

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : FULL BENCH

**CITATION** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE -v- ELEY [2007] WASC 148

**CORAM** : STEYTLER P  
WHEELER JA  
EM HEENAN AJA

**HEARD** : 10 APRIL 2007

**DELIVERED** : 10 JULY 2007

**FILE NO/S** : LPD 1 of 2005

**BETWEEN** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE  
Applicant

AND

DAVID ERNEST ELEY  
Respondent

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*Catchwords:*

Professions and trades - Legal practitioners - Application for practitioner to be struck off roll - Undue delay - Gross negligence - Unprofessional conduct - Protracted course of conduct

*Legislation:*

*Legal Practitioners Act 1893 (WA), s 29A, s 30*  
*Legal Practice Act 2003 (WA), s 187, s 194*

*Result:*

Practitioner struck off roll

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr P C Doherty  
Respondent : No appearance

*Solicitors:*

Applicant : Law Complaints Officer  
Respondent : No appearance

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

A Solicitor v Council of the Law Society of New South Wales (2004)  
216 CLR 253  
Legal Practitioners Conduct Board v Trueman [2003] SASC 58  
Re Maraj (A Legal Practitioner) (1995) 15 WAR 12  
The Law Society of South Australia v Murphy [1999] SASC 83  
Ziems v The Prothonotary of the Supreme Court of New South Wales (1957) 97  
CLR 279

1     **STEYTLER P:** This is an application by the Legal Practitioners  
Complaints Committee ("Committee") to have the respondent  
practitioner, David Ernest Eley, struck off the roll of practitioners. The  
Committee relies upon findings made against the practitioner by the Legal  
Practitioners Disciplinary Tribunal ("Tribunal") in respect of a number of  
references brought against the practitioner in the Tribunal. There were  
10 references and the practitioner was found guilty of the conduct alleged  
in nine of them.

**The references**

2             The 10 references related to five different matters. I will deal with  
these in turn.

***"Mr and Mrs S" - references 29A, 29 B, 29C and 29D***

3             References 29A, 29B, 29C and 29D related to clients of the  
practitioner who were described by the Tribunal only as "Mr and Mrs S".

4             Reference 29A alleged that the practitioner had been guilty of  
neglect in a number of respects while representing Mr and Mrs S from  
about April 2000 until about November 2000. Mr and Mrs S had retained  
the practitioner to defend a claim brought against them in the District  
Court. The practitioner was then practising as a member of a firm known  
as the Stirling Legal Group. When first instructed, he told Mr S that the  
case was "easy" and that he had "nothing to worry about". Consequently,  
Mr S did not contact him on a regular basis in order to enquire about  
progress.

5             On 26 March 1998 the practitioner filed a defence on behalf of  
Mr and Mrs S. On 8 June 1998 an order for discovery was made,  
pursuant to which Mr and Mrs S were required to provide discovery by  
3 August 1998. Extraordinarily, the time for lodging discovery was  
subsequently extended until 31 March 2000.

6             On 20 September 1999, Mr S wrote to the practitioner complaining  
that messages left with him had not been responded to and asking about  
progress with the action. Neither Mr S nor Mrs S received a reply to that  
letter. On 14 February 2000 the practitioner filed a notice of change of  
solicitors which revealed that the solicitors on the record were now a firm  
known as Messrs Eley Palmer Archer, practising from a different address  
than that given in respect of the Stirling Legal Group. Mr and Mrs S were  
not told of the practitioner's change of address. After a number of

unsuccessful attempts to contact the practitioner, Mr S was eventually able to discover his new address.

7           On 19 April 2000 the District Court directed Mr and Mrs S to file and serve a certificate of discovery within seven days. Then, on 23 May 2000, a further order was made that, unless within seven days of service of that order on Mr and Mrs S, they complied with the order that had earlier been made, judgment would be entered on behalf of the plaintiff. The practitioner was served with that order on 28 June 2000. He did not comply with it. He first asked Mr S to sign an affidavit of discovery in July 2000. Mr S did so. However, the practitioner failed to file a certificate of discovery. Consequently, default judgment was entered in favour of the plaintiff on 26 July 2000. Damages were ordered to be assessed. The practitioner did not tell Mr and Mrs S what had happened. Mr S's attempts to contact the practitioner were unsuccessful. He heard nothing from the practitioner.

8           On 2 August 2000 the plaintiff's solicitors served a copy of the judgment on the practitioner. He was told that an application would be made for assessment of damages. Mr and Mrs S were not told of this. On 5 February 2001 the plaintiff's application for assessment of damages was served on the practitioner. Mr and Mrs S were not told of this either. The special appointment for the assessment of damages was listed for hearing on three different occasions, being 27 April 2001, 16 July 2001 and 25 September 2001. The practitioner made no attempt to contact Mr and Mrs S or to report to them in respect of these appointments. He did not appear at any of them.

9           The practitioner finally appeared on behalf of Mr and Mrs S at a hearing on 20 November 2001. He told the court that an affidavit had only just been received by him and he needed to obtain instructions in respect of it. The matter was adjourned until 18 December 2001. On that day the practitioner again appeared on behalf of Mr and Mrs S. He said that he had received no instructions from them in relation to the matter. However, there is no evidence that he had made any attempt to obtain instructions. The matter was relisted for hearing on 27 February 2002. It is not apparent from the Tribunal's reasons what took place on that day although it seems that damages were assessed and that judgment was entered accordingly.

10          On 12 August 2002 the Sheriff came to Mr and Mrs S's home with a land seizure notice and a goods seizure notice. He removed their motor vehicle. Mr and Mrs S had not heard from the practitioner since Mr S had

sworn the discovery affidavit. Mr S went immediately to the practitioner's office. He was told that he had nothing to worry about. He was introduced to a Mr Vogt, an employee of the practitioner. He was told that Mr Vogt would be taking over the file. Mr Vogt told Mr S that it would cost \$10,000 to "renew [his] case". Subsequently, on 21 August 2002, the practitioner prepared a file note for Mr Vogt in which he misstated the events leading up to the judgment and the execution proceedings.

11 After being served with a reference complaining of these matters, the practitioner lodged an answer, supported by a statutory declaration made on 21 May 2004. However, he did not appear at the subsequent hearing of the Tribunal. The Tribunal rejected the practitioner's answer, finding that he had not adequately explained his failure to provide a certificate of discovery and to comply with the springing order. His explanation for his failure to attend the assessment of damages hearings and for his failure to report to Mr and Mrs S were likewise rejected. A subsequent failure to set aside the judgment was found not to have been excused by the fact that the practitioner had passed on the file to Mr Vogt. This was because the instructions had been given to him personally and he had had an obligation to ensure that the work was done.

12 The reference was consequently found to have been established.

13 Reference 29B complained that the practitioner was guilty of unprofessional conduct between November 2002 and November 2003 in failing to respond adequately to enquiries made of him by the Committee and by the Law Complaints Officer, arising out of their investigations of the complaint which, by then, had been made by Mr S. Numerous letters were sent to the practitioner asking him to address the complaint. He did not respond to any of them. He said, at one stage, that he was too ill to respond. When requested to provide evidence that this was so, he failed to do so.

14 On 15 May 2003 the practitioner was served with a summons to produce his file pursuant to s 31D of the *Legal Practitioners Act 1893* (WA) ("1893 Act"). He failed to comply with the summons. On 17 June 2003, after two reminder letters had been sent to him, the practitioner supplied a part, only, of the documents comprising his file. On 23 June 2003 he provided additional documents. After further requests were made of him, more documents were provided in December 2003. Even then, he was unable to give any assurance that he had provided more than a "substantial portion" of the file.

15 In all of these circumstances, the Tribunal found that this reference,  
too, was established.

16 Reference 29C alleges that the practitioner was guilty of  
unprofessional conduct between November 2002 and November 2003 in  
failing to follow the instructions of Mr and Mrs S to transfer their file to  
their new solicitor. The new solicitor, Mr Levitan, told the practitioner  
that he had been instructed to take over the conduct of the matter.  
Mr Levitan also sent the practitioner a copy of an application to set aside  
the judgment that had been entered against Mr and Mrs S. He asked that  
the file be sent to him. This was not done. He wrote again, threatening  
that, if the file was not sent, he would report the practitioner to the Legal  
Practice Board. This produced no response from the practitioner.

17 The Tribunal consequently found the reference proved.

18 Reference 29D alleges that the practitioner was guilty of  
unprofessional conduct in or about August 2002 in misleading Mr and  
Mrs S with regard to the status of the matter in which he had been  
instructed. The Tribunal found that he had failed to inform Mr and Mrs S  
of critical events and that he had misled them in response to their  
enquiries when Mr S came to his office following the visit of the Sheriff.  
I have mentioned that the practitioner then told Mr S that "everything was  
fine". This reference was consequently found to have been established.

***"Mr OGD" - reference R4***

19 The next reference relates to a client of the practitioner described by  
the Tribunal only as "Mr OGD". The reference alleges that the  
practitioner was guilty of neglect and/or undue delay in the practice of the  
law from about August 2000 to about April 2000 when acting for  
Mr OGD.

20 On about 2 August 2000, the practitioner, then a member of the firm  
Eley Palmer Archer, was instructed to represent Mr OGD in Local Court  
proceedings that had been commenced against him. The plaintiffs applied  
for summary judgment. They served a chamber summons accordingly on  
the practitioner on 28 August 2000. The practitioner appeared on the  
return of the chamber summons on 11 September 2000. However, he did  
not tell Mr OGD that an application for summary judgment had been  
brought. The hearing was adjourned until 6 October 2000. The  
practitioner first told Mr OGD about the application on 5 October 2000.  
On that day he sent him a draft affidavit in opposition to the application  
for summary judgment. On 6 October 2000 the hearing was adjourned

until 20 October 2000. Mr OGD was told of the adjournment on 10 October 2000.

21 One of the practitioner's partners, Mr Garrick Archer, appeared on behalf of Mr OGD at the resumed hearing on 20 October 2000. An order was made dismissing the application for summary judgment but requiring Mr OGD to pay \$5000 into court by way of security for costs. No payment into court was made and, on 10 November 2000, the plaintiffs filed a motion for an order that the defence be struck out and that judgment be entered in their favour. On the same day, the practitioner filed a notice of appeal seeking to set aside the judgment. On 5 December 2000 a stay was granted in respect of the order requiring payment into court, pending the outcome of the appeal. Mr OGD was not told of this.

22 It seems that, after this, the practitioner made some attempts to contact Mr OGD by mail but that the correspondence, addressed to a post office box, was returned undelivered. Notwithstanding this, the practitioner continued to deal with the matter without attempting to locate Mr OGD. On 30 May 2001 the appeal was dismissed.

23 Seemingly, Mr OGD had, by then, been located by the practitioner. The practitioner telephoned him and told him that he would "try to negotiate a settlement of some sort". On 20 June 2001 the plaintiffs' solicitors wrote to the practitioner threatening to apply for judgment if the money was not paid into court and offering to agree the costs of the appeal. The letter was not referred to Mr OGD for instructions. There followed a taxation of the plaintiffs' costs of the appeal on 6 August 2001. The practitioner did not attend this. Nor did he attend a further application on 9 August 2001 in which the defence was struck out and judgment was entered in favour of the plaintiffs.

24 A demand was made by the plaintiffs' solicitors for payment of the judgment debt. They offered to agree costs. On 20 August 2001, the practitioner obtained an interim stay of the judgment and made an application to set it aside. It seems that, between 20 October 2000 and about 20 August 2001, Mr Archer had been looking after the file. However, the practitioner took control of the file once again from about the date upon which the stay was obtained. He asked Mr OGD to provide him with \$5000 to "try something else". He also asked for \$1873.80 in respect of the plaintiffs' solicitors' costs of the appeal.

25 On 5 October 2001 the judgment was set aside on condition that the sum of \$5000 was paid into court, by cash or bank cheque, within

48 hours. The practitioner, who had not kept Mr OGD informed of these events, sought to pay the sum of \$5000 into court by way of a personal cheque. That was not accepted and judgment was ultimately entered in favour of the plaintiffs. The practitioner did not tell Mr OGD what had happened, other than by telephoning him and saying that he was "stuffed". A bill of costs was lodged for taxation, but the practitioner failed to attend the ensuing appointment on 7 March 2002. A judgment summons was ultimately issued against Mr OGD for the payment of the judgment sum and costs. Between the time of the taxation of the costs and the receipt of the judgment summons Mr OGD had not heard from the practitioner.

26 The Tribunal found that the practitioner had been guilty of neglect and/or undue delay in failing to ensure compliance with the order made by the court on 10 October 2000 in respect of the payment into court of \$5000 by cash or bank cheque, by not advising Mr OGD of the entry of judgment (and also of the fact that a subsequent offer of a negotiated settlement had been rejected), in not informing Mr OGD of the demand for costs, in not attending on the return of the bill of taxation and in not informing Mr OGD that costs had been taxed and that there was a demand for payment.

***"Mrs M" - reference 30***

27 Reference 30 alleges that the practitioner had, between October 1999 and June 2002, been guilty of unprofessional conduct by reason of his gross negligence in the course of acting for a client described by the Tribunal as "Mrs M". Mrs M had been sued by a legal practitioner, Mr Andrew Thorpe, for \$154 in unpaid legal fees. She wanted to pay the claim but was persuaded by her then solicitor, Mr Colin McKerlie, not to do so. Mr McKerlie had previously worked for Mr Thorpe and the two had parted in acrimonious circumstances. Mr McKerlie said that he would "cover the costs". In July 1999, Mr McKerlie was required to cease acting for Mrs M because he had a conflict of interest. In October 1999 he handed his file over to the practitioner.

28 About a week before the hearing of the action, Mrs M heard from the practitioner for the first time. He told her he that he would be acting on her behalf, that Mr McKerlie had bad feelings for the Mr Thorpe and that he, the practitioner, would defend the claim as best he could. The practitioner first met with Mrs M on the morning of the trial. He told her that the case could go against her but that Mr McKerlie had said that he would cover the costs because it was his preference to go ahead with the case. He gave no other advice to Mrs M concerning the likely financial

consequences of losing the case. The practitioner seemingly made no attempt to enquire whether or not there was any binding written undertaking from Mr McKerlie in respect of Mrs M's liability for costs if she should lose the action. Also, although the practitioner knew that Mr McKerlie had no assets, he did not disclose this to Mrs M.

29 At a hearing on 20 February 2000, the parties were able to agree the facts concerning the disputed fees. The matter was then adjourned for the preparation and filing of written submissions. It was subsequently relisted for oral argument on 15 August 2000. The practitioner did not tell Mrs M of this. Judgment was delivered on 14 September 2000. Mrs M was found to be liable for the sum of \$154 plus costs to be taxed. The practitioner did not tell Mrs M of this until 5 November 2000.

30 On 13 June 2002, costs of the action were taxed at \$5541.75. Mr Thorpe wrote directly to Mrs M claiming payment of the judgment, interest and costs. She telephoned the practitioner about the costs. He advised her to "ignore them" because he thought that Mr Thorpe might ignore them due to the way in which Mrs M had been "used by Mr McKerlie". The practitioner denied saying this, but the Tribunal rejected his evidence in that respect.

31 Mrs M subsequently wrote to the practitioner protesting that she had not heard from him. She said that it was apparent from the judgment that she had had no defence to the claim. She complained that the practitioner had not advised her of her risk of being made liable for costs of the magnitude of those that had subsequently been taxed. She also complained that he had not attended the taxation hearing or informed her about it. The practitioner responded with what the Tribunal described as "a defensive and very evasive reply".

32 The reference was found to have been established.

***"R" and "U" - references 5A, 5B and 5C***

33 References 5A, 5B and 5C relate to the practitioner's conduct of litigation on behalf of clients described by the Tribunal only as "R" and "U".

34 R and U had commenced a District Court action against R's former solicitor, Mr Andrew Thorpe. They were represented by Mr McKerlie, who, as I have said, had an acrimonious relationship with Mr Thorpe. The proceedings were vigorously defended. On 30 April 1999 the court made orders restraining Mr McKerlie from representing R and U on the

ground that he had a conflict of interest. Ultimately, on 8 October 1999, the practitioner took over the conduct of the matter. R and U were not aware of this until, in R's case, he received a letter dated 10 August 2000 and, in U's case, until he received a "reminder account" in July 2001. R and U neither met with nor instructed the practitioner. It appears that his instructions came from Mr McKerlie.

35 On 20 December 1999 orders were made that the statement of claim that had been filed on behalf of R and U should be struck out, with liberty to file an amended statement of claim within 28 days. R and U were ordered to pay the defendant's costs of the application to strike out, including reserved costs, in any event. On 22 February 2000, after previous unanswered correspondence, Mr Thorpe's solicitors wrote to the practitioner enclosing a chamber summons dated 21 February 2000. This sought judgment in the action should the plaintiffs fail, within 14 days, to comply with the court's order dated 20 December 1999 that an amended statement of claim be filed and served. The summons was returnable on 2 March 2000. The practitioner did not attend court on that day and the orders sought were made.

36 On 14 March 2000 the practitioner prepared an amended statement of claim. However, this pleaded no new facts and the changes were largely cosmetic. Mr Thorpe's solicitors wrote to the practitioner on 31 March 2000, raising further objections to the statement of claim. They again applied to strike out the statement of claim. The application was adjourned to a special appointment which was listed for hearing on 14 June 2000.

37 On 23 May 2000 the practitioner wrote to R and U for the first time, although neither of them saw the letter until shortly before the hearing in the Tribunal. Whatever may have been the position in that respect, the Tribunal found that the letter failed fully to explain the grounds for the strike-out application or the results of the application. The letter did not reveal that the practitioner had, on 20 December 1999, consented to the orders sought, including costs orders. The letter sought no instructions in relation to the matters pleaded or in respect of the matters to which Mr Thorpe's solicitors had taken objection.

38 On 14 June 2000 the statement of claim was again struck out, with leave to file a further pleading within 14 days. R and U were ordered to pay Mr Thorpe's costs. By letter dated 28 June 2000 Mr Thorpe's solicitors wrote to the practitioner telling him that, if a further pleading was not filed and served by 3 July 2000, they would seek a springing

order. On the following day the practitioner wrote to them enclosing a fresh statement of claim and informing them that it would be filed with the court on that day. Once again, there were few changes of substance. None of these met the concerns that had been raised by Mr Thorpe's solicitors.

39 By letter dated 4 August 2000, Mr Thorpe's solicitors wrote to the practitioner asserting that the statement of claim filed on 4 July 2000 was defective. The letter asked the practitioner what his intentions were in the light of the complaints outlined.

40 By letter dated 10 August 2000, the practitioner wrote to R and U, referring to a prior letter (which neither had received) and requesting that they contact him in relation to the future conduct of the file. U did not receive the letter dated 10 August 2000. However, R did. On 3 September 2000 he wrote to the practitioner informing him that he would be in Perth from 12 to 14 September 2000. He asked for an appointment during that period. He tried, unsuccessfully, to contact the practitioner by telephone on about six occasions at around the time of the letter. R received no response to his letter or to his telephone calls.

41 On about 13 July 2001 the practitioner sent a reminder account to U. This showed outstanding legal fees of \$3140. U responded by fax on 23 July 2001. He told the practitioner of money that he said was held on trust jointly for R and Mr Thorpe. The letter also told the practitioner about a guarantee that had been given by R in respect of any amounts claimed by Mr Thorpe from U. Subsequently, over a period of around six weeks, U made a number of attempts to contact the practitioner by telephone. He also went to the practitioner's office. He was told that the practitioner was not available. He left a message for the practitioner to contact him. He told the practitioner's receptionist that he had received an invoice but that he had no knowledge of what it related to. He received no response from the practitioner.

42 There appears to have been no further contact between either of R and U and the practitioner until November 2003. Earlier, on 12 May 2003, Mr Thorpe's solicitors had written to the practitioner informing him that unless he took steps to progress the action within 14 days, they would apply to strike the action out for want of prosecution. Eventually, on 25 November 2003, Mr Thorpe's solicitors wrote to the practitioner, enclosing an application to dismiss the action for want of prosecution. The application was returnable on 2 December 2003. On the same day, the practitioner instructed one of his employees, Mr Mitchell Orman, to

write to R and U seeking instructions. He did so and, on about 28 November 2003, Mr Orman and the practitioner met with R. R informed them that he had no idea what was happening. A file note prepared by Mr Orman in respect of the meeting records that the practitioner's firm had ceased to act for R on 10 August 2000 and that he owed \$3500 in fees. However, on 2 December 2003, a notice of change of solicitor was filed. This revealed that the partnership name had altered from Eley Palmer Archer to Eley Palmer and that the latter firm was now representing the plaintiffs. Notwithstanding this, on the following day Mr Orman wrote to R and U confirming that Eley Palmer did not act for them. He sought payment of the outstanding costs. There were further communications between Orman and R. Eventually, Eley Palmer applied to have itself removed from the record as the solicitors for R and U.

43 The Tribunal found the reference to have been established. It found, in particular, that the practitioner had failed to:

- (a) seek instructions from his clients to file a notice of appointment of solicitor in the District Court, or instructions to act for them at all;
- (b) inform his clients that he had received a chamber summons dated 19 October 1999 to strike out the statement of claim;
- (c) inform his clients, or seek their instructions, before adjourning the chamber summons to a special appointment;
- (d) inform his clients, or seek their instructions, before consenting to orders striking out the statement of claim and to costs orders against them;
- (e) seek instructions before drawing up and filing an amended statement of claim on two separate occasions;
- (f) draw up and file an amended statement of claim within the time provided by the court or seek an extension of time;
- (g) inform his clients of the chamber summons dated 21 February 2000 seeking what was, in effect, a springing order;
- (h) attend the return of that chamber summons, or inform his clients that the order sought was made;

- (i) reply to the defendant's letter of 31 March 2000 raising further objections to the statement of claim, inform his clients of the letter, or seek instructions;
- (j) return U's calls, or otherwise contact his clients, on numerous occasions;
- (k) enquire as to what funds were held on trust for R and endeavour to have those funds transferred;
- (l) inform his clients that he had received the letter dated 4 August 2000 raising objections to a later version of the statement of claim; and
- (m) take any action in the District Court proceedings between April 2001 and 25 November 2003.

44 Reference 5B alleged that the practitioner was guilty of unprofessional conduct between 2 February 2004 and 29 March 2004 in that he failed to respond to letters from the Committee dated 2 February and 17 February 2004 concerning complaints by R and U. The Tribunal found this reference proved.

45 It is unnecessary to deal with reference 5C. This was the only reference found by the Tribunal not to have been proved.

***Property transaction - reference 9***

46 Reference 9 charged the practitioner with unprofessional conduct between about 30 October 2002 and 1 November 2002 in the course of handling a property transaction.

47 The practitioner's client had operated a tavern on land which it leased. It sold the tavern business. The sale was subject to the landlord's consent to the assignment of the lease. The landlord had sought payment of money which it claimed was due to it by the tavern owner. An employee of the practitioner contacted the landlord's agent and agreed that the practitioner would provide a cheque for that money, drawn on the practitioner's trust account, on settlement of the sale of the tavern.

48 Settlement was effected on 30 October 2002. The cheque was provided by the practitioner. However it was dishonoured shortly afterwards. The practitioner had stopped payment on it. On 4 November 2002 the landlord's agent contacted the practitioner. The practitioner told the agent that the cheque had been stopped until his client's liability for the money claimed could be determined.

49 In his answer to the reference (which alleged that his conduct in this respect had been unprofessional), the practitioner said that his client had expressed concern about paying the money demanded by the landlord (although there was some dispute as regards the question whether this was before or after settlement). The practitioner told his client that it was possible to stop the trust cheque and that he was not sure of any specific rule that prevented him from doing so. The client instructed him to stop the cheque. He acted on those instructions.

50 The Tribunal found that the practitioner had given an undertaking to produce a trust cheque on settlement and that, by stopping payment of the cheque so produced, he had breached the undertaking. This was found to be unprofessional conduct. However, the Tribunal was not prepared to find that the practitioner knew, when giving the undertaking, that the client had given, or would give, instructions to stop the cheque.

### **The Tribunal's conclusions**

51 The Tribunal concluded that, taken individually and collectively, the references showed that the practitioner had been in breach of fundamental legal and professional obligations owed by him to his clients, who depended on him and trusted him. It said that he had abused their trust and that he remained unconcerned by his actions. In most instances he had blamed his clients. The Tribunal considered that he was not a fit and proper person to practice law. It concluded that the only appropriate outcome was that the practitioner's name should be removed from the roll of practitioners. It made a recommendation accordingly in its report to the Court.

### **Delay by the practitioner**

52 Before considering what order should be made by the Court, it is pertinent to say something about the manner in which the practitioner conducted the proceedings before the Tribunal and in this Court.

### ***Proceedings before the Tribunal***

53 The references were first set down for hearing in the Tribunal on 24 May 2004. The practitioner sought an adjournment because he was ill. The references were adjourned until 28 May 2004 for further directions and also to enable the practitioner's counsel to provide medical evidence of the practitioner's condition.

54 On 28 May 2004 a medical report was provided to the Tribunal. This revealed that the practitioner would be unfit to attend a hearing for some two to three weeks. The Tribunal ordered the practitioner to file and serve answers to references 5A to 5C by no later than 2 June 2004. He did not do so. The Tribunal also ordered that references 29A to D, 30, 4 and 5A to C be set down for hearing over two days on either of 17 and 18 June 2004 or 28 and 29 June 2004. The Tribunal was told that the practitioner would be overseas on business (giving lectures) between 21 and 30 June 2004 and that his counsel was unavailable on 17 and 18 June 2004. The Tribunal considered that these references should be given priority by the practitioner. It listed them for hearing on 28 and 29 June 2004. The practitioner was also told that other references (including reference 9) were listed for directions on those days.

55 On 28 June 2004 the Tribunal was told by counsel for the practitioner that the practitioner had been overseas for three weeks on business and that, on his return, he had been unable to finalise his preparations for the hearings. Counsel sought an adjournment for four weeks. The practitioner was not present. The request for an adjournment was refused, although the Tribunal ordered that the references that had been listed for hearing be adjourned to 2.15 pm that day. The hearing was ultimately adjourned until the following day and the practitioner was directed to attend. His counsel undertook to inform him of this. His counsel also sought, and was granted, leave to withdraw due to lack of instructions.

56 The practitioner did not attend on the following day. The Tribunal consequently dealt, in his absence, with the references that had been listed for hearing. It also directed that reference 9 be listed for hearing on 9 July 2004. The Tribunal expressed concern at the absence of the practitioner and asked that its concern be conveyed to him. It also noted that it was intended by at least one of the parties affected by the complaint to make a compensation claim under the provisions of the 1893 Act. The Tribunal directed that notice of these matters be given to the practitioner. This was done by letter dated 30 June 2004. The letter also informed the practitioner that the Tribunal had reserved its decision on the references heard on 29 June 2004 until 9 July 2004, when it proposed to deal with the issue of penalty and costs. The practitioner was told that reference 9 would also be dealt with on that day.

57 On the morning of 9 July 2004 the practitioner sent a letter to the Registrar of the Tribunal, attaching his answer to reference 9. The letter questioned the Tribunal's processes and made derogatory comments

concerning the Law Complaints Officer and the Tribunal. However, the practitioner did not appear. The Tribunal proceeded to deal with the matters foreshadowed by it in his absence.

### *Proceedings in this Court*

58 The Committee's originating motion was filed in this Court on 10 March 2005. The matter was listed for hearing on 28 July 2006. However, the hearing date was vacated because the practitioner was overseas and the Committee was unable to serve him with the relevant documents.

59 The practitioner was eventually served on 16 November 2006. However, shortly afterwards he travelled to Malaysia. The hearing was relisted for 10 April 2007. Notice of the listing was served on the practitioner by fax on 9 March 2007 and the Committee's submissions were served on him by email and fax on 26 March 2007.

60 Notwithstanding this, the practitioner did not appear at the hearing, whether in person or by counsel. The hearing consequently proceeded in his absence.

### **Should the practitioner be struck off the roll?**

61 The Court is empowered by s 194(2) of the *Legal Practice Act 2003* (WA) ("2003 Act"), upon reading a report transmitted by the Tribunal (now the State Administrative Tribunal), without further evidence to fine, suspend from practice or strike a practitioner off the roll. Section 194(1) of the 2003 Act provides that the report is to be taken as conclusive of all facts and findings mentioned or contained in it. Similar provisions are to be found in s 30 of the 1893 Act.

62 It is settled that the object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession, rather than punishment. Consequently, the question for this Court is whether the practitioner is a fit and proper person to remain a member of the legal profession: *Re Maraj (A Legal Practitioner)* (1995) 15 WAR 12 at 25 per Malcolm CJ, with whom Kennedy and Franklyn JJ agreed; *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253 at [15] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

63 A protracted course of conduct encompassing serious delay and neglect might justify an order removing the practitioner's name from the

roll, even if aspects of that conduct, taken individually, would not justify an order of that kind: *Legal Practitioners Conduct Board v Trueman* [2003] SASC 58 at [13] per Doyle CJ (Duggan and Gray JJ agreeing); *The Law Society of South Australia v Murphy* [1999] SASC 83 at [17] - [19] per Doyle CJ (Millhouse and Prior JJ agreeing).

64 In *Murphy*, the conduct complained of was the neglect of clients' affairs, failure to provide information to them, failure to respond to requests for information from the South Australian Legal Practitioners Complaints Committee and instances of overcharging and failures properly to account to clients. In assessing this behaviour, Doyle CJ said (at [18] - [19]):

"Considered as a whole, in my opinion the conduct of the practitioner demonstrates a disregard of his professional obligations, or a failure to meet them, and indicates (subject to any explanation) that he is unfit to remain a practitioner. The disregard of professional obligations is too frequent and too lengthy to permit of any other conclusion, even though any one of these matters in isolation, or even some taken together, might not lead to that conclusion.

There is no reason to think that the practitioner was unaware of his obligations. It appears that for some years he conducted a moderately busy practice, and he must have known what was expected of him. There is no reason to think that in the relevant matters the practitioner was deliberately defrauding or cheating his clients. What emerges is that in relation to certain clients the practitioner simply failed to discharge fundamental obligations of which he must have been well aware."

65 Precisely the same might be said of the practitioner in this case. The Tribunal's findings disclose repeated and serious failures to attend to his clients' interests over a period of several years, as a consequence of which their interests were significantly prejudiced. Moreover, some of the matters found by the Tribunal reflect on the practitioner's integrity. As will be apparent, he was willing to mislead his clients, and indeed others, when it suited him to do so. His unfitness to practice is further underlined when regard is had for the approach which he adopted to the Committee's requests for information and in the course of the proceedings in the Tribunal. He appears to be unwilling or unable to recognise his inability to maintain proper professional standards. He is unable to command the confidence and respect of the Court, his fellow solicitors and counsel and

his clients: *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 285 - 286.

66 In my opinion it follows inevitably that the practitioner is not a fit and proper person to remain in practice and that his name should be removed from the roll of practitioners.

### **The claim for a compensation order**

67 Counsel for the Committee has applied for an order requiring the practitioner to pay to R and U the sum of \$2866 by way of compensation for costs said to have been incurred in "sorting out problems caused by the practitioner, as articulated in [references 5A and 5B]". The Committee relies, in this respect, on s 29A(3)(h) and s 30(2) of the 1893 Act. Relevantly equivalent provisions are now to be found in s 187(1)(h) and (2) and s 194(2) of the 2003 Act.

68 Section 29A(3)(h) gives to the Tribunal power, in a case in which the conduct of the practitioner has directly caused a person to suffer pecuniary loss and that person asks to be compensated, to order the payment by the practitioner to the Legal Practice Board for the benefit of the person, of compensation to be assessed by the Tribunal. The compensation is subject to a limit which is not presently relevant. The power is expressed to be "subject to the person executing and lodging with the tribunal a document in a form satisfactory to the tribunal whereby that person renounces irrevocably any right to recover from the practitioner damages by way of civil proceedings for the pecuniary loss in respect of which an order is made under this paragraph ... ". By s 30(2) of the 1893 Act, the court is empowered to make any order which the Tribunal might make under s 29A(3).

69 Section 187(1)(h) of the 2003 Act is similar in effect to s 29A(3)(h) of the 1893 Act, save that it does not expressly require that the person suffering the pecuniary loss should have requested the making of the order. However, this last requirement is necessarily implicit in the fact that the Tribunal is required by s 187(3) of the 2003 Act not to make an order under subs (1)(h) "unless the person who suffered the pecuniary loss executes and lodges with the Tribunal a document in a form satisfactory to the Tribunal renouncing irrevocably any right to recover from the legal practitioner damages by way of civil proceedings for the pecuniary loss in respect of which the order is to be made". By s 187(2)(a) of the 2003 Act the amount to be assessed is a maximum of \$25,000 or an amount prescribed by the Regulations, whichever is the greater, or, if the parties to

the proceedings before the Tribunal agree, such greater amount as is agreed.

70 The only evidence lodged with us in support of the compensation claim takes the form of an affidavit sworn by the Committee's previous solicitor, Mr Bruce Goetze. The affidavit does no more than annex two letters. The first of these was received by the Committee from the current solicitors for R and U. It is dated 7 July 2004. The letter "confirms" R and U's request that the Tribunal make an order under s 29A(3)(f)(ii) "in respect of the costs that they have incurred with our firm to make good or otherwise rectify those steps in the District Court action vis a vis Mr Thorpe that the practitioner failed to do, or the like". Contrary to what is said in the applicant's written outline of submissions, no claim for an order under s 29A(3)(h) is advanced in that letter. Instead, a claim of that kind is specifically disclaimed. The letter records that R and U wish to reserve their rights to pursue the practitioner for loss and damage in court proceedings.

71 As to the request for an order under s 29A(3)(f)(ii) of the 1893 Act, that section (see now s 187(1)(f)(ii) of the 2003 Act) empowers the making of an order requiring the practitioner or his firm to pay, wholly or in part, for further work to be done for the client by another practitioner or firm of practitioners. The letter of 7 July 2004 says no more, in this respect, than the following:

"In respect of the Section 29A(3)(f)(ii) application, we confirm our clients have to approximately 2 July 2004, incurred legal fees in the sum of approximately \$4,300.00 inclusive of GST. On [*sic*] the limited time available to us and without having undertaken an exhaustive analysis, it is the writer's estimate that 2/3rds of those fees have been incurred so as to deal with the ... District Court action [concerning Mr Thorpe] and in particular, in establishing what has occurred in the action, review the documents so filed (including defective statements of claim and the like) taking instructions from our clients as to what [the practitioner] did or did not do, or what he did or did not advise them as to the progress of the action, responding to the Plaintiff's solicitors and thereafter preparing, filing and serving an affidavit of [R] sworn 22 April 2004 in opposition to the Defendants' strike out application for want of prosecution. Thus our clients seek an order that [the practitioner] pay to them \$2,866.00."

72 The second of the annexed letters is dated 5 July 2006. It is written by the solicitors for the Committee to the practitioner. That letter reads, relevantly, as follows:

"We write to advise you that when the notice of originating motion is heard in this matter by the Full Bench of the Supreme Court on 28 July 2006, the Legal Practitioners Complaints Committee will seek compensation orders against you in the sums of:

1. \$3,000.00 to be paid to [Mrs M]; and
2. \$2,866.00 payable to [R].

The power to seek such orders and for the same to be ordered against you is contained in the Legal Practice Act, as to which, we refer you to sections 185(2)(b), 187(1)(f)(ii) and (g) and 194(2)."

73 As to the claim advanced on behalf of R and U, I have mentioned that we were told that this was brought in reliance upon s 187(1)(h) of the 2003 Act (s 29A(3)(h) of the 1893 Act). Plainly, the application for a compensation order upon that basis cannot succeed, given that R is unwilling to renounce his right to recover damages from the practitioner by way of civil proceedings. So far as the application relies upon s 187(1)(f)(ii) of the 2003 Act (s 29A(f)(ii) of the 1893 Act), I am not persuaded that the evidence, as it presently stands, is sufficient to support it. The only evidence available to us is, as I have said, the affidavit of Mr Goetze, to which the letters from which I have quoted are annexed. There is no affidavit evidence from the author of the letter from R's solicitors dated 7 July 2004. Nor is there any proper analysis of the time expended on remedial work undertaken by the new practitioners. There is also no sufficient identification of the work that is said to be remedial, rather than merely designed to progress the action, or of the time expended on it. Moreover, s 187(1)(f)(ii) of the 2003 Act (and s 29A(3)(f)(ii) of the 1893 Act) empowers an order for payment for further work "to be done" and not one for payment for further work already done. No submissions have been addressed to the question whether the section should be construed so as to empower the making of an order for further work already done. A claim of that kind can, of course, be brought in civil proceedings of the kind proposed to be instituted by R and U.

STEYTLER P  
WHEELER JA  
EM HEENAN AJA

74 In these circumstances I am not prepared to make the order sought by R and U. I have assumed, from the fact that nothing has been said or done concerning the claim for compensation by M, that that claim is not pursued.

### **Conclusion**

75 I would order that the practitioner, David Ernest Eley, be struck off the roll of practitioners. I would decline to make the order for compensation that has been sought.

76 **WHEELER JA:** I have had the advantage of reading in draft the reasons for decision of Steytler P. I agree with those reasons and have nothing to add.

77 **EM HEENAN AJA:** I agree with the conclusions of Steytler P that the name of this practitioner should be struck off the roll of practitioners and that the Court should decline to make the order for compensation sought. I agree with respect, with the reasons for decision published by the President for reaching those conclusions.