

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : VOCATIONAL REGULATION

**ACT** : LEGAL PRACTICE ACT 2003 (WA)

**CITATION** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE and REYBURN [2005] WASAT 293

**MEMBER** : JUDGE J CHANEY (DEPUTY PRESIDENT)  
MS M CONNOR (MEMBER)  
MR C EDMONDS SC (SENIOR SESSIONAL  
MEMBER)

**HEARD** : 19 AND 20 JULY 2005

**DELIVERED** : 9 NOVEMBER 2005

**FILE NO/S** : VR 10 of 2004

**BETWEEN** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE  
Applicant

AND

JOHN HENRY REYBURN  
Respondent

---

*Catchwords:*

Professions - Legal practitioner - Disciplinary proceedings - Unprofessional conduct - Entry into agreement giving rise to breach of *Settlement Agents Act 1981* - Sale of business to unlicensed person - Payment for use of vendor company's licence - Practitioner director of vendor - Whether advice given in relation to transaction - Whether unprofessional conduct

*Legislation:*

*Settlements Agents Act 1981 (WA)*, s 26, s 26(1), s 28(1)(d), s 29, s 40(3)

*Result:*

Allegations of unprofessional conduct established

*Category:* B

**Representation:**

*Counsel:*

Applicant : Dr AF Dickey QC and Ms KA Williams  
Respondent : Mr MD Cuerden

*Solicitors:*

Applicant : Law Complaints Officer  
Respondent : Nicholson Clement

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

Briginshaw v Briginshaw (1938) 60 CLR 336

Kyle v Legal Practitioners Complaints Committee (1999) 21 WAR 56

**Case(s) also cited:**

Nil

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Summary of Tribunal's decision***

1           The Legal Practitioners Complaints Committee alleged that Mr John Reyburn was guilty of unprofessional conduct in relation to a contract for the sale and purchase of a settlement agency, Mandurah Settlement Services. As well as being the principal of a law firm, Nicholson Clement, Mr Reyburn was the principal of Mandurah Investments Pty Ltd, which was the licensee of the settlement agency. He sold the settlement agency business to an employee of the Mandurah Settlement Services, Ms Perich. Ms Perich did not hold a settlement agents licence and it would be an offence under the *Settlement Agents Act 1981* (WA) for her to carry on the business as a settlement agent or for Mandurah Investments Pty Ltd to permit her to use its licence.

2           Mr Reyburn told Ms Perich that the problem of her not having a licence could be overcome if the business continued to utilise the licence of and operate legally as Mandurah Investments Pty Ltd and Ms Perich paid an annual fee for supervision of the business by Mr Reyburn. Ms Perich relied upon that advice and entered into the agreement to purchase the business. She subsequently paid all but the final \$10 000 instalment on the purchase price, moved the business to new premises and commenced its operation. After a few months Ms Perich ceased carrying on business and left the premises.

3           Mr Reyburn's conduct was alleged to be unprofessional in that he entered into a contract, the performance of which would result in a breach of the *Settlement Agents Act 1981*. It was also alleged that his advice to Ms Perich that the proposed arrangement would avoid the problem was, in the circumstances in which it was given, unprofessional. The Tribunal finds that the allegations against the practitioner have been made out, and that he was guilty of unprofessional conduct in the two respects alleged.

***The allegations against the practitioner***

4           The first allegation (as amended at the hearing) is that the practitioner, Mr Reyburn, was guilty of unprofessional conduct in that in or around September 2001 he entered into a contract on behalf of Mandurah Investments Pty Ltd with Brenda Perich (who has since married and is now Mrs Ranger), which contract included terms that would result in a breach of the *Settlement Agents Act 1981*. That allegation is particularised as follows:

- "1. At all material times the practitioner was:
  - (a) a holder of a real estate settlement agents licence pursuant to the Settlement Agents Act 1981; and
  - (b) a director and shareholder of Mandurah Investments Pty Ltd which operated a real estate conveyancing business known as Mandurah Settlement Services.
2. At all material times the Settlement Agents Act 1981 specified that:
  - (a) *'...a person shall not carry on business, or by any means hold himself or itself out, as a real estate settlement agent... unless he or it is licensed as such under this Act...'* (Section 26),
  - (b) *a [settlement agents] licence or a triennial certificate is not transferable (Section 40(2)); and*
  - (c) *a licensee shall not in any way permit, or hold himself out as being willing to permit, another person to use the licence or a triennial certificate of the licensee'* (Section 40(3)).
- (3) In or around August 2001 Mandurah Investments Pty Ltd employed Ms Brenda Perich (*'Perich'*) as a settlement clerk and manager of Mandurah Settlement Services.
- (4) At no time did Perich hold a settlement agents licence. At all relevant times the practitioner was aware of this fact.
- (5) In or around September 2001 the practitioner suggested to Perich that she buy Mandurah Settlement Services from Mandurah Investments Pty Ltd. Thereafter the practitioner, on behalf of Mandurah Investments Pty Ltd, agreed to sell the business to Perich (*'the contract'*). The terms of the contract included, inter alia:
  - (a) That Perich would pay Mandurah Investments Pty Ltd or alternatively the practitioner \$20,000 by way of purchase price, of which \$10,000 was

payable immediately and the remainder was to be paid after not more than 12 months later;

- (b) That interest was payable on the outstanding \$10,000 at the rate of 15% monthly in arrears;
  - (c) That Perich would pay Mandurah Investments Pty Ltd a licensee fee of \$10,000 per annum, payable by monthly instalments of \$834.00, for the use of the practitioner's settlement agents licence or that of Mandurah Investments Pty Ltd.
- (6) Perich paid the practitioner the initial purchase payment [of] \$10,000, and the sale of Mandurah Settlement Services from Mandurah Investments Pty Ltd to Perich was effected on or around 30 September 2001.
- (7) The contract was or would result in breach of the Settlement Agents Act in:
- (a) purporting to sell a real estate conveyancing business to a person who did not hold a real estate settlement agent licence, as is required by the Act in order for a person to own such a business; and
  - (b) purporting to permit Perich, for a fee, to use the practitioner's real estate settlement agent licence or that of Mandurah Investments Pty Ltd."

5 The second allegation against the practitioner (as amended at the hearing) is that in or around September 2001 he was guilty of unprofessional conduct in the nature and circumstances of the advice he provided to Ms Perich regarding her purchase of a business from Mandurah Investments Pty Ltd. That allegation is also fully particularised.

6 Paragraphs 1 – 4 of the particulars of this allegation are identical to the first four paragraphs of the particulars of the first allegation. It is then alleged that:

"In or around September 2001 the practitioner suggested to Perich that she buy Mandurah Settlement Services from Mandurah Investments Pty Ltd. Perich and the practitioner then had discussions about the sale of the business. These

discussions included, inter alia, Perich saying to the practitioner words to the effect that she was not able to buy the business from the practitioner because she was not a licensed agent. The practitioner advised her in response with words to the effect that the licence problem could be overcome by:

- (a) his leasing her his licence for a fee until she was able to obtain a real estate Settlement Agent licence; and
- (b) the practitioner's staff and any enquirer being informed that Perich was managing the business, rather than owning it for the time being

(*the advice*)."

7 Paragraphs 5 and 6 of the particulars of the other allegation are then repeated, and then finally it is alleged that:

"8. In giving the advice, the practitioner's conduct was unsatisfactory in all the circumstances in that:

- (a) it constituted legal advice; and
- (b) it was advice upon which Perich could reasonably be expected to rely, given the practitioner's status as the principal of the law firm by which she was employed; and
- (d) the advice was deliberately misleading or grossly negligent; and
- (e) further, the advice was that Mr Reyburn would, and that Ms Perich should, be misleading to all inquirers about the true nature and effect of the agreement; and
- (f) in any event, the advice was provided in circumstances where the practitioner's interests conflicted with those of Perich, the practitioner having a financial interest in the transaction; and
- (e) the practitioner did not make any recommendation that Perich obtain independent legal advice."

*The practitioner's response*

8           The practitioner admits to par 1 – 4 of the particulars of the first allegation. In relation to par 5, the practitioner denies that he suggested to Ms Perich that she buy Mandurah Settlements Services, but says that it was Ms Perich who first raised the possibility that she buy the business. He denies that a licence fee of \$10 000 was payable for use of the practitioner's settlement agents licence, and says that the figure of \$10 000 was arrived at to remunerate the practitioner for his daily participation and the participation of his staff in the ongoing running of the settlement agency. He otherwise admits the terms of the contract as set out in par 5 of the particulars.

9           As to par 6 of the particulars, the practitioner admits that Ms Perich paid the initial payment of \$10 000 but denies that the sale was effected on 30 September 2001 and says possession was given to Ms Perich as manager of the business on or about that date but that settlement of the sale was delayed until Ms Perich obtained her own settlement agent licence, whereupon she would then be entitled to the business.

10          In relation to the second allegation, the practitioner admits that there were discussions between himself and Ms Perich as to the proposed purchase of the business and that Ms Perich advised him that she was not able to buy the business because she was not a licensed agent, but he otherwise denies the allegations in par 5 of the particulars. He says that:

"(a) the Practitioner did not give any advice to the Complainant, but rather outlined to the Complainant a proposal which:

(i) he believed complied with his obligations pursuant to the Settlement Agents Act; and

(ii) gave effect to the intention of the company Mandurah Investments Pty Ltd of which the Practitioner was a director, to sell the business.

(b) there was no agreement to lease the settlement agents licence, the parties agreeing that:

(i) Perich would agree to purchase the business;

(ii) she would have possession of the business as manager immediately upon payment of the first \$10,000.00;

- (iii) settlement of the sale of the business whereby she became entitled to ownership of the business would be delayed until she obtained a settlement agents licence in her own name;
- (iv) pending completion of settlement the Practitioner would remain in bona fide control of the business and supervise on a daily basis;
- (v) to remunerate the Practitioner for his ongoing daily involvement and that of his staff the Practitioner would be paid \$10,000.00 per annum."

11 In response to par 8 of the particulars of the second allegation, the practitioner denies giving advice to Ms Perich and says:

- "(a) the Practitioner did not provide legal advice;
- (b) Perich was not employed by the Practitioner or the law firm of which the Practitioner was and is principal;
- (d) the advice if it was given, which is denied, was not deliberately misleading or grossly negligent;
- (e) there was no intention to mislead by the Practitioner;
- (f) the Practitioner had no conflict as Perich was not his client and he was not providing legal advice to her, rather he was a director of a company which entered into a commercial transaction with Perich as buyer; and
- (e) whilst the Practitioner admits that he did not recommend that Perich obtain independent legal advice, the Practitioner says that in the circumstances he was under no professional or legal duty to do so."

***The facts***

12 Ms Perich had been employed in the settlement industry since 1984. During that time she had worked as a conveyancing clerk and been a director of a settlement agency between 1992 and 1995.

13 In August 2001, Ms Perich commenced work with Mandurah Settlements. Mandurah Settlements was the business name of a

settlement agency conducted by Mandurah Investments Pty Ltd. Mr Reyburn was the holder of a settlement agents licence, and a director of Mandurah Investments Pty Ltd. He was the person in *bona fide* control of the business as required by s 29 of the *Settlement Agents Act 1981*. He was also the principal of the law firm Nicholson Clement. Mandurah Settlements operated from the same premises as Nicholson Clement although it had a separate office area. A secretary employed by Nicholson Clement was engaged in the Mandurah Settlements business prior to Ms Perich commencing work, and the office manager of Nicholson Clement performed some tasks on behalf of the settlement agency business.

14 Ms Perich was initially engaged on the basis that she would probably only be required for three months because the business of Mandurah Settlements had been sold. She was told that it was a matter for the purchaser as to whether she would be required thereafter. It was clear to Ms Perich when she commenced work that the business was somewhat rundown, although she gave evidence that, by reason of her being in the office on a full time basis, the work built up and she formed the view that the business had potential.

15 In early September 2001, Mr Reyburn told Ms Perich that the sale of the business had fallen through. He told her that she could work until 30 September 2001 and then he proposed to close the business down. Ms Perich said words to the effect that the business could be built up and that Mr Reyburn would be "mad" to close it down. There were then discussions about the possibility of Ms Perich purchasing the business. There was a dispute on the evidence as to who first suggested that possibility, but nothing turns on that issue. Whoever raised the subject, it is common ground that Ms Perich identified that the fact that she did not hold a settlement agents licence would prevent her purchasing the business. There followed a number of discussions between Mr Reyburn and Ms Perich which led to an agreement which Ms Perich sought to reduce to writing. Both Mr Reyburn and Ms Perich agree that the document which she produced reflected terms of the oral agreement between them although not all of its terms. Mr Reyburn said that he told Ms Perich that he was "happy with her written proposal". The document reads as follows:

**"PROPOSAL TO PURCHASE MANDURAH SETTLEMENT SERVICES"**

1. **PURCHASE PRICE \$20,000.00** – of which \$10,000.00 paid up front and the remainder to be finalized at the end of the 12 month period, an interest on the outstanding moneys shall be at a rate of 15%, as agreed, and payable monthly in arrears. This of course will be paid out in full should I acquire my License [*sic*], within the 12 month period. (**My offer to pay \$10,000.00 is subject to finance**)
2. **FIXED PURCHASE PRICE** the \$20,000.00 is to be fixed.
3. **LICENSEE FEE** – this is to be set at \$10,000.00 per annum, and payable by monthly installments [*sic*] of \$834.00 on the 28<sup>th</sup> day of each month, in arrears.
4. **MAIL BOX/PHONE NUMBER** – to retain the services of the mail box number 777 Mandurah, (to accommodate the Licensee regulation) I will collect the mail for Nicholson Clement each morning. I will however be responsible for the outgoing mail. The existing phone number is included in the purchase price.
5. **OFFICE FURNITURE** – an agreed price set for the purchase of the Reception desk, fax machine and remaining stationery at hand. A list of which is annexed hereto.
6. **COMPUTOR [*sic*] LEASE** – I will take over the lease on the computer.
7. **EXISTING MSS ACCOUNTS** – all existing MSS accounts to be paid in full within 30 days of take-over.
8. **ACCOUNTS HELD BY MSS** – I am able to utilize Stationery, DOLA, Advertising, etc. upon take over, they are to be my full responsibility.
9. **CURRENT FILES** – to be carried through to completion by me, and retained at new premises for post settlement enquiries. Fees/Disbursements to be split 50/50 basis on completion.

10. **RETENTION FILES** – I will retain until individual files are closed and returned to John Reyburn for "dead Filing".
11. **FILES/RECORDS/ETC** – the Purchaser will make available to John Reyburn, all files, ledgers, reports and records for inspection, as he may need.
12. **VENDOR CONVEYANCING** – John Reyburn's (the Vendor), involvement in Real Estate Settlements, is to be restricted to ONLY those that are directly related to ESTATES & MATRIMONIAL matters through Nicholson Clement, for a period of 12 months.

**OFFICE FURNITURE ITINERY [sic]**

1. RECEPTION DESK @ \$200.00
2. FACIMILE [sic] @ \$150.00
3. IBM GOLF BALL TYPEWRITER @ \$ 25.00
4. OFFICE CHAIR (arm rests) @ \$ 50.00"

16 Although it was not spelt in the written proposal, it is clear on the evidence that what was contemplated by the parties was that the business would operate under the settlement agents licence held by Mandurah Investments Pty Ltd until Ms Perich obtained her own licence. The parties did not appear to have addressed the question of what would happen if a licence was not obtained by Ms Perich within the 12 month period contemplated or at all. The effect of the agreement was that the vendor would receive half of the purchase price of \$20 000 immediately, and would receive a generous rate of interest on the outstanding balance until it was paid. The office furniture was to be purchased immediately for separate specified consideration. Existing files would be completed by Ms Perich, and the revenue from them split equally between Mandurah Investments Pty Ltd and Ms Perich on completion. Although not spelt out in the written agreement, it is again clear on the evidence that the parties agreed that Ms Perich would assume all the liabilities of the business, would obtain new premises on which to conduct the business, and would be entitled to receive all of the revenue from new files opened. They also agreed orally that Ms Perich would meet the cost of professional indemnity insurance maintained by Mandurah Investments Pty Ltd.

17 As recorded in par 3 of the written document, a "licensee fee" of \$10 000 per annum was to be payable by monthly instalments each month. Ms Perich was asked who chose the expression "licensee fee". Initially when asked, her response was that it came from Mr Reyburn who said "because I was using his licence he wanted a fee". When pressed as to who used the word "licensee fee" she maintained that it was Mr Reyburn who said "because I was using his licence he wanted a licensee fee".

18 Mr Reyburn said that the expression "licensee fee" was Ms Perich's choice of words. He said in his witness statement:

"We had discussed that I would continue to be involved in supervising the business on a daily basis, and I wanted to be paid for that. We had discussed that would be a fixed fee, as mentioned above. [Ms Perich] suggested a fee of \$10 000 per annum. I cannot now recall whether or not she ran that figure past me before including it in the written proposal, but I was happy with that."

19 Similarly Mr Reyburn gave evidence that it was Ms Perich's suggestion "from the outset, that she receive the revenue of the business and be responsible for the expenses". Each party maintained that the general framework of the proposed arrangement was suggested by the other.

20 It is not necessary to determine who first suggested that Ms Perich might buy the business or who coined the expression "licensee fee". It is common ground that Ms Perich saw that the business had potential, and she was enthusiastic about re-entering the settlement industry. There is no dispute that Mr Reyburn wanted to sell the business. It is also common ground that the final arrangements emerged after several discussions. The likelihood is that both of them contributed suggestions as to the terms of a possible agreement. What is important is the nature and effect of what was ultimately agreed, and the extent to which, if at all, Ms Perich relied on what might be described as advice from Mr Reyburn.

21 The question of the annual fee of \$10 000 (however described) - was central to the agreement. We are satisfied that Mr Reyburn did tell Ms Perich that the arrangement whereby Mandurah Investments Pty Ltd would remain the licensor and he would receive a fee for supervision of the business would overcome the problem of Ms Perich not having a licence herself. Mr Reyburn's evidence was that the payment was for his

own continued involvement in supervising the business. Payments were ultimately made, however, to Mandurah Investments Pty Ltd, not to Mr Reyburn personally. The valid use of the licence held by Mandurah Investments Pty Ltd was dependant on the existence of another licensed person exercising *bona fide* control of its settlement agency business. It would have been of no value to Ms Perich to be permitted to utilise Mandurah Investments Pty Ltd's licence in the absence of a person apparently in *bona fide* control. The payment of \$10 000 per annum was, in substance, a payment in consideration for Ms Perich being able to operate the business utilising the licence of Mandurah Investments Pty Ltd which in turn required the participation of Mr Reyburn. We are satisfied that that was the substance of what was said by Mr Reyburn to Ms Perich during their discussions. In that context Mr Reyburn may have put it in terms that the payment would include compensation for his ongoing involvement and supervision. The utilisation of the licence required things to be done by Mr Reyburn, namely things which would normally be done by a person in *bona fide* control of a settlement agency carried on by a corporate licensee. That does not alter the essential substance of the arrangement.

22 Part of the advice which is the subject of the second allegation is said to be advice that the licence problem could be overcome by the practitioner's staff and any enquirer being informed that Ms Perich was managing the business, rather than owning it for the time being. It is clear the parties did reach agreement to so inform the staff or anyone else who asked. We are satisfied that it was Mr Reyburn's suggestion that that be the stated position. That is what the practitioner's staff was in fact told. At a Nicholson Clement's staff meeting on 19 September 2001, it is recorded that "MSS will be taken over on 1/10/01 and will be moving to premises at Charlotte Lodge (next door). JR still owns MSS and Brenda will be the Manager. JR will visit MSS at least 2 times per day to show an appearance. Signs on doors are to be removed."

23 Ms Perich agreed during cross-examination that she never intended to mislead the Settlement Agent Supervisory Board, or anybody else, as to the question of ownership and management of the business. Rather, her understanding was that she was not to become the owner of the business until she obtained her licence and paid the final instalment and that, in the interim, her proper description was manager of the business.

24 The minutes of the further staff meeting on 3 October 2001 record that Mr Reyburn said "Mandurah Settlements is only managed by BP at the moment (because she hasn't got her licence yet)."

25 As arranged around 30 September 2001, Ms Perich obtained premises in a building known as Charlotte Lodge next door to Nicholson Clement. Initial payments under the agreement were made, and Ms Perich removed the furniture and stationery of Mandurah Settlement Services to her new premises. She purchased other furniture to establish her business. For the first week, Mr Reyburn came to the new premises on a daily basis, but the frequency of his visits then diminished to once or twice a week.

26 Ms Perich was one of three signatories to the trust account operated by Mandurah Settlement Services, with Mr Reyburn, and his office manager, Mr Bathurst, being the others. Incoming mail for Mandurah Settlement Services was received at the offices of Nicholson Clement and collected by Ms Perich each day. Ms Perich, as her written document identified, was responsible for all outgoing mail. She conducted all of the day to day work in relation to settlements. She visited Nicholson Clement to obtain signatures for trust cheques quite frequently. She acknowledged that Mr Reyburn was available to provide her with advice in relation to difficult files, but said that that was a service to which she only occasionally availed herself. She received all incoming cheques for her services and disbursements and paid them into her personal account.

27 Not long after she commenced operating the business, the relationship between Ms Perich and Mr Reyburn soured. In late November she consulted solicitors, Clark Whyte. They wrote a letter to Mandurah Investments Pty Ltd asserting that the contract for sale of Mandurah Settlement Services was void for illegality, on the basis that it was not possible for Ms Perich to own the business while she was unlicensed. The letter sought to have Mandurah Investments Pty Ltd restore Ms Perich to the position she would have been in but for the entry into the contract. It is apparent that after that letter was sent, matters were "smoothed over" between the parties, and Ms Perich continued to operate the business.

28 Each month Mandurah Investments Pty Ltd rendered an invoice to Ms Perich for computer rental, indemnity insurance cover and the licensee fee. The October invoice included an amount for "Telstra" and the November and December invoices included amounts for "M-Technology". The December invoice also claimed the monthly interest on the outstanding balance of the purchase price. Ms Perich was late in making payment for the December invoice, and on 14 January 2002, Nicholson Clement sent a letter of demand for that payment. Payment was then made, but on 22 January 2002, Ms Perich

wrote to Mandurah Investments Pty Ltd advising that her proposal to purchase the business was terminated forthwith and tendering her "resignation as the nominated manager" effective immediately.

29 By letter dated 24 January 2002, Nicholson Clement, acting on behalf of Mandurah Investments Pty Ltd, accepted Ms Perich's letter of 22 January 2002 as a repudiation of the purchase contract and advised that it proposed to retake possession of the business. Notwithstanding that, it appears that a further invoice for the monthly expenses including the licensee fee was rendered on 31 January 2002.

30 On 12 February 2002, Nicholson Clement wrote a letter to Star Track Express, a creditor of Mandurah Settlement Services. That letter advised that "The owner of Mandurah Settlement Services at the time of this account and the person responsible for the debt was Ms Brenda Perich" and advised that correspondence regarding the outstanding debt had been forwarded to her. On 18 February 2002, Nicholson Clement wrote to Ms Perich, again on behalf of Mandurah Investments Pty Ltd, advising that their client had satisfied various accounts in relation to the business and claiming payment of the amount of those accounts. On 26 February 2002, Nicholson Clement wrote to another creditor of the business advising that Ms Perich was the owner of Mandurah Settlement Services and the person responsible for a debt that had been incurred. Similar advice was given to other creditors by letters dated 28 February and 8 March 2002. Those letters appear to have gone out under the hand of Mr Bathurst. On 17 April 2002, Nicholson Clement, under the hand of Mr Reyburn, wrote to the lessor of the Charlotte Lodge premises, stating that "Ms Perich made rental arrangements with yourself on her own behalf as the new owner of Mandurah Settlement Services". The letter denied liability for monies outstanding for rent.

31 On 1 August 2002, Nicholson Clement wrote to Mossensons Solicitors under the hand of Mr Sean Stocks, an employed solicitor, advising that the firm acted "for Mandurah Investments Pty Ltd which previously traded as Mandurah Settlement Services." and advising that the business of Mandurah Settlement Services was sold to Brenda Perich on 1 October 2001.

32 Mr Reyburn put his description of Ms Perich as the new owner of the business down to "poor phraseology". He was unable to explain how his office manager and a solicitor under his supervision had made assertions to the same effect.

*Did the agreement lead to a breach of the Settlement Agents Act 1981?*

33 In addressing the question of whether the agreement led to a breach of the *Settlement Agents Act 1981*, and thus the potential for prosecution of either or both of the parties to the agreement, we are mindful of the seriousness of the allegation that is made. We approach the matter on the basis that the allegations against the practitioner must be proved to the civil standard of proof, but in reaching any conclusion adverse to the practitioner the gravity of the allegations must be borne in mind. A finding that the allegations are proved is not to be made lightly - see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 392.

34 There are two ways in which it is said that the agreement led to a breach of the *Settlement Agents Act 1981*. First it is said there is a breach of s 26(1) which provides:

"On and after the appointed day a person shall not carry on business, or by any means hold himself or itself out, as a real estate settlement agent...unless he or it is licensed as such under this Act and holds a current triennial certificate in respect of the licence."

35 The applicant contends that, as a result of the agreement, Ms Perich carried on business as a real estate settlement agent when she was not licensed under the Act. The practitioner contends that the business was being carried on by Mandurah Investments Pty Ltd which remained the registered owner of the business name "Mandurah Settlement Services" and was licensed. He points to the fact that the stationery used in the business showed Mandurah Investments Pty Ltd as the licensee, and contended that the contracts for the provision of services were entered into under the business name, and thus legally by Mandurah Investments Pty Ltd. He contends that, in carrying on its business, Mandurah Investments Pty Ltd was under the *bona fide* control of Mr Reyburn who himself was a licensed settlement agent.

36 In our view, Mr Reyburn's contention does not bear close scrutiny. Under the agreement, Ms Perich:

- (i) was responsible for the tenancy of the business premises and operated the office on a day to day basis;
- (ii) owned all the plant and equipment used in the business;
- (iii) arranged and effected all of the settlement transactions on a day to day basis without supervision;

- (iv) received, banked and was entitled to the income of the business;
- (v) was responsible for all of the expenses of the business;
- (vi) was responsible for the marketing and promotion of the business; and
- (vii) took all the business risk (save arguably for liability for breach of contract or negligence which may have attached to Mandurah Investments Pty Ltd which had been held out as the contracting party).

37 By contrast, Mandurah Investments Pty Ltd's involvement in the business was that it was held out as the contracting party. To the extent that that involved business risk, it is apparent that it held insurance, the premiums for which were met by Ms Perich. Through Mr Reyburn, it provided some supervision and maintained control of the trust account to the extent that his or his employee's signature was required on cheques drawn on the trust account.

38 Section 26 of the Act proscribes carrying on business as a real estate settlement agent. Whether or not it can be said that Mandurah Investments Pty Ltd was carrying on business, and we tend to the view that it was not, we find that Ms Perich was carrying on business in the relevant sense. It follows that the agreement was bound to lead to a breach of s 26(1) of the Act. We reject the practitioner's contention in evidence that Ms Perich was an independent contractor to the business being operated by Mandurah Investments Pty Ltd. The effect of the agreement was that Mr Reyburn, through Mandurah Investments Pty Ltd, was contracted to provide services to the business being conducted by Ms Perich.

39 The second breach of the Act which is contended by the applicant is a breach of s 40(3) which provides:

"A licensee shall not in any way permit, or hold himself out as being willing to permit, another person to use the licence or a triennial certificate of the licensee."

40 Ms Perich could only carry on business utilising Mandurah Investments Pty Ltd's licence if the arrangement involved a natural person holding a licence being nominated as the person in *bona fide* control in order to satisfy s 28(1)(d) of the *Settlement Agents Act 1981*. Under the agreement, Mr Reyburn was being paid to do what he would have been obliged to do if, as he maintained, Mandurah Investments Pty Ltd was

carrying on business as a settlement agent. That arrangement simply aided the objective of allowing Ms Perich to use the licence.

41 Our view is that the effect of the agreement was to permit Ms Perich to use the licence of Mandurah Investments Pty Ltd for the purpose of the business which she ran. The performance of the agreement led also to a breach of s 40(3).

***Was the practitioner's conduct unprofessional?***

42 Unprofessional conduct is 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 - see *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56 at 71-72. The first allegation against Mr Reyburn relates to conduct occurring outside the practice of his profession. That conduct must be judged against the first limb of the definition which is not necessarily confined to conduct in the course of legal practice. The second allegation concerns the giving of advice, and falls to be judged against either of the two limbs.

43 The starting point of the discussions which led to the agreement was that Ms Perich could not buy the business because she was unlicensed. The transaction could only occur if some way around that problem was found. Mr Reyburn's position was that, aware of the problem, he 'outlined' a proposal which he believed would satisfy his obligations under the Act. We are satisfied that the detail as to the arrangement that enabled Ms Perich to use Mandurah Investments Pty Ltd's licence was determined or largely determined by Mr Reyburn.

44 Mr Reyburn said that he did not consider that the arrangements put in place by the agreement would result in a breach of the Act. He contends that, even if the agreement did result in a breach of the Act, that would not amount to unprofessional conduct on his part because, he was merely a party to an agreement which, contrary to his own opinion, has been found to give rise to illegal consequences. He asserts that in the absence of an intention to bring about a breach of the law, he ought not to be found to have acted unprofessionally.

45 The applicant's position on this aspect is that the breaches of the Act were so obvious that the practitioner must have known the legal consequences of the contract.

46 In our view the breach of s 40(3) of the Act is obvious, and Mr Reyburn could not reasonably have held a belief that the arrangement did not amount to permitting Ms Perich to use Mandurah Investments Pty Ltd's licence. The obvious effect of the agreement was that Ms Perich was conducting the business of a settlement agent as from 1 October 2001. She needed a licence to do that, and the licence which she used was that of Mandurah Investments Pty Ltd. That licence could only effectively be used if there were a person in *bona fide* control as required by s 29. That meant that Mr Reyburn had to provide some services in order for the company's licence to effectively be used. The supervision, limited as it was, the continued holding out of Mandurah Investments Pty Ltd as the legal entity operating the business, and the maintenance of ultimate control of the trust account, were merely arrangements which enabled Ms Perich to use the company's licence without the true effect of the arrangement being obvious to outside observers. Mr Reyburn was paid for the service he provided to Ms Perich's business, and not to provide services to the business of Mandurah Investments Pty Ltd.

47 In respect to the breach of s 26, there is room for some debate as to whether the company was also carrying on business. It was Mandurah Investments Pty Ltd that held itself out as carrying on the business. There is no suggestion that the agreement was a sham. The practitioner did provide an element of supervision. He did, maintain ultimate or at least joint control of the trust account. On at least one occasion, he gave a direction to Ms Perich in relation to the conduct of settlements generally. We accept that he may have thought that, by his maintaining some degree of supervision and by the company holding itself out as carrying on the business, the arrangement did not technically offend s 26. As we have found, the obvious effect of the agreement was that the company permitted Ms Perich to use its licence. In doing so, and running the business on a day to day basis as we have described, she was carrying on business as a settlement agent, and a breach of s 26 was inevitable regardless of whether it might be said that the company was also carrying on business. If Mr Reyburn failed to appreciate that consequence, that failure was unreasonable given the clear breach of s 40(3).

48 In our view, Mr Reyburn's conduct in entering into the contract the performance of which led to an obvious and inevitable breach of the *Settlement Agents Act 1981* by Mandurah Investments Pty Ltd, the company of which Mr Reyburn was the controlling director, is conduct which can reasonably be regarded as dishonourable by practitioners of good repute and competence. Accordingly, we find that the first

allegation against the practitioner is established. It is important to the maintenance of the reputation of the profession that solicitors do not involve themselves in conduct that breaches, or leads to breaches of, the law. It brings dishonour to the profession where they do so. In this case, Mr Reyburn entered into a contract which involved a substantial monetary benefit for him but which inevitably led to a breach of the *Settlement Agents Act 1981*. The entry into the agreement amounts to unprofessional conduct.

***Did Mr Reyburn advise Ms Perich?***

49 The advice which Mr Reyburn is alleged to have given is that the problem of Ms Perich not having a licence could be overcome by:

- "(a) his leasing Ms Perich his licence for a fee until she was able to obtain a real estate settlement agent licence; and
- (b) the practitioner's staff and any enquirer being informed that Perich was managing the business, rather than owning it for the time being."

50 The threshold question in relation to the second allegation is whether the practitioner said things to the effect of the words constituting the advice. We have previously found that the arrangement for the payment of the \$10 000 per annum "licensee fee" (however described by him) was a suggestion by Mr Reyburn, and that it was, in substance, a payment for the use of Mandurah Investments Pty Ltd's settlement agents licence. The evidence does not support a finding that Mr Reyburn used the word "lease", but that is not fatal to the complaint. The use of the word "leasing" in the particulars of the allegation should not be narrowly construed. The substance of the allegation is that Ms Perich would, on payment of a fee, use the licence to operate her business. We have also found that it was Mr Reyburn's suggestion that his staff and any enquirer be informed that Ms Perich was the manager of the business and that it continued to be owned by Mandurah Investments Pty Ltd.

51 It is alleged in the particulars to the second allegation that the practitioner's conduct in "giving advice" was "unsatisfactory" in all the circumstances set out at [7] above.

52 The first circumstance is that the advice constituted legal advice. The proposition that the licence problem could be overcome by Ms Perich utilising the licence of Mandurah Investments in the manner outlined above does constitute legal advice. It was information given by Mr Reyburn in response to Ms Perich raising concern about a legal

impediment to her purchasing the business. It conveyed to her an arrangement by which, it was contended, the legal impediment could be overcome. That is clearly legal advice.

53 It is then said that this was advice which Ms Perich could reasonably be expected to rely upon given the practitioner's status as the principal of a law firm by which she was employed. In response, Mr Reyburn correctly observes that Ms Perich was not employed by his law firm, but rather by Mandurah Investments Pty Ltd. That distinction is of little significance. When Ms Perich commenced working with Mandurah Settlements, its office was co-located with the offices of Mr Reyburn's legal practice. We have no doubt that Ms Perich would have seen Mr Reyburn as being first and foremost a lawyer. He was the principal of the company which employed her, and while she was not employed in the legal practice, there can be no doubt that when Mr Reyburn expressed a view as to whether the requirements of the *Settlement Agents Act 1981* would be met, Ms Perich would have taken that as the opinion of a lawyer. She undoubtedly relied upon that view as to the legal position when she entered the agreement with Mr Reyburn to purchase the settlement agency business. Given the relation between the parties, that reliance was entirely reasonable. These were not simply parties acting at arm's length in a commercial transaction.

54 The respondent submits that no retainer can conceivably be implied or inferred where the parties had inherent conflicting commercial interests in their negotiations for the sale and purchase of the business. Their relationship is said to be inimicable to the existence of a retainer, and in the absence of a retainer no duties or no fiduciary duties can be owed by a solicitor. We disagree. Mr Reyburn expressed the view that the constraints of the *Settlement Agents Act 1981* could be overcome by the arrangements proposed. Ms Perich accepted that to be the position. Mr Reyburn admits he did not suggest Ms Perich obtain her own legal advice and he had no reason to believe that Ms Perich was receiving any independent advice on the matter. The only inference to be drawn was that she was relying on his view of the legal position in entering a transaction. That reliance was reasonable for the reasons outlined above. Having assumed the task of expressing a view of the law that provided a foundation upon which his employee entered a contract with him, Mr Reyburn cannot now disclaim responsibility for the advice he gave.

55 The third matter relied upon by the applicant as demonstrating that the practitioner's conduct was in all the circumstances unsatisfactory is the allegation that the advice was deliberately misleading or grossly negligent. We find that the advice was not deliberately misleading. The

advice is said to have been grossly negligent. As we have already determined, the advice was plainly wrong. In the context in which it was given, it was a serious breach of Mr Reyburn's duty of care which arose when he provided the advice to Ms Perich. Breaching a duty of care would not necessarily constitute unprofessional conduct. But here it was advice which induced her to enter into the contract and in respect of a matter in which Mr Reyburn had a financial interest.

56 The fourth matter relates to telling the staff and others that Ms Perich was managing the business rather than owning it, which is said to be misleading. Ms Perich agreed in evidence that she believed that to be an accurate statement of the position. The evidence of both of the parties to the agreement was that property in the business would not pass until Ms Perich obtained her settlement agent's licence and paid the final instalment of the purchase price. Mr Reyburn's evidence on that point is inconsistent with the position asserted to creditors in letters written by Mr Reyburn and his employees after Ms Perich quit the business. Whatever one might think of the tension between the parties' evidence at hearing on one hand and both the correspondence from Nicholson Clement and the terms of the contract relating to payment for and delivery of the assets of the business, it cannot be said that the proposal to tell people that Ms Perich was the manager of the business was deliberately misleading.

57 The fifth allegedly unsatisfactory aspect of the practitioner's conduct in giving the advice is said to be that the advice was provided in circumstances where the practitioner's financial interests conflicted with those of Ms Perich. It is undoubtedly the case that the interests of the two parties conflicted. The advice was given in the context of negotiations for an agreement for Ms Perich to purchase the business from Mr Reyburn. They had diametrically opposed financial interests.

58 This then leads to the final allegation about the unsatisfactory nature of the practitioner's conduct namely that he did not make any recommendation that Ms Perich obtain independent legal advice. Given the relationship of the parties, the conflict of his interests with those of Ms Perich, his knowledge that she was relying on his advice as to the legal position, and given the potential detriment that she faced, the practitioner was under a professional duty to and should have told her to obtain independent legal advice before she proceeded with the transaction.

59 In all the circumstances, we find that the provision of advice to Ms Perich concerning the licence and the circumstances in which it was

provided fell short of the standard of conduct observed and approved by members of the profession of good repute and competence and does amount to unprofessional conduct.

***Conclusion***

60 For the foregoing reasons, we find that the two allegations against the practitioner are established, namely that:

- (i) he was guilty of unprofessional conduct, in that, in or around September 2001, he entered a contract on behalf of Mandurah Investments Pty Ltd with Ms Perich, which contract included terms that would result in a breach of s 40(3) of the *Settlement Agents Act 1981*; and
- (ii) he was guilty of unprofessional conduct in the nature and circumstances of the advice he provided to Ms Perich regarding her purchase of a business from Mandurah Investments Pty Ltd.

61 The Tribunal will hear the parties as to the appropriate penalty.

I certify that this and the preceding [61] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

---

**JUDGE J CHANEY, DEPUTY PRESIDENT**