

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : FULL BENCH

CITATION : THE LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE -v- DE ALWIS [2006] WASCA 198

CORAM : STEYTLER P
PULLIN JA
MURRAY J

HEARD : 1 SEPTEMBER 2004, 15 DECEMBER 2005,
17 FEBRUARY, 30 MARCH & 31 MAY 2006

DELIVERED : 29 SEPTEMBER 2006

FILE NO/S : LPD 5 of 2004

BETWEEN : THE LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Applicant

AND

VIJITHA GAMINI DE ALWIS
Respondent

FILE NO/S : CACV 59 of 2006

BETWEEN : VIJITHA GAMINI DE ALWIS
Appellant

AND

LEGAL PRACTITIONERS DISCIPLINARY
TRIBUNAL
LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Respondents

ON APPEAL FROM:

Jurisdiction : LEGAL PRACTITIONERS DISCIPLINARY
TRIBUNAL

Coram : HON B W ROWLAND QC, MR N W
McKERRACHER QC, MS A M LISCIA & MR J K
DUNCAN

File No : R 11 of 2003

Catchwords:

Legal practitioners - Disciplinary proceedings - Misappropriation of trust money
- Whether practitioner fit and proper person to remain on roll of practitioners -
Turns on own facts

Legal practitioners - Disciplinary proceedings - Appeal from finding of
disciplinary tribunal - Application for extension of time - Application for
disqualification of member of coram - Whether reasonable apprehension of bias

Legislation:

Legal Practice Act 2003 (WA), s 194
Legal Practitioners Act 1893 (WA), s 25(1)(b)(v), s 25(1)(c), s 28D, s 31, s 59
Legal Practitioners Disciplinary Tribunal Rules 1993 (WA), r 7
Rules of the Supreme Court 1971 (WA), O 5, O 65 r 3(1)

Result:

Practitioner struck off the roll

Category: B

Representation:

LPD 5 of 2004

Counsel:

Applicant : Mr B J H Goetze
Respondent : In person

Solicitors:

Applicant : Minter Ellison
Respondent : In person

CACV 59 of 2006

Counsel:

Appellant : In person
Respondents : Mr B J H Goetze

Solicitors:

Appellant : In person
Respondents : Minter Ellison

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

A Solicitor v Council of the Law Society of New South Wales (2003) 216 CLR 253
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196
FAI Insurance Co Ltd v Southern Cross Exploration NL (1988) 165 CLR 268
Forge v Australian Securities and Investments Commission [2006] HCA 44
Gallo v Dawson (1990) 64 ALJR 458
Gavin v The Queen (1992) 6 WAR 195
Girando v Girando (1997) 18 WAR 450
In re A Practitioner (1982) 30 SASR 27
In Re Davis (1947) 75 CLR 409
In re H A O'Donnell [1895] 12 WN (NSW) 42
Johnson v Johnson (2000) 201 CLR 488
Kioa v West (1985) 159 CLR 550

Law Society of New South Wales v Moulton [1981] 2 NSWLR 736
Legal Practitioners Conduct Board v Hannaford (2002) 83 SASR 277
Lindon v Commonwealth of Australia (No 2) (1996) 70 ALJR 541
Livesey v New South Wales Bar Association (1983) 151 CLR 288
McCreech v The Queen (2003) 27 WAR 554
Palata Investments Ltd v Burt & Sinfield Ltd [1985] 1 WLR 942
Re a Barrister and Solicitor (1979) 40 FLR 1
Re A Practitioner [2003] WASCA 172
Re Maraj (1995) 15 WAR 12
Re Polites; Ex parte The Hoyts Corporation Pty Ltd (No 2) (1991) 173 CLR 78
Twist v Randwick Municipal Council (1976) 136 CLR 106
Vakauta v Kelly (1989) 167 CLR 568
Western Australia v Watson [1990] WAR 248
Ziems v Prothonotary of the Supreme Court of New South Wales (1957) 97
CLR 279

Case(s) also cited:

Harvey v Law Society of New South Wales (1975) 49 ALJR 362
Orsi v Legal Contribution Trust [1976] WAR 74
Re A Barrister & Solicitor (1972) 20 FLR 234
Re Legal Practitioners Act 1893, unreported; SCt of WA; Library No 930527;
30 September 1993

1 **JUDGMENT OF THE COURT:** There are three motions before the Court, as well as a subsidiary application made to one of its members. The first motion is one filed by the Legal Practitioners Complaints Committee ("Complaints Committee") for orders that Vijitha Gamini De Alwis ("practitioner") be struck off the roll of practitioners of this Court ("strike-off proceedings"). That motion relies upon an undated report made by the Legal Practitioners Disciplinary Tribunal ("Tribunal"). The second motion is one, brought orally on 31 May 2006, for an extension of time within which to appeal against the decision of the Tribunal to refer the matter to this Court with a view to having the practitioner struck off the roll. The third motion is one brought by the practitioner for a stay of the strike-off proceedings pending the outcome of his appeal. The subsidiary application is one to have one of our number, Pullin JA disqualify himself from hearing the matter upon the grounds that he had served as Chairman of the Complaints Committee before his appointment to the Bench in 2001.

2 In order for the issues arising in these proceedings to be properly understood it is, unfortunately, necessary for us to recite some of its tortured history. We will start with the proceedings before the Tribunal.

Proceedings in the Disciplinary Tribunal

3 During 2002 Mrs Jacqueline Taylor lodged a complaint with the Complaints Committee concerning the practitioner. Her husband, Mr Neville Taylor, had been convicted of criminal offences and imprisoned. The Commonwealth Minister for Immigration sought to have him deported to the United Kingdom, from whence he had come, after he was released from prison. The practitioner was retained to represent him in that respect. The complaint related to the practitioner's conduct in the performance of that retainer. At the time at which the complaint was made Mr Taylor was in prison.

4 By letter dated 24 December 2002 the Complaints Committee provided the practitioner with a written statement from Mrs Taylor outlining the details of the complaint. The practitioner did not respond to the letter or to any subsequent request by the Complaints Committee for a response from him. His conduct was referred by the Complaints Committee to the Tribunal on 16 May 2003 ("reference"). The reference was served on the practitioner on 22 May 2003. Rule 7 of the *Legal Practitioners Disciplinary Tribunal Rules 1993* (WA) required the practitioner to file an answer within 14 days. He did not file an answer within that time or at all.

5 The reference alleged that the practitioner had misappropriated funds from Mr Taylor. As we have mentioned, Mr Taylor had sought the assistance of the practitioner to prevent his deportation. The reference recited that, on or about 8 January 2002, the practitioner and Mr Taylor had agreed that, in consideration of the payment of a fixed fee of \$10,000, the practitioner would "undertake all such work and incur such reasonable disbursements as may be necessary as an additional expense in respect of the client's migration matter, namely to make application to the Federal Court ... and the High Court ... if necessary, to set aside the decision ... of the Minister for Immigration and Multicultural Affairs ... to cancel the client's permanent resident's visa ... ". Next, the reference alleges that the practitioner received \$10,900 on account of costs from or on behalf of Mr Taylor. This was made up of three cash payments made in January 2002 amounting, in all, to \$2400, two payments made, respectively, in February and March 2002 totalling \$4500 by way of direct deposit into the practitioner's private account and a further two payments made on 21 June 2002, amounting to \$4000, by way of direct deposit into the practitioner's general or office account. The deposits which had been made into the bank accounts were made pursuant to the practitioner's request to Mr and Mrs Taylor that payment should be made in that way. None of this money was ever paid into the practitioner's trust account.

6 The reference recites that a cash payment of \$400 made on 11 January 2002 (being part of the sum of \$2400 referred to above) was paid to the practitioner by or on behalf of Mr Taylor on trust for counsel fees. Mr Taylor had been told by the practitioner that the practitioner proposed to brief counsel, Mr Robert Lindsay, in the proceedings which he proposed to bring on behalf of Mr Taylor. However, apart from one meeting that took place between the practitioner and Mr Lindsay, Mr Lindsay was not instructed. Mr Lindsay has never raised a note of fees concerning Mr Taylor's matter.

7 One of the two deposits made on 21 June 2002 was the deposit of a sum of \$500. This is said to have been paid after Mrs Taylor was told by the practitioner that, if that sum was not paid on that day, the practitioner would not file documents which were required to be filed in the Federal Court by 3 pm on the following Monday.

8 The reference next alleges that the practitioner has not undertaken all such work as was necessary to set aside the Minister's decision. It records that he did no more than prepare an application and a one-page supporting affidavit to the Federal Court, attend directions hearings in the Federal

Court on six occasions during the period January to June 2002; prepare an application to the High Court and a supporting affidavit (the application was never filed and the affidavit was never sworn) and attend to other incidental matters on Mr Taylor's behalf. The reference also recorded that the practitioner had "neither completed nor anywhere near completed" Mr Taylor's instructions.

- 9 Finally, the reference alleges that the practitioner had no valid costs agreement with Mr Taylor within the meaning of s 59 of the *Legal Practitioners Act 1893* (WA) ("1893 Act") and that he had never rendered or provided Mr Taylor with a memorandum of costs and disbursements in respect of work done by him or in order to demonstrate that trust moneys had been applied by him towards payment of costs and disbursements.

The hearing on 12 June 2003

- 10 The reference was listed for hearing by the Tribunal on 12 June 2003. On 3 June 2003 the practitioner was sent a copy of an affidavit that had been sworn by Mrs Taylor and a report, relating to the practitioner's practice, that had been sworn by a trust account inspector. On Monday 9 June 2003 two folders of documents were left at the practitioner's home address containing the affidavits and annexures upon which counsel for the Complaints Committee proposed to rely. The documents were accompanied by a letter which informed the practitioner that the Complaints Committee intended to submit to the Tribunal that, if the practitioner should be found guilty on the reference, the Complaints Committee would move to have a report sent to the Supreme Court with a view to having the practitioner struck off.

- 11 On 12 June 2003 Mrs Taylor travelled from Donnybrook, where she lived, to attend the hearing in Perth so as to be available to be cross-examined if required by the practitioner. The practitioner attended the hearing but asked for an adjournment on the grounds of ill health. He produced a medical certificate from Dr Sonja Coetzee of the Cottesloe Medical Centre dated 10 June 2003. The certificate recorded only the following:

"This gentleman suffers from numerous medical problems and is currently unfit to stand trial or an inquiry."

- 12 On that day, the practitioner also sought to have the Chairman of the Tribunal, the Honourable BW Rowland QC, disqualified for bias. This application was based upon the fact that the Chairman had presided over earlier Tribunal hearings in which the practitioner had been found guilty

on other charges. The Chairman declined to disqualify himself, but the hearing was adjourned until 16 June 2003 at 9.30 am. The practitioner was told that the hearing would proceed on that day unless he could produce further detailed medical evidence to substantiate the vague statement in the medical certificate that he had produced. He was also ordered to file an answer to the reference by close of business on Friday 13 June 2003. The Chairman remarked that, as the practitioner had been able to produce a seven-page statutory declaration "about everything but this case", he should be able to produce an answer. However, no answer was filed by that date or at all.

The hearing on 16 June 2003

13 The practitioner did not provide any further medical evidence concerning his health problems. However, at about 9 am on 16 June 2003 he telephoned the office of the Tribunal and left a message to the effect that he was in the Coronary Care Unit at Royal Perth Hospital and was unable to attend the hearing. He asked for an adjournment. The hearing was adjourned to a date to be fixed.

Events in June, July and August 2003

14 The Complaints Committee then made an application to the Supreme Court for an order under s 31 of the 1893 Act suspending the practitioner from practising until the reference had been determined by the Tribunal. The application came on for hearing on 26 June 2003 before Hasluck J. The practitioner attended in person and made an oral application to adjourn the hearing. This was refused and Hasluck J made the order that had been sought by the Complaints Committee: ***Re A Practitioner*** [2003] WASCA 172.

15 The Complaints Committee requested that the reference be relisted before the Tribunal as Mrs Taylor was seriously ill and would soon require surgery. A notice of hearing for 29 August 2003 was sent to the practitioner on 13 August 2003. On 26 August 2003 the practitioner sent a facsimile to the Registrar of the Tribunal acknowledging receipt of the notice of hearing but seeking an adjournment upon the grounds of his poor health and because he was seeking legal aid. He also said that he intended to file a motion for the issue of a writ of prohibition to prevent the Chairman from sitting.

16 At 4.50 pm on 27 August 2003 the practitioner personally delivered a letter to the Registrar of the Tribunal enclosing what he described as an *ex parte* application to be filed in the Supreme Court on 28 August 2003

seeking a writ of prohibition against the Chairman and the Registrar. The letter sought an adjournment of the hearing set for 29 August 2003 upon the grounds of the practitioner's ill health.

The hearing on 29 August 2003

17 The hearing before the Tribunal on 29 August 2003 was listed to commence at 9.30 am. At 9.45 am the practitioner had not arrived. Nor had he contacted the office of the Registrar. He could not be contacted by telephone either at his home or by means of his mobile telephone. Nor could he be contacted by facsimile. No-one appeared on his behalf. Counsel for the Complaints Committee told the Tribunal that no motion for a writ of prohibition had been filed at the Supreme Court. No further medical evidence had been received concerning the practitioner's health problems. The Tribunal decided to proceed to hear the case against the practitioner notwithstanding that he was not present.

18 Several affidavits were tendered. There was one from Ms Anna Buckley, the Legal Practice Board's trust account inspector, sworn on 3 June 2003. This revealed that the practitioner had applied for a practising certificate on 14 November 2001 so as to practice on his own behalf. In his application, the practitioner informed the Legal Practice Board that he would open a trust account with the Commonwealth Bank. However, that was never done. Instead, a trust account was opened with Challenge Bank on 17 December 2001 and closed on 18 July 2002. The records of that account reveal that the amounts paid by Mrs Taylor were not deposited into it.

19 There was also an affidavit from Mr Robert Lindsay, sworn 5 June 2003, who said that he had been consulted by the practitioner and Mr and Mrs Taylor on or about 11 January 2002 in relation to Mr Taylor's case. He gave oral advice concerning the prospects of success of a constitutional challenge in respect of the deportation order and discussed "the likely substantial fees which would be associated with such an application". He said that he had not been further instructed in relation to the matter and that he had no recollection, or record, of ever having sent an invoice to the practitioner or of receiving any payment from him in respect of the interview.

20 A third affidavit was sworn by Mr Henry Christie who had been appointed by the Legal Practice Board as supervising practitioner of the practitioner's firm on 8 July 2002, after the practitioner had been suspended from practice in respect of unrelated matters. Mr Christie had recovered Mr Taylor's file and provided it to Mrs Taylor. Mr Christie's

inspection of the file revealed that an application to the Federal Court and a supporting affidavit had been prepared on about 8 January 2002 and that, during January 2002, a High Court application and supporting affidavit had also been prepared in draft form, although there was no indication that this application and affidavit had ever been filed.

21 The Tribunal was also provided with copies of transcripts of the proceedings that had taken place before Hasluck J and also of proceedings that had earlier taken place before McKechnie J. The earlier of the two transcripts related to a hearing, on 8 July 2002, of an application to restrain the practitioner from dealing with his trust account after his suspension from practice on unrelated matters. In the course of that hearing, the practitioner had admitted that he had received \$10,900 from Mr and Mrs Taylor and that he had not paid it into a trust account. He said that he had prepared accounts but that he had not sent them to the client. When it was put to him by McKechnie J that there appeared to be no dispute that he had received \$10,900 and that this sum was not lodged in his trust account, the practitioner responded by saying that he was entitled to that sum.

22 The transcript of the later proceedings before Hasluck J reveals that the practitioner told the Court that he did not deny that he had received \$10,900 from his client. However, he advanced a number of possible explanations for his conduct (these have been repeated, at various times and in various ways, in affidavits since lodged with this Court in the course of these proceedings). He said that he had lacked familiarity with the rules relating to solicitors' trust accounts. He spoke of delays with banks concerning the opening of a trust account. He said that he had performed legal services to a value which exceeded the amounts paid to him by Mr Taylor. He said that the agreed sum of \$10,900 did not include disbursements, of which there had been many. He said that, under the Federal Court scale, Mr Taylor would have had to pay more than the money already paid. He also said that the sum of \$400 paid to him on 11 January 2002 was not paid in respect of counsel fees but was his own fee for briefing counsel.

23 Having considered all of this material, the Tribunal found the allegations in the reference proved. It concluded that the practitioner was not a fit and proper person to remain on the roll of practitioners. It ordered that a report be submitted to the Full Court of the Supreme Court recommending that the practitioner be struck off the roll and also that, pending the decision of the Full Court, the practitioner be suspended from practice.

24 By letter dated 1 September 2003 the Registrar of the Tribunal notified the practitioner that these orders, and other ancillary orders, had been made. On 23 September 2003 the Tribunal published its reasons. These were provided to the practitioner.

25 In its reasons, the Tribunal said that it was satisfied by the evidence which had been placed before it that the practitioner had received the total sum of \$10,900 on account of costs and that none of this was ever paid into a trust account. It found that the practitioner told Mrs Taylor that the sum of \$400 paid in cash on 11 January 2002 was a fee that the practitioner would be charged by counsel to whom he had spoken regarding Mr Taylor's case. It also found that, at the commencement of the relationship between Mr Taylor and the practitioner, the practitioner had obtained Mr Taylor's signature in respect of what was said to have been a costs agreement. The Tribunal considered that there were doubts as regards the validity of that agreement but said that, in any event, the practitioner had undertaken to Mr Taylor that he would finalise the matter before the Federal Court or the High Court for a fee of \$10,000. The Tribunal said, as regards the work done by the practitioner:

"Apart from some rather simple pro forma applications to the Federal Court, a one page supporting affidavit from Mr T[aylor], his own one page affidavit, the preparation of a subsequent affidavit in draft and five short attendances at the Federal Court, three of which were occasioned because the practitioner had not complied with Orders of that Court, there is very little found on the practitioner's files to indicate an expenditure of anything approaching \$10,900.

We should note that, since we resolved this matter on 29 August, counsel for the Committee has forwarded to us correspondence he has recently received emanating from the Deputy Registrar of the High Court to the practitioner on 5 February 2002 stating that, in T[aylor]'s matter, the practitioner had purported to file an application for special leave to appeal but the documents were returned because the application was incompetent as there had been no adjudication of the matter before a single Justice of the Federal Court or the Full Court of the Federal Court. Counsel advises that this letter was not on the files produced by the practitioner to the supervising solicitor. This correspondence cannot of course assist the practitioner's cause but it will be accepted and marked

as exhibit 4 and produced and the papers sent to the Full Court of the Supreme Court".

The Tribunal also referred to the admissions that had been made by the practitioner in the course of the proceedings before each of McKechnie J and Hasluck J and to other statements that had been made by him in the course of those proceedings. It went on to find "as fact each of the allegations set out in the particular to the Reference". It consequently concluded that the practitioner had fraudulently converted the seven instalments of money paid to him by or on behalf of Mr Taylor to his own use and that he was not a fit and proper person to remain on the roll of practitioners.

Events subsequent to the delivery of reasons

26 On 26 September 2003 the practitioner went to the office of the Tribunal in an attempt to lodge with it an application to rehear the reference. His application was supported by an affidavit in which he said that he had not been able to attend the hearing on 29 August 2003 due to ill health. Annexed to the affidavit was a medical certificate signed by Dr Peter Connolly of the Perth Medical Centre, in which Dr Connolly said that he had examined the practitioner on 1 September 2003 and that he was "unfit for work" between 29 August 2003 and 31 August 2003. The affidavit also annexed a form from the Emergency Department of Fremantle Hospital recording that the practitioner had attended that hospital on Friday 29 August 2003, complaining of chest pain and saying that he had felt dizzy and collapsed, hitting his head on a window sill. The diagnosis was one of atypical chest pain and an "uncomplicated knock to head".

27 The practitioner appears to have been told by the Registrar that his application could not be pursued in the Tribunal. Then, on 26 September 2003, he brought an urgent oral application in the Supreme Court before Pullin J for a stay of an order made by the Tribunal that there be publication of its reasons. Pullin J refused the application.

History of the Supreme Court proceedings

28 On 29 April 2004 the Tribunal's report, and the originating motion to have the practitioner struck off the roll, were filed at the Supreme Court.

The hearing on 1 September 2004

29 The motion was listed for hearing on 1 September 2004 before a Full Court comprising Malcolm CJ, Templeman and McKechnie JJ. On the

previous day the practitioner had filed and served a document entitled "Objections of the practitioner to the hearing as it is". These objections were to the effect that the Full Court had no jurisdiction to hear the matter "as it is", that the hearing would gravely prejudice the practitioner, resulting in a miscarriage of justice and that the practitioner was ill and unable to defend himself and had not been able to obtain legal representation.

30 The practitioner said that lawyers were "frightened to accept instructions" to represent him because of the "unfair and unprofessional practices" engaged in by counsel for the Complaints Committee in an attempt to "curry favour with" a judge of the Supreme Court who had referred a matter concerning the practitioner to the Complaints Committee and who was "gunning for" him. He said that the Full Court had no jurisdiction to hear the strike-off proceedings until a decision had been made on his application for a rehearing. He also said that an application for a writ of *certiorari* against the Tribunal was pending in the Supreme Court and that this required to be determined before the Full Court could hear the strike-off proceedings. In fact, there was no such application pending, no application for a writ of *certiorari* against the Tribunal having been filed in respect of its decision to refer the matter to the Full Court.

31 During the course of the hearing, the practitioner collapsed and was taken from the Court by ambulance officers. The matter was adjourned.

32 On 8 October 2004, the Complaints Committee wrote to the Court asking that the matter be relisted. On 10 November 2004 it wrote a further letter to the Court to the effect that the practitioner had been able to appear before the High Court, seeking to represent an in person litigant in the matter of *Bridges v MIMIA* (2004) HCA Trans 408 (25 October 2004). The practitioner had also appeared in the Supreme Court on 23 August 2005, before McLure JA, and on 9 September 2005, before McLure JA and Le Miere AJA, seeking leave to appear on behalf of a self-represented litigant by the name of Ejueyitsi.

The hearing on 15 December 2005

33 On 19 October 2005 the Court wrote to both parties notifying them that the matter had been relisted for hearing on 15 December 2005.

34 On 24 November 2005 the practitioner sent a facsimile transmission to the Court objecting to the hearing. He said that he had not been contacted before the matter was listed for hearing on 15 December 2005. He said that he would not be ready to argue the matter for at least three

months. He also said that he was unwell. He said that he had suffered three minor strokes and that these had affected his memory. He said that he continued to collapse and to suffer fits and severe headaches and that his doctors had yet to determine the cause of these. He said that he had been involved in two accidents. In the first, on 1 August 2005, he had received multiple injuries to the whole of his body, including head injuries. In the second, on 8 October 2005, he had suffered other severe injuries, including head injuries. He said that he suffered severe pain "every waking moment". He also said that he had serious conditions of the brain and heart and a deformed cervical cord that caused him excruciating pain. He wanted the hearing adjourned until after he had completely recovered. He attached a report dated 3 November 2005 from a Dr Nick Dale of SKG Radiology who said that the practitioner had a torn tendon in his left shoulder. This was 3 mm wide. Scans had revealed no evidence of any head injuries or other anatomical abnormality in his brain or skull.

35 On 28 November 2005 the Court wrote to the practitioner informing him that the hearing on 15 December 2005 would not be vacated, as the practitioner had sought, because the medical certificate supplied by him did not support the injuries asserted by him.

36 On 8 December 2005 the practitioner again faxed the Court seeking to vacate the hearing date. This time he attached a two-line letter from Dr O'Donovan of the Coolbellup Medical Centre dated 6 December 2005, which recorded only that the practitioner had been involved in two motor vehicle accidents and that, as a result of injuries received, he was not fit to attend Court on 15 December 2005. On 13 December 2005 the Court again responded to the practitioner informing him that the hearing would not be vacated and that he was required to make an appearance either in person or through counsel.

37 On 15 December 2005 the practitioner appeared in person before a bench composed of Malcolm CJ, Steytler P and Murray J. He applied for an adjournment on the grounds of ill health. He spoke at length about the medical conditions afflicting him. He said that he had been involved in two accidents, that he had memory problems, severe head injuries and brain haemorrhages. He said that he had had three transient ischaemic attacks, that he had chest pains and that he continued to suffer collapses. He handed up a six-page unsigned affidavit in support of his application for an adjournment. This did not attach any medical evidence. Instead, the practitioner handed up several documents, one of which was the radiology report prepared by Dr Dale dated 3 November 2005 which, as

we have said, found that the CT scan of the practitioner's head had found no injury or abnormality, but that ultrasound examination had revealed that the practitioner had torn his left shoulder tendon. There were various documents relating to back pain that the practitioner had experienced. The practitioner also produced letters from the Insurance Commission of Western Australia noting that he had made claims in respect of motor vehicle accidents on 8 October 2005 and 1 August 2005. The practitioner said that he was due to undergo surgery on his shoulder, "probably on ... Christmas day". The practitioner's unsworn affidavit made a range of very serious allegations against various persons including persons at the Tribunal and the Supreme Court.

38 The matter was adjourned until 17 February 2006. The practitioner was ordered to file an affidavit by 10 February 2006 annexing all medical reports relating to his medical condition. He was warned that if he did not provide to the Court a medical certificate providing credible reasons why he could not appear in person or by counsel at the resumed hearing, the matter would proceed. As the hearing was adjourned, the practitioner collapsed and was taken from the Court by ambulance officers.

39 On 24 December 2005, 6 January 2006 and 11 January 2006 the practitioner appeared in the Supreme Court before various judges in proceedings which he had commenced on his own behalf against a government housing body, Homeswest. On 9 February 2006 he appeared in the District Court seeking to represent an in person litigant by the name of Cristovao in proceedings against a firm of solicitors, Butcher, Paull & Calder. He filed no affidavit or medical evidence in the Supreme Court by 10 February 2006 or at all.

The hearing on 17 February 2006

40 On 13 February 2006 the Court received a handwritten facsimile transmission from the practitioner requesting an adjournment of the hearing listed for 17 February 2006. He said that he had been admitted to Fremantle Hospital on 9 February 2006 after collapsing and striking his head on a metal filing cabinet. The Court replied, on 13 February 2006, saying that the hearing scheduled for 17 February 2006 would not be vacated and that affidavit evidence should be filed in relation to the practitioner's medical condition.

41 On 15 February 2006 the practitioner filed an affidavit in support of an adjournment of the hearing listed for 17 February 2006. His affidavit annexed what appeared to be a short letter from Dr George Howell of the Coolbellup Medical Centre stating that the practitioner suffered from

"complex medical issues" and was not fit to attend Court. On the following day he filed another affidavit which annexed a short letter from Dr O'Donovan of the Coolbellup Medical Centre, who said:

"This man has suffered two Motor Vehicle Accidents in the past and an unexplained collapse requiring admission on 10/02/06 and as a result of injuries received, he is not fit to attend court on 17th February 2006."

That affidavit also attached a medical certificate from Fremantle Hospital dated 16 February 2006 to the effect that the practitioner was "unfit to attend Court" on 17 February 2006. On the following morning, a further affidavit was filed. This attached a radiological report from Dr Dirk Sweeney to the effect that the practitioner had a 5 mm by 2 mm (but high grade) rotator cuff tear in his left shoulder as a result of a motor vehicle accident and that he had problems with his left and right knees.

42 The affidavits filed by the practitioner also contained a good deal of argumentative material that did not address the application for an adjournment. However, they made it plain that the practitioner considered that he was too ill to defend his case, as he was prone to suffering "collapses" that were often triggered by physical or emotional stress.

43 The hearing commenced on 17 February 2006 (this time before a bench comprising Steytler P and Roberts-Smith and Pullin JJA). The practitioner appeared in person and sought an adjournment upon the grounds of ill health. The Court suggested to him that submissions with respect to the strike-off proceedings could be made by counsel representing the Complaints Committee and that the practitioner could simply sit in Court and listen to them. If, at the conclusion of those submissions, he was too unwell to make his own submissions, the Court would make the transcript of proceedings available to him and give directions for the lodging of written submissions in response, to be supplemented by oral submissions at a later date if the practitioner so desired. The practitioner agreed to this proposal.

44 Also, at the commencement of the hearing, Roberts-Smith JA disclosed that he had served as Deputy Chairman of the Complaints Committee before being appointed to the bench during 2000. Pullin JA also disclosed that he had served as Chairman of the Complaints Committee before his appointment to the bench in September 2001. The practitioner said that he had no objection to either judge hearing the Complaints Committee's motion.

45 Counsel for the Complaints Committee thereupon made his oral submissions in the course of the strike-off proceedings in the presence of the practitioner. Then, the Court directed that the practitioner (who said that he was due to undergo shoulder surgery "any time now") be given until 20 March 2006 in order to make written submissions in response and the matter was adjourned until 29 March 2006, at which time the practitioner would be able to supplement his written submissions with oral submissions, if he chose to do that. He was told that he should make his written submissions in the knowledge that if, for some reason, he could not make oral submissions, the matter might be determined upon the basis of the written submissions only.

46 The practitioner did not file written submissions by the specified date. However, late on 20 March 2006 he faxed to the Court a notice of motion seeking to have Roberts-Smith and Pullin JJA voluntarily disqualify themselves from hearing the matter and asking for a further adjournment. He also faxed to the Court an affidavit that had been affirmed by him on 20 March 2006. In it, he said that he had sought legal advice and that he intended to file an application for a writ of *certiorari* and that he would also consider whether to lodge an appeal against the decision of the Tribunal as well. He added that he intended to file written submissions with respect to a case involving a writ of *certiorari* that was before Justice Templeman. This appears to refer to an application that the practitioner had lodged, in July 2002, seeking to quash orders that had been made by the Tribunal in unrelated matters. At a hearing of that application before Templeman J on 2 August 2002, the practitioner had been directed to file and serve written submissions by 4.00 pm on 9 August 2002. He did not do so by that time or, it seems, at any time thereafter.

47 The practitioner's affidavit also enumerated concerns that he had concerning his ill health. He said that he expected to undergo shoulder surgery on the following Tuesday and that he would have to enter Royal Perth Hospital on 3 April 2006 to undergo tests for "collapsing". He said that he had medical advice to the effect that, if he continued to handle his case he "might end up having a severe Heart Attack or a massive Stroke that will be fatal".

48 In response to this motion and affidavit, the Complaints Committee filed an affidavit sworn by Ms Diane Howell (the Law Complaints Officer) on 29 March 2006 in which she set out what had been the involvement of Roberts-Smith JA and Pullin JA in respect of complaints concerning the practitioner. She said:

"[T]he complaints and enquiries concerning Mr De Alwis dealt with by their Honours before their appointment to this Honourable Court are as follows:

- (i) Justice Roberts-Smith chaired several meetings of the Committee where it was resolved that information held by the Committee concerning the practitioner be published to the Legal Practice Board.
- (ii) Justice Roberts-Smith chaired several meetings in which a complaint by a Mr Azaddin was considered. On 4 July 2000 the Committee resolved not to take the matter further.
- (iii) Justice Roberts-Smith chaired several meetings concerning an enquiry regarding whether Mr De Alwis had been discourteous to a court. That matter was ultimately not taken any further.
- (iv) Justice Roberts-Smith chaired a meeting where it was resolved that a Reference issue against Mr De Alwis in respect of his convictions in the Court of Petty Sessions of three charges of giving immigration assistance when he was not a registered agent under the Migration Act.
- (v) Justice Pullin chaired a meeting at which it was resolved that information regarding Mr De Alwis be published to the Law Society of the Northern Territory."

The hearing on 30 March 2006

49 When the matter came on for hearing on 30 March 2006 the practitioner appeared in person, again before Steytler P, Roberts-Smith and Pullin JJA. The practitioner made oral submissions in support of his application to have Roberts-Smith JA and Pullin JA disqualify themselves. He said that, because they had sat on the Complaints Committee in circumstances in which previous issues involving him had been discussed, they may be biased against him. He sought, and was given, a short adjournment and, on resumption, he appeared to have collapsed once again. Medical assistance was called. The Court advised

the parties that Roberts-Smith JA had chosen to disqualify himself from sitting on the matter and that the matter would otherwise be adjourned.

The hearing on 27 April 2006

50 On 11 April 2006 the Complaints Committee wrote to the Court requesting a directions hearing in order to progress the matter. On the following day, the Court notified the parties that a directions hearing had been listed for Thursday 27 April 2006 at 2.15 pm.

51 On the morning of that day the practitioner telephoned the Court and said that he was at the emergency ward of Fremantle Hospital and was very ill. He did not provide a medical certificate. The directions hearing proceeded in his absence. Directions were made to the effect that the oral submissions that had been made by counsel for the Complaints Committee on 17 February 2006 would stand as written submissions on behalf of the applicant at the resumed hearing; that the practitioner was to file his written submissions by 4 pm on Thursday 18 May 2006 and that the applicant have liberty to file written submission in reply by 4 pm on Monday 22 May 2006. The matter was relisted to be heard at 10.30 am on Wednesday 31 May 2006. Directions were made to the effect that a copy of the transcript of the directions hearing be made available to the practitioner.

52 On 28 April 2006 the Court wrote to the practitioner informing him of the directions that had been made and providing him with a copy of the transcript of the proceedings on 27 April 2006.

53 Once again, the practitioner failed to lodge his written submission by the specified date. However, on 11, 17, 18 and 24 May 2006 he appeared in the District Court seeking leave to appear on behalf of Mr Cristovao in his proceedings against Butcher Paull & Calder. On 24 May 2006 he also sought leave to appear in the Supreme Court, on Mr Cristovao's behalf, in an application for leave to appeal the District Court's refusal to grant him leave to represent Mr Cristovao.

54 On 29 May 2006 the Court received, by facsimile, written submissions from the practitioner in the strike-off proceedings. The practitioner also filed, on that day, a notice of appeal against the decision of the Tribunal made on 29 August 2003, some two and a half years previously. Under O 65 r 3 (1) of the *Rules of the Supreme Court 1971* (WA) ("Rules"), an appeal from a statutory tribunal is required to be instituted within 21 days of the date of the decision.

55 The practitioner attached to the notice of appeal a document specifying that the following orders were wanted:

- "1. An Urgent **order to Stay** the further Hearing of the Report to the Full Court in LPD - 5 of 2004, until this Appeal is heard to a finality be made;
2. That an extension of time to lodge this appeal be granted;
3. That the orders made by The Legal Practitioners' Disciplinary Tribunal in Reference R 11 of 2002, be set aside;
4. That the Report to the Full Court be dismissed;
5. That the Respondents be ordered to discover all discoverable documents in their custody control and power within three weeks from the date of the order."

56 In the course of his written submissions the practitioner renewed his application that Pullin JA disqualify himself.

The hearing on 31 May 2006

57 On 31 May 2006 the practitioner appeared in person before this Court. Counsel for the Complaints Committee was asked if he wished to add anything to what had been said previously, the transcript of which was to stand as his written submissions. Save to point out that the practitioner could have provided his submissions and notice of appeal earlier, he declined to add anything to what had previously been said by him.

58 The practitioner handed up a 56 page affidavit that had been affirmed by him that morning. It contained largely argumentative material. He then made submissions concerning his request that Pullin JA disqualify himself and also submissions concerning the merits of his proposed appeal which, in significant respects, overlapped his contentions in respect of the strike-off proceedings. After the proceedings had been underway for at least two hours, the practitioner said that he was "having a little chest pain". He was asked if he would prefer to complete his submissions in writing. He said that he would. Notwithstanding that he had earlier told the Court that he could complete any written submissions by 6 June 2006, he was given 28 days within which to make any additional written submissions that he may choose to make.

59 No supplementary written submissions were received by 28 June 2006. Instead, on 29 June 2006, the practitioner filed an application for an extension of time for a further three and a half months in which to file his written submissions. This was supported by an affidavit. In that affidavit, the practitioner said that he had been too unwell to prepare submissions. He also said that he had recently been looking through a file when he had "stumbled upon" \$400 in cash in an envelope with a note marking it as having come from Mr Taylor. A copy of the envelope was annexed.

60 On 6 July 2006 the Court wrote to the practitioner, giving him until 4 pm on 31 July 2006 in which to file any further written submissions. He did not file any further written submissions, although he was able to fax to the Court a handwritten letter running to several pages, the substance of which appeared to be that he had recently undergone shoulder surgery and was in too much pain to make any further submissions.

61 No further written submissions have since been received from him. The most recent correspondence received from the practitioner was on 30 August 2006 when the practitioner faxed a two-page letter to the Court, informing it that he intended to file a writ of prohibition against Pullin JA, although he was presently too ill to prepare that document. No writ of prohibition to prevent Pullin JA from sitting on these matters has been filed.

62 That brings us to the substance of the applications now before the Court. We propose, first, to deal with the issue of disqualification, then with the application for an extension of time within which to lodge the appeal against the decision of the Tribunal and, finally, with the strike-off proceedings.

Disqualification of Pullin JA

63 As will be apparent, Pullin JA declined to disqualify himself. He, and the other members of the Court, are of the opinion that no basis has been shown for him to do so.

64 The foundation upon which the practitioner's request was based is one of apprehended bias. The test, in such a case, is that of whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide: *McCreech v The Queen* (2003) 27 WAR 554 at 557 [8]; *Johnson v Johnson* (2000) 201 CLR 488 at 492; *Vakauta v Kelly* (1989) 167 CLR 568 and *Forge v Australian Securities*

and Investments Commission [2006] HCA 44 at [67]. The principle gives effect to the requirement that justice should be done and be seen to be done and that a court is an independent and impartial body. Justice can only be done if there is no bias and it can only be seen to be done if there is no appearance of bias: *McCree* at 557 [7].

65 In *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294, the High Court said:

"In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters 'of degree and particular circumstances may strike different minds in different ways' (per Aickin J. in *Shaw [Re Shaw; Ex parte Shaw]* (1980) 55 ALJR 12 at 16). If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court."

66 More recently, in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348, Gleeson CJ, McHugh, Gummow and Hayne JJ said:

"Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection

should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.

This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."

67 In our opinion there is no reasonable basis upon which a fair-minded lay observer might apprehend that Pullin JA might not bring a fair and impartial mind to this case. The suggestion that there is a reasonable apprehension of bias is based solely upon the proposition that Pullin JA had previously served as Chairman of the Law Society's Complaints Committee prior to his appointment to the bench in 2001. The evidence before the Court (in the form of the affidavit of Ms Diane Howell sworn on 29 March 2006) suggests that the only interaction Pullin JA may have had with the practitioner during his time as Chairman of the Complaints Committee was in chairing a meeting at which it was resolved that information regarding the practitioner be published to the Law Society of the Northern Territory. There is no suggestion from the practitioner that Pullin JA had any greater involvement than this although, as will be apparent from what we have earlier said, Pullin JA also heard, and refused, an application by the practitioner to stay the order that there be publication of the reasons of the Tribunal on 26 September 2003. However, the practitioner contends that, even if this involvement is insufficient to justify his claim of apprehended bias, then the fact of Pullin JA's past association with members of the Complaints Committee and the Tribunal may affect his ability to decide the case on the merits, more especially in circumstances in which the practitioner has made a number of complaints concerning the behaviour of some of those persons.

68 In our opinion, Pullin JA's very limited involvement with matters concerning the practitioner (he has no independent recollection of them) are insufficient to give rise to any reasonable apprehension of bias. As to the suggestion that his association with members of the Complaints

Committee and Tribunal is likely to affect his ability to decide the case on its merits, it seems to us that, in circumstances in which his association with these persons was limited to an official capacity and is now some five years distant, this, too, is incapable of giving rise to any reasonable apprehension of bias, whether viewed in isolation or together with the other matters relied upon. It has been said that the administration of justice is a practical business which relies to a very great extent on judges putting aside whatever personal professional associations they may have had and doing justice as they are sworn to do: see *Western Australia v Watson* [1990] WAR 248 at 264. It should also be remembered that the fair-minded observer is taken to be reasonable and that the person being observed is "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial": *Vakauta*, at 527, per McHugh JA, quoted with approval by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Johnson*. There is no reason to think that a fair-minded observer would doubt that Pullin JA would be able to do so in this case.

Application for an extension of time within which to appeal

69 Order 5 of the Rules gives to the Court a wide discretion to grant an extension of time in order to prevent injustice: *FAI Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268. Four important (but not necessarily determinative) factors to be taken into account in the exercise of the discretion are the length of the delay, the reasons for the delay, whether there is an arguable case and the extent of any prejudice to the respondent: *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 1 WLR 942 at 946; *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196 at 198.

70 The longer the delay in making an application, the more cogent must be the reasons for it before a court will grant an extension of time: *Girando v Girando* (1997) 18 WAR 450 at 454. It is well established that in a case of lengthy delay exceptional circumstances will be required before an extension of time will be granted, unless it can be shown that there will be a miscarriage of justice if the extension is not granted: *Gavin v The Queen* (1992) 6 WAR 195 at 198 - 199, per Malcolm CJ and the cases there referred to.

71 In *Gallo v Dawson* (1990) 64 ALJR 458 at 459, McHugh J said:

"In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the

consequences for the parties of the grant or refusal of the application for extension of time ... When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872 ... It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has 'a vested right to retain the judgment' unless the application is granted: *Vilenius v Heinegar* (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice."

72 In this case the delay is very substantial (some two and a half years) and the reasons given for it are unconvincing. However, we are nevertheless of the opinion that it is important, in deciding whether or not to grant an extension of time, to consider the appeal's prospects of success.

73 After amendment, there are nine grounds of appeal. These read as follows:

"1. The Tribunal was biased against the Appellant; the hearing was attended by BOTH Actual Bias and Perceived Bias;

PARTICULARS

- Hon. B.W Rowland was biased against the Appellant. He had heard cases against the Appellant in the recent past;
- The Member Ms. Liscia was the Appellant's Solicitor in the recent past;
- The Member Mr. Duncan had heard a case against the Appellant in the recent past.
- Ms. Mary Ann-Paton, the Registrar of the Tribunal was the General Manager of the Legal Practise [sic] Board as well. The Applicant and the Prosecutor of the Reference, the Legal Practitioners' Complaints Committee whose law Complaints Officer received and investigated the complaint were all working under the Legal Practise [sic] Board. It defeated the maxim that Justice must be not

only done but must be manifestly and undoubtedly be seen to be done.

2. **The Appellant was denied Natural Justice; there was a gross violation of the principle of Natural Justice – *audi alteram partem* rule;**

PARTICULARS

- Appellant informed the Tribunal that he was indisposed and was unfit to attend a hearing and defend himself;
- Appellant submitted Medical Certificates in support of his condition of health;
- Tribunal began harassing and forcing the Appellant to attend the Hearing completely disregarding the expert evidence on his health and the certification that he was not fit to attend the hearing or to defend himself;
- The Counsel for the Applicant, Mr Bruce Goertze [*sic*] began contacting the Appellant's doctors and harassed them, intimidated them and frightened them.
- Despite the Appellant informing the Tribunal that he was unable to attend due to ill health, having supported that with Medical Certificates, the Tribunal heard the case ex-parte, suppressing the Medical evidence that he had submitted to the Registrar of the Tribunal.
- When the Counsel for the LPCC moved the Tribunal that the transcripts of the evidence led and the copy of his written submissions be sent to the Appellant by mail and ordered to respond to them within a stipulated period, the Tribunal refused that application. Appellant was denied an opportunity to respond and reply to the allegations made against him or to respond and reply to the legal arguments raised against him. It was a blatant denial of Natural Justice. It miscarried Justice.
- The Tribunal did NOT notify the Appellant before sentencing him at all. He was not heard before sentencing at all. It was a gross violation of the principles of Sentencing and of Natural Justice. Appellant was

denied Natural Justice as regards sentencing as well. A gross miscarriage of Justice occurred as a result.

- The Tribunal gave legal advice to the Prosecutor from the Bench. It was unfair and unjust. Tribunal descended to the dust of the Arena and blinded itself. Tribunal thus became a Judge in its own cause, violating a principle Natural Justice. Appellant was denied a fair Trial [*sic*] as a result.
- 3. The complaint that was made to the Law Complaints officer by the complainant was not made according to the legislation. Everything that followed as a result was not according to law and was a violation of the law. The findings of the Tribunal were all-bad [*sic*] in law and are null and void.**
- 4. Statements made by the Appellant in interlocutory proceedings in other Courts were led as evidence. Such evidence was inadmissible and inadducible. Admission of such evidence was unreasonable, unfair and unjust. It caused a gross miscarriage of Justice.**
- 5. There was insufficient enquiry by the tribunal in view of the fact that it was an ex-prate [*sic*] hearing. The tribunal owed a duty to the Appellant to be more inquisitive. The failure of its duty and the neglect of its duty by the Tribunal caused a gross miscarriage of Justice. The findings are therefore bad in law and must be set aside.**
- 6. Affidavit evidence was not led correctly. It was not admissible as a result. Admission of such evidence caused a miscarriage of Justice. The findings are therefore bad in law and must be set aside.**
- 7. The findings of the tribunal are, in all the circumstances unsatisfactory and unsafe and must be set aside.**
- 8. Sentence was in all the circumstances not proportionate, excessive and unfair.**

9. Mr Rowland QC refused to give reasons for failing to disqualify himself."

74 Although the practitioner has not taken the opportunities afforded to him to supplement his submissions in writing, the arguments raised by him in support of each ground can, for the most part, be gleaned from the various affidavits and outlines of submissions which have been lodged by him, and also oral submissions made by him on 31 May 2006. We have taken all of that material into consideration.

Ground 1

75 As to ground 1, it will be apparent from what we have earlier said that the Chairman of the Tribunal, Mr B W Rowland QC, declined to disqualify himself when asked to do so on 12 June 2003. The basis upon which he was asked to do so, and the basis upon which he is now said to have been biased, is that he had previously presided over disciplinary tribunal hearings which had found the practitioner guilty of other charges. Mr Duncan, too, is said to have been a member of a disciplinary tribunal which had heard another complaint concerning the practitioner.

76 So far as the Chairman is concerned, it is plain from what we have earlier said that the practitioner was given a reasonable opportunity to file an answer to the reference, or suitable medical evidence to explain his failure to do so, or to appear at the hearing on 29 August 2003. There is nothing in his conduct which is suggestive of bias or the appearance of it. Nor is there anything to suggest that his prior involvement in matters concerning the practitioner was such as to preclude him from bringing a fair and impartial mind to the complaint in question or to create an apprehension of bias in the mind of a reasonable fair-minded observer, more especially having regard for the fact that the Chairman is a former judge of the Supreme Court, as to which see *Vakauta* at 527 and *Johnson* at 493.

77 The same is true of Mr Duncan (save, of course, that he is not a former judge). Moreover, it is a relevant consideration that, at the relevant time, the practitioner raised no objection to Mr Duncan sitting on the Tribunal (as to which see *Lindon v Commonwealth of Australia (No 2)* (1996) 70 ALJR 541 at 548).

78 As to Ms Liscia, the practitioner says that she should have disqualified herself because she had previously represented him and had taken instructions on his behalf in a professional negligence matter. A prior relationship of legal adviser and client does not generally disqualify

the former adviser, on becoming a member of a tribunal, from sitting in proceedings before that tribunal to which the former client is a party (at least if the correctness or appropriateness of advice given to the client is not a live issue for determination by the tribunal): *Re Polites; Ex parte The Hoyts Corporation Pty Ltd (No 2)* (1991) 173 CLR 78 at 87 - 88. There is consequently no basis for the claim of bias, or perceived bias, concerning Ms Liscia.

79 As to Ms Paton, the practitioner suggested that she had deliberately constituted the Tribunal with people who would be biased against him. However, that suggestion is merely an assertion which is unsupported by any evidence. Ms Paton, as Registrar of the Tribunal, was not involved in the hearing in any decision-making capacity and there is consequently no other basis that could be raised in support of an allegation of bias, whether actual or perceived.

80 Ground 1 consequently seems to us to have little prospect of success.

Ground 2

81 It is, of course, a fundamental rule of procedural fairness that, generally speaking, when an order is to be made which will deprive a person of some right or interest, that person is entitled to know the case sought to be made against him or her and to be given an opportunity of replying to it: *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109; and *Kioa v West* (1985) 159 CLR 550 at 583. The first basis upon which this rule is said to have been infringed is essentially that the Tribunal ignored the fact of the practitioner's unfitness to attend the hearing and defend himself and took no account of his medical evidence.

82 It will be apparent, from what we have earlier said, that the practitioner was given ample opportunity to know the case sought to be made against him and to reply to it. He was served, in May 2003, with the reference. In early June 2003 he was provided with copies of the affidavits that constituted the case against him. He failed to file his written answer to the reference notwithstanding that he knew that he was required to do so and notwithstanding, also, that there was insufficient in the medical evidence that was provided by him to support his proposition that he was unable to do so.

83 It is incorrect to suggest that medical evidence supplied by the practitioner was not taken into account. As we have said, the hearing on 12 June 2003 was adjourned, notwithstanding the vague nature of the medical certificate provided on that day. Moreover, notwithstanding that

the practitioner had been told that the hearing would proceed on 16 June 2003 unless the practitioner could produce further detailed medical evidence, the hearing was again adjourned on that day because of the practitioner's telephone call to the effect that he was in the Coronary Care Unit at Royal Perth Hospital. When the hearing of the reference ultimately took place on 29 August 2003, the Tribunal had been provided with no additional medical evidence and there was nothing to support the proposition that the practitioner was medically unfit to attend on that day. There is consequently no substance to the first three particulars provided under this ground or to the fifth particular provided in respect of it.

84 As to the fourth particular, the practitioner has asserted, both orally and in writing, that counsel for the applicant, Mr Bruce Goetze, contacted the doctor who had issued the medical certificate to which we have referred and intimidated her to the point where she was reluctant to assist any further. There is no admissible evidence of this. The transcript of the hearing on 29 August 2003 reveals that Mr Goetze had telephoned the practitioner's doctor in order to ask her whether she proposed to be present before the Tribunal on 29 August. It appears that he may have sought to subpoena her to attend the hearing and that she was unhappy with this. However, this does not amount to intimidation. The practitioner also asserts that news of the "intimidation" of the doctor "spread like wild fire" and the stage was reached where it became very difficult for him to obtain any medical assistance. Again, there is no admissible evidence in support of this other than the practitioner's own assertions.

85 As to the sixth particular, this appears to be a reference to a suggestion that was made by Mr Goetze on behalf of the applicant shortly after the commencement of the hearing on 29 August 2003. Mr Goetze told the Tribunal that there had been some correspondence from the practitioner requesting an adjournment and of his response to the effect that the practitioner should make that application in person on the day of the hearing. Then, he asked whether the Tribunal wished him "to proceed or perhaps at least to tender the documentary evidence, hand up a copy of the submissions and perhaps call on ... [the practitioner] to provide within a certain time an identification of what it is that he says by way of defence in the matter". The Chairman of the Tribunal responded by saying that the practitioner appeared to have been given every opportunity to put in an answer but had failed to do so and that the Tribunal considered that they "should just get on with it". In our opinion, given the history of the matter as at that date, it was open to the Tribunal to decline to furnish the practitioner with yet another opportunity to lodge an answer to the case

made against him. He had, by then, already been given a more than ample opportunity to put his case, had he wished to do so.

86 As to the penultimate particular, this adds little to the other contentions advanced on behalf of the practitioner. He must have been aware that, if the matter proceeded on 29 August 2003, it might proceed to its conclusion, including a decision as regards what should be done if the facts stated in the reference should be found to have been proved. Once again, he had the opportunity to make submissions, whether orally or in writing, as to the appropriate disposition of the reference should the charge be found proved, but he declined to take advantage of it. We should add that it is not appropriate for the practitioner to refer to himself as having been "sentenced". All that has happened is that a report, coupled with a recommendation, has been made to this Court. It is for this Court to decide what is the appropriate response to the findings of the Tribunal.

87 As to the final particular, it is not entirely clear to us what "legal advice" is referred to. In the practitioner's oral and written submissions (including those contained within his affidavits) this is said to have been advice to the effect that Mr Goetze should approach the Supreme Court in order to have the practitioner suspended. This seems to be a reference to the Tribunal's ultimate finding, made on 29 August 2003, to the effect that a report would be submitted to the Full Court of the Supreme Court recommending that the practitioner be struck off the roll and that, pending that decision, the practitioner be suspended from practicing. That does not constitute legal advice, whether to Mr Goetze or anyone else. It is simply a recommendation made by the Tribunal to the Supreme Court. There is consequently no issue of any failure of procedural fairness of the kind contended for.

88 It follows, from these conclusions, that ground 2 has little prospect of success.

Ground 3

89 Ground 3 is difficult to follow. The gravamen of the complaint appears to be that it was Mrs Taylor who made the complaint and not Mr Taylor, who was the practitioner's client and who is said to have been the proper person to make a complaint against him. In his affidavit affirmed on 31 May 2006, the practitioner suggests that Mr Taylor had refused to make a complaint against him when contacted by a representative of the Complaints Committee. He says that Mrs Taylor

was then contacted and that she, too, did not want to make a complaint against him, until she was offered \$10,900 if she would do so.

90 As to the contention that the complaint should have been made by Mr Taylor, s 25(1)(b)(v) of the 1893 Act, which was in force at the time, provides that the Complaints Committee could receive complaints from "any client or a practitioner or other complainant or subject to s 27(1)(d) any other person on behalf of a complainant, the complainant being a person who has or had a direct personal interest in the matters alleged in the complaint". Mrs Taylor was a person who had a direct personal interest in the matter, the funds in question having been paid by her and her husband. In any event, s 25(1)(c) of the 1893 Act provided that the Complaints Committee could enquire into conduct of a practitioner whether it had received a complaint or not.

91 There is consequently no substance to this ground.

Ground 4

92 As to ground 4, the practitioner's point is presumably that the transcript relied upon was never satisfactorily proved. It seems merely to have been handed up by counsel for the applicant. However, under s 28D of the 1893 Act the Tribunal is not bound by the rules of evidence but may inform itself in any manner it considers just. Moreover, the accuracy of the transcript is not in issue and, indeed, the practitioner's contentions, as they appear from the affidavit evidence before us, seem to be to the effect that he was entitled to the money that he received, and more, by way of payment for his services. There was nothing unreasonable, unfair or unjust in the admission of the transcripts. Also, the practitioner's receipt of the money, the absence of any accounts rendered in respect of it and the failure to deposit the money into a trust account were all proved by independent evidence in any event. In its reasons for decision the Tribunal expressly found that, "apart from the practitioner's statements from the Bar table to McKechnie J and Hasluck J ... there is satisfactory proof from Mrs T[aylor] and her Bank and Ms Buckley that those amounts were paid to the practitioner".

93 There is consequently no substance to ground 4.

Ground 5

94 Ground 5 is difficult to understand. The evidence before the Tribunal plainly established the conduct that was alleged against the practitioner. There was no need for it to be "more inquisitive".

Mrs Taylor's evidence of the payments that were made by her to the practitioner was supported by documents from the practitioner's records. There was also documentary evidence establishing into which accounts the payments went and that no money was paid into trust. The practitioner's file was available to the Tribunal. There was nothing more that it could investigate. Ground 5 consequently has no merit.

Ground 6

95 While ground 6 contends that affidavit evidence was not led correctly, we have been unable to find anything in the submissions lodged or made orally by the practitioner, or in his affidavit material, to explain why it is that the affidavit evidence is said to have been incorrectly led. There is consequently nothing to suggest that this ground has any merit. In any event, as we have said when dealing with ground 4, s 28D of the 1983 Act provided that the Tribunal was not bound by the rules of evidence.

Ground 7

96 Ground 7 merely expresses a conclusion, based upon other grounds, that the findings of the Tribunal are in all the circumstances unsatisfactory and unsafe. Given the conclusions at which we have arrived in respect of those grounds, there is no substance to this ground.

Ground 8

97 The practitioner complains, by ground 8, that the "sentence" imposed upon him was "not proportionate, excessive and unfair". As we have said, no sentence has been imposed upon the practitioner. There is only a report to this Court, coupled with a recommendation. It is consequently for this Court to decide what should be the consequence of the Tribunal's finding that the charge against the practitioner was proved.

Ground 9

98 Finally, the practitioner contended that the Chairman, Mr Rowland QC, refused to give reasons for his refusal to disqualify himself. That is not correct. The Chairman did give reasons, albeit they were very briefly expressed. He said (page 8 of the transcript of the hearing on 12 June 2003) that the practitioner had not "produced any grounds to suggest that ... [the Chairman was] biased, other than perhaps the fact that ... [he] sat on an earlier case in which ... [the practitioner] was involved". He went on to say that he had a statutory obligation "to sit on these matters". It is obvious from what little he said that he did not regard the fact that he

had sat on an earlier case involving the practitioner as being a sufficient basis for disqualification. This ground, too, has little merit.

Conclusion on the application for an extension of time

99 In all of the circumstances we are not persuaded that there would be any miscarriage of justice if the practitioner should not be granted an extension of time in which to appeal. His grounds of appeal have, as we have said, little merit and are unlikely to succeed.

100 We have said that his explanation for the very substantial delay is unconvincing. The explanation appears to centre primarily upon the practitioner's ongoing ill health and inability to devote the necessary time and energy to his case. While he has produced medical evidence of some problems, including the rotator cuff tear in his left shoulder and a number of examinations which he appears to have undergone in respect of his frequent collapses, these do not, by any stretch of the imagination, explain his inability to lodge a notice of appeal over so long a period. We have mentioned that, during that period of two and a half years, the practitioner has been able to assist other litigants in this Court and, indeed, in the District Court. He has repeatedly prepared and lodged other documents (some of them very lengthy) during that time.

101 The practitioner also asserts that he has been seeking legal advice and that he has been unable to find anyone to represent him. However, he is, of course, legally qualified, with some years of experience, and it is difficult to believe that he could not himself have prepared a notice of appeal (as he has subsequently done) and lodged it in good time. He has made allegations to the effect that he has been subjected to persecution by, and corruption on the part of, the Court leading him to believe that it would be pointless for him to file any applications or appeals. There is no evidence to support any of these allegations. The practitioner has also asserted that he was under the impression that the strike-off proceedings could be treated as an appeal. Given his legal qualifications, we are unable to accept that he was under any such misapprehension.

102 In all of these circumstances, and even if it be assumed that the respondent would not be prejudiced by the grant of an extension of time, we are satisfied that the only appropriate exercise of discretion is to refuse the extension of time that has been sought. It necessarily follows that the practitioner's application for a stay of the strike-off proceedings pending the appeal falls away.

The strike-off proceedings

103 That brings us, finally, to the Complaints Committee's referral to this Court. Our task, relevantly, is that of determining whether the practitioner is a fit and proper person to remain on the roll of practitioners: *In Re Davis* (1947) 75 CLR 409 at 416; *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 288; *Re Maraj* (1995) 15 WAR 12 at 25; and *A Solicitor v Council of the Law Society of New South Wales* (2003) 216 CLR 253 at 265 - 266. In considering that question, this Court is bound to treat the report of the Tribunal as conclusive in respect of all facts and findings contained in it: s 30 of the 1893 Act and s 194 of the *Legal Practice Act 2003* (WA).

104 Proceedings of this kind against a legal practitioner are not instituted in order to punish the practitioner. Their sole object is the protection of the public and maintenance of proper standards in the legal profession: *Re a Barrister and Solicitor* (1979) 40 FLR 1 at 24 - 25, per Blackburn CJ, Connor and Davies JJ; *Re Maraj* at 25. In order to protect the public and the reputation of the profession, the consequences for the practitioner may need to be more severe than if the only object of the proceedings was one of punishment: *Re Maraj*.

105 On the findings of the Tribunal, this is a case of misappropriation of trust money. As we have said, the practitioner received a number of instalments of money from or on behalf of his client and none of these was paid into his trust account. Instead, they were paid into his general office account or into his private account. Plainly, the practitioner showed little or no understanding of the necessity to keep proper accounts and records, of the need to keep his own money separate from that held on behalf of his client, or of his obligation to account to his client for money that had been paid to him on account of fees and disbursements.

106 Conduct of this kind is serious and has often been treated as such by the courts. One example is the case of *In re A Practitioner* (1982) 30 SASR 27. A practitioner failed to pay cheques into a trust account and instead disbursed the proceeds for profit. An equivalent sum was ultimately paid by the practitioner into the trust account and no loss or delay was suffered by the client. When called upon to explain the irregularities, the practitioner at first gave a misleading and untrue explanation. The Court ordered that he be struck off the roll of practitioners. King CJ said (at 31) that, despite the fact that the practitioner always intended to pay the money back, his conduct was:

" ... an affront to the sanctity of the practitioner's Trust Account and this Court has a duty to vindicate the inviolability of the trust imposed upon a practitioner to treat his clients' money in all respects as their money and to use their money for their purposes and no other. The public can feel confidence in legal practitioners and their handling of their money only if they know that there is involved no element of judgment on the part of the practitioner, and that their money must remain in his Trust Account until it is disbursed in accordance with their direction; because no matter how good the intentions of a practitioner might be, no matter how confident he might be that the money can be made good, whenever a client's money is deliberately used for a purpose other than the purpose for which the client entrusted it to the practitioner, there is an act of dishonesty on the part of the practitioner and one which exposes the client to some element of risk as to his money."

107 Another example is provided by *Legal Practitioners Conduct Board v Hannaford* (2002) 83 SASR 277. In that case a solicitor obtained \$10,000 on account of legal costs from his client's father. The solicitor did not pay the money into his trust account but instead paid it into his office account and then made an application for a grant of legal aid in respect of his client's legal costs. In that application, he failed to disclose his receipt of the sum of \$10,000 and the fact that his client lived with his father. Legal aid was granted and, by that means, the practitioner was paid around \$20,000 in respect of certified total costs, including counsel fees and disbursements. He paid the counsel whom he had briefed and retained the balance. He was later charged with unprofessional conduct relating to the false application to the Legal Services Commission and his failure properly to account for the \$10,000 received from his client's father. His conduct was found to have represented a gross departure from proper professional standards and he was struck off the roll of practitioners. Gray J, in the course of his judgment (at 284), said that the need for practitioners to keep their clients' money separate from their own has been consistently recognised by legislation and the courts over many years. He referred to *In re H A O'Donnell* [1895] 12 WN (NSW) 42 at 42 where the Chief Justice said:

"Solicitors have been warned over and over again that their clients' moneys should not be mixed with their own, but should be placed in a trust account; under no circumstances whatsoever should a solicitor pay the money of his client into his own banking account. If it is discovered that solicitors mix the

money of their clients with their own, that fact alone, apart from any defalcation, should render them liable to punishment, even though the next day they might be in a position to draw a cheque for the money."

He referred also to what had been said by Simpson J, in the same case, at 43:

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

108 In *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736 a practitioner had obtained loans from his clients in respect of various transactions in circumstances in which he made no adequate disclosure of material considerations. So, for example, interest was often paid below commercial rates in respect of the loans, securities were often inadequate and either no or no adequate information or advice was given to the clients in respect of the securities. Nor was any advice given concerning the need for the clients to obtain independent legal advice. The Court considered the practitioner to be unfit to practice and removed his name from the roll of solicitors. Hope JA, with whom Reynolds JA was in agreement, said that even if the practitioner's acts were done in ignorance or lack of concern as to what his duty was, then, in that event, he put himself forward as a solicitor who had accepted the position of trustee but who had no inkling of his obligations to beneficiaries and had not troubled to find out what they were. He said that such an unawareness of and lack of care about the most elementary propositions of law concerning the responsibility taken on by the practitioner and the standards required of solicitors were themselves sufficient to justify the protection of the public by his removal from the roll.

109 It seems to us that in this case the practitioner's conduct was so serious a breach of his obligations as to demonstrate his unfitness for practice. Not only did he reveal no understanding of his obligation to keep proper accounts and records and, more fundamentally, to keep his own money separate from that held on trust for his client and to account to his client for that money, he has also continued to argue that he has done nothing wrong and that the money was owed to him for the large amount of work that he claims to have done on behalf of his client. We have said that the evidence before the Tribunal, and accepted by it, reveals that he had done no more than prepare pro forma applications and short

supporting affidavits in the Federal Court, make five short attendances at the Federal Court (three of which were brought about by his failure to comply with orders of that Court), engage in some incidental conduct and prepare an incompetent application for special leave to the High Court. While he asserts that he performed work on other matters on behalf of Mr Taylor, Mrs Taylor's evidence was that the money paid to the practitioner was solely in relation to his services concerning the Minister's decision to cancel Mr Taylor's permanent residence visa.

110 In all of the circumstances, we consider that we have no alternative than to order that the practitioner be struck off the roll of practitioners and that he pay to the applicant the costs of this application to be taxed.

111 We should add that in our opinion the practitioner's unfitness for practice is amply demonstrated, in addition, by the manner in which he has conducted himself in these proceedings. His affidavits have been replete with argumentative material, often including allegations of gross misconduct against judicial officers, practitioners and court staff, none of which appear to have any foundation. Moreover, as will be apparent, he has repeatedly failed to comply with time limits and directions imposed by the Court.