4**).

119 The Practitioner, in his response, states that the Insertion was made in the presence of the client and with her consent and 'she signed it [the costs agreement] to signify it as such' (**Response page 15, paras 37 - 38**).

120 The Committee called Mr John Douglas Gregory, an expert document examiner with over 30 years continuous experience in handwriting and document examination. He examined the costs agreement. By a series of tests referred to in his report dated 6 July 2009 (**Exhibit 1, pages 228 - 237**), he came to the conclusion that the Insertion was made 'using a different pen than that used to write and sign the agreement document dated 12 July 2004'. He then said 'I am unable to comment when this questioned entry was added to the document' (**Exhibit 1, page 237**).

121 Because the Practitioner did not challenge the findings of Mr Gregory, it is not necessary for the Tribunal to detail the various tests used by him to arrive at his findings. The only comment made by the Practitioner was that there were a number of pens on his desk and he must have picked up a different pen to make the Insertion (T:54, 12.10.11).

122 The evidence of the Practitioner is contradictory. In his Response he pleaded that the Insertion was made <u>before</u> signature, but in his evidence in chief he stated that it was made <u>after</u> the agreement was signed. He said that he had worked more hours and he added the extra words (T:54, 12.10.11). It should be noted that, although in his evidence the Insertion was made because the trust would take time, the extra words were expressed to relate to five hours for 'written legal advice', which

according to the Report (**Exhibit 1, page 215**) was the actual time taken by him to draft the Memo, completed two days after the costs agreement was signed.

123 An examination of the written agreement reveals that the inserted words have been added in the small space between the end of the written text and above the signature. Had the Insertion been made prior to the signature, it would have been unnecessary in our view to squeeze the words in, as they appear to be. We accordingly find that the Insertion was made after the document was signed and was made with a pen different to the one used to write the main portion of the costs agreement.

124 The important question arises as to whether the client consented to pay $175 for legal advice taking five hours as reflected in the words added by the Practitioner. The Practitioner conceded that he knew that additions made to the document should be initialled (T:55, 12.10.11), but he did not think of having the document initialled at the time. The initialling of alterations to documents is so fundamental that we cannot accept his evidence that he did not think of it at the time. He knew that the addition was important, as it clearly was (T:54, 12.10.11).

125 Notwithstanding the fact that the Client's Witness Statement (to the effect that she agreed to pay $400 for the will and trust deed and that the inserted words did not appear on the document which she was given to sign (**Exhibit 6, para 4**), was untested in cross-examination because she did not give evidence, we find that the Insertion was not made in her presence nor with her consent. The probabilities indicate that, had she consented to the additional fees, the Practitioner would most certainly have insisted on her initialling this most important change. We reject his evidence that he forgot to have the agreement initialled 'in the spur of the moment' (T:55, 12.10.11). The initialling could have been done after leisurely reflection at a later stage.

126 The seriousness of the insertion of additional provisions into a costs agreement without the client's consent cannot be over-emphasised. Such conduct is at the top end of professional misconduct, and we accordingly make that finding in relation to the Practitioner in this instance.

(d) Charging client fees in excess of the agreed amount

127 This complaint is linked to the Tribunal's findings in the immediately preceding complaint by the Client. In order to deal comprehensively with this complaint, it must be noted that about ten days after the Client instructed the Practitioner to draw the will and trust deed, she instructed

him to prepare a letter to be sent on her behalf to Mondial Insurance in respect of a travel insurance claim for lost luggage (**Insurance Claim**). The Practitioner advised her that he would charge her $100 to prepare such a letter which he duly did (**Exhibit 1, page 188**) (**SFC para 39, page 11**).

128 In his Response (**page 15, para 39**) the Practitioner alleges that the Client agreed to pay him 'about $300 if I were successful in her claim attained of at least $1,000'. He averred that this was written down by the client and signed by her. This appears to be supported by a note scribbled in what appears to be the Practitioner's handwriting and signed by the Client on 20 July 2004, that if the claim is successful for about $1,000, a fee of $300 would be payable (**see Annexure NCC - 12C to the Response**). In a letter to the Committee dated 5 October 2004, the Practitioner repeated that the client agreed to pay $300 'but had to pay an upfront fee of $100' (**Exhibit 1, page 189**).

129 The Insurance Claim was settled for the sum of $1,591. The cheque was sent to the Practitioner who indicated to the Client that he was holding that cheque in trust 'pending your settlement of our bill of costs' (**Exhibit 1, page 184**).

130 The bill of costs rendered to the client on 23 August 2004 (**Exhibit 1, page 185**) of $1,732 purported to charge the Client for work performed and attendances in relation to the preparation of the will and trust deed at an hourly rate of $175, making a total (excluding GST) of $1,225. There is no mention in the bill of the sum of $400 for drawing the will and trust deed referred to in the costs agreement signed by the Client.

131 By reason of our above finding that the insertion was added to the signed costs agreement without the Client's knowledge and consent, the bill of costs represents a fee that is not only grossly excessive but outrageous.

132 In relation to the fees rendered for the Insurance Claim, despite the conflict between the Client and the Practitioner on the fee agreed upon, the fee charged by the client of two hours at $175 per hour, on any basis of the various versions which he gave, was excessive. As shown above, he agreed to work on the Insurance Claim for $300. No hourly fee had ever been agreed upon and a charge of $350 for the work, even on the version most favourable to the Practitioner, was excessive.

133 We accordingly find that the charging of fees for his work on the will and trust deed was grossly excessive and in respect of the Insurance Claim

excessive. We are of the view that his conduct in so doing has been dishonest and amounts to professional misconduct.

(e) Intemperate and offensive language in letter to client

134 The Client terminated the Practitioner's mandate on or about 19 August 2004. In a letter to the Client dated 23 August 2004 (**Exhibit 1, page 184**), the Practitioner recorded the Client's withdrawal of her instructions, and enclosed the bill of costs referred to above.

135 In regard to the above complaint, the letter relevantly states as follows:

> As a learned person and a professor in your own field, you are now equipped with the 'professional knowledge' that you have improperly and stealthily acquired from us to benefit yourself in a way you think is most fit and most economical to you … In short, you have induced us to provide you with draft copies of our handiwork in order to serve your private purpose to defraud us of our professional fees by refusing to give the necessary details to render the instruments we were preparing for you complete and perfect …'

136 The intemperate and offensive nature of the language used speaks for itself. In his Response, the Practitioner seems to admit that 'the letter was in all the circumstances offensive' (**Response page 16, para 45**). In cross-examination, it was put to the Practitioner that the letter should not have been sent in such terms. His response was that if the allegations were true, he could see nothing wrong with the letter (T:49, 12.10.11). He stated that he used the word 'defraud' in the sense that his Client 'used me all the time' (T:49-50, 12.10.11)

137 We find once more that his conduct is most unseemly and totally unbecoming of a legal practitioner. We need say no more than that this is not the conduct which a member of the public is entitled to expect from **any** practitioner, let alone a reasonably competent one. His attempt to justify his conduct and to water down the meaning which he sought to ascribe to the word 'defraud' merely exacerbates the position. We accordingly find the Practitioner guilty of professional misconduct.

(f) Attempt to subvert the jurisdiction of the Committee

138 The submission of the bill of costs to the Client gave rise to a dispute with the Practitioner. The dispute was finally settled and in a letter written by the Practitioner to the Client dated 19 October 2004, the Client agreed to pay $300 in full and final settlement of all claims whatsoever

and howsoever arising from the dispute (**Exhibit 1, page 220**). The letter then ended as follows:

> By signifying your acceptance of the full and final settlement of this dispute and by way of your signing at the space provided below, you have agreed that you shall withdraw all complaints that you have already made or will make to the Legal Practice Complaints Committee with regard to the dispute.

139 The Client signed the letter accepting the terms and her signature was witnessed by the Practitioner on the same date (**Settlement Letter**).

140 The Committee contends that the above quoted portion of the letter attempts to subvert the jurisdiction of the Committee (**SFC pages 13 - 14, para 49**). In his Response, the Practitioner refers to a 'Memorandum' signed by the Client, who contacted him 'in the aftermath of the complaint to the LPCC'. He alleges that 'she indicated in that memorandum that she volunteered that settlement upon terms which she agreed and that she volunteered to withdraw her complaint without any compunction. She has put her thought and intention in black and white and she is estopped by her conduct to contradict the terms of her written document witnessed by the Practitioner'; (**see Response page 16, para 48, Annexure NNC - 9 and NNC - 10**).

141 The memorandum to which the Practitioner refers is presumably the Settlement Letter. No other document placed before us was produced relating to the settlement of the fee dispute other than the Settlement Letter and Annexure NNC - 9 attached by the Practitioner is the Settlement Letter. The Annexure NNC-10 attached to para 48 of the Response in support of the allegations made in that paragraph has nothing to do with those allegations but deals almost exclusively with alterations made to the will and trust deed.

142 There is no evidence before us indicating that 'she volunteered to withdraw her complaint to the Committee', and the documents which he has attached to his Response do not bear out those allegations.

143 In his evidence in chief, the Practitioner stated that when he drafted the Settlement Letter, the complaint to the Committee had not been made. He stated that the complaint had only been made on 1 September 2004, after settlement (T:41-42, 12.10.11). In cross-examination he stated that when he drafted the Settlement Letter, he was unaware that a complaint had been made. He stated that he added the last sentence about the LPCC because 'she is astute and I thought she might complain' to that body. It

was put to him that, in that case, there was no need to mention the LPCC in the Settlement Letter, to which he replied that it stopped her from changing her mind (T:57, 12.10.11). He stated further that the last sentence in the Settlement Letter was his idea (T:58, 12.10.11) which is contrary to the statement in the Response that the client volunteered to withdraw the complaint.

144 The evidence of the Practitioner that the complaint to the Committee had been made after the Settlement Letter had been drafted and that he was unaware of any complaint at the time of drafting that letter is demonstrably false. On 5 October 2004, (two weeks before the Settlement Letter was drafted), the Practitioner's principal responded to a complaint made by the Client to the Committee (**Exhibit 1, page 217**). That letter was, in turn, in response to a letter from the Committee to the Practitioner's firm dated 22 September 2004. It is inconceivable, in our view, that the Practitioner was unaware of this correspondence from 22 September 2004 to 19 October 2004 when he drafted the Settlement Letter.

145 We accordingly reject his evidence that he was unaware of any complaint when he drafted the Settlement Letter and the allegation in the Response that it was the client who volunteered to withdraw the complaint. If, on his evidence, he was indeed unaware of a complaint having been made, to what complaint was he referring when he drafted the last sentence of the Settlement Letter?

146 We accordingly come to the conclusion that the Practitioner's intention in drafting the last sentence of the Settlement Letter was to attempt to terminate the proceedings already on foot before the Committee. The effect of that conduct was an attempt to subvert the jurisdiction of the Committee. We find that a practitioner who attempts to interfere with and undermine the work and proceedings of the regulatory body is guilty of professional misconduct and we so find in relation to the Practitioner's conduct.

Complaint E - Hall

147 This matter again involves the Practitioner's client, Ms Nancy Hall, along with Spunter, both of whom featured in complaint C above.

148 On 26 July 2002, Spunter lodged two caveats over land belonging to Ms Hall, in relation to a loan made by Spunter to Ms Hall.

149 Ms Hall denied that Spunter had a caveatable interest in the land.

150 In January 2005, Spunter commenced proceedings in the Supreme Court (CIV 1142 of 2005) to extend the operation of the caveats. The Practitioner represented Ms Hall in those proceedings.

151 On 20 January 2006, her Honour Justice Jenkins published her decision in the matter. Spunter's application to extend the caveats was conditionally upheld.

152 On or about 13 February 2006, the Practitioner wrote to her Honour's associate and in that letter he said (**Exhibit 1, page 239**):

> I refer to the written judgment of the above matter which was delivered by Her Honour Justice Lindy Jenkins in open court on the 20th day of January, 2006. This judgment is reported and cited as SPUNTER PTY LTD -v- HALL & ANOR [2006] WASC 6. I represented and still represent the First Defendant but the Second Defendant, the Registrar of Titles of Western Australia, was not represented and will be accordingly be notified by the First Defendant as to the outcome of this matter.
>
> My client first made a section 138B application to the Registrar of the Supreme Court of Western Australia to have the two caveats of the Plaintiffs against her Hazelmere and Grosvenor properties removed. But the Plaintiffs applied to have the operation of the caveats extended. Consequently, Her Honour extended the operation of the caveats conditionally so as to enable the Plaintiffs to file an equitable right claim over my client's two properties in the Court within 21 days. Her Honour through the intercession of Counsel for the Plaintiffs invoked the Section 138B statutory 21-day period to be granted and to be made available to the Plaintiffs once again for this purpose for which I as counsel for the First Defendant had reluctantly agreed to. Her Honour had initially suggested a 14 day compliance period for her conditional order to extend the operations of the impugned caveats. This 21-day period has now elapsed with the consequence that those impugned caveats are now automatically 'lapsed' in accordance with a proper interpretation of subsection 138B(1) of the Act in light of the prevailing circumstances.
>
> In view of the inordinate delay and the consequent damages which the Plaintiffs had already caused to my client in accessing her funds and addressing the needs of her mortgagees coupled with the urgent requirements of the Learned Judge Greaves of the Liquor Licensing Court for the Colliefields Hotels to be operating again, I am therefore inquiring from the learned Justice Jenkins the following:
>
> a) Whether I should be making a formal ex-parte application under subsection 138C(3) of the Act, by way of Summons in Chambers through the 'delaying process' of the court to seek an interim order for the cessation of the operations of the impugned caveats, OR

b) Whether Her Honour would automatically exercise her discretionary powers and make the Orders sought for by the First Defendants as indicated in the attached DRAFT ORDER FOR APPROVAL dated the 11th day of February, 2006 in its amended form if need be, forthwith, without any further representation by counsel for the First Defendant in an ex-parte application for an interim order under subsection 138C(3) of the Act. This latter course of action is the preferred one as it would save the First Defendant's further costs.

If the learned Justice agrees to the latter course of action, I am assuring her Honour that there will be no issue of a conflict of interest or conflicting interests arising out of this matter for me to content (sic) with as solicitor and counsel for the First Defendant. I have now been assured by the First Defendant in writing that my legal fees have not been and are not being made contingent upon the outcome of this case.

153 The Practitioner does not deny these contentions but does attempt to explain his actions (**Response pages 17 - 18**).

154 Once more, we have considerable difficulty in understanding the Practitioner's explanation. He says in his Response that his purpose in communicating with her Honour 'is to promote judicial activism'. He mentions the 'peculiar circumstances of the late Ms Hall' and says that she has been taken advantage of and that his purpose was 'to provide information to … the Supreme Court who are exercising inquisitorial or investigative functions for the purpose of setting aright the administrative functions of the Courts'. He considers that his communication is 'essential to good government and must be capable of taking place fearlessly'.

155 He refers to his 'administrative communication' as a 'legal necessity' and he says that he should be 'excused as the harm done to the late Ms Hall would be greater by the omission of that administrative communication rather than by its commission'.

156 The Practitioner then says that '[t]he particular circumstances of the case did not permit the Practitioner to communicate administratively with the solicitors for the other party until it was the ripe time for him to do so and he did so as reasonably soon as he could on 15.2.2006 as he recognises that his duty towards the court is paramount to his client's interests' (**Response page 17**, **para 59i**). He did not intend, he says, to 'usurp the powers of the judiciary nor for tampering with the impartialities, integrity and independence of Justice Jenkins'. Somewhat at odds to that statement, though, he continues by saying that 'the administrative communication' was in the nature of 'a complaint

procedure against the errant solicitor for the other party for investigation and is a step in those proceedings'.

157 He concludes by saying that as a consequence of his explanation, the assertions made by the Committee are 'incorrect having regard to the above circumstances'. His final statement in this regard is as follows:

> This is in conformance with the principle of *ubi jus, ibi remedium*. Where law prevails, there is a remedy.

158 At the hearing, the Practitioner explained that in writing to her Honour's Associate he was merely attempting to alert the Court to the fact that the period of 21 days, during which the caveator was to substantiate its claim of a caveatable interest in the land, had expired. He somewhat reluctantly accepted that this was not an issue that he could expect to resolve by writing to her Honour's Associate, but he remained adamant that 'Jenkins J should be proactive' (T:61, 12.10.11).

159 He conceded that what he was actually seeking was an order that the caveats had ceased to operate (T:63, 12.10.11).

160 He was asked by the Tribunal at least four times whether he had sent to Mr Taylor a copy of his letter to her Honour's Associate and he finally stated that he had not (T:65, 12.10.11).

161 There is no doubt that the Practitioner was seeking advice from the Court as to what his next steps should be - that is evident from the terms of his letter, in the passage beginning 'I am therefore inquiring from the learned Justice Jenkins the following:'.

162 However, whatever his reasons for writing to her Honour might have been, there is a fundamental principle that there should be no communication between a judge and one of the legal advisers of a party, otherwise than in the presence of, or with the previous knowledge and consent of, the other party. This principle is set out by McInerney I in ***R v Magistrates' Court at Lilydale; Ex parte Ciccone*** **-** [1973] VR 122 at 127, in a statement approved in ***Re JRL; Ex parte CJL*** (1986) 161 CLR 342 (**Re JRL**) by Gibbs CJ (at 346). To do so would place the integrity of the judicial process at risk and a failure to disclose that communication will seriously compromise the integrity of that process; ***Re JRL*** by Mason J (at 350 - 351).

163 We find that the Practitioner's conduct in approaching Her Honour seeking her advice, whether legal or administrative, to be improper and

irregular. The Practitioner's attempt to justify his conduct by asserting (in his Response but not in his evidence) that, by doing so, he intended 'to promote judicial activism' manifests a complete failure to understand the ethics and workings of the Australian legal system. Even the most ardent proponent of judicial activism would baulk at the idea of a judge being able to furnish advice of whatever kind to one of the parties to the litigation. We furthermore reject his evidence that he had no time to inform his opponent of his intention to approach Her Honour.

164 The Tribunal finds that the Practitioner's conduct in writing to a judicial officer seeking legal advice in relation to proceedings in which he was retained and in which the judicial officer had delivered a judgment and, in any event, communicating directly with a judicial officer in relation to proceedings in which he was retained without first advising or notifying the solicitors for the other party was, in all the circumstances, a substantial failure to reach the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner.

165 We therefore conclude that the Practitioner is guilty of professional misconduct.

Complaint F - M & J Metals

166 In early 2005 the Practitioner was instructed to act for M & J Metals **(M & J)** in relation to the recovery of a debt of $7,607.65 from WA Patios & Pergolas.

167 On 9 February 2005 the Practitioner wrote to M & J confirming his terms of appointment as its solicitor in the following terms (**Exhibit 1, page 255**):

> I would like to confirm the terms of my appointment as your solicitor in this matter in the following:
>
> a) You pay me the sum of $1,000.00 as a deposit towards my legal fees forthwith.
>
> b) You agree that, in addition to the $1,000.00 above, you will pay me for my total legal costs up to the extent of 30% of $7,608.65 plus costs obtained from the other side, whichever is less upon the successful completion of your claim.
>
> c) All disbursements and out of pocket expenses are to be incurred by you.

168 The Committee alleges in their complaint that the component of 'to the extent of 30% of $7,607.65' represented a fee structure that was contingent upon the amount ultimately recovered by the client. The Committee relies on s 285 of the LP Act which reads:

> **Contingency fees are prohibited**
>
> (1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.
>
> Penalty: a fine of $10 000.
>
> …

169 The Practitioner denies the allegation and contends (**Response page 19**) that in the letter sent to M & J on 9 February 2005 there is a mistake in its contents, namely that the word 'plus' should have been 'or'. The Practitioner goes on to say that the letter should therefore have read:

> … 30% of $7,607.65 **or** the party and party costs the losing party should pay to the winning party (Tribunal's emphasis).

170 The Practitioner states that because the following words, 'whichever is less' suggest that the two items referred to above are separate items and not one item. Thus the 30% is not a contingent sum but a measure of the legal fees payable by M & J.

171 The Practitioner in his Response at page 19 states the following:

> a. He [the practitioner] did not take over the ownership of the debt owning by WA Patios & Pergolas to M & J Metals Pty Ltd.
>
> b. He therefore did not work on a contingency basis for his just remuneration because he did not intend to partake in the fruits of the litigation on a percentage basis.
>
> c. This is despite the fact that 30% of $7,607.65 is mentioned in the terms of the costs agreement. The 30% is only intended by both parties as a measure of the amount of legal fees due and payable for the legal services to be performed by the practitioner.
>
> d. That is why the words 'whichever is less' is [sic] very important to separate the two items.

> e. The practitioner wanted to be paid not 30% of the value of the debt to be collected but the party and party costs that is assessed at 30% of the value of the debt.
>
> f. This means that the practitioner wants to be paid for his legal services irrespective of whether he is successful in collecting the debt for debtor. The legal costs for the work done by him amounts to $2,282.30 only.
>
> …

172 It is interesting to note that the above reference to the total legal costs of $2,282.30 is exactly 30% of $7,607.65, being the total value of the debt. Further, there was no suggestion in the evidence before us that the Practitioner ever informed his client that there was a mistake in the contents of the letter of appointment.

173 Throughout the hearing the Practitioner confirmed that he was aware that as a solicitor he ought not to seek a contingency fee from his client (T:68, 12.10.11) and **Exhibit 1, page 257**. He maintained that the 30% of $7,607.65 represented a 'guide' only and 'The 30 per cent, whichever less, means my fees is not contingent upon the outcome. The outcome is just a measuring rod. Whether or not the outcome has been achieved, my fee is still payable. Therefore I did not agree to a contingency fee…'. (T:66, 12.10.11)

174 Under cross-examination the Practitioner went on further to explain his proposed fee structure at (T:66-67, 12.10.11):

> Mr Chin, if I can break down your proposed fee structure, initially you do request a payment of $1000 as a deposit forthwith?---Yes.
>
> But in addition to that, so in addition to the $1000, you also seek total legal costs?---Yes.
>
> Up to the extent of 30 per cent of the 7000?---Yes.
>
> Plus costs obtained from the other side?---Yes.
>
> Whichever is less?---Not plus costs. Plus costs obtained from the side, whichever is less. Which means that if I win the case for you, I get paid for all my legal work, and the value of the measure of my legal work is based on your debt of $7600. That means it is 30 per cent, whichever is less.
>
> …

> That was contingent on what was recovered by the client, wasn't it?---It is not contingent, because irrespective of whether I recover for you or not, I will get 30 per cent. All right? I will get 30 per cent, and that 30 per cent - and if I get the court costs, that court costs is going to be mine. Which means that if I get the court costs of $500, plus the 2100, so I get $2600.
>
> But within that component is the recovery that's based on 30 per cent of $7607.65?---Yes. Because there's a liquidated debt. So is not contingent on the outcome. Because I want you to pay me $2500, whether or not I win the case for you or not.

175 On balance, the Tribunal does not accept the Practitioner's evidence that the '30% of $7,607.65 represented a guide only'. It is clear on the face of the letter to M & J that the Practitioner sets out a contingency basis for calculating his legal fees. The Tribunal also notes that the Practitioner's argument reflects a poor understanding of the concept of contingency fees.

176 The Tribunal finds that the Practitioner's conduct in seeking to receive remuneration which varies in accordance with the amount that may be recovered, in addition to costs obtained from the opposing party, was in all the circumstances improper and fell short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent legal practitioner. The Tribunal finds that this conduct constitutes unsatisfactory professional conduct.

Complaint G - Tylor, Powell and Fleay

177 On 11 March 2005, the police laid the following charges against Mr Rodney David Tylor, Mr James Francis Fleay and Mr Steven John Powell:

1) Mr Tylor was charged with possession of 2 grams of methylamphetamine and possession of 0.1 gram of cannabis in relation to the items found on his person;

2) Mr Fleay was charged with possession of cannabis with intent to sell or supply in relation to 486 grams of cannabis; and

3) Mr Powell was charged with possession of 3.6 grams of cannabis and possession of a smoking utensil in relation to the items found on his person.

178 According to the Committee, on or before 14 March 2005, the Practitioner acted for all three accused in relation to the charges.

However, the Practitioner in his Response denies this. He says that he interviewed all three accused separately 'in order to find the actual state of affairs' (**Response page 20, para 72**). He says that he subsequently decided to act for Mr Tylor only. He says that Mr Tylor 'represents a pathetic figure that needed his help most' (**Response page 20, para 74(iii)**). However, in the evidence which he gave later at the hearing, he said that he chose to act for Mr Tylor by way of drawing 'a lot'; (T:83, 12.10.11). He states that he believed that Mr Powell was obtaining assistance from Legal Aid and that he told Mr Fleay to engage the services of a lawyer in Collie.

179 It appears to be common ground between the Committee and the Practitioner that between 14 March 2005 and 12 April 2005, the Practitioner performed tasks including:

1) on 14 and 17 March 2005, writing to the Perth Court of Petty Sessions on behalf of all three accused;

2) on 14 March 2005, writing to Perth Police Prosecutions on behalf of all three accused;

3) on 30 March 2005, representing Mr Tylor and Mr Fleay in the Perth Court of Petty Sessions. On that day, Mr Tylor pleaded guilty to possession of methylamphetamine and possession of cannabis and indicated a willingness to plead guilty to possession with intent to sell or supply 486 grams of cannabis (with which he had not been previously charged). On the same day, Mr Fleay pleaded not guilty to the charge of being in possession of the 486 grams of cannabis with intent to sell or supply;

4) on 1 April 2005, writing to the investigating officer on behalf of Mr Tylor and Mr Fleay;

5) on 12 April 2005, providing detailed and joint written advice to Mr Tylor and Mr Fleay; and

6) on 31 August 2005, writing to the Perth Court of Petty Sessions and Police Prosecutions on behalf of Mr Fleay.

180 The Practitioner continued to maintain that he only acted for Mr Tylor. Mr Tylor was originally charged with possession of a

prohibited drug (**Exhibit 1, page 261**) but three days later he was charged with possession of prohibited drugs with intent to sell or supply (**Exhibit 1, page 260**).

181 Mr Tylor apparently pleaded guilty to those two charges. Mr Fleay, on the other hand, pleaded not guilty to the charge of possession of a prohibited drug.

182 As best we can understand it, both men acted on the advice of the Practitioner.

183 The Practitioner disagrees. He says that he did not act for Mr Fleay, but he could not allow 'an innocent person' to be 'blamed for something he had not done' (T:74, 12.10.11). He went on to say immediately after that:

> Here you have one person admitting that the drug is his and the other person denying that the drug was his. Who do I listen to?

184 The Practitioner summarised his approach to the matter in his response (**Response page 21, paras 75(c) and (d)**) as follows:

> …
>
> (c) The truth is not for what the three accused persons had to say for themselves but it was something for the practitioner to ascertain and test it for himself.
>
> (d) As he (the practitioner) was ascertaining the truth of the case, it was unavoidable that he had to give some preliminary advice to Mr Fleay and to Mr Powell.
>
> …

185 It is difficult to discern from the Practitioner's response and from the evidence which he gave under cross-examination whether the Practitioner:

(a) is denying that he acted for anyone other than Mr Tylor; or

(b) convinced himself and having, as he put it, ascertained the truth, that he could safely continue to act for all three men, or at least Mr Tylor and Mr Fleay.

186 If the former is the case, the evidence simply does not support that argument.

187 If the latter is the case, his approach is fundamentally flawed.

188 We have already set out the law as the Tribunal sees it in respect of conflicts of interest under the Tribunal's findings in Complaint A.

189 The finding by the Tribunal is that the Practitioner was between 14 March 2005 and 31 August 2005 guilty of professional misconduct by giving legal advice to and representing Mr Tylor and Mr Fleay in relation to criminal charges against each of them in circumstances where, to the Practitioner's knowledge, the interests of each accused were, or were potentially, in conflict. The interests of Mr Tylor and Mr Fleay were, to the Practitioner's knowledge, in potential and actual conflict as to the possession of the 486 grams of cannabis with intent to sell, in relation to which:

1) Mr Fleay was charged;

2) Mr Tylor was not charged; and

3) where Mr Tylor, following advice from the Practitioner, admitted to its possession and was subsequently convicted thereof.

190 In this complaint too, there is a second leg, namely that the Committee complains that the Practitioner was on 12 June 2006 guilty of unsatisfactory professional conduct in providing an inaccurate and misleading response to the Committee in relation to this matter.

191 On 12 June 2006, in response to an inquiry by the Committee in relation to the Practitioner's conduct in representing Mr Tylor and Mr Fleay, the Practitioner stated to the Committee, *inter alia*, that:

> …
>
> 4. Because of the apparent conflicting interests among Mr Tylor and Mr Fleay, I told these two men from the outset that I could only represent one person and the lot fell upon Mr Tylor.
>
> 5. Mr Fleay was to find his own lawyer after I had briefed both parties as to what their separate defences would be involving …
>
> 7. While Mr Fleay was getting his own lawyer, I attended Court for both of them merely to mention the case of Mr Fleay while I was there to represent Mr Tylor although I did write a submission for them to present to the presiding Magistrate.
>
> 8. Mr Fleay paid me no legal fees and I was merely there to help him while I was engaged by Mr Tylor to do the job for him.

…

192 The Committee contends that the Practitioner's statement to the Committee is inconsistent with the Practitioner's conduct. The Committee concludes that the Practitioner's conduct in providing an inaccurate and misleading response to the Legal Practitioners Complaints Committee fell short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner.

193 At the hearing, the practitioner admitted that he had misled the Committee (T:85, 12.10.11).

194 In ***Legal Practitioners Complaints Committee and Lee-Steere*** [2010] WASAT 189, the Tribunal said at [24]:

> In our view it is unacceptable, both to members of the public and to the profession, for a practitioner to undermine the authority of a regulatory body by ignoring its requests for information or failing to respond to those requests with alacrity and with complete honesty. To flaunt that authority is to fly in the face of the legislative intent and disables the body from executing its statutory functions. Such conduct is viewed by this Tribunal in a most serious light and will not be countenanced.

195 The Tribunal continued at [32]:

> Such conduct brings the profession into disrepute and does not constitute a standard of practice which members of the public and [the practitioner's] colleagues can reasonably expect of a member of the legal profession.

196 On the Practitioner's admission, we find that the Practitioner has misled the Committee and that the Practitioner's conduct in so doing fell short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner. He is accordingly guilty of unsatisfactory professional conduct.

197 We should add that had the Committee sought from the Tribunal a finding in respect of this complaint that the Practitioner is guilty of professional misconduct, we may have been so inclined to do so. However, the allegation by the Committee was one of unsatisfactory professional conduct only. Although it is open to the Tribunal under s 442 of the LP Act for the Tribunal to find a person guilty of unsatisfactory professional conduct even though the referral alleged professional misconduct, the converse position is not the case.

Complaint H - Clohessy

198 In April 2006, the Practitioner was approached by Mr Wayne Clohessy to provide family law advice to his daughter, Ms Rochelle Clohessy.

199 On 12 April 2006, the Practitioner met with Ms Clohessy and received instructions in relation to the breakdown of her de facto marriage with Mr Ross Merrick and in respect of arrangements for contact by Mr Merrick with their child from that relationship.

200 The Practitioner was instructed that Mr Merrick had a residential address in Port Kennedy and worked at the Stirling Naval Base as a member of the Royal Australian Navy.

201 On 14 and 16 April 2006, the Practitioner provided Ms Clohessy with drafts of a letter to be sent to Mr Merrick relating to the arrangements proposed by Ms Clohessy for the contact by Mr Merrick with the child and the division of property between them.

202 On 20 and 21 April 2006, the Practitioner sent by email a final version of that letter to Mr Merrick through his Commanding Officer at the Royal Australian Navy. The letter made a number of accusations against Mr Merrick, including that he:

1. had contact with prostitutes;
2. engaged in a sexual relationship with a female shipmate;
3. used steroids while on duty during his employment with the Royal Australian Navy; and
4. was physically violent towards Ms Clohessy during their relationship.

203 The Practitioner admits these facts (**Response page 22, paras 79 - 87**).

204 The Committee alleges that those accusations were in the circumstances scandalous and irrelevant and the Practitioner's conduct in including them in the letter to Mr Merrick was, in all the circumstances:

1) a substantial failure to reach the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner; and

2) conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence.

205 The Practitioner disagrees. He says (**Response page 22, para 88**) he was contacted by Ms Clohessy and her father who provided him with 'evidence', in the form apparently of copies of SMS messages, and that what he said in the letter was true. He said that Ms Clohessy could be called as a witness to testify to those facts, as could her parents. He also said that 'without the assistance of the practitioner, untold harm would have been caused to her by Mr Merrick' (**Response page 22, para 88(g)**).

206 In his instructions from Ms Clohessy's father, Mr Clohessy told the Practitioner that Mr Merrick had asked that all future correspondence be sent to him through Mr Merrick's mother (**Exhibit 1, page 289)**.

207 At the hearing, counsel for the Committee took the Practitioner to his notes taken at a meeting which he had with Ms Clohessy on 12 April 2006. The Practitioner's hand written notes are at **Exhibit 1, pages 301 - 304**, with a typewritten transcription at page 298 - 300. Counsel asked the Practitioner whether what Ms Clohessy said at that meeting was the sole basis of his assertion that the facts contained in his letter were established. He agreed, although he added that those 'facts' were also based on 'telephone messages with all her friends from the ship' (T:90, 12.10.11).

208 The Practitioner was then asked:

> Do you agree that it's completely inappropriate to make those allegations in this sort of letter? (T:90, 12.10.11)

209 The Practitioner was not prepared to concede this. His response was, eventually:

> I feel that I could have written it in a soft-softer way but the softer way of doing it is because this man is abandoning his own child, he's so irresponsible. (T:92, 12.10.11)

210 The Practitioner was then asked whether, in view of the fact that his letter had been sent to Mr Merrick through a person the Practitioner believed to be Mr Merrick's commanding officer, he might have kept the language of the letter 'detached and appropriate' (T:94, 12.10.11).

211 The Practitioner agreed, but reminded counsel that he had marked the letter 'confidential'.

212 In the Practitioner's closing submissions, he said that he did not intend to insult or offend Mr Merrick (T:53, 13.10.11). He was merely putting Mr Merrick on notice of what he was being accused of. He said that notice was 'a vital principle of fairness and due process in legal proceedings' (T:54, 15.10.11).

213 The Tribunal has already commented at complaint B above that, while it is undoubtedly the duty of a practitioner to carry out the instructions of a client, that duty must be exercised with some care. A practitioner cannot simply take the word of his or her client and repeat the client's assertions without having taken a great deal of care to inform himself or herself that a proper basis for such an allegation has been made. This, as we have already said, constitutes misconduct of the most serious kind.

214 While the Practitioner undoubtedly believed what Ms Clohessy had told him and was outraged by what he believed to be Mr Merrick's conduct, the Practitioner cannot be excused for writing such a letter.

215 This is particularly so given that the letter was sent as an attachment to an email, regardless of the fact that the attachment was marked 'confidential'.

216 The Tribunal may however disagree with the Committee that some of the accusations made by the Practitioner in the letter were irrelevant. One of the things which the Practitioner asks Mr Merrick to do is to forfeit all rights to the child. Accordingly, his fitness to have contact with that child, and therefore his behaviour, could be a relevant factor.

217 However, the Practitioner did not provide any evidence to justify the allegations which he made in the letter and we do not believe that a reasonably competent practitioner would make those allegations in the absence of that evidence.

218 We therefore find that the Practitioner made allegations of improper conduct against a third party without a reasonable or proper basis for doing so. We further find that his conduct involved a substantial failure to reach or maintain a reasonable standard of competence and diligence and that he is accordingly guilty of professional misconduct.

Complaint I - Trust account

219 The Committee alleges that there were five instances between April 2005 and February 2006 when the Practitioner:

1) did not maintain a trust account within the meaning of s 137 of the LP Act 2003 and failed to deposit trust monies to the credit of a trust account, as required; and

2) failed to render an account in respect of legal services and did not provide a notice in accordance with s 231 and s 232 of the LP Act 2003, then applicable.

The law

220 The relevant sections of the LP Act 2003 are set out below for ease of reference.

> **3. Terms used in this Act**
>
> …
>
> ***trust moneys*** means -
>
> (a) moneys that are received by -
>
> (i) a legal practitioner;
>
> …
>
> (iv) a firm of legal practitioners;
>
> …
>
> (vi) an employee, officer or agent of a legal practitioner, incorporated legal practice, firm of legal practitioners or multi-disciplinary partnership,
>
> in the course of legal practice in this State for the use or benefit of a person or persons other than the recipient but so as to be under the exclusive control of the legal practitioner, interstate practitioner, practice, firm or partnership[.]
>
> …
>
> **137. Trust moneys to be paid to trust account**
>
> (1) Every legal practitioner practising in this State who receives trust moneys must -
>
> (a) deposit the moneys to the credit of a trust account, whether a general account or an account maintained for one or other of the persons from whom, or for whose use or benefit the moneys are received, specifically; and
>
> (b) retain the moneys in the account until -

(i) they are dealt with as directed by the person from whom or for whose use or benefit they are received; or

(ii) they are otherwise dealt with according to law.

(2) Subsection (1) does not apply when a legal practitioner deals with the trust moneys as directed by the person from whom, or for whose use or benefit, the trust moneys are received.

(3) Trust moneys -

(a) are not available for the satisfaction of any debt due to, or any claim or demand made by, a person other than the person for whose use or benefit they are received; and

(b) must not be attached or taken in execution at the instance of any other person.

(4) Nothing in subsection (3) affects a lien or valid claim that a legal practitioner may have over or against trust moneys under the control of that legal practitioner.

…

231. Party may request bill for detailed items

(1) A legal practitioner must include in each bill of costs for a lump sum served under section 230(2)(b) a notice to the person charged in the following form -

"

> Within 30 days of receipt of this account you may require me by notice in writing to provide to you an itemised bill of costs the subject of this account. Within 30 days of receiving an itemised bill of costs, you may require me by notice in writing to submit the bill of costs to a taxing officer of the Supreme Court for review of the amount of costs charged to you, the subject of this account.

".

(2) The notice must appear on the face page of each bill of costs in at least 10 point type size.

(3) At any time within 30 days from the service of the bill for a lump sum the party charged may require the legal practitioner to serve upon the party charged, in lieu of the lump sum bill, a bill containing detailed items.

(4) Upon a requirement being made under subsection (3) the lump sum bill is of no effect except that proceedings for recovery already instituted under section 230 may be continued unless stayed by the court in which those proceedings were instituted or under section 236.

232. Party charged with itemised bill may give notice of intention to tax

(1) Where a bill of costs contains detailed items, the legal practitioner must include a notice to the person charged in the following form -

"

> Within 30 days of receiving this account you may require me by notice in writing to submit the bill of cost to a taxing officer of the Supreme Court for review of the amount of costs charged to you, the subject of this bill of costs.

".

(2) The notice must appear on the face page of each bill of costs in at least 10 point type size.

(3) A person charged with a bill of costs that contains detailed items may -

(a) serve upon the legal practitioner, within 30 days from the service of the itemised bill, a written notice of intention to have the bill taxed; and

(b) upon service of that notice, have the bill taxed by the taxing officer.

…

Trust money

221 Money received from a client in payment of professional costs already incurred clearly is not trust money but money received in advance of providing legal services and must be accounted for as trust monies. In this event, statute has prescribed the steps to be followed before transferring that trust money into the solicitor's general office account; s 137 of the LP Act 2003.

M & J Metals

222 The costs arrangement with M & J is referred to in complaint F, which related to the legal costs which varied in accordance with the amount recovered.

223 From in or about February 2005 the Practitioner acted for M & J. By agreement dated 11 August 2005 the Practitioner agreed with a debtor of M & J, Mr White, that funds received from Mr White in reduction of a debt to M & J would be paid to the Practitioner's general practice account. The Practitioner received on behalf of M & J five payments amounting to $5,000 which were paid into the Practitioner's personal account. The Practitioner then arranged for his legal fees to be deducted from the amounts received in his personal account.

224 In relation to this complaint the Committee allege that the Practitioner dealt with trust money in a manner inconsistent with his duty under s 137 of the LP Act 2003, and failed to render an account and provide a notice pursuant to s 231 and s 232 of the LP Act 2003 respectively.

225 The Board's senior trust accounting inspector, Ms Anna Maria Young, inspected the Practitioner's files and accounting records on 10 April 2006, prepared a report outlining her findings and subsequently prepared a witness statement which is dated 19 January 2010, marked **Exhibit 2**. The Board undertook a second inspection of the Practitioner's files on 26 May 2006; this was undertaken by Ms Coombs and Ms Whitney.

226 The Board sought a response from the Practitioner after viewing his files and records. The Committee says that the Practitioner did not provide a response with respect to the issue of not having issued invoices and notices to the client. However, the Practitioner's response with respect to the allegation that the funds ought to have been placed in the trust account is set out in two letters. The first, a letter dated 27 May 2006, is **Exhibit 1, page 324** and the other, a letter dated 8 June 2006, is **Exhibit 2, Annexure D.**

227 Essentially, the Practitioner's response is that he explained to his client the dangers of not depositing the money into the trust account and told M & J that they could give him a written direction pursuant to s 137(2) of the LP Act 2003, so he could deposit the money into his personal account.

228 The Committee points out that under r 54(1) of the *Legal Practice Board Rules 2004* (WA) (**LPB Rules**), a direction of that kind must be in writing and signed by the client.

229 At the hearing in this matter, the Practitioner was cross-examined on the issue. He had asserted in his Response (**Response, page 23, para 92)**

that the money was transit money and was therefore not required - so he contended - to be placed into the trust account. However, we reject that contention because there is nothing before us to suggest that he had received an instruction of the kind required to qualify it as transit money. Indeed, the Practitioner ultimately conceded that he did not have a signed written direction under s 137(2) of the LP Act 2003 from M & J. He said the following (T:11, 13.10.11):

> Mr Chin, as far as I can tell - but you correct me if I'm wrong - amongst your response there is no copy of a section 132 written direction to you?---There is a letter that I wrote to him when I - at the time when Mr Geoff White is ready to settle, and he told me all the directions on the telephone and I put it in writing to him.
>
> But you did not receive a written and signed direction from him, did you?---Yes, I told him to sign it and give back to me but somehow - other - **he did not give back to me** (Tribunal's emphasis).
>
> So you don't have a written direction from him?---Yes, but I gave him the letter which contained his instructions, which I faxed to him, and I gave a copy to the LPCC. You have it?

230 In relation to the second issue surrounding the alleged backdated invoices, when Ms Young undertook an inspection of the Practitioner's files and records on 10 April 2006, she found no invoices to the client on file. At a subsequent inspection by the Board on 27 May 2006 three invoices on the top of the file were found, one relating to these five payments, namely the amount of $2,000 on 11 August 2005 (**Exhibit 2, Annexure A, page 4**). The Practitioner advised the Board that this was $1,000 in legal fees and $1,000 in disbursements (**Exhibit 2, Annexure B, page 2**). When subsequently asked why backdated invoices had been prepared, the Practitioner's response in his letter of 8 June 2006, (**Exhibit 2, Annexure D, page 2, para 2**) was that this was an 'open file', and he was preparing for the Board's inspection. He said in that letter, 'I would then have backdated invoices in order to get ready for the coming inspection'.

231 During cross-examination the Practitioner further confirmed that the invoice in his book was not prepared on the date shown on that invoice (T:55, 13.10.11).

232 The Tribunal finds that the Practitioner failed to deal with trust money pursuant to s 137 of the LP Act 2003, failed to render an account in respect of legal services and did not provide notice in accordance with s 231 and s 232 of the LP Act 2003.

Mr Jack Hildebrandt

233 From in or about January 2006 the Practitioner acted for Mr Jack Hildebrandt (**Mr Hildebrandt**) in respect of a deed of lease.

234 On or about 12 January 2006 the Practitioner received the sum of $750 from I and PL Hildebrandt on behalf of Mr Hildebrandt, which was paid into the Practitioner's general practice account. In relation to this complaint the Committee allege that the Practitioner dealt with trust money in a manner inconsistent with his duty under s 137 of the LP Act 2003, and failed to render an account and provide a notice pursuant to s 231 and s 232 of the LP Act 2003 respectively.

235 The Board inspected the file and found that the Practitioner received $750 for preparing a deed of lease on 12 January 2006 before providing the document to Mr Hildebrandt on 19 January 2006. The Committee stated that funds received should have been dealt with as trust money until the work had been fully completed and an invoice was issued in accordance with s 138 of the LP Act 2003. Ms Young states in her report (**Exhibit 2, Annexure A, pages 4 - 5**) that the Practitioner's receipt shows that the $750 was received on 12 January 2006 and records show it was banked on 16 January 2006.

236 When the Board inspected the file on the first occasion, 10 April 2006, Ms Young found a memorandum of advice to Mr Hildebrandt bearing a date 19 January 2006. However when Ms Young conducted the second inspection on 11 May 2006, she found that the date of that advice had been amended manually to 16 January 2006 and that the date of receipt was amended manually to 19 January 2006, then back to 16 January 2006 (**Exhibit 2, Annexure A, pages 4 - 5**). When asked about this, the Practitioner's response was that he changed the date upon the receipt from 16 January 2006 to 19 January 2006 to 'tally up with the date of the memorandum of legal advice' but that he did not change the date of the memorandum (**Exhibit 2, Annexure D, page 3, para 5**).

237 The Practitioner's response in his letter of 27 May 2006 (**Exhibit 1, page 326**) is that he met with Mr Hildebrandt and his wife on 16 January 2006 and had by then prepared a draft lease. The Practitioner, on that date, ascertained that they were willing to pay his fee of $750, which they did on that day, and the Practitioner told them to return on 19 January 2006 to collect the written advice.

238 The Practitioner's response in his letter of 8 June 2006 (**Exhibit 2, Annexure D, page 3, para 5**) is that he had not expected the Board to examine this file as it was a 'closed file' and not on the list of files the Board requested to inspect. He stated the following in that letter:

> …
>
> e) I apologise for this mistake as I thought the amended date would have avoided Ms Whitney and Ms Coombs inquiring about my getting the legal fees before I did the work.
>
> f) I actually did the work after before I got paid for it. Therefore, there was no trust monies involved in this case.
>
> …

239 At the hearing the Practitioner, although by somewhat obscure and contradictory dialogue, said the following (T:12-14, 13.10.11):

> So in this instance it's true, isn't it, that **you did receive the $750 before you provided the deed of lease to the client?---Yes, but after one or two days' work** (Tribunal's emphasis).
>
> Yes, but the $750, that was actually for the deed of lease, not for the one or two days' work. Is that correct?---Yes.
>
> So do you accept that that $750 ought to have gone into trust?---No, I never expect that to go into trust because - - -
>
> No, 'accept' - do you accept that it ought to have gone into trust?---No.
>
> Mr Chin, it was also the case, wasn't it, that there wasn't an invoice on the file. Is that correct?---Yes, but this Jack Hildebrandt money was not given to me immediately. It was after I have performed my work, and he's seen the deed and he gave me the money.
>
> They didn't receive the deed until some time later?---They received the deed when they gave me the money.
>
> Mr Chin, I put to you that your receipt showed that the money was received on 12 January 2006 and banked on 16 January 2006. That's the evidence given by Ms Young?---Yes, and when was the work done for him?
>
> On 19 January?---So the work was done for him on 19 January?
>
> I'm now referring to your response in your letter of 27 May 2006 which is at page 324 of the book. If I could ask you to turn to that?---324?
>
> …

'That they were willing to pay my legal costs which they did on 16 January, I told them to come back on 19 January for my written legal opinion'?---Yes. There was no money involved because I have done the work for which they have paid me my dues only after the work was done, although this is contrary to the principle established by Privy Council of Hong Kong where moneys received for work to be done is not to be counted as trust moneys.

But the work in fact wasn't provided to the client until after you received their money?---No. You can ask them. I provide them at the time when I received the money.

…

Mr Chin, this invoice addressed to Jack Hildebrandt for $750 - - - ?---Yes.

- - - it bears the date 19 January 2006?---Yes.

Now, was this prepared after the board came and inspected your file?---After?

After the board came and inspected your file?---When did the board came to - - -

Did you prepare - - - ?---- - - -inspect my file?

Yes. Was this document prepared after the board came and inspected the Jack Hildebrandt file?---Yes. I'm not sure. I'm not sure.

240 The Tribunal finds the Practitioner's response to be inadequate and contradictory. We find that the Practitioner was paid for his legal services on 16 January 2006 and gave Mr Hildebrandt the memorandum of legal advice on 19 January 2006. The Tribunal notes that the Practitioner changed the dates on the receipt and memorandum 'as I thought the amended date would have avoided Ms Whitney and Ms Coombs from inquiring about my getting the legal fees before I did the work'. (**Exhibit 2, Annexure D, page 3, para 5(e)**). We accordingly find that the Practitioner did not comply with his duty to render an invoice and give Mr Hildebrandt the necessary notices pursuant to s 231 and s 232 of the LP Act 2003.

241 The Practitioner, in respect of the issue regarding trust money, maintains that money owed to him did not fall within the definition of 'trust money' therefore, there was no requirement for him to open and use a trust account (T:55, 13.10.11). In relation to this issue the Tribunal also finds that the Practitioner dealt with trust money in a manner inconsistent with the requirement under s 137 of the LP Act 2003.

Mr Vui Lin Chong

242 From in or about July 2005 the Practitioner acted for Mr Vui Lin Chong (**Mr Chong**) in respect of a property purchase.

243 On or about 12 July 2005 the sum of $750 was received by the Practitioner on behalf of Mr Chong, and was paid into the Practitioner's personal account. The Committee allege that the Practitioner failed to send an account in respect of legal services and did not provide notices in accordance with s 231 and s 232 of the LP Act 2003.

244 In its investigation, the Board inspected the file and found that the Practitioner received $750 on 12 July 2005 from Mr Chong (**Exhibit 2, Annexure A, page 5**). At the time of the inspection there were no invoices on the file. The Board sought a response and in his letter of 27 May 2006 (**Exhibit 1, page 326**) the Practitioner apologised for his 'remissness in not preparing the invoice' and said that 'I was under the impression that as long as the settlement statement discloses the settlement fees to my client, there is no need for an invoice because the settlement statement itself acts as an invoice'.

245 In the Practitioner's response (**Response, page 79**), the Practitioner seeks to rely on an invoice dated 12 July 2005, which was later found to have been prepared and backdated after the Board inspected the file. At the hearing, the following exchange took place (T:16, 13.10.11):

> I'm putting to you, Mr Chin, that that invoice could not have been created on 12 July 2005 and that's because - for two reasons, and you can tell me whether you agree with me or not, because your file was inspected, an invoice wasn't found?---Yes.
>
> And on 27 May 2006, almost a year later, you apologised for not preparing the invoice, and you say you will prepare one?---Yes.
>
> Yes. So this invoice here could not have been prepared on 12 July 2005, could it?---Yes, that's right.
>
> That's correct?---Yes.
>
> So why have you put the 12 July 2005 date on it?---Because I told you that I have never been exposed with this particular aspect of my legal training, because as far as many matters is concerned, this table for me, so I can't touch it, so I didn't know. I didn't learn. I haven't learned. So when I haven't learned, when they say, 'You want an invoice done,' so, okay, my commonsense tell me I'm not dishonest. I have shown you the receipt. That's the money that I received. You want invoice? Simple. **I prepare on the date when it was supposed to be** (Tribunal's emphasis).

246 We accordingly find that the Practitioner did not comply with his duty to render an invoice and give the Client the necessary notices pursuant to s 231 and s 232 of the LP Act 2003.

Mr Joseph Ebans Atmojo

247 This allegation was also conceded by the Practitioner at the hearing.

248 The facts of the matter are that the Practitioner, from in or about August 2005, acted for Mr Joseph Ebans Atmojo (**Mr Atmojo**) in respect of the preparation of a will. On or about 30 August 2005 the sum of $100 was received by the Practitioner on behalf of Mr Atmojo, and was paid into the Practitioner's personal account.

249 The Committee alleges that the Practitioner failed to send an account in respect of legal services and did not provide a notice in accordance with s 231 or s 232 of the LP Act 2003 to Mr Atmojo.

250 During its investigation the Board inspected the file and found that the Practitioner received $100 on 30 August 2005 in respect of the preparation of a will. The signed will was on the file and dated 30 August 2005. At the time of the inspection there were no invoices or notices on the file. The Board sought a response and in his letter of 27 May 2006 the Practitioner apologised for not preparing an invoice and said that he would have one prepared.

251 Once again, during cross-examination, the Practitioner conceded that he had prepared the invoice after the Board inspected the file (T:17, 13.10.11):

> So this is an invoice to Mr Joseph Ebans Atmojo. It's dated 30 August 2005 and it's for $100?---Yes.
>
> Yes. So again, Mr Chin, I'm putting to you that that invoice could not have been prepared on 30 August 2005?---Yes.
>
> That's correct?---Yes, but can you tell me what is the element of honesty - dishonesty there?
>
> …

252 The Tribunal therefore finds that the Practitioner did not comply with his duty to render an invoice and give Mr Atmojo the necessary notices pursuant to s 231 and s 232 of the LP Act 2003.

Mr Antonio Politi

253 From in or about April 2005 the Practitioner acted for Mr Antonio Politi (**Mr Politi**) in respect of two matters, being the purchase of a property and the licensing of a vehicle.

254 In relation to this complaint the Committee alleges that the Practitioner dealt with trust money in a manner inconsistent with his duty under s 137 of the LP Act 2003, and failed to render an account and provide a notice pursuant to s 231 and s 232 of the LP Act 2003, respectively.

255 This matter concerns two files: one related to the licensing of a stretch limousine, and the other file related to the settlement of the purchase of a property. The Board inspected and found that the Practitioner received and paid into his personal account a number of payments on these two matters which were set out in Ms Young's statement, being:

6 April 2005	$51.00
2 June 2005	$846.00
28 July 2005	$1,000.00

256 The Board alleged that the above were trust monies and found there were no invoices on the file at the time of the inspection. The Board sought a response from the Practitioner. The Practitioner appears to have provided differing explanations in his letters to the Board dated 27 May 2006 and 8 June 2006.

<u>Response on 27 May 2006</u>

257 On 27 May 2006 (**Exhibit 1, page 326**) the Practitioner essentially said that the $51 received on 6 April 2005 related to the fact that he had paid court fees to the State Administrative Tribunal from his credit card and the Client repaid him in cash.

258 The Practitioner states that the amount of $846 on 2 June 2005 was paid by the client to him in cash for the settlement matter. It was noted by the Board, however, that settlement occurred more than one month later on 5 August 2005, as set out in the Practitioner's letter of 8 June 2006 and evidenced by the stamp duty statement, which is attached to Ms Young's witness statement (**Exhibit 2, Annexure D, page 7**).

259 Regarding the payment of $1,000 on 28 July 2005 the Practitioner, in his letter of 27 May 2006, said that it related to legal fees for the vehicle licensing matter '… which should have been included as my legal fees in my account. I will make the necessary amendment to include this amount as my legal fees' (**Exhibit 1, page 326**).

Response on 8 June 2006

260 The Practitioner sent a further letter to the Board dated 8 June 2006 (**Exhibit 2, Annexure D**) in an attempt to clarify the situation. The explanation provided in the letter is somewhat difficult to follow but in essence the Practitioner asserted that the $846 received on 2 June 2005 was not for the property settlement matter but was actually for the vehicle licensing matter, after deducting disbursements. Unfortunately the receipt simply states 'Legal fees' and 'Cashed not banked'.

261 Further, in relation to the payment of $1,000 on 28 July 2005, the Practitioner's evidence on this point was vague. The Practitioner states he received $670.50 as legal fees on 30 July 2005 for the property settlement matter as he began work on this matter on 11 July 2005. However, Ms Young found that the $1,000 was a record of a personal cheque payable to the Practitioner, with no record of it having been deposited into his bank account.

262 In his letter of 8 June 2006 (**Exhibit 2, Annexure D, page 3, para 6(a))** the Practitioner concedes that '… as a result, I had not updated them [files] in preparation for the arrival of Ms Whitney and Ms Coombs. I have since issued the invoice for these two files'.

263 At the hearing the Practitioner gave evidence based upon his version of events outlined in his letter of 27 May 2006. In relation to the $846 paid on 2 June 2005, the Practitioner confirmed that the money was for the property settlement matter, and that the settlement occurred on 15 July 2005 (T:18, 13.10.11). The Practitioner rather vaguely maintained that the invoice was prepared on 30 July 2005 and stated that the reason for its absence on the file inspected by Ms Young on 10 April 2006 was that 'it could have been placed somewhere and I put it back there' (T:18, 13.10.11).

264 In respect of the amount of $1,000 that was received on 28 July 2005, the Practitioner conceded that despite the fact that the date of the invoice reads 30 July 2005, the invoice was prepared after the trust account inspector came on 10 April 2006 (T:19, 13.10.11). However, he

then went on to say that 'I don't know. I couldn't remember' (T:19, 13.10.11).

265 The Tribunal finds that the Practitioner did not prepare the necessary invoices or notices to the client pursuant to s 231 and s 232 of the LP Act 2003 as evidenced in his letter to the Board on 8 June 2006, whereby he stated that after the Board's inspection 'I have since issued the invoices for these two files'. (**Exhibit 2, Annexure D, page 3, para 6(a)**).

266 The Practitioner, in respect of the issue regarding trust money, maintains that money owed to him does not fall within the definition of 'trust money' and therefore there is no requirement for him to open and use a trust account (T:55, 13.10.11). In relation to this issue the Tribunal also finds that the Practitioner dealt with trust money in a manner inconsistent with the requirement under s 137 of the LP Act 2003.

Mr Rodney Tylor

267 The arrangement with Mr Rodney Tylor (**Mr Tylor**) is referred to in complaint G.

268 The Committee alleges that from in or about February 2006 the Practitioner acted for Mr Tylor in relation to a criminal matter. On 9 February 2006 the Practitioner received the sum of $200 on behalf of Mr Tylor, which sum was paid into the Practitioner's general practice account.

269 The Committee further alleges that the Practitioner failed to send an account in respect of legal services and did not provide a notice in accordance with s 231 or s 232 of the LP Act 2003 to Mr Tylor.

270 The Board had inspected the file and found that $200 was received by the Practitioner on 9 February 2006 and was not deposited. On the file was a statement of material facts witnessed by the Practitioner on 31 January 2006. However, no invoice was located when the Board inspected on 10 April 2006. On 27 April 2006 when a complaints' officer from the Board conducted a further inspection of the file, an invoice dated 9 February 2006 was evident (**Exhibit 2, Annexure A, page 7**).

271 The Board stated that the invoice appeared to be backdated after Ms Young's inspection. The Practitioner's response on 27 May 2006 was to 'apologise for not getting the invoices prepared on time' (**Exhibit 1, page 327**).

272 At the hearing the Practitioner stated, although somewhat vaguely, that he prepared the invoice after 9 February 2006, namely on 16 May 2006 (T:20, 13.10.11) (**Exhibit 1, page 327**).

273 The Tribunal therefore finds that the Practitioner did not comply with his duty to render an invoice and give the client the necessary notices pursuant to s 231 and s 232 of the LP Act 2003.

274 The Committee alleges that the matters set out above within complaint I highlight the Practitioner's constant failure to maintain a trust account and repeated conduct in failing to deposit trust monies to the credit of a trust account is in contravention of s 137 of the LP Act 2003. The Committee also alleges that the Practitioner's failure to render accounts and give the appropriate notice for legal fees in respect of the clients was, in all the circumstances, a consistent failure to reach the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner.

275 The Tribunal finds that the Practitioner's conduct manifested a complete lack of insight and knowledge in relation to a solicitor's duties in trust accounting so as to involve a substantial failure to reach or maintain a reasonable standard of competence, and as such, constitutes professional misconduct in terms of s 403(i)(a) of the LP Act.

Orders

1. There is a finding that Mr Ni Kok Chin, between about July 2004 and March 2005, is guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) by:

   (i) acting for his son and for the vendor in the purchase and sale of a business when the interests of all parties, including his own interests, would be in conflict and when he was a likely witness in relation to a dispute relating to that purchase and sale; and

   (ii) making a proposal to another practitioner that he avail himself of costs in relation to work that that practitioner did not perform, at the expense of the defendant in the case.

2. There is a finding that Mr Ni Kok Chin, on or before January 2005, is guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) by failing to treat a professional colleague with the utmost fairness and courtesy and by making allegations of improper conduct against fellow practitioners without a reasonable or proper basis for doing so.

3. There is a finding that Mr Ni Kok Chin, between May 2006 and August 2006, is guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) by making allegations that another practitioner had resorted to underhand tactics in falsifying a court document and by accusing that practitioner of deliberately misleading an officer of the court.

4. There is a finding that Mr Ni Kok Chin, between about July 2004 and August 2004, is guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) by:

   (i) failing in a substantial way to reach or maintain a reasonable standard of competence and diligence in drafting a will and a trust deed on behalf of a client;

   (ii) inserting additional provisions into a costs agreement with his client without his client's consent;

   (iii) charging his client fees for work which were excessive;

   (iv) using intemperate and offensive language in a letter to his client; and

   (v) attempting to subvert the jurisdiction of the Legal Profession Complaints Committee.

   The Tribunal found that a further allegation of professional misconduct made against Mr Chin for failing to carry out his client's instructions in the preparation of a will and a trust deed was not made out.

5. There is a finding that Mr Ni Kok Chin, on or about 13 February 2006, is guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) by writing to a judicial officer seeking legal advice in relation to proceedings in which he was retained and in which the judicial officer concerned had delivered a judgment and, in any event, communicating directly with a judicial officer in relation to proceedings in which he was retained without first advising or notifying the solicitors for the other party.

6. There is a finding that Mr Ni Kok Chin, in February 2005 and thereafter, is guilty of unsatisfactory professional conduct contrary to the *Legal Profession Act 2008* (WA) by seeking to receive remuneration from a client which varies in accordance with the amount that may be recovered, in addition to costs obtained from the opposing party

7. There is a finding that Mr Ni Kok Chin is guilty of:

   (i) professional misconduct contrary to the *Legal Profession Act 2008* (WA) by giving legal advice to and representing two parties, between 14 March 2005 and 31 August 2005, in relation to criminal charges against each of them in circumstances where the interests of each accused were, or were potentially, in conflict; and

   (ii) unsatisfactory professional conduct contrary to the *Legal Profession Act 2008* (WA) by providing to the Legal Profession Complaints Committee, on 12 June 2006, an inaccurate and misleading response to the Committee in relation to this matter.

8. There is a finding that Mr Ni Kok Chin, on or about 19 April 2006, is guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) by making allegations of improper conduct against a third party, Mr Ross Merrick, without a reasonable or proper basis for doing so

9. There is a finding that Mr Ni Kok Chin, between February 2005 and February 2006, is guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) by:

    (i) not maintaining a trust account within the meaning of s 137 of the *Legal Practice Act 2003* (WA) and failing to deposit trust monies to the credit of a trust account as required; and

    (ii) failing to render an account in respect of legal services and failing to provide notices in accordance with s 231 and s 232 of the *Legal Practice Act 2003* (WA).

10. The Legal Profession Complaints Committee is to file and serve any submissions on penalty within 21 days of publication of these reasons.

11. Mr Chin is to file and serve any submissions on penalty within 21 days of the service of the Legal Profession Complaints Committee's submissions.

12. Subject to any further order of the Tribunal, the question of penalty is to be dealt with on the papers.

I certify that this and the preceding [275] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE T SHARP, DEPUTY PRESIDENT