
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PRACTICE ACT 2003 (WA)

CITATION : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE and CULLEN [2005] WASAT 211

MEMBER : JUSTICE M L BARKER (PRESIDENT)
MR D R PARRY (SENIOR MEMBER)
MS J STANTON (SENIOR SESSIONAL MEMBER)

HEARD : 20 JULY 2005

DELIVERED : 19 AUGUST 2005

FILE NO/S : VR 228 of 2005

BETWEEN : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Applicant

AND

PETER BRUCE de BARRAN CULLEN
Respondent

Catchwords:

Legal practice - Professional disciplinary proceedings - Legal practitioner - Unsatisfactory conduct - Unprofessional conduct - Failure to properly maintain trust account - Trust monies deposited through bank error into practitioner's general account on 13 occasions over 27 months - Failure to transfer monies to trust account in timely manner - Payments from trust account for clients resulting in debit balances in clients' trust ledger accounts - Failure to cause trust account to be balanced - Failure by auditors to identify first three incorrect deposits in annual audit - Failure by practitioner's bookkeeper to correct first

five incorrect deposits when notified by auditor - Auditor issued unqualified certificate without confirming correction of deposits - Practitioner transferred monies to make up deficiency in trust account promptly once informed - Senior practitioner - Previous finding of unprofessional conduct in relation to handling of trust monies - No allegation of dishonesty on either occasion - Whether suspension of practitioner from practice necessary or appropriate for protection of public and maintenance of proper standards of legal profession - Whether imposition of practical conditions on right to practice necessary and appropriate - Reprimand, fine, conditions on practice for two years, and publication order imposed

Legislation:

*Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 (WA), s 4
Interpretation Act 1984 (WA), s 37(1)*

Legal Practice Act 2003 (WA), s 3, s 164(1)(f), s 180, s 185(1), s 185(2), s 187(1), s 250A(1), s 250A(2)

Legal Practice Board Rules 1949 (WA), r 91, r 92, r 93, r 94, r 99

Legal Practice Board Rules 2004 (WA), r 51, r 52, r 53, r 57, r 77

Legal Practitioners Act 1893 (WA), s 29A

State Administrative Tribunal Act 2004 (WA), s 3(1), s 7, s 13(1)

Result:

Reprimand, fine, conditions on practice for two years, and publication order

Category: B

Representation:

Counsel:

Applicant : Mr BJH Goetze
Respondent : Mr MJ McCusker QC

Solicitors:

Applicant : Minter Ellison
Respondent : Self-represented

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

Re A Barrister and Solicitor (1979) 40 FLR 1

Case(s) also cited:

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The Legal Practitioners Complaints Committee brought professional disciplinary proceedings against Peter Bruce de Barran Cullen. The Committee contended, and Mr Cullen conceded, that he was guilty of unprofessional conduct in relation to the maintenance of his trust account.

2 The circumstances which gave rise to the conduct were a series of bank errors, without any fault on the part of Mr Cullen or his staff. The bank errors were compounded by the failure of Mr Cullen's auditors to identify the problem and the failure of Mr Cullen's bookkeeper, once the problem was identified to her by the auditors, to correct it and to bring it to Mr Cullen's attention. There was no allegation of dishonesty on Mr Cullen's part. Once the problem was brought to his attention, he corrected it promptly.

3 The Committee sought an order that Mr Cullen be suspended from practice for the maximum period available to the Tribunal, namely two years. The Tribunal determined that suspension was not necessary or appropriate for the protection of the public or the maintenance of proper standards. Rather, the Tribunal considered that a reprimand, a substantial fine, the imposition of practical conditions on Mr Cullen's right to practice for two years, and the publication of its decision and reasons, was necessary and appropriate. The conditions on practice imposed by the Tribunal required daily reconciliation of the trust account, weekly reconciliation and submission to the Legal Practice Board, and quarterly review by an independent auditor and submission to the Legal Practice Board.

Introduction

4 These are professional disciplinary proceedings brought by the Legal Practitioners Complaints Committee (Committee) against a legal practitioner, Peter Bruce de Barran Cullen, under s 164(1)(f) of the *Legal Practice Act 2003* (WA) (the 2003 Act) and s 29A of the *Legal Practitioners Act 1893* (WA). The Committee contends, and Mr Cullen concedes, that he was guilty of unprofessional conduct between 1 October 2001 and 30 December 2003, and unsatisfactory conduct by unprofessional conduct between 1 January 2004 and 11 May 2004. The grounds advanced by the Committee for a finding of unprofessional conduct and unsatisfactory conduct by unprofessional conduct are as follows:

- "1. Depositing trust monies received from or on behalf of clients to the credit of his general account and failing to transfer the monies to the credit of his trust account in a timely manner.
2. Further or alternatively, paying out of his trust account monies for or on account of clients which resulted in debit balances occurring in client's [sic] ledger accounts when the practitioner did not hold in his trust account sufficient monies belonging to him to cover the debit balances which were clearly recorded and identified in his trust account as his own monies, as required by rule 94(2) of the *Legal Practice Board Rules 1949*.
3. Further or alternatively, failing to ensure that by himself or his staff his accounting records relating to his trust account were maintained in such a manner as to disclose the true position as regards the trust monies received by him."

5 The reason for the difference in terminology in relation to Mr Cullen's conduct over the two periods, namely "unprofessional conduct" between 1 October 2001 and 30 December 2003, and "unsatisfactory conduct by unprofessional conduct" between 1 January 2004 and 11 May 2004, is that during the former period, legal practice in this State was regulated by the *Legal Practitioners Act 1893*, whereas during the latter period, it was regulated by the 2003 Act. Section 29A(1) of the *Legal Practitioners Act 1893* conferred jurisdiction on the Legal Practitioners Disciplinary Tribunal (Disciplinary Tribunal) to make a finding that a practitioner has been guilty of, among other types of conduct, "unprofessional conduct". On making such a finding, the Disciplinary Tribunal had power, under s 29A(2) and s 29A(3) of the *Legal Practitioners Act 1893*, to make orders including:

- (i) suspension of the practitioner from practice for a period not exceeding two years;
- (ii) the imposition of conditions or restrictions on the right of the practitioner to practice for a period not exceeding two years;
- (iii) that the practitioner take advice in relation to the management and conduct of the practice from the Legal

Practice Board (Board) or a person named and approved by the Board or the Law Society of Western Australia;

- (iv) the payment by the practitioner to the Board of a fine not exceeding \$10,000; and
- (v) the reprimand of the practitioner.

6 The *Legal Practitioners Act 1893* was repealed with effect from 1 January 2004: *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA) s 4. The 2003 Act commenced on that day: 2003 Act s 2 and *Gazette* 30 December 2003 page 5722. Section 162 of the 2003 Act established the Committee. By s 164(1)(f) of the 2003 Act, the functions of the Committee include, if it "considers it appropriate to do so, and whether or not it has conducted an inquiry, to institute professional disciplinary proceedings against a legal practitioner before the State Administrative Tribunal". Between 1 January 2004 and 31 December 2004, s 164(1)(f) gave the Committee the same function, but provided for the institution of professional disciplinary proceedings against a practitioner before the Disciplinary Tribunal.

7 Since 1 January 2005, s 185(1) of the 2003 Act has conferred jurisdiction on the Tribunal to make a finding that a legal practitioner is guilty of "unsatisfactory conduct". Between 1 January 2004 and 31 December 2004, equivalent jurisdiction was conferred on the Disciplinary Tribunal. The term "unsatisfactory conduct" is defined in s 3 of the 2003 Act to include "unprofessional conduct on the part of a legal practitioner, whether occurring before or after admission as a legal practitioner". Section 185(2) and s 187(1) of the 2003 Act confer on the Tribunal (and, during 2004, conferred on the Disciplinary Tribunal), on making a finding that a legal practitioner is guilty of unsatisfactory conduct under s 185(1), an equivalent suite of powers to that which was available to the Disciplinary Tribunal under s 29A(2) and s 29A(3) of the *Legal Practitioners Act 1893*, prior to its repeal. The only differences are in relation to the maximum fine and maximum compensation which may be imposed. The maximum fine which could be imposed by the Disciplinary Tribunal from 1 January 2004, and which can be imposed by this Tribunal, is \$25,000.

8 Although the *Legal Practitioners Act 1893* was repealed a year before the establishment of the Tribunal by s 7 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), it is common ground that the Tribunal has jurisdiction to make a finding that Mr Cullen is guilty of

unprofessional conduct under s 29A(1) of the *Legal Practitioners Act 1892*, and to make consequential orders under s 29A(2) and s 29A(3) of that Act. Section 13(1) of the SAT Act provides that "a provision of an enabling Act that enables an application to be made to the Tribunal gives the Tribunal jurisdiction to deal with the matter concerned". Section 3(1) of the SAT Act defines the term "enabling Act" to mean "another Act ... under which jurisdiction is conferred on the Tribunal ... ". Given that the *Legal Practitioners Act 1893* was repealed prior to the commencement of the SAT Act, it did not, by its terms, enable an application to be made to the Tribunal. However, s 37(1) of the *Interpretation Act 1984* (WA) provides, in part, as follows:

"Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears -

...

(c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;

(d) affect any duty, obligation, liability or burden of proof imposed, created, or incurred prior to the repeal;

...

(f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, [or] burden of proof, ...

and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, ... as if the repealing written law had not been passed or made."

- 9 The effect of this provision is that the Committee may commence professional disciplinary proceedings in the Tribunal in relation to conduct by a practitioner prior to 1 January 2004, and the Tribunal has jurisdiction, under s 29A(1) of the *Legal Practitioners Act 1893*, to make a finding that a practitioner has been guilty of unprofessional conduct during that period, and has power, under s 29A(2) and s 29A(3) of the *Legal Practitioners Act 1893*, on making such a finding, to make any of the orders referred to at par [5] above.

10 The circumstances which gave rise to Mr Cullen's unprofessional conduct and unsatisfactory conduct by unprofessional conduct were a series of errors by employees of Challenge Bank Ltd, which held the trust account and general account of Frank Unmack & Cullen, the firm name under which Mr Cullen carried on practice, in which monies which were expressly identified by Mr Cullen's employees to be deposited into the trust account were, on 13 occasions over a 27-month period, deposited into the general account. In total, some \$107 980.13 of trust monies was deposited by Challenge Bank Ltd into the wrong account. As set out more fully below, the bank's errors were compounded by mistakes made by the firm's auditors, RSM Bird Cameron Partners, and by Mr Cullen's experienced bookkeeper, Ms Maria Camarda. However, when these proceedings were commenced, Mr Cullen promptly and properly conceded that, as a practitioner, he was responsible for the failure to identify and correct the bank's errors, and for the consequent creation of negative balances in his clients' trust ledger accounts.

11 Mr BJH Goetze, counsel for the Committee, ultimately submitted that, despite Mr Cullen's early plea and acceptance of responsibility, and that there is no allegation of dishonesty on his part, the Tribunal should suspend him from legal practice for the maximum period available to it under s 187(1) of the 2003 Act, namely two years, in consequence of the serious nature of the conduct, the amount of money involved, the requirement to protect the public, and the fact that, as set out below, the Disciplinary Tribunal has, on a prior occasion, found the practitioner guilty of unprofessional conduct in relation to the operation of his trust account. As the Committee had previously foreshadowed that it would seek Mr Cullen's suspension from practice, the Tribunal was constituted so as to include the President, in accordance with s 250A(2) of the 2003 Act. In accordance with s 250A(1) of the 2003 Act, the Tribunal was constituted by three members being the President, a senior member who is a legally-qualified member as defined in s 3(1) of the SAT Act, and a person who is not a legal practitioner, but has knowledge and understanding of the interests of a person dealing with a legal practitioner.

12 For reasons set out below, the Tribunal does not consider that the protection of the public and the maintenance of proper standards of the legal profession require that Mr Cullen be suspended from practice, and thereby not be permitted to earn a livelihood from his profession. Although the Committee sought a suspension of two years, Mr MJ McCusker QC, counsel for Mr Cullen, was correct in his submission that Mr Cullen "would, in effect, have his practice and his livelihood completely destroyed if a two-year suspension were imposed".

The Tribunal determined that the necessary and appropriate orders for the protection of the public and the maintenance of proper standards are a reprimand, a substantial fine, the imposition of practical conditions on Mr Cullen's practice for a two-year period to ensure the proper maintenance of the trust account and the publication of the Tribunal's decision and reasons. The conditions on practice imposed by the Tribunal require daily reconciliation of deposits to the trust account against the trust account bank statement by an experienced bookkeeper or the practitioner, weekly reconciliation of all deposits to and withdrawals from the trust account against the trust account bank statement by an experienced bookkeeper, review by the practitioner, and submission to a Senior Trust Account Inspector of the Board within seven days, and quarterly review of trust account records by an independent firm of accountants or auditors, and submission of a quarterly report by that firm to both the practitioner and a Senior Trust Account Inspector of the Board.

- 13 In these reasons, we will at first set out key aspects of the factual background to the proceedings, before considering the parties' submissions and the necessary and appropriate disciplinary consequences of Mr Cullen's conduct.

Factual background

- 14 Mr Cullen is a senior legal practitioner, having been admitted to practice in Western Australia on 24 December 1965. A number of character references from senior practitioners who have known and worked with Mr Cullen over a long period of time, in some cases for nearly 40 years, speak of his professionalism, diligence, competence and, above all, his honesty in practice. A practitioner who completed articles of clerkship under Mr Cullen's brother, father, and Mr Cullen himself, in the early 1970s, said that he "has always been a thorough, honest and efficient lawyer and I have always felt privileged to have learned from both he [*sic*] and his father". Another practitioner, who has been in practice for almost 40 years, described Mr Cullen as "singularly honest and sincere" and as "one of those persons for whom honesty is not an option, it is the only way".

- 15 On 25 July 1997, Mr Cullen pleaded and was found guilty by the Disciplinary Tribunal of unprofessional conduct in relation to five allegations concerning the operation of his firm's trust account. He was reprimanded, fined a total of \$2000, ordered to undertake a course of further study involving not less than six hours of instruction from a partner or a senior staff member of Price Waterhouse (or another firm

approved by the Board) in the maintenance of proper accounting practices appropriate to the conduct of his legal practice, and ordered to pay costs of \$1000. There was no allegation of dishonesty. The allegations in relation to which Mr Cullen was found guilty of unprofessional conduct were that:

- (i) he received trust monies on behalf of clients and failed to retain the same in his trust account;
- (ii) he failed to maintain books of account of all trust monies in such manner as to disclose the true position as regards those monies;
- (iii) he failed to ensure that books of account and other accounting records relating to his trust account were kept written up to distinguish between monies received from or held on account of his clients and monies received or held or paid on account of himself;
- (iv) he failed to cause the ledgers in his trust account to be balanced as required by r 99 of the *Legal Practice Board Rules 1949 (WA)* (1949 Rules); and
- (v) he failed to cause an account or statement to be drawn up reconciling the balance of the ledgers in the trust account with the trust account bank statements, as required by r 99 of the 1949 Rules.

16 The Disciplinary Tribunal noted that "the trust ledger contained a large number of accounts with debit balances reflecting disbursements made by the practitioner for or on behalf of the clients concerned in respect of professional services being performed by him on their behalf".

17 The Disciplinary Tribunal made the following findings:

"The system of accounting maintained by the practice could have worked satisfactorily provided checks were made from time to time to see that the trust monies held on behalf of clients were covered by monies in the trust bank account. If this had been done from time to time, by the practitioner or his staff, and it was not, then it should have been apparent to him that there was a flaw in the basis used to assess the level of surplus trust funds available for transfer into the practice bank account. In short, there was nothing wrong with the now outdated

accounting system, provided those running it understood what it was telling them. That something was wrong in the system as being operated, was discovered by Ms Camarda, not the auditors, and was brought to the attention of the auditors by her."

18 The Disciplinary Tribunal concluded as follows:

"The Tribunal took into account the above matters put in mitigation to it and accepted that the practitioner had been misled by the system then operating. However, it was the Tribunal's view that the final responsibility for the correct and lawful method of handling trust monies lies with the practitioner. Had the practitioner died while there was a deficit in the trust account, there would have arisen a very serious situation."

19 Mr Cullen subsequently replaced the "now outdated accounting system" with a computerised system, which was examined by the Board's Senior Trust Account Inspector and passed by her. Mr Cullen also retained new auditors.

20 As noted earlier in these reasons, on 13 occasions over a 27-month period, commencing on 4 October 2001 and concluding on 17 December 2003, staff of Challenge Bank Ltd erroneously deposited trust monies received by Mr Cullen's firm into the firm's general account. On each occasion, Mr Cullen's staff correctly filled out the bank deposit slips to show that the money was to be deposited into the trust account. Mr Cullen then proceeded to draw on the trust account on behalf of his clients, in circumstances where the money had been placed by the bank into the general account, resulting in debit balances in the relevant trust ledger accounts. The firm's general account was overdrawn throughout this period to the extent of about \$90 000 or more.

21 On 17 June 2002, Mr Cullen's new auditors, RSM Bird Cameron Partners, wrote to him, referring to "the completion of our audit of your trust account" and enclosing a certificate required under s 42A of the *Legal Practitioners Act 1893* to be appended to the application for the renewal of his practising certificate. The certificate, also dated 17 June 2002 and addressed to the Board, stated that Simon Charles Cubitt, partner of RSM Bird Cameron Partners, an approved accountant for the purposes of the 1949 Rules, "had examined the accounting records and accounts of Peter Bruce de Barran Cullen,

practising alone under the style of Frank Unmack & Cullen, for the period 1 April 2001 to 31 March 2002" and certified that "from my examination of the accounting records and accounts relating to the above practice produced to me and from the information and explanations given to me, I am satisfied that the said Practitioner has complied with the provisions of the said Rules". In fact, on three occasions during the accounting period in relation to which the certificate was provided, Challenge Bank Ltd had deposited amounts totalling \$18 108.24 into the wrong account.

22 In about May 2003, at the conclusion of the audit of Mr Cullen's firm's accounting records for the period 1 April 2002 to 31 March 2003, an employee of RSM Bird Cameron Partners informed Ms Camarda that a number of deposits which should have been credited to the trust account were credited to the general account. During the accounting period in question, according to the agreed facts, two deposits had been erroneously banked into the general account totalling \$18 866.95. The employee of the auditors requested Ms Camarda to send the auditors a letter, which Ms Camarda did on 20 May 2003, confirming that Challenge Bank Ltd had incorrectly deposited outstanding amounts, and that "we are currently in the process of having this problem corrected and we will confirm in writing when this has been done".

23 Although Ms Camarda admitted that she should have brought this matter to Mr Cullen's attention, she failed to do so, because he was suffering from a liver condition at the time, which made him extremely nauseous, and he was, to quote Mr McCusker, who related the evidence which Ms Camarda was prepared to give and which was accepted on that basis by Mr Goetze, "in and out of the firm as much as he could pretty much on a part-time basis". Ms Camarda did not raise the problem with the bank, as she, too, was distracted by health problems.

24 Although neither Ms Camarda nor Mr Cullen had confirmed in writing to RSM Bird Cameron Partners that the problem had been corrected, on 29 May 2003, the auditors wrote to Mr Cullen, referring to "the completion of our audit of your trust account", and enclosing a certificate under s 42A of the *Legal Practitioners Act 1893* to be appended to the application for renewal of his practising certificate. Although the certificate, also dated 29 May 2003, referred to a shortfall in Mr Cullen's trust account, the certificate stated that the shortfall was rectified on 16 May 2003. It was common ground that the shortfall referred to in the certificate did not include the deposits which have given rise to these proceedings. Otherwise, the certificate stated that Mr James Anthony Komninos, partner of the auditors, had "examined the

accounting records and accounts of Peter Bruce de Barran Cullen, practising alone under the style of Frank Unmack & Cullen, for the period 1 April 2002 to 31 March 2003" and certified that "from my examination of the accounting records and accounts relating to the above practice produced to me and from the information and explanations given to me, I am satisfied that the said Practitioner has complied with the provisions of the said Rules".

25 During the accounting period 1 April 2003 to 31 March 2004, Challenge Bank Ltd erroneously deposited amounts totalling \$71 004.04 into the firm's general account, rather than into the trust account. In May 2004, following the audit in relation to that accounting period, Mr Cubitt informed Ms Camarda of this. He also told her that the bank had incorrectly credited some general account deposits to the trust account. Ms Camarda then brought these matters to Mr Cullen's attention. On 24 May 2004, Mr Cubitt telephoned Mr Cullen directly and confirmed what he had told Ms Camarda. Mr Cubitt said that he would have to inform the Board of what had occurred.

26 Mr Cullen remedied the trust account deficiency by 21 June 2004, that is, within about a month of having learned of the problem.

27 On 23 June 2004, Mr Cubitt wrote to the Board certifying that he was satisfied that Mr Cullen had complied with the provisions of the 1949 Rules "except insofar as concerns, non-compliance with Rule 92" relating to the erroneous deposits which gave rise to the conduct in question in these proceedings, an additional erroneous deposit of \$601.70 made by the bank on 30 January 2004, and five erroneous deposits made by the bank into Mr Cullen's firm's trust account, rather than into the general account, in amounts totalling \$3955.85. The letter confirmed that the non-compliances with r 92 had been rectified by the date of the letter.

Proper disciplinary outcome

28 Mr Goetze submitted that the unprofessional conduct of Mr Cullen is of a serious nature. The amount of money involved was substantial and the potential risk to the practitioner's other clients who had money in his trust account during the period in question was also substantial, given that their money had effectively been used to cover the amounts which had been incorrectly banked. As the general account was generally overdrawn in the amount of \$90,000 or more throughout the period in question, the other clients' money was at serious risk. The practitioner's operation of his trust account had previously been considered in the disciplinary jurisdiction, and despite the practitioner having undertaken further study,

he had neglected to properly or adequately maintain his trust account over a substantial period of time. Ultimately, Mr Goetze submitted that protection of the public required that Mr Cullen be suspended from practice for the maximum period available to the Tribunal, namely two years. Mr Goetze also indicated that he was instructed to inform the Tribunal that, following the two-year suspension, the Committee would request the Board to impose conditions on Mr Cullen's ability to maintain a trust account if he applies for a practising certificate.

29 Mr McCusker accepted that there was a risk to clients' money during the period in question, although, had Mr Cullen died, those clients would have had a claim against his estate. Mr McCusker also accepted "unreservedly that the maintaining of a trust account by a practitioner properly is a very important" matter and that "the practitioner is ultimately responsible". However, he submitted that it was important to take into account how Mr Cullen's unprofessional conduct came about. Mr McCusker submitted that "it was a series of [three] errors, [none] of which was due to the practitioner's fault". The first error was on the part of the bank, the second on the part of the auditors conducting the audit for the accounting period 1 April 2001 to 31 March 2002, and the third on the part of Ms Camarda, who failed to address the problem in May 2003 or to bring it Mr Cullen's attention at that time. Mr McCusker could well have added a fourth error to this unfortunate history, namely the auditors' failure to check that the problem which was raised with Ms Camarda in May 2003 had been corrected before Mr Komminos wrote to Mr Cullen enclosing a relevantly unqualified certificate of compliance with the 1949 Rules. As noted earlier, eight of the 13 incorrect deposits, totalling \$71 004.04 out of the \$107 980.13, occurred after the auditors' incorrect certificate. Mr McCusker submitted, and the Tribunal accepts, that had the problem been raised with Mr Cullen in May 2003, as it should have been by the auditors and his bookkeeper, he would have immediately taken steps to ensure that it was rectified. By the time he was told, the problem, which was already significant, had become all the more so.

30 In an often cited passage in *Re A Barrister and Solicitor* (1979) 40 FLR 1, Blackburn CJ, Connor and Davies JJ held, at 24 - 25, as follows:

"The object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession. Disciplinary legal proceedings are not taken by way of punishment, per Barwick CJ in *Harvey v Law Society of New South Wales* (1975) 49 ALJR 362, at p. 364, or to exact

retribution, per Fox, Blackburn and Woodward JJ in *Ex parte Attorney-General for the Commonwealth; Re A Barrister and Solicitor* (1972) 20 FLR, at p. 244." (See also *Re Legal Practitioners Act 1893* (Supreme Court, WA, Full Court, Library No 930527, 30 September 1993, unreported) at 8; *Re Maraj (a legal practitioner)* (1995) 15 WAR 12 at 25).

31 The protection of the public requires that money paid by a client on trust to a practitioner is properly recorded and that it is available, and only available, in relation to that client's affairs. Throughout the period of the conduct in question, Part XI of the 1949 Rules contained detailed provisions to ensure the proper recording of trust monies and maintenance of trust accounts. Rule 91(1) required that every practitioner keep and maintain books of account and other accounting records necessary to show and distinguish between money received from or held on account of each client and money received, or held or paid, on account of the practitioner himself. Rule 92 required that a practitioner deposit trust monies to the credit of a trust account. Rule 94(2) permitted a practitioner to pay out of the trust account money for or on account of a client, notwithstanding that the practitioner did not hold in the trust account money, or sufficient money, for that payment, only if the practitioner had sufficient money in the trust account to cover the debit balance. Rule 99 required a practitioner, at least every month and at intervals of no longer than six weeks, to cause the trust ledger to be balanced and an account or statement to be drawn up reconciling the balance of the trust ledger with the trust account bank statements. The 1949 Rules were repealed, with effect from 14 May 2004, by r 77 of the *Legal Practice Board Rules 2004* (WA) (2004 Rules). However, Part VI of the 2004 Rules contains similar requirements in relation to trust accounts (see, in particular, r 51, r 52, r 53 and r 57).

32 Notwithstanding the previous finding by the Disciplinary Tribunal that Mr Cullen had been guilty of unprofessional conduct in a similar respect to the present charge, the Tribunal does not consider that the severe sanction of Mr Cullen's suspension from legal practice is necessary or appropriate for the protection of the public or the maintenance of proper standards in the legal profession. Had he been aware of the problem, and failed to address it, or had he directly caused the problem, a suspension may have been appropriate. Had there been dishonesty, a suspension for the maximum period available to the Tribunal, or a report to the Supreme Court (full bench) recommending a greater consequence, would certainly have been appropriate.

33 The Tribunal considers that the protection of the public and the maintenance of proper standards warrants a reprimand, a substantial fine, the imposition of conditions on the right of Mr Cullen to practice for the maximum period available to the Tribunal, namely two years, and publication of the Tribunal's decision and reasons.

34 The fine should be substantial because, although the circumstances which gave rise to Mr Cullen's unprofessional conduct were not of his making, and do not reflect any dishonesty or impropriety on his part, there was a risk to clients' money, and he did not have in place a proper system to ensure that trust account deposits and bank statements were reconciled, as was required by r99 of the 1949 Rules. The Tribunal accepts that it would generally be impractical for a practitioner to undertake the reconciliation which was required by r 99 of the 1949 Rules (and which is now required by r 57(1) of the 2004 Rules) personally. However, the protection of the public and the maintenance of proper standards require that a practitioner must put in place a system to ensure that reconciliation by an appropriately qualified and experienced person occurs in accordance with the Rules, and that any irregularities are brought immediately to his or her attention.

35 It is apparent that Mr Cullen did not have an appropriate system in place to ensure compliance with r 99 of the 1949 Rules. This resulted in a breach of r94(2) of the 1949 Rules, which only permitted Mr Cullen to use trust account money on behalf of a client, notwithstanding that he did not hold money in trust or sufficient money, if he had a sufficient amount of his own money in the trust ledger to cover the debit balance; see now r 53 of the 2004 Rules. Mr Cullen's failure to have in place a system to ensure that the firm's trust ledger was balanced and reconciled with the bank statements in accordance with r99 of the 1949 Rules was all the more significant, given that the Disciplinary Tribunal previously had found that he was guilty of unprofessional conduct in relation to the firm's trust account, and particularly in consequence of his failure to comply with r 99.

36 Throughout most of the period during which Mr Cullen was guilty of unprofessional conduct, from 1 October 2001 to 31 December 2003, the maximum fine which was available under s 29A of the *Legal Practitioners Act 1893* was \$10 000. During the period 1 January 2004 to 11 May 2004, the maximum penalty under the 2003 Act was \$25 000. Bearing in mind the finding of unprofessional conduct in a similar respect in 1997, and the fine imposed by the Disciplinary Tribunal on that occasion, Mr Cullen's plea and acceptance of responsibility, the risk to

clients' money, and the compliance costs, in light of the conditions on practice referred to below, the Tribunal considers that a fine of \$8000 is appropriate. In the context of the maximum fine which was available throughout most of the period in question, this fine is, and is intended to be, substantial.

37 At the Tribunal's request, in the course of his address, Mr McCusker outlined a practical system, involving daily, weekly and quarterly review, to ensure that money received by Mr Cullen on trust is properly deposited and used. The Tribunal directed Mr Cullen to submit a proposed system in writing reflecting the characteristics outlined by Mr McCusker, following conferral and agreement with the Committee.

38 In accordance with the Tribunal's direction, Mr McCusker submitted a proposed system on behalf of Mr Cullen which is appropriate, practical and sensible, and which should be imposed by way of condition on Mr Cullen's practice for two years. The proposed system involves daily reconciliation by an experienced bookkeeper or the practitioner of deposits to the trust account with the trust account bank statement referenced by internet, weekly reconciliation by an experienced bookkeeper of deposits and withdrawals against the trust account bank statement, provision of this reconciliation to Mr Cullen and, following his review, to a Senior Trust Account Inspector of the Board within seven days, and provision by the auditors of a quarterly report in relation to the maintenance of the trust account to Mr Cullen and a Senior Trust Account Inspector of the Board within 21 days of the end of each quarter.

39 The Tribunal does not consider that the imposition of a condition on the right of Mr Cullen to practice which would preclude him from holding a trust account is necessary or appropriate for the protection of the public or the maintenance of proper standards. Such a condition would, in effect, prevent Mr Cullen from practising on his own account in the areas in which he has considerable experience. The conditions which are referred to in the previous paragraph in relation to daily, weekly and quarterly review of Mr Cullen's trust account will ensure its proper maintenance.

40 It is appropriate that Mr Cullen pay the Committee's costs in bringing these proceedings. Mr Goetze sought the sum of \$2000, and Mr McCusker consented to that amount on behalf of Mr Cullen.

Orders

41 The Tribunal makes the following orders:

1. The Tribunal finds Peter Bruce de Barran Cullen (the practitioner) guilty of unprofessional conduct during the period from 1 October 2001 to 31 December 2003 under the *Legal Practitioners Act 1893* (WA), and guilty of unsatisfactory conduct by unprofessional conduct during the period from 1 January 2004 to 11 May 2004 under the *Legal Practice Act 2003* (WA).
2. The practitioner is reprimanded in accordance with s 29A(3)(e) of the *Legal Practitioners Act 1893* for his unprofessional conduct and in accordance with s 187(1)(e) of the *Legal Practice Act 2003* his unsatisfactory conduct.
3. In accordance with s 29A(3)(d) of the *Legal Practitioners Act 1893* and s 187(1)(d) of the *Legal Practice Act 2003*, the practitioner must pay a fine of \$8000 to the Legal Practice Board within 28 days of the date of this Order.
4. In accordance with s 29A(3)(b) of the *Legal Practitioners Act 1893* and s 187(1)(d) of the *Legal Practice Act 2003*, the following conditions shall be imposed on the right of the practitioner to practice for a period of two years from the date of this Order:
 - (1) The practitioner must follow the procedures set out in par (2) below in relation to the trust account of the firm of Frank Unmack & Cullen and in relation to the trust account of any other firm in which he may be a partner or sole practitioner.
 - (2) The procedures referred to in par (1) are as follows:
 - (a) On a daily basis, deposits to the trust account are to be reconciled, by an experienced bookkeeper or the practitioner, with the trust account bank statement referenced by internet.
 - (b) On a weekly basis, the trust account bank statement (referenced by internet) is to be reconciled by an experienced bookkeeper with all deposits to and withdrawals from

the trust account, and a copy of the reconciliation is to be provided to the practitioner, for his review, investigation and rectification of all outstanding items (such as outstanding deposits and issued unrepresented cheques over 15 months old). The reviewed reconciliations are to be signed and dated by the practitioner and provided to a Senior Trust Account Inspector of the Legal Practice Board nominated by that Board within seven days of the date on which reconciliation is provided by the bookkeeper to the practitioner.

- (c) In addition to the annual audit required under the *Legal Practice Act 2003*, within seven days of the end of each quarter, the practitioner must provide all material relating to the trust account, including bank statements, deposit slips, receipts and withdrawal authorities, to an independent firm of accountants/auditors for a quarterly review of the trust account operations. The practitioner must ensure that, within 21 days of the end of each quarter, the independent firm of accountant/auditors provides a quarterly report on its review of the trust account operations to the practitioner and a Senior Trust Account Inspector of the Legal Practice Board nominated by that Board. The review is for the purpose of ensuring that the trust account is being properly maintained.
5. In accordance with s29A(4) of the *Legal Practitioners Act 1893* and s 87(2) of the *State Administrative Tribunal Act 2004* (WA), the practitioner must pay the applicant its costs of and incidental to the hearing and determination of the proceedings, which are fixed in the sum of \$2000, within 28 days of the date of this Order.

6. The decision and reasons of the Tribunal may be published.

I certify that this and the preceding [41] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUSTICE M L BARKER, PRESIDENT