
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and STAFFA [2020] WASAT 58

MEMBER : JUDGE T SHARP, DEPUTY PRESIDENT
MR D AITKEN, SENIOR MEMBER
MS M CONNOR, MEMBER

HEARD : 30 JANUARY 2020, 31 JANUARY 2020 AND
6 MARCH 2020

DELIVERED : 2 JUNE 2020

FILE NO/S : VR 25 of 2019

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

KEVIN COLIN BENEDICT STAFFA
Respondent

These reasons have been reissued with deletions to par [130] in accordance with
O 3 of the Orders made by the Court of Appeal in CACV 131 of 2020

Catchwords:

Vocational regulation - Legal practitioner - Professional misconduct -
Unsatisfactory professional conduct - Conflict of interest - Failure to be open
and candid with Legal Profession Complaints Committee

Legislation:

Corporations Act 2001 (Cth)

Criminal Code (WA), s 378, s 378(7)

Interpretation Act 1984 (WA), s 46

Legal Profession Act 2008 (WA), s 5(a), s 401-s 469, Pt 13

Legal Profession Conduct Rules 2010 (WA), r 14(2), r 14(3), r 50, r 50(2), r 50(3)

State Administrative Tribunal Act 2004 (WA), s 62, s 87(2)

Result:

Practitioner guilty of professional misconduct

Practitioner guilty of unsatisfactory professional conduct

Category: B

Representation:

Counsel:

Applicant : Mr MD Cuerden SC

Respondent : Mr GD Cobby SC

Solicitors:

Applicant : Legal Profession Complaints Committee

Respondent : N/A

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

Blackwell v Barroile Pty Ltd and Ors 51 FCR 347; (1994) 123 ALR 81

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Commonwealth Bank of Australia and Anor v Smith and Anor 42 FCR 390;
(1991) 102 ALR 453

Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115;
(1999) 21 WAR 56

Legal Profession Complaints Committee and A Legal Practitioner
[2013] WASAT 37

Legal Profession Complaints Committee and Caine [2010] WASAT 178

Legal Profession Complaints Committee and Lee-Steere [2010] WASAT 189

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66;
(1992) 110 ALR 449

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction and background

Application

- 1 This matter comes before the Tribunal by way of an application made by the applicant (**Committee**) dated 1 March 2019. In its application, the Committee seeks an order that the Tribunal make a finding that the respondent (**Practitioner**) has engaged in professional misconduct pursuant to s 438(1) of the *Legal Profession Act 2008* (WA) (**LP Act**) and consequential orders pursuant to s 438(2) of the LP Act. The Committee also seeks an order that the Practitioner pay the Committee's costs pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**).

- 2 The grounds for the Committee's allegation that the Practitioner has engaged in professional misconduct are set out in full later in these reasons, but may be summarised as follows:
 - (1) the Practitioner, having been engaged by a company (**Australian Company**) through its managing director (**W**) to provide legal services to the Australian Company, also provided legal services to W for his personal benefit in circumstances where there was a conflict or potential conflict of the Practitioner's duty to act in the best interests of each of the Australian Company and W;
 - (2) the Practitioner rendered bills to the Australian Company for legal services performed by the Practitioner for the personal benefit of W;
 - (3) the Practitioner advised W to transfer money from the Australian Company's bank account to a personal account controlled by W in anticipation of W's entitlements upon the termination of W's employment with the Australian Company; and
 - (4) the Practitioner was not open and candid in his dealings with the Committee and failed to provide a full and accurate account of his conduct in relation to the Practitioner's professional behaviour.

Suppression order

3 On the first day of the final hearing in the Tribunal, 30 January
2020, the Committee sought and the Tribunal made an order under s 62
of the SAT Act that the names of witnesses in the proceeding
(excluding the Practitioner), the Practitioner's clients and their
employees are not to be published.

4 The making of that order was unopposed by the Practitioner.

Proceedings in the Tribunal

5 The Committee's application included its Statement of Facts and
Contentions. With the consent of the parties, on 15 March 2019 the
Tribunal ordered the filing of the Practitioner's statement of facts and
contentions (which he did on 13 May 2019) (**Practitioner's statement**)
and referred the matter to mediation to take place on 6 August 2019.
The mediation did not result in a resolution of the matter and was
terminated.

6 Following the making of further programming orders, on
29 October 2019 the Committee filed its book of documents
(**Committee's Book**). On 12 December 2019 the Practitioner filed an
amended statement of facts and contentions (**Practitioner's amended
statement**) and, on 13 December 2019, his book of documents
(**Practitioner's book**). The Practitioner, through counsel, confirmed
that the Practitioner's amended statement was in substitution for the
Practitioner's statement and the Practitioner's statement should be
disregarded; ts 6, 30 January 2020.

7 The Practitioner filed his supplementary book of documents
(**Practitioner's supplementary book**) on 16 January 2020 and
on 28 January 2020 the Committee filed a supplementary book of
documents (**Committee's supplementary book**).

8 The Committee's book, the Committee's supplementary book, the
Practitioner's book and the Practitioner's supplementary book were all
admitted and were marked, respectively, Exhibit 1, Exhibit 2, Exhibit 3
and Exhibit 4.

9 The Practitioner provided a witness statement dated 20 December
2019 (**PWS**). The Committee provided a witness statement from W
dated 19 December 2019 (**WWS**) and the Practitioner provided a
supplementary witness statement dated 24 January 2020.

10 The matter was heard over two days, on 30 January 2020 and
31 January 2020. The Practitioner and W gave evidence and were both
cross-examined at the hearing.

11 At the end of the second day, the Tribunal ordered that the
Committee and the Practitioner both file written closing submissions.
The Committee's closing submissions (**CCS**) are dated and were filed
with the Tribunal on 27 February 2020. The Practitioner's closing
submissions (**PCS**) are dated and were filed with the Tribunal on
5 March 2020.

12 The parties then sought and the Tribunal allowed them the
opportunity to make further responsive submissions orally, and this
took place on 6 March 2020.

Facts not contested

13 The following facts are not disputed between the parties and the
Tribunal makes these findings of fact.

14 At all material times the Practitioner was:

- (a) admitted as an Australian legal practitioner within the
meaning of s 5(a) of the LP Act; and
- (b) the sole legal practitioner director of an incorporated
legal practice, Legal Success Pty Ltd, trading as 'Legal
Success' (**Practice**).

15 The Australian Company at all material times was a company
registered pursuant to the *Corporations Act 2001* (Cth) on 16 May
2012. The Australian Company was a wholly owned subsidiary of a
limited liability company incorporated under the laws of Germany
(**German Company**). The German Company in turn was owned to the
extent of 75% by another German company, of which **MH** was the
managing director. The remaining 25% of the German Company was
owned by **HB**, a German resident.

16 The Australian Company acted as the Australian agent of the
German Company for the sale in Australia of equipment and parts made
by the German Company for ore beneficiation and for related services.

17 Until on or around 8 July 2016, W was a director of the Australian
Company; Committee's book page 272. Although he had resigned as a
director of the Australian Company on or around 8 July 2016,

he remained as an employee of the Australian Company as its general manager after that date, until on or around 27 July 2016.

18 The Practitioner had acted for the Australian Company in respect of various matters, on instructions from W on the Australian Company's behalf, since around May 2012.

19 Between on or around 24 June 2016 and on or around 28 June 2016, the Practitioner was engaged by W on behalf of the Australian Company to provide legal advice to the Australian Company with respect to various issues concerning its management, including advising the Australian Company as to the rights and entitlements of its employees, including W, against the Australian Company; Practitioner's amended statement para 17.

20 In an email from W to the Practitioner of 8 July 2016 (Committee's book pages 112-113) from W's private email address (W having previously emailed the Practitioner from the email address of the Australian Company) bearing the title '*[W] - Request for Services - Termination*', W:

- (a) informed the Practitioner that he (W) had or had purportedly been given notice of termination of his employment and had been removed as a director of the Australian Company by resolution of the Australian Company's sole shareholder passed or purportedly passed the previous day, 7 July 2016;
- (b) provided the Practitioner with copies of documents that he (W) had received in respect of the termination or purported termination of his directorship of, and employment with, the Australian Company;
- (c) sought the Practitioner's advice about the validity of his termination and about other matters relevant to the termination of his employment;
- (d) asked the Practitioner to send all correspondence to his private email address, and to invoice him personally on the matter rather than the Australian Company 'unless an outcome is found whereby [the Australian Company] settles all legal fees'.

21 In another email from W to the Practitioner dated 11 July 2016 (Committee's book pages 114-116), again from W's private email address and again bearing the title '*[W] - Request for Services - Termination*', W:

- (a) attached calculations as to the approximate amount of his employment entitlements as provided by the Australian Company's accountants, based on W's instructions (the amount being stated as \$350,158.62);
- (b) stated that his (W's) 'objectives' were to obtain confirmation from the Australian Company's shareholder as to his entitlements, to determine if the circumstances of his termination qualified for a redundancy package, to clarify the period of notice he would be paid, and to explore on what grounds, if any, he could leave the Australian Company prior to the expiry of the 6 months' notice period; and
- (c) asked the Practitioner to review and advise if there was legal justification for any of his objectives.

22 In a letter dated 13 July 2016 sent by email to W at the Australian Company's email address (Committee's book pages 120-121), bearing the title '*Termination of Employment*', the Practitioner:

- (a) said he was separately preparing his advice;
- (b) advised W to change immediately the password for all of the Australian Company's bank accounts and not divulge it to any third parties, including officers of the German Company; and
- (c) said this advice reflected the Practitioner's concerns that 'some of the documentation emanating from Germany is ineffective and may be invalid', and that 'were [the Australian Company] to be wound up you may lose all your entitlements unless steps are taken to protect you'.

23 In another letter also dated 13 July 2016 sent by email to W, also at the Australian Company's email address, (Committee's book page 122), and also bearing the title '*Termination of Employment*', the Practitioner advised W not to give any advice to the German Company

except to the extent it would be beneficial to W to do so, or to the extent he was obliged to do so in the course of his duties as manager of the Australian Company's business.

24 In a letter dated 14 July 2016 sent by email from the Practitioner to W, also at the Australian Company's email address, (Committee's book pages 125-133), the title again being '*Termination of Employment*', the Practitioner:

- (a) referred to W having sought the Practitioner's advice 'in relation to the termination of your employment with [the Australian Company]';
- (b) gave advice to W about various issues including the issues raised in W's emails to the Practitioner of 8 and 11 July 2016 and W's rights and entitlements as an employee of the Australian Company;
- (c) stated that he shared a concern expressed by W that '[the German Company's] plan is to remit funds from [the Australian Company's] account back to Germany. Once that occurs, it would likely be extraordinarily difficult, and possibly very costly, for you to try to recover your employment entitlements. More than likely, [the Australian Company] would be put into voluntary liquidation, and you would be left high and dry'; and
- (d) advised W as to a strategy to recover his termination entitlements including writing to the Australian Company's shareholder, the German Company, in that respect.

25 On or about 15 July 2016, the Practitioner through the Practice billed the Australian Company in respect of his legal services for the period between 8 and 14 July 2016 inclusive; Committee's book pages 136-137.

26 In accordance with the Practitioner's advice to W in his letter of 14 July 2016 that W should write to the German Company, on 15 July 2016 W wrote to MH seeking confirmation as to W's entitlements upon termination of his employment; Committee's book pages 138-139.

27 MH responded to W in a letter dated 20 July 2016, saying that MH could not provide W with the confirmation he sought; Committee's book pages 140-141.

28 By email to the Practitioner of 21 July 2016, the subject of which was described as '*W* - *Employment [the Australian Company]*', W:

- (a) sent the Practitioner copies of his letter to MH of 15 July 2016 and MH's response of 20 July 2016; and
- (b) asked to meet with the Practitioner 'to clarify the options that I may have to determine the possibilities of having my entitlements paid'.

(Committee's book page 142)

29 The Practitioner, in a letter of 21 July 2016 sent by email to W, once again at the Australian Company's email address, the subject of which was described as '*Termination and Other Issues*' (Committee's book pages 144-145), responded to W's email of 21 July 2016, suggesting that they meet to discuss what options may be open to W, including 'putting a proposal to [the German Company] to resolve the matter'. On 22 July 2016, the Practitioner met with W.

30 At that meeting on 22 July 2016 (the Practitioner's note of which is at pages 146-147 of the Committee's book):

- (a) the Practitioner and W discussed steps that could be taken to protect and advance W's personal interests in obtaining his anticipated termination entitlements;
- (b) W informed the Practitioner that he had resigned as a director of the Australian Company on 8 July 2016; and
- (c) W proposed 'taking and parking' money from the Australian Company in an amount sufficient to cover W's anticipated termination entitlements.

31 In a letter of the same date, 22 July 2016, sent by email to W at W's personal email address, bearing the title '*Termination of Employment*', the Practitioner:

- (a) referred to their meeting earlier that day;

- (b) advised W that there was a real risk of W losing a substantial proportion, if not all, of his termination entitlements as a result of his position as managing director of the Australian Company becoming redundant;
- (c) said:

'Given the evasive response in the letter of 20 July 2016 from [MH], I see no option but for you to take proactive steps to protect your entitlements. I therefore confirm that my advice to you is that you immediately transfer into a bank account controlled only by you the full amount of your employment entitlements from today up to and including 4 January 2017 as per the advice you have received from [the Australian Company's accountants] and my office'; and
- (d) advised that he (the Practitioner) was now aware that W had resigned as a director on or about 8 July 2016 but that this did not alter his advice; and
- (e) attached a draft letter for W to send to MH.

(Committee's book pages 150-151)

32 The draft letter which the Practitioner sent to W, referred to in the preceding paragraph, appears at pages 152-153 of the Committee's book. That letter provided, amongst other things, that:

- (a) there was doubt about whether W would be paid his employee entitlements;
- (b) 'it is patently obvious that the agenda of [the German Company] (the shareholder) is to siphon off the funds of [the Australian Company] to prop up [the German Company's] ailing business in Germany';
- (c) '[i]n the circumstances, and on the basis of advice I have received, I have transferred the sum of \$[[W] to insert] from [the Australian Company's] account into a holding account controlled by me, to ensure that I receive my full termination entitlements. The above amount is calculated as follows: ...'.

33 On or about 22 July 2016, the Practitioner through the Practice billed the Australian Company in respect of his legal services provided on 21 and 22 July 2016; Committee's book pages 148-149.

34 On or about 22 July 2016, W transferred \$378,000 from the Australian Company's bank account into a bank account controlled by W himself.

35 On 25 July 2016, W wrote to MH in terms based on (but not identical to) the draft letter which the Practitioner had prepared on W's behalf and is referred to at [31] and [32]. In his letter he informed MH that, having taken advice and on the basis of that advice, he (W) had transferred the sum of \$378,000 from the Australian Company's account 'into a holding account controlled by me, to ensure that I receive my full termination entitlements'; Committee's book pages 154-155.

36 In an email dated 27 July 2016 from **WM**, a legal practitioner engaged by the German Company, WM asked the Practitioner to confirm who the Practitioner's client was at the time he advised W regarding the transfer of funds from the Australian Company's account. In a responsive email of the same date, the Practitioner confirmed that he was 'at all times taking instructions from and providing advice to [the Australian Company], via its manager [W]'; Committee's book pages 162-163.

37 In a letter of 27 July 2016 sent by email to W, bearing the title '*Termination of Employment*', the Practitioner:

(a) referred to two lengthy telephone discussions he had had with W on the afternoon of 26 July 2016;

(b) said:

'as a result of your concerns, which I share, I have agreed with your idea of putting the funds into the holding account and in fact I have stated clearly that that is my advice. This should give you some comfort as no matter how matters unfold, you will be able to state, categorically, that you sought legal advice and acted only in accordance with legal advice';

(c) told W to keep the funds in the holding account, but advised W that he was almost certainly not entitled to

receive the termination payments until his employment actually ended, which had not then occurred;

- (d) advised W as to the terms of his letter of resignation from the Australian Company; and
- (e) concluded by advising W in the following terms:

[i]f you now leave [the Australian Company] I will be obliged to open a file in your name and charge you for my time, including the teleconferences on 26 July 2016 and this advice. Please let me know whether that is agreeable to you.

(Committee's book pages 157-160)

38 On 27 July 2016, following receipt by W of a letter by email from MH accusing him (W) of misconduct and criminal behaviour with respect to the transfer of the funds and demanding the return of those funds that day (Committee's book pages 166-167), the Practitioner had a telephone discussion with W in which he advised W, with respect to the allegations of misconduct and criminal behaviour made against him, that he disagreed with those allegations.

39 In a letter of 28 July 2016 sent by email to W at his personal email address, again bearing the title '*Termination of Employment*', the Practitioner confirmed that the decision as to whether or not W returns the funds was 'a decision for [W] to make'. He 'readily agreed that [the transfer of funds into a holding account] was appropriate if you had reason to believe that the funds would be transferred overseas and might result in you not being paid' and advised that he believed that the Australian Company would not pay for any of the Practitioner's ongoing work. The Practitioner said he was proceeding on the basis that W would ensure that his tax invoices were paid and he asked W to confirm that this was the case; Committee's book pages 169-171.

40 On 1 August 2016, the Practitioner through the Practice billed W in respect of his legal services provided between 27 July and 1 August 2016; Committee's book pages 179-180.

41 In a letter dated 10 April 2017 (Committee's book pages 188-189), the Committee wrote to the Practitioner:

- (a) advising the Practitioner that the Committee was investigating a complaint made in respect of his conduct, including that the Practitioner advised W to transfer the funds from the Australian Company's account to a holding account in circumstances in which the Practitioner was aware, or ought to have been aware, that W was not presently entitled to the funds and had no authority to transfer the funds and that the transfer may be regarded as an unlawful act by W;
- (b) informing the Practitioner that he had the right to make submissions to the Committee in respect of the conduct complained of;
- (c) requesting that the Practitioner provide his entire original file and all documents relating to the matter; and
- (d) reminding the Practitioner that he must be open and candid in his dealings with the Committee and must provide a full and accurate account of his conduct, and referred to r 50(2) and (3) of the *Legal Profession Conduct Rules 2010 (Conduct Rules)*.

42 In his letter to the Committee of 2 May 2017 (Committee's book pages 190-211), the Practitioner:

- (a) provided a file of documents which included (amongst other things) the Practitioner's letters of 14 July 2016 and 22 July 2016 (referred to at [24] and [31] respectively of these reasons), his draft letter to MH (referred to at [31] and [32] of these reasons) and his email and his letter both dated 27 July 2016 (referred to at [36] and [37] respectively of these reasons);
- (b) said (at par 7(b)) that the Committee was mistaken to state that he (the Practitioner) had advised W to transfer an amount of \$378,000 from the Australian Company's account, and that 'that decision was made by [W]';
- (c) provided a table of comments with respect to the documents provided in the file to the Committee;

- (d) in that table, with respect to the Practitioner's letter to W of 14 July 2016 (referred to at [24] of these reasons), made the comment (Committee's book page 204 para (g)) that:

'note: none of the advice given by me suggested that [W] remove funds from any accounts of [the Australian Company] - that suggestion came from him, and it was no doubt a decision made by him in his capacity as managing director';

- (e) in that table, with respect to the Practitioner's letter to W of 22 July 2016 (referred to at [31] of these reasons), said (Committee's book page 205) 'No comment';

- (f) in that table, with respect to the Practitioner's letter to W of 27 July 2016 (referred to at [37] of these reasons), made the comment (Committee's book page 206 para (c)) that 'in paragraph 5(a), I confirmed that it was [W] whose idea it was to put funds of [the Australian Company] into a holding account, and that this had been done without any input from me'.

43 In a letter dated 5 February 2018 (Committee's book pages 212-215), the Committee again wrote to the Practitioner, requesting the Practitioner to provide further submissions as to, amongst other things, the reference in the Practitioner's notes of the meeting with W of 22 July 2016 (referred to at [30] of these reasons) that he 'take and park the money'.

44 In his letter to the Committee dated 5 March 2018 (Committee's book pages 219-223), the Practitioner said (at para 1.2(a)) that W can either confirm or deny that W initially transferred the funds of his own volition without his (the Practitioner's) advice or input. He also said (at para 9) that W had already made a decision to put funds into a holding account to cover his anticipated employee entitlements prior to the Practitioner's meeting with W on 22 July 2016 (referred to at [30] of these reasons).

45 On 4 April 2018, the Committee again wrote to the Practitioner, seeking further submissions; Committee's book pages 224.

46 In his letter to the Committee of 27 April 2018 (Committee's book pages 229-233), the Practitioner repeated and supplemented the answer he provided to the Committee in his letter of 5 March 2018, and said (at paras 3 and 9(b)) that:

- (a) W made the decision to transfer the funds;
- (b) W actually effected the transfer before seeking advice from the Practitioner; and
- (c) he (the Practitioner) did not advise W to transfer the funds from any account or to any account and that that was a decision that W made.

Allegations against the Practitioner in detail

47 The allegations made against the Practitioner by the Committee are set out in Annexure A of the Committee's application to the Tribunal as follows:

Ground 1

48 The Practitioner between on or about 8 July 2016 and on or about 28 July 2016 engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act, in that his conduct fell short consistently and by a substantial degree of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, in that, having been engaged by the Australian Company through its managing director, W, to provide legal services to the Australian Company, namely legal advice with respect to issues concerning the management of the Australian Company including advising the Australian Company as to the rights and entitlements of the employees of the Australian Company (including W) against the Australian Company, the Practitioner provided legal services to W for the personal benefit of W and pursuant to W's instructions in his personal capacity with respect to the same or related matters, namely legal advice to W in relation to the termination or purported termination of his employment by the Australian Company, his rights and entitlements consequential upon the termination of his employment and recovery of his entitlements from the Australian Company consequential upon the termination of his employment, in circumstances in which the interests of the Australian Company and

W were adverse and there was a conflict or potential conflict of his duties to act in the best interests of each of the Australian Company and W, contrary to r 14(2) of the Conduct Rules.

Ground 2

49 The Practitioner on or about 15 and 22 July 2016 respectively engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act, in that his conduct fell short consistently and by a substantial degree of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be regarded as disgraceful or dishonourable to practitioners of good repute and competence, in that he caused the Practice to render bills to the Australian Company for services performed by the Practitioner for the personal benefit of W and pursuant to W's instructions in his personal capacity, and further in circumstances in which:

- (a) W had expressly requested the Practitioner to bill him personally with respect to the legal services the subject of those bills;
- (b) the legal services the subject of those bills were adverse to the interests of the Australian Company; and
- (c) on 22 July 2016, before the Practitioner caused the Practice to render the bill on that date, W informed the Practitioner that W was no longer a director of the Australian Company.

Ground 3

50 The Practitioner on or about 22 July 2016 engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act, in that his conduct fell short by a substantial degree of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, in that he advised W to transfer money from the Australian Company's bank account to a personal account controlled by W in an amount equivalent to the estimated amount of W's potential entitlements consequential upon the termination or potential termination of his employment with the Australian Company in

circumstances in which the Practitioner knew that W had resigned as a director of the Australian Company on or about 8 July 2016 and:

- (a) the Practitioner knew or ought to have known that W had no entitlement to, or interest in, that money;
- (b) the Practitioner knew or ought to have known that W had no authority from the Australian Company to transfer that money to a personal account controlled by him or at all;
- (c) the Practitioner's advice exposed W to the possibility of being charged with the offence of stealing contrary to s 378 of the *Criminal Code* (WA) (**Criminal Code**).

Ground 4

51 The Practitioner between on or about 2 May 2017 and on or about 27 April 2018 engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act, in that his conduct fell short consistently and by a substantial degree of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, in that by his correspondence to the Committee dated 2 May 2017, 5 March 2018 and 27 April 2018, the Practitioner was not open and candid in his dealings with the Committee and failed to provide a full and accurate account of his conduct in relation to matters covered by requests by the Committee to provide comments or information in relation to the Practitioner's conduct or professional behaviour contrary to r 50 of the Conduct Rules, in that the Practitioner told the Committee that the Practitioner did not advise W to transfer the Funds from the Australian Company's bank account to a personal account controlled by W (**Statement**) in circumstances in which:

- (a) the Statement was false or misleading, or both, as in fact the Practitioner did advise W to so transfer the Funds;
- (b) the Practitioner well knew that the Statement was false or misleading, or both, in a material respect and/or that it had the potential to mislead the Committee and the Practitioner intended that the Committee be misled;

- (c) alternatively to (b), the Practitioner acted with reckless disregard or indifference as to whether or not the statement was false or misleading, or both, and/or had the potential to mislead the Committee and as to whether the Committee would be misled by the Statement;
- (d) further alternatively to (a) and (b), the Practitioner was grossly careless in failing to ensure that the Statement was not false or misleading, or both, in a material respect, and/or had the potential to mislead the Committee.

Standard of proof

52 The Committee bears the onus of proof. The standard of proof which the Committee must meet in proving its case is the civil standard, namely proof on the balance of probabilities. However, in determining whether on the evidence this standard has been satisfied, the Tribunal will recognise that '[t]he seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences'; ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336 (***Briginshaw***) per Dixon J at 362.

53 As the High Court expressed the position in ***Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*** [1992] HCA 66; (1992) 110 ALR 449 at 450, the significance of ***Briginshaw*** is that the seriousness of the matter and of its consequences does not affect the standard of proof, but the strength of the evidence necessary to establish a fact required to meet that standard on the balance of probabilities may vary according to the nature of what it is sought to prove.

54 Allegations of professional misconduct and unsatisfactory professional conduct are undoubtedly serious and it is therefore considered in proceedings such as these that the Tribunal must, again to quote the words of Dixon J in ***Briginshaw*** at 361, feel an actual persuasion of the occurrence or existence of the relevant facts before being satisfied that those facts have been made out.

Statutory framework

55 The heading to Pt 13 of the LP Act is 'Complaints and discipline'.
Part 13 comprises s 401 to s 469 inclusive.

56 Section 401 of the LP Act provides that the purposes of Pt 13 of
the LP Act are to:

- (a) provide for the discipline of the legal profession in Western Australia in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally;
- (b) promote and enforce the professional standards, competence and honesty of the legal profession; and
- (c) provide a means of redress for complaints about lawyers.

57 Section 402 of the LP Act provides:

For the purposes of this Act -

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

58 Section 403(1) of the LP Act provides:

For the purposes of this Act -

professional misconduct includes -

- (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

59 Under s 438(1) of the LP Act, the Tribunal has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

60 Section 438(2) of the LP Act provides:

If, after it has completed a hearing in relation to a referral under this Part in respect of an Australian legal practitioner, the State Administrative Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may -

- (a) make and transmit a report on the finding to the Supreme Court (full bench); or
- (b) make any one or more of the orders specified in sections 439, 440 and 441.

61 Sections 439, 440 and 441 of the LP Act contain the various penalties which the Tribunal may impose if it is satisfied that a practitioner is guilty of unsatisfactory professional conduct or professional misconduct.

62 Rule 14(2) and (3) of the Conduct Rules provides as follows:

- (2) A practitioner must not provide, or agree to provide, legal services for a client if -
 - (a) the practitioner or the practitioner's law practice is engaged by another client in the same or a related matter; and
 - (b) the interests of the client and the other client are adverse; and
 - (c) there is a conflict or potential conflict of the duties to act in the best interests of each client.
- (3) Subrule (2) does not apply if -
 - (a) each client is aware that the practitioner or the practitioner's law practice is also providing legal services to each other client; and
 - (b) each client has given informed consent to the practitioner or the practitioner's law practice providing the legal services to each other client; and
 - (c) an effective information barrier has been established to protect the confidential information of each client.

63 Rule 50 of the Conduct Rules provides as follows:

(1) In this rule -

regulatory authority means a local regulatory authority and an interstate regulatory authority.

(2) A practitioner must be open and candid in his or her dealings with a regulatory authority.

(3) A practitioner who is requested by a regulatory authority to provide comments or information in relation to the practitioner's conduct or professional behaviour must -

(a) respond to the request within a reasonable time and in any event within 14 days (or such extended time as the regulatory authority may allow); and

(b) provide in writing a full and accurate account of his or her conduct in relation to the matters covered by the request.

64 Section 378(7) of the Criminal Code provides:

If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for 10 years.

The meaning of 'professional misconduct'

65 The definition of 'professional misconduct' in s 403(1) of the LP Act is inclusive and is not an exhaustive statement of that term for the purposes of the LP Act. In particular, conduct which constitutes professional misconduct at common law (sometimes referred to as 'unprofessional conduct') can constitute professional misconduct (or unsatisfactory professional conduct) under the LP Act; *Legal Profession Complaints Committee and Caine* [2010] WASAT 178 at [10], [15] and [19]; *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37 at [9]-[12].

66 The common law concept of unprofessional conduct was restated by Parker J (with whom Ipp and Steytler JJ agreed) in *Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56 at [61] as follows:

... This Court has long accepted and applied, in this context, the understanding of the notion of unprofessional conduct which was

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

The Practitioner's response to the Committee's allegations

Ground 1

67 The Committee's allegation under Ground 1, in short, is that between on or around 8 July 2016 and on or around 28 July 2016:

- (a) the Practitioner was engaged by the Australian Company and by W in the same or a related matter;
- (b) the interests of W and of the Australian Company were adverse; and
- (c) there was a conflict or potential conflict of duties to act in the best interests of each of W and the Australian Company.

(CCS at para 12)

68 The Practitioner, through counsel, confirms that the second and third limbs of the Committee's allegation are not in dispute; ts 215, 6 March 2020. It is the first limb of the Committee's allegation which is in issue. The Practitioner says, with regard to the first limb, that during the period between 8 July 2016 and 28 July 2016 he was acting only for W and not for the Australian Company. He says that his instructions from the Australian Company ceased as of 28 June 2016; PCS para 5. The Practitioner accordingly denies that during the relevant period he was acting for both the Australian Company and for W in the same or a related matter and accordingly submits that he is therefore not in breach of r 14(2) of the Conduct Rules.

69 The Practitioner does, however, concede that by accepting W's instructions on 8 July 2016, in circumstances where he had advised the Australian Company as recently as 28 June 2016 on the same or related matter, his conduct might have been seen to attract the principle that the due administration of justice requires that he not do so. For that reason, the Practitioner submits that his conduct in so doing could be characterised as unsatisfactory professional conduct; PCS at para 17. However, the Practitioner emphasises that because the Committee alleges only a conflict or potential conflict of interest on the part of the Practitioner, the Tribunal should find that the Committee has failed to establish either position; PCS at para 14.

Ground 2

70 The Committee's allegation under Ground 2, in short, is that the Practitioner engaged in professional misconduct by performing work for W in W's personal capacity but invoiced the Australian Company for that work.

71 The Practitioner concedes that the invoices issued on 15 and 22 July 2016 respectively were 'inappropriate'; ts 255, 6 March 2020. The Practitioner says that these invoices were sent in error and that they should have been sent to W.

72 The Practitioner says however that the proper characterisation of the issuing of the two invoices to the Australian Company is not professional misconduct but unsatisfactory professional conduct 'because it's the result of a single mistake'; ts 255, 6 March 2020. He says that this does not constitute professional misconduct as alleged by the Committee because the issuing of the two invoices could not be described as falling short consistently and by a substantial degree of the standard of competence and diligence observed and approved by members of the legal profession; ts 256, 6 March 2020.

Ground 3

73 The Committee's allegation under Ground 3 is that the Practitioner is guilty of professional misconduct by advising W to transfer money from the Australian Company's bank account to a personal account controlled by W, in an amount equivalent to W's estimated entitlements consequential upon the termination of his employment with the Australian Company.

74 Paragraph (c) of Ground 3 contains the allegation that the Practitioner's advice exposed W to the possibility of being charged with the offence of stealing contrary to s 378 of the Criminal Code. The Practitioner says that para (c) of Ground 3 is critical as to how the Tribunal should consider the Practitioner's conduct; ts 257, 6 March 2020.

75 The Practitioner, through counsel, says that:

[t]he trouble is that the assertion that [the Practitioner's] advice exposed [W] to the possibility of being charged with the offence of stealing is speculative. It's all based on hypothesis and it's not changed by reference to section 371, sub-section (2)(f) of the Criminal Code, because as my learned friend put to you, that definition deals with the intent to use the funds and there was never any evidence that [W] intended to use the funds at all. The evidence was that [W] intended to park the funds, put them into a holding account and not deal with them until his entitlements were decided.

(ts 257, 6 March 2020)

76 The Practitioner submits that therefore the allegation in sub-paragraph (c) of Ground 3 is not made out. The Practitioner accepts however that the other aspects of Ground 3 still need to be dealt with.

77 The Practitioner says that as at 22 July 2016, the Practitioner knew that W would be entitled to receive payment in respect of his employee entitlements, although the amount of those entitlements was dependent on a number of factors. The Practitioner, in his view, therefore knew that the Australian Company was indebted to W, although the amount of the debt might change.

78 The Practitioner also held the view that, after W had been removed as a director, he still possessed authority and responsibility to ensure that the Australian Company paid its employees' entitlements in his capacity as general manager. The Practitioner's advice to W was therefore that W should implement his idea to 'take and park' sufficient funds to ensure that his employee entitlements would be paid; PCS paras 33-36.

79 The Practitioner concedes that this advice was negligent. He says that he failed to appreciate that:

- (a) notwithstanding that the Australian Company was indebted to W, he could not engage in 'self-help' to protect his position by transferring funds to which he was not presently entitled;
- (b) W's authority as general manager did not extend to his transferring the funds, in circumstances where W and the new controllers of the Australian Company had not reached agreement on his entitlements.

(PCS para 37)

80 The Practitioner points out that part of his advice to W was that W should advise the German Company of the fact of his transfer of the funds. This advice was contained in the draft letter prepared by the Practitioner for W (Committee's Book pages 152-153) and in the letter which W sent to the German Company; Committee's Book paras 154-155.

81 The Practitioner says that whether W disclosed the intention to transfer the funds immediately before doing so or disclosed it immediately after the transfer made no difference to the Australian Company's position; PCS para 41.

82 The Practitioner says that the Tribunal should therefore assess his conduct on the basis that his advice was negligent but did not involve 'any element of dishonesty or sharp dealing' on the part of the Practitioner; PCS para 42.

Ground 4

83 In Ground 4, the Committee alleges that in his letters to the Committee dated respectively 2 May 2017 (Committee's Book pages 190-211), 5 March 2018 (Committee's Book pages 219-223) and 27 April 2018 (Committee's Book pages 229-233), the Practitioner was not open and candid in his dealings with the Committee when the Practitioner told the Committee that the Practitioner did not advise W to transfer an amount equivalent to the estimated amount of W's potential termination entitlements because in fact the Practitioner did so advise W.

84 The Practitioner's evidence was that he was of the clear recollection that W had told him on 22 July 2016 that he had already transferred funds to another account to hold pending the determination

of his entitlements; PWS paras 88, 145 and 149. The Practitioner accepts that he was mistaken and that the transfer of money had taken place after he had provided his advice of 22 July 2016; PWS paras 89-91, 98-100 and 162.

85 The Practitioner points out that when the Committee originally identified the nature of the complaint made against the Practitioner in its letter to the Practitioner of 10 April 2017 (Committee's Book pages 188-189), the Committee identified the relevant complaint against the Practitioner to be that he advised W 'to transfer an amount of \$378000 (*the funds*) from [the Australian Company's] account to a '*holding account*' in circumstances where you were aware, or ought to have been aware, that [W] was not presently entitled to the funds and had no authority to transfer the funds and that the transfer may be regarded as an unlawful act by [W]' (original emphasis).

86 The Practitioner says that his letter to the Committee of 2 May 2017, where it answers the allegation that the Practitioner had advised W to transfer \$378,000 into his own account, was true. He told the Committee in that letter that he did not advise W to transfer an amount of \$378,000 from the Australian Company's account.

87 The Practitioner says that he dealt with those aspects of the complaint by providing the Committee with copies of his 'email advices to [W] of 22, 27 and 28 July 2016'. The Practitioner says that he was entitled to expect that the Committee would read all of that material and read his responsive letter in the context of that material; PCS para 58.

88 The Practitioner says that his letter of 22 July 2016 to W (Committee's Book pages 150-151) along with his proposed letter from W to the Germany Company, (Committee's Book pages 152-153), make it clear that he did not advise W to transfer \$378,000.

89 The Practitioner goes on to say that it is important to recognise that the Committee did not then raise the matter with the Practitioner again until 5 February 2018, some 18 months after the Practitioner had met with W and over nine months after the Practitioner had written to the Committee and provided his file. The Practitioner says that the Tribunal should not place the same reliance on the letter from the Practitioner to the Committee dated 17 October 2016 (Committee's Book pages 186-187) that the Committee does. The Practitioner says that this letter was written the same day as the Committee had refused

the Practitioner an extension of time in which to respond and without reference to his file; PCS para 61.

90 The Practitioner says that his suggestion to the Committee that the Committee contact W to ascertain what occurred with regard to the transfer (Committee's Book page 220) is consistent only with the Practitioner seeking to assist the Committee rather than an intention to mislead it; PCS para 64.

91 The Practitioner says that '[i]t defies common sense that a person seeking to present a false state of affairs, as the Committee alleges, would encourage investigation'; PCS para 65. The Practitioner says that his acknowledgment, prior to the hearing in the Tribunal, that he had been mistaken about the timing of the transfer of money by W is not consistent with any intention on his part to mislead the Committee; PCS para 67.

Formulation of the Committee's allegations

92 In its application, the Committee alleges that the Practitioner has engaged in professional misconduct and then sets out four grounds, each of which contains a separate allegation of professional misconduct.

93 In closing, there was this exchange between counsel:

[COMMITTEE'S COUNSEL]: We are looking in - in grounds 1, 2 and 3, our case is based upon the practitioner's conduct, having objectively fallen below the relevant standard. And we say, in each case, having fallen substantially below. And we also say, having fallen consistently below, because the relevant conduct, for the purpose of establishing a pattern of consistency, is the whole of his conduct over the period from 8 July through to 28 July.

[PRACTITIONER'S COUNSEL]: It's not put as a ground.

[COMMITTEE'S COUNSEL]: Sorry?

[PRACTITIONER'S COUNSEL]: It's not put as a ground, that all these things are (indistinct).

[COMMITTEE'S COUNSEL]: My friend says it's not put as a ground, but each of the grounds does refer to his conduct falling consistently and substantively and substantially - consistently and by a substantial degree - falling short consistently and by a substantial degree of the standard of professional conduct observed and approved by members of the legal profession of good repute and confidence, and

would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence.

(ts 221, 6 March 2020)

94

Later, counsel for the Practitioner said this:

And again, firstly in ground 1 - well, firstly, before I start that, can I point out to the tribunal that this is not a case where there is a ground where it's said the practitioner's conduct taken as a whole amounts to unprofessional conduct. Now, my learned friend in his submissions made - put forward the proposition that you can look at the practitioner's conduct as a whole in coming to the view, for example, in relation to ground 2.

The grounds aren't formulated in that way. Ground 1 deals only with the provision of advice to [W]. Ground 2 deals only with the issues of invoices to the [Australian Company], and ground 3 relates solely to the provision of the advice on 22 July. There is no ground that seeks to put all of that conduct together and to say that taken as a whole the practitioner has engaged in unprofessional conduct.

(ts 250, 6 March 2020)

95

Later still, there was another exchange between counsel:

[COMMITTEE'S COUNSEL]: I do say that - and this is the way I put it in my submissions earlier - I do say that when it comes to characterisation one - and the focus on consistency - one can have regard to the whole of the conduct before the tribunal.

[PRACTITIONER'S COUNSEL]: See, we object to that. It's not put like that in the grounds.

...

[COMMITTEE'S COUNSEL]: That's an unduly - and I don't say this with criticism - but an unduly pedantic way to approach the grounds to ... disaggregate them in that way rather than have regard to the whole of the conduct.

...

[PRACTITIONER'S COUNSEL]: Well, I think the problem with accepting my learned friend's construction of how the matter is framed is that if you, for example, found on a majority of cases that there was to be a finding of unsatisfactory professional conduct, how would - and, for example, on one ground found that it was professional misconduct, how does the tribunal make the order sought? If it's put as all four grounds can go forward to the one order, how is that put? We

construed the application as saying there should be a ground - a finding of professional misconduct because in four separate cases that you see ... And it was said that he engaged in professional misconduct and there is no attempt between those grounds to interlink the conduct ... It's all put in discrete grounds and each ground says there should be a finding of professional misconduct ... Well, I think where we differ is the practical aspect of how the tribunal is to deal with evidence of conduct in relation to each ground because we would say it's effectively siloed. It's the allegation made in each ground that's to be dealt with. And my learned friend is saying that, "No, you can look at all of it together".

(ts 263-265, 6 March 2020)

96 Following conferral between counsel, counsel for the Committee informed the Tribunal as follows:

Your Honour, I've spoken to my friend over lunch about the issue that your Honour raised just before lunch. ... The position is that - I think my friend's position is correct, that is, within each of grounds 1, 2 and 4, but not ground 3 because ground 3 is a single instance of conduct on a particular date ... Grounds 1, 2 and 3 each allege in their terms that the practitioner's conduct fell both consistently below and substantially below the relevant standard with respect to each of those grounds, and so the committee's position is that the tribunal can have regard to consistency of conduct, if I can put it that way, with respect to each of grounds 1, 2 and 4, but we do not invite the tribunal to look at questions of consistency amongst the grounds themselves ... So for example, if the tribunal, for the sake of argument, made a finding of unsatisfactory professional conduct on any one or more of - on two or more of the grounds, we don't invite you to effectively aggregate the grounds to achieve ... a finding of professional misconduct.

97 Counsel for the Practitioner confirmed that this also reflected the Practitioner's view, saying:

Each of grounds 1, 2 and 4 specify certain conduct ... to substantially fall beneath the standard. What I'm keen to ensure is that that conduct in grounds 1, 2 and 4 are aggregated in some way.

(ts 266-267, 6 March 2020)

98 We believe that counsel meant to say in that last sentence 'are **not** aggregated in some way'.

99 In the light of this agreement between the parties, the Tribunal will accordingly deal with each of the four grounds as separate allegations of professional misconduct on the part of the Practitioner.

Disposition

Ground 1

100 The Practitioner accepts, and the Tribunal finds, that the Practitioner, between 8 July 2016 and 28 July 2016, provided legal services to W in his personal capacity pursuant to W's instructions in his letter to the Practitioner of 8 July 2016, and not for the benefit of the Australian Company; Practitioner's amended statement para 18(c) and para 32, ts 80 and 101, 30 January 2020. The Practitioner also accepts, and the Tribunal also finds, that the interests of W and the Australian Company were adverse and that there was a conflict or potential conflict of duties to act in the best interests of each of W and the Australian Company; CCS at para 12 and ts 215, 6 March 2020.

101 The issue for the Tribunal in this ground is therefore whether, between 8 July 2016 and 28 July 2016, the Practitioner was also engaged by the Australian Company in the same or a related matter.

102 The fact that the Practitioner at all relevant times both before and after 8 July 2016 was taking instructions from W himself is not determinative as to whether at any point in time the Practitioner was continuing to act for the Australian Company or acting for W as an individual. It is not in dispute that the Practitioner almost invariably took his instructions from the Australian Company through W.

103 The Tribunal considers that the Practitioner was acting for the Australian Company when he wrote to the Australian Company on 28 June 2016; Committee's book pages 94-101. That is also not in dispute. The Practitioner says however that from this date forward there was 'no suggestion that the [Australian Company] thereafter requested further advice in relation to the matters addressed' in that letter of 28 June 2016; PCS para 5. The Practitioner says that while he believed that he was still acting for the Australian Company over the days between 8 July 2016 and when he ceased to act on 29 July 2016, 'on any objective analysis he was not'; PCS para 7.

104 The Tribunal accepts that the Australian Company had not requested any further advice from him but otherwise does not agree with that analysis.

105 The Practitioner told the Tribunal that he 'considered at the time that [he was] the lawyer for [the Australian Company]'; ts 74, 30 January 2020.

106 The existence of this belief is supported by the fact that the Practitioner, in an email on 27 July 2016 to WM (Committee's book page 162), expressly confirmed to WM, in response to a query from WM about who the Practitioner was advising with regard to the transfer of funds from the Australian Company, that the Practitioner was 'at all times taking instructions from and providing advice to [the Australian Company], via its Manager [W]'.

107 It is apparent in any event that, as at 27 July 2016, W was clearly of the view that the Practitioner continued to act for the Australian Company. In a letter of that date (Committee's book page 168) to MH, W refers to the Practitioner as the Australian Company's lawyer. This letter was reviewed and approved by the Practitioner; ts 145, 31 January 2020.

108 Further, when the Practitioner wrote to W on 28 July 2016 (Committee's book pages 169-171), confirming advice that he had given to W verbally, he included the paragraph:

I advised you not to meet with [WM] on your own. I suggested that you immediately write to [MH] informing him that you will only meet with [WM] in company with [the Australian Company's] legal advisor (meaning me).

109 In a letter from the Practitioner to WM dated 28 July 2016 (Committee's book pages 173-174), the Practitioner said that '[W] has asked that I be present at any meeting he has with you to resolve the matter, given that I have been acting as legal advisor to [the Australian Company] for many years'.

110 The Tribunal notes that, in WM's response to the Practitioner dated 29 July 2016 (Committee's book pages 175-177), WM pointed out to the Practitioner, amongst other things, that 'it would be a serious conflict of interest for you to attempt to represent [W's] personal interests, over those of [the Australian Company]'. He goes on to say that '[a]s you are an advisor to [the Australian Company], and not [W], there is no need for any agreement to be reached with you in respect of the terms of the meeting with [W] ...'.

111 There is no evidence as to whether the Practitioner replied to that letter. However, it is apparent that the Practitioner considered the terms of that letter, because, in the Committee's book at page 178, there is a copy of an email sent by the Practitioner on 30 July 2016 to a

Mr Cameron Clifton bearing the title 'Employment Law' in the following terms:

Hi Cameron

Do you do employment law?

I have one that I have a conflict on.

Regards

112 The Committee says that the Practitioner was an argumentative witness (CCS para 9) and counsel for the Practitioner agreed; PCS para 1 and ts 276, 6 March 2020. The inconsistencies between the Practitioner's evidence in his written submissions, in his witness statement and under cross-examination may be explained at least in part by this. However, whatever the reason, the Practitioner's evidence on the point of whether he was acting for the Australian Company during the relevant period in July 2016 is certainly inconsistent. It was the Practitioner's oral testimony that at the relevant time he was acting for the Australian Company through its managing director; ts 80, 30 January 2020. This is in contrast to what the Practitioner said in his written submissions (Practitioner's amended statement paras 18(c) and (d)) and inconsistent with what he said under cross-examination when he told the Tribunal that he now believed that he was acting, during the relevant time, for W alone and not for the Australian Company; ts 84, 30 January 2020. It is also inconsistent with what the Practitioner said in his witness statement, namely that 'I did not hear from [the other director of the Australian Company or HB] during the period relevant to the complaints against me. My instructions concerning [W] and his employment matters were never withdrawn'; PWS para 36. There was a further inconsistency when the Practitioner, under cross-examination, in response to the question '... as at 26 July you considered that you were the lawyer only for [the Australian Company]', said 'I was engaged by [the Australian Company]; ts 143, 31 January 2020. He had already told the Tribunal (ts 112, 31 January 2020) that '[t]here was no other lawyer acting for the [Australian Company]'.

113 Some of the Practitioner's other answers under cross-examination show that it was the Practitioner's clear understanding that W was instructing him both in W's personal capacity and in W's capacity as managing director (and subsequently manager) of the Australian Company; ts 97 & 104, 30 January 2020 and 115 & 132, 31 January 2020.

114 The Tribunal agrees with the Committee that, in the words of counsel for the Committee, there is 'no neat divide before and after 28 June 2016'. The Practitioner had been acting for the Australian Company for a number of years (since 2012) and, up to 28 June 2016, he was providing advice to the Australian Company through W on employment issues. That is not in contest. When the Practitioner received written instructions from W on 8 July 2016, it was clear from the express terms of W's email and the nature of the advice being sought that the Practitioner was being asked by W for advice on W's personal behalf rather than on behalf of the Australian Company. The Tribunal has already accepted that the Practitioner was not expressly asked by the Australian Company for further advice about employment matters after 28 June 2016. However, the Practitioner on his own admission (see [112] above) says that he believed at that time that he was still acting for the Australian Company. The fact that he now takes the view that he was not acting for the Australian Company does not assist him. At the time when he took instructions from W as an individual, he considered that he was acting for the Australian Company on the same matter.

115 The Tribunal concludes that, on the balance of probabilities, and with the comments of Dixon J in *Briginshaw* in mind, it is more likely than not that during the relevant period the Practitioner was acting for both the Australian Company and W in respect of the same or related matters, namely W's rights and entitlements in relation to the termination or purported termination of his employment by the Australian Company.

116 Even though the Practitioner before the Tribunal denied that he was acting for the Australian Company from and after 8 July 2016, he also argued before the Tribunal, presumably, although not expressly, in reliance on the exception in r 14(3) of the Conduct Rules, that he had full and unqualified consent of the Australian Company and the German Company to act in a position of conflict between W and the Australian Company in any situation and that he was to prefer the interests of W. W 'was the one person they could not live without'; ts 73, 30 January 2020. When asked whether he understood that 'a lawyer who wishes to act in a position of concurrent conflicts must obtain the fully informed consent of both parties to the conflict', he replied '[y]es, and as far as I was concerned, I had it'; ts 76, 30 January 2020.

117 For r 14(3) of the Conduct Rules to apply, an information barrier
needs to have been established to protect the confidential information
of each client. There is no evidence of any such information barrier
having been established. In any event, even if the Practitioner had the
consent of the Australian Company on an ongoing basis to act for both
W and the Australian Company, it is the Tribunal's view that that
consent would no longer apply in circumstances where W had been or
was about to be removed as both a director of the Australian Company
and its manager. Further, even if the Australian Company had
consented to its lawyer acting for another party, this could not be
described as an informed consent, because the Australian Company was
entirely unaware that the Practitioner was acting for W in his personal
capacity; ts 75-76 and 78, 30 January 2020.

118 The Tribunal concludes that the Practitioner had not obtained the
informed consent of the parties.

119 The appointment of a solicitor by a client creates a fiduciary
relationship between them. As the fiduciary, the solicitor is required to
employ his knowledge, skill and expertise exhaustively in the interests
of his client. That obligation was described by the Full Court of the
Federal Court in *Commonwealth Bank of Australia and Anor v Smith
and Anor* 42 FCR 390; (1991) 102 ALR 453 at 477 as follows:

Not only must the fiduciary avoid, without informed consent, placing
himself in a position of conflict between duty and personal interest, but
he must eschew conflicting engagements. The reason is that, by reason
of the multiple engagements, the fiduciary may be unable to discharge
adequately the one without conflicting with his obligation in the other.

120 In *Blackwell v Barroile Pty Ltd and Ors* 51 FCR 347;
(1994) 123 ALR 81 at 93, the Full Court of the Federal Court said that
the obligation of a legal practitioner:

to provide a client with professional advice and skill uncompromised by
the performance of a like duty to another whose interests conflict with
those of the client ... is an ethical rule of long standing which goes to
the core of the solicitor-client relationship, the maintenance and
protection of which is a matter of public interest reflected in the
doctrine of professional privilege. It is central to the preservation of
public confidence in the administration of justice.

121 The Practitioner's conduct represents a clear breach of r 14(2) of
the Conduct Rules.

122 The Conduct Rules are subsidiary legislation as defined in the *Interpretation Act 1984* (WA) (**Interpretation Act**). Accordingly, a reference to 'this Act' in the LP Act includes a reference to the Conduct Rules (s 46 of the Interpretation Act). It follows that a contravention of the Conduct Rules is conduct capable of constituting unsatisfactory professional conduct or professional misconduct; s 404(a) of the LP Act.

123 The Tribunal considers that the Practitioner's conduct in breach of r 14(2) of the Conduct Rules is at least unsatisfactory professional conduct, in that it is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

124 The issue is then whether the Practitioner's unsatisfactory professional conduct involved a substantial failure to reach or maintain a reasonable standard of competence and diligence and is thus professional misconduct.

125 The Tribunal concludes, and we find, that this conduct is professional misconduct. The conflict was, to use the Committee's words, 'obvious and blatant'; CCS para 43. The Practitioner put himself in a position where he could no longer perform his duties to the Australian Company. He knew what it was that W intended to do to protect his claimed entitlements and gave advice in that regard. He was therefore conflicted because he was unable to protect the interests of his client the Australian Company, by at least informing his client the Australian Company of the transfer of funds and advising the Australian Company appropriately, without breaching his duty of confidentiality to his client W. It was, in the Tribunal's view, a substantial failure on his part.

Ground 2

126 The Practitioner acknowledges, and the Tribunal finds, that it was inappropriate conduct on his part to cause the Practice to render bills to the Australian Company on 15 July 2016 and 22 July 2016 respectively; Practitioner's Amended Statement para 18(e).

127 The Practitioner accepts that it is clear that W had asked him to bill him personally for the advice and that it was an error on the part of the Practitioner to bill the Australian Company instead. The Practitioner says that the invoices should have been sent to W 'because there's no reason not to'; ts 255, 6 March 2020. In the

Practitioner's witness statement, by way of explanation he says that, at that time, he 'did not see [W's] request' and in any event regarded the Australian Company as his client. He 'did not have any reason not to invoice [W], instead of [the Australian Company]'; PWS paras 75-76.

128 The Tribunal does not, however, accept the Practitioner's claim that this conduct should be regarded as no more than simply an error on his part. We agree with the Committee's submission that the Practitioner's conduct under Ground 2 must be seen in the context that the Practitioner had in fact been asked, clearly and expressly, by W to bill him personally and that the Practitioner was aware that at the relevant time W, while an employee of the Australian Company, was no longer a director. The description of the work carried out, contained in the two invoices, makes it clear that the relevant work being billed for was in respect of advice about W's termination of employment. It was more than a simple error and the Tribunal finds that it was careless of the Practitioner to bill the Australian Company for that work.

129 The Tribunal does, however, accept the Practitioner's concession that his conduct should be characterised as unsatisfactory professional conduct rather than professional misconduct. The Tribunal finds that the conduct falls short, but not substantially short, of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. The Tribunal finds that the Practitioner's conduct under Ground 2 is unsatisfactory professional conduct.

Ground 3

130 The Tribunal has found, at [31] above, that the Practitioner on or about 22 July advised W to transfer money from the Australian Company's bank account to an account controlled by W, in an amount equivalent to the estimated amount of W's potential entitlements consequential upon the termination or potential termination of his employment with the Australian Company. The circumstances of the transfer, the Tribunal has also found, was that the Practitioner knew at the time of that advice that W had resigned as a director of the Australian Company. Further, the Practitioner has conceded (PCS para 37) and the Tribunal finds that ~~the Practitioner knew that~~ W had no entitlement to the money in question and that ~~the Practitioner knew that~~ W had not been authorised by the Australian Company to make that transfer.

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131 The Practitioner accepts that on 22 July 2016, he advised W to transfer money to cover his entitlements from the Australian Company's account to an account controlled by him; ts 89-90, 30 January 2020.

132 The Practitioner further accepts that, as a 'fairly basic proposition', the fact that a person might be owed money by a third party does not of itself give that person a legal interest in funds or assets of that third party; ts 135-136, 31 January 2020. Inexplicably though, the Practitioner did not, and does not, accept the proposition that W had no authority to transfer those funds; ts 136, 31 January 2020.

133 The Tribunal accepts that it may have been W who first proposed that such a transfer be made, but the Tribunal also accepts W's evidence (WWS para 36) that the transfer was not 'a course of action I was prepared to take unless on [the Practitioner's] advice'.

134 We note the Practitioner's assertion that, at the time of the advice, the Practitioner may not have been aware of the precise amount of W's entitlement. However, this does not affect the outcome of the Tribunal's deliberations on Ground 3.

135 We do not accept the Practitioner's submission at para 33(b) of the Practitioner's amended statement that the Practitioner merely 'agreed' with the proposal to transfer the funds. In his written advice to W dated 22 July 2016, the Practitioner clearly told W that he saw no option for W but 'to take proactive steps to protect your entitlements'; Committee's book page 150. He advised W to immediately transfer the full amount of his employment entitlements into a bank account controlled by W. The Tribunal does not characterise that advice as merely 'agreeing' with W's proposed action if, indeed, it was W who proposed the action in the first place.

136 As the Committee has pointed out, it is not the case that W had no alternative, in order to protect any right he may have to receive money from the Australian Company, other than to make that transfer to his own account. The Tribunal considers that it was entirely open to W to apply to the Supreme Court for a freezing order which, in the Tribunal's view, would have been the preferable approach. The Practitioner's evidence in that regard was that he had in fact 'fleetingly' considered the possibility of applying for a freezing order but thought that 'there was another way that was preferable'; ts 137 and 138, 31 January 2020. He said that his reservation about the approach of applying for a

freezing order was that he would have difficulty effecting service and he had some doubt as to whether the order would be made ex-parte. A little later, he told the Tribunal that his concerns were 'Time, cost. Just time and cost'; ts 138, 31 January 2020.

137 In contrast to this evidence, he told the Committee in response to its enquiry that he 'was not in a position to consider alternatives to secure the funds'; Committee's book page 186. That was, of course, in the context of the Practitioner then maintaining that W had already transferred the funds at the time when he sought the Practitioner's advice but, nonetheless, it still highlights the Practitioner's inconsistencies in his account of his conduct.

138 The Tribunal does not consider that the Practitioner applied his mind at all to the issue beyond the advice to transfer the money to another bank account.

139 The Practitioner concedes that his advice was negligent (PCS para 37), but considers that his conduct should be characterised as unsatisfactory professional conduct rather than professional misconduct.

140 The Tribunal does not agree. The Practitioner gave advice to W to the effect that W should transfer money, which did not belong to him and in which he had no interest, to an account in the sole name of W. Even if it had been established that W was owed that money by the Australian Company (which it had not), it was entirely inappropriate to advise W to take that money.

141 There is no relevant conduct rule, nor was any evidence led as to what the legal profession considers to be the relevant standard to be observed. However, in the Tribunal's view, derived from the Tribunal Members' own knowledge and experience, the Practitioner's conduct, in giving that advice to W, is conduct that could be reasonably regarded as disgraceful and which, to a substantial degree, falls short of the standard of professional conduct observed or approved by members of the legal profession of good repute and competence. The Tribunal concludes that the Practitioner's conduct constitutes professional misconduct under the LP Act.

142 The Committee has also alleged that the Practitioner's advice exposed W to the possibility of being charged with the offence of stealing contrary to s 378 of the Criminal Code. However, the Tribunal does not accept the Committee's submission that the Tribunal should

find that by giving that advice to W, the Practitioner was putting W at risk of being charged with an offence under the Criminal Code. A finding of that nature is beyond the jurisdiction of the Tribunal to make and in any event would be entirely speculative.

Ground 4

143 The allegation made by the Committee is that, in the Practitioner's correspondence to the Committee dated 2 May 2017, 5 March 2018 and 27 April 2018 respectively, he was not open and candid in his dealings with the Committee, in breach of the Conduct Rules.

144 Rule 50(3)(b) of the Conduct Rules requires that, when a legal practitioner is requested by the Committee to provide comments or information in relation to that practitioner's conduct or professional behaviour, that practitioner must provide a full and accurate account of his or her conduct in relation to the matters covered by the request.

145 The Tribunal has found that the Committee wrote to the Practitioner on 10 April 2017 advising the Practitioner that the Committee was investigating a complaint made in respect of the Practitioner's conduct and asking that the Practitioner provide his entire original file and all documents relating to the matter under investigation.

146 The Practitioner on 2 May 2017 provided the Committee with certain documents, along with a table of comments in respect to those documents. He said specifically that the Committee was mistaken to state that the Practitioner had advised W to transfer an amount of \$378,000 from the Australian Company's account to W's account and said that 'that decision was made by [W]'; Committee's book page 192.

147 The Practitioner, in his table of comments where he refers to the letter from the Practitioner to W of 27 July 2016, notes that he had expressly stated that it was W's idea to put money from the Australian Company into a holding account and that 'this had been done without any input from me'; Committee's book page 206(c).

148 The Practitioner then responded to the Committee on 5 March 2018, suggesting that the Committee approach W for whatever information it was seeking. He repeated this suggestion in his letter to the Committee on 27 April 2018. He said in that letter that 'it is a simple matter for the [Committee] to ask [W] whether or not he transferred the funds before seeking advice from [the Practitioner]'

149 The Practitioner continued to maintain that he did not advise W to transfer money 'from any account or to any account'. The Practitioner, however, agreed that he did 'subsequently tell [W] that in the peculiar circumstances that appertained he was probably justified in doing so'; Committee's book page 232.

150 The Practitioner has admitted that his statement to the Committee that it was W's idea to put money from the Australian Company into a holding account, without any input from the Practitioner, was incorrect; Practitioner's Amended Statement at para 38(a).

151 The Tribunal finds that this part of Ground 4 is made out. The Practitioner did advise W to transfer that money to another account and so his statement to the Committee that he did not do so was false. The issue for the Tribunal is therefore whether or not the Committee has established as true its allegation that the Practitioner, in contravention of r 50 of the Conduct Rules, knew that this statement was false or misleading, or both, in a material respect and that it had the potential to mislead the Committee and that the Practitioner intended that the Committee be misled.

152 The Practitioner accepted in cross-examination that his statements to the Committee that he had not given such advice to W or that W had transferred the funds before seeking advice from the Practitioner were wrong or incorrect and therefore false; ts 159 and 185, 31 January 2020.

153 The Practitioner told the Tribunal that he met with W on 22 July 2016 and W raised the possibility of paying money out of the Australian Company's account into an account controlled by him.

154 The Practitioner accepted that in his letter of 22 July 2016 his advice to W was that it was appropriate for W to transfer the money in the way proposed. He agreed that there was nothing in that letter to suggest that W had already transferred that money before seeking the Practitioner's advice; ts 129, 31 January 2020.

155 The Practitioner agreed that he considered that it was a matter of some importance that W transfer the money as soon as possible; ts 135, 31 January 2020. He also agreed that he knew W was waiting for the Practitioner's written advice before he effected the transfer; ts 135, 31 January 2020. The Practitioner conceded that if W had in fact come to him and told him that he had already transferred the funds before

obtaining the Practitioner's advice, the Practitioner would not have given advice in those terms; ts 140, 31 January 2020.

156 The Practitioner also concedes that he approved the proposed letter from W to WM of 27 July 2016, which contained the statement that W had acted upon legal advice, and that the Practitioner would not have approved that letter in those terms if he had thought that this was not the case; ts 146, 31 January 2020.

157 The Practitioner said that he had 'readily agreed' that it was appropriate for W to transfer the funds into a holding account; ts 147, 31 January 2020.

158 From this, the Tribunal concludes that when the Practitioner wrote to the Committee on 2 May 2017, he did not hold the view that W had transferred the funds before obtaining the Practitioner's advice to do so.

159 Further, when the Practitioner was asked by the Committee about his possible failure to consider other alternatives to achieve W's purpose, such as a freezing order, the Practitioner told the Committee that he was not in a position to consider such alternatives. This was on the basis that the decision to transfer the funds was a decision of W's, which the Tribunal has rejected, and it is also inconsistent with the Practitioner's evidence that he had in fact considered the possibility of applying for a freezing order but that it presented difficulties.

160 The Practitioner conceded that what he said to the Committee 'could have been worded better'; ts 157, 31 January 2020.

161 Before the Tribunal, the Practitioner referred to his statement that the Committee was mistaken to state that the Practitioner had advised W to transfer an amount of \$378,000 from the Australian Company's account. The Practitioner explained that the Committee was mistaken to state that he had advised W to transfer that amount, on the basis that he had never advised W to transfer that particular amount of money; ts 162, 168 and 169, 31 January 2020. It is readily apparent from a reading of the Committee's enquiry that the particular amount of money involved was not the issue which the Committee wished the Practitioner to address.

162 The Practitioner stated that his response may be open to some misinterpretation; ts 169, 31 January 2020. That explanation is disingenuous. Further, in the Tribunal's view, the Practitioner's response was a deliberate attempt to mislead the Committee and to

cover up the true state of affairs, which was that the Practitioner had advised W to transfer money, of whatever amount, belonging to the Australian Company to an account controlled by W to protect W's personal interests. When the Practitioner considered what he was being asked about by the Committee, he could not in any circumstances have believed that the Committee's concern was the actual figure involved.

163 The Tribunal notes that in the table of comments beside the entry identifying the letter of 22 July 2016, the Practitioner wrote 'no comment'; Committee's book page 205. That would, in fact, have been the opportunity for the Practitioner to provide whatever explanation he considered appropriate in order to deal with the Committee's investigation.

164 The Tribunal can only conclude that the Practitioner knew the true position, as he conceded (ts 172, 31 January 2020) and thus misled the Committee. Such conduct brings the profession into disrepute and is below the standard of practice which members of the public and the legal profession can expect from a legal practitioner.

165 As to the Practitioner's suggestion that the Committee take the matter up with W direct, this is not in the Tribunal's view how the Practitioner should have dealt with the Committee's enquiries. Of course, it would have been, and was, open to the Committee to make enquires of W but the Committee was seeking the Practitioner's own explanation, not that of W. This in the Tribunal's view demonstrates a failure by the Practitioner to appreciate his obligations to the Committee under the Conduct Rules and generally.

166 The Tribunal concludes that the Practitioner knew that his statement to the Committee was false and that he intended to mislead the Committee. We repeat what the Tribunal said in *Legal Profession Complaints Committee and Lee-Steere* [2010] WASAT 189 at [24], namely that 'it is unacceptable, both to members of the public and to the profession, for a practitioner to undermine the authority of a regulatory body by ignoring its requests for information or failing to respond to those requests with alacrity and with complete honesty. To flaunt that authority is to fly in the face of the legislative intent and disables the body from executing its statutory functions. Such conduct is viewed by this Tribunal in a most serious light and will not be countenanced'.

167 It follows that the Practitioner is guilty of professional misconduct.

Orders

1. The Tribunal finds that Kevin Colin Benedict Staffa, a legal practitioner director of an incorporated legal practice, Legal Success Pty Ltd, trading as 'Legal Success':
 - (a) engaged in professional misconduct as defined in s 403(1) of the *Legal Profession Act 2008* (WA) by providing legal services to a client when the Practitioner and the Practitioner's law practice is engaged by another client in the same or a related matter and the interests of the client and the other client were adverse and there was a conflict of the duties to act in the best interests of each client contrary to r 14(2) of the *Legal Profession Conduct Rules 2010* (WA);
 - (b) engaged in unsatisfactory professional conduct as defined in s 402 of the *Legal Profession Act 2008* (WA) by rendering two invoices to a client in respect of work carried out for another client;
 - (c) engaged in professional misconduct as defined in s 403(1) of the *Legal Profession Act 2008* (WA) by advising a client to transfer money belonging to another client to a bank account controlled by the first client without the consent or authority of the other client;
 - (d) engaged in professional misconduct as defined in s 403(1) of the *Legal Profession Act 2008* (WA) by failing to be open and candid in his dealings with the Legal Profession Complaints Committee in breach of r 50 of the *Legal Profession Conduct Rules 2010* (WA).
2. The parties will make submissions to the Tribunal on penalty and costs.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

JUDGE T SHARP, DEPUTY PRESIDENT

2 JUNE 2020