[2007] WASAT 120

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PRACTICE ACT 2003 (WA)
CITATION	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and GLUESTEIN [2007] WASAT 120
MEMBER	**:**	JUSTICE M L BARKER (PRESIDENT) MR C RAYMOND (SENIOR MEMBER) MS V O'TOOLE (SESSIONAL MEMBER)
HEARD	**:**	14 MAY 2007
DELIVERED	**:**	23 MAY 2007
FILE NO/S	**:**	VR 39 of 2007 VR 40 of 2007
BETWEEN	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND BRIAN CHARLES GLUESTEIN Respondent

Catchwords:

Professions - Legal practitioner - Legal practice - Unsatisfactory conduct - Two years' neglect - Failure to rectify trust account deficiencies in a timely manner

Legislation:

Legal Practice Act 2003(WA)
State Administrative Tribunal Act 2004 (WA), s 61(4), s 62

Result:

Findings of unprofessional conduct
Fine of $6000 for neglect
Fine of $8000 for failure to rectify trust account deficiency
Order for costs

Category: B

Representation:

Counsel:

Applicant	:	Ms PE Le Miere
Respondent	:	Mr A Metaxas

Solicitors:

Applicant	:	Legal Practitioners Complaints Committee
Respondent	:	A Metaxas & Co

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

C and Chief Executive Officer, Department for Community Development [2007] WASAT 116
Medical Board of Western Australia and A Medical Practitioner [2007] WASAT 20
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97
Re a Barrister and Solicitor (1979) 40 FLR 1
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The practitioner admitted to allegations of unsatisfactory conduct under the *Legal Practice Act 2003* (WA).

2 As a result, the Tribunal made the following findings and orders.

3 In proceeding VR 39 of 2007, the Tribunal found the practitioner guilty of unsatisfactory conduct by neglect between 2004 and July 2006 in the administration of a deceased estate. The practitioner was fined $6000 and ordered to pay costs of $1500.

4 In proceeding VR 40 of 2007, the Tribunal found the practitioner guilty of unsatisfactory conduct by unprofessional conduct between May 2005 and July 2006 in failing to rectify, in a timely manner, a deficiency in trust funds held by his firm for a deceased estate. The Tribunal fined the practitioner $8000 and ordered him to pay costs of $1500.

5 The Tribunal declined to make an order for non-publication of the practitioner's name.

The issue

6 We have before us two matters, VR 39 of 2007 and VR 40 of 2007, which involve the Legal Practitioners Complaints Committee (Complaints Committee) as applicant and Brian Charles Gluestein as respondent (practitioner). In VR 39 of 2007, the practitioner has admitted that he is guilty of one count of unsatisfactory conduct, by neglect, in the administration of a deceased estate. In VR 40 of 2007, the practitioner admits one count of unsatisfactory conduct, by unprofessional conduct, in failing to rectify in a timely manner a deficiency in trust monies held by his firm for a deceased estate. The deceased estate referred to in both those applications is the estate of a Mrs M. The identity of the deceased is not material to this decision and so, for reasons of confidentiality, it will not be used.

7 The issue for the Tribunal is what penalty is appropriate in light of the practitioner's unsatisfactory conduct.

The facts

8 In VR 39 of 2007, the facts which are set out by the Complaints Committee, and accepted by counsel for the practitioner, can be shortly stated along these lines. Under the term of Mrs M's will, the practitioner's firm was appointed as executors and trustees of the will. The practitioner took over the conduct of the administration of the estate from the time he was notified of her death, on or about 12 January 2004.

9 Between January 2004 and May 2004, the practitioner took some steps in the administration of the estate, but thereafter took no effective step to advance the administration of the estate, with the result that by July 2006, when the Complaints Committee first had the opportunity to review the estate file, no application for probate had been lodged. In consequence, the period of the neglect was just over two years, and it was brought to an end only by reason of the Complaints Committee's intervention.

10 The explanation given to the Complaints Committee by the practitioner for his neglect at relevant times was that the estate file fell into a "black hole".

11 In VR 40 of 2007, the facts are along these lines. In June 2004, the practitioner received a cheque for the estate of $65 956.99, close enough to $66 000. This was the refund of the nursing home bond paid by Mrs M during her lifetime. That money was wrongly credited to another estate file that the practitioner was handling at the time, with the result that the bond money was then disbursed between 28 June 2004 and 7 January 2005, partly to beneficiaries of that other estate, and partly in payment of the practitioner's firm's fees for handling that other estate. In other words, Mrs M's estate did not receive the funds due to it.

12 This mistake went unnoticed until the practitioner made a distribution in April 2005 in that other estate of $41 861 following the receipt by the practitioner of monies from the sale of the interest the deceased in that other estate had in an aged care unit. Payment was made to the executrix of that other estate, who resided in the United Kingdom. The executrix made inquiries of her own as to why two payments had been received in respect of the sale of her mother's aged care unit. It was as a result of that executrix making those inquiries that the mistake was brought to the attention of the practitioner.

13 The mistake was brought to the practitioner's attention by letter dated 4 May 2005, but it took until 8 July 2005 for the practitioner to

acknowledge that an error had been made, at which time the practitioner requested the executrix to repay the initially wrongly paid $65 956.99. He took no steps in the interim to rectify the deficiency in the firm's trust account concerning the estate of Mrs M.

14 By letter dated 31 August 2005, the executrix advised the practitioner that she proposed to repay the sum of $41 861, being the amount of the last distribution, and requested that the practitioner's firm bear the shortfall of $24 095.99. Subsequently, the executrix repaid the sum of $41 861 on or about 10 November 2005, but when the practitioner received it, he failed to credit it to the estate of Mrs M. It was, in fact, credited to the other estate once again.

15 The deficiency in the trust monies held by the practitioner's firm on behalf of the estate of Mrs M remained until the Complaints Committee became aware of the deficiency in July 2006. We have been told today that the Complaints Committee received different complaints in respect of each of the estates to which I have referred, and then acted on them. On becoming aware of the deficiency, the Complaints Committee, by letter dated 20 July 2006, requested the practitioner immediately to rectify the deficiency. However, the practitioner failed to do so. As a result, the Complaints Committee brought the deficiency to the attention of the managing partner of the practitioner's firm, who notified the Complaints Committee on 27 July 2006 that he had immediately rectified the deficiency.

16 It is common ground in these proceedings that the practitioner has since reimbursed his former partners in the sum of $24 000 on account of the deficiency. In other words, he has met that deficiency from his own funds.

17 The practitioner was aware of the deficiency in his firm's trust account from May 2005. When asked by the Complaints Committee to immediately rectify the deficiency, he failed to take any immediate action to do so. Again, the only explanation given by the practitioner to the Complaints Committee was that he had a "mental block" and was in some form of "denial" that he could have made such an error.

18 The practitioner's failure to rectify the deficiency in the trust fund as soon as he became aware is a matter of considerable concern to the Complaints Committee, which is emphasised in these proceedings.

19 We have received submissions today, both in writing and orally, from counsel on behalf of the practitioner.

Submissions of practitioner

20 The practitioner admits, through counsel, the facts alleged by the Complaints Committee. It is said on his behalf, so far as the neglect charge in VR 39 of 2007 relating to the estate of Mrs M is concerned, that: he was the only solicitor at the firm who dealt with probate applications; he was carrying a significant workload within the firm; there was no one else to whom he could delegate the work; there was nothing complicated about the work and he had done it many times before; and the file was not accorded sufficient priority by him because there was always another matter that seemed more pressing.

21 On behalf of the practitioner it is said, as regards VR 40 of 2007 and the payment of the monies belonging to the estate of Mrs M, that the cheque for nearly $66 000 was handled by the practitioner, and incorrectly banked to the credit of the other estate. When the erroneous payment was brought to his notice, he could not bring himself to deal with the problem. He was extremely embarrassed and annoyed with himself that a lack of attention on his part had caused the problem, and that as a result, two months passed before he took any action to recover the funds. The failure to draw, immediately, the matter to the attention of his partners was symptomatic of his "inability to deal with the problems he was encountering at the time". In further discussion with counsel, "the problems" here referred to were identified as the handling of the two estate files in question.

22 It is also pointed out that the practitioner has personally paid the deficiency of about $24 000.

23 Counsel for the practitioner draws attention to a number of factors personal to the professional standing of the practitioner.

24 The practitioner was admitted to legal practice on 23 December 1976. He practised in a country town for many years before relocating to Perth in about 1995. He joined the firm he was at when these events occurred in 1998. It is said, and it is not disputed, he has not been in this disciplinary position before and he has an unblemished record as a legal practitioner and member of the community. Indeed, as his *curriculum vitae*, which has been given to the Tribunal, discloses, the practitioner has been very active in professional affairs, the Law Society of Western Australia, the Family Law Practitioners' Association and various other committees and activities, for a number of years.

25 In February 2007, the practitioner, following a competitive selection process, was appointed a Magistrate.

26 We are told, and have no reason to doubt, that the practitioner remains acutely embarrassed about what happened on these matters, and how he failed to deal with them in a satisfactory manner. It is said, and we agree, it is clear and should have been clear to him at all times, that had he taken his partners into his confidence, the issues could have been addressed quickly and remedied - as they were in the end - almost immediately, so far as the deficiency of funds was concerned.

Submissions of Complaints Committee

27 In all of these circumstances the Complaints Committee submits that to register the importance of the maintenance of proper professional standards, which are designed to protect the public generally, appropriate fines should be imposed, in the two matters, on the practitioner.

Penalty

28 The Tribunal agrees with the Complaints Committee's submission. As the Complaints Committee says in its written submissions to the Tribunal, and as is well understood in all disciplinary matters, the important object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the profession, rather than punishment.

29 The decisions of ***Re a Barrister and Solicitor*** (1979) 40 FLR 1, and ***Re Maraj (a Legal Practitioner)*** (1995) 15 WAR 12, support those propositions. Indeed, these propositions have been affirmed in the very recent decision of the Court of Appeal of Western Australia in ***Paridis v Settlement Agents Supervisory Board*** [2007] WASCA 97 at [25], Buss JA. It is only through the maintenance of proper standards in the legal profession, for example, that the public can be properly protected in the long run.

30 Thus, in proceedings like this, the focus of the Tribunal is what is necessary by way of penalty to maintain public confidence in the legal profession. Sometimes the Tribunal is faced with an affected person who, by their conduct, displays incompetence or other inability to appreciate proper professional standards. In such cases, it becomes necessary to consider removing a person's registration, or indeed suspending them for a period from practising. That is not this case, and it is not suggested by the Complaints Committee that those sorts of penalties are appropriate.

31 Rather, what we have here is a failure of a lawyer in a particular setting to properly recognise what his obligations were. Unless the public has confidence that high standards of professional practice are maintained, it will not have the confidence to deal with professionals, in this case, lawyers dealing with the winding up of deceased estates. In popular literature and, indeed, in the annals of disciplinary bodies such as this, the winding up of estates seems always to have been a difficult area for lawyers, or at least, an area in which delay tends to occur. In this case, we have heard that in the professional practice conducted by the firm of which the practitioner was a member, he apparently was the only person handling these estates.

32 It is very important when firms or individual practitioners take on work that they have the capacity - both in terms of competence and workload - to do that work. If they do not, really they should not be doing it. In the end, we are left with very few explanations as to what happened to the practitioner in this case. It seems, on the facts as we have been given them, that there were delays in the handling of the winding up of the estate by the practitioner of Mrs M well before the mistake concerning the payment of the $66 000 came to his attention.

33 Indeed, once the mistake came to his attention, there were still delays in the winding up of that estate. It was only when complaints were made to the Complaints Committee, and investigations conducted, that the full array of difficulties came to light. As we have noted, having been alerted to the mistake so far as the receipt of the $66 000 was concerned and its incorrect payment out, the practitioner then had to deal with it. He failed to deal with it quickly. Later he failed altogether to tackle the problems that the deficiency created.

34 So we have, in this case, the dual difficulties of delay in the handling of a deceased's estate, where a number of other parties - executors and trustees, and beneficiaries - were no doubt all affected by the delay, as well as the problem of the mishandling of the funds, the deficiency created and the failure to quickly remedy that particular deficiency.

35 We think, in the circumstances, it is appropriate to register the practitioner's failure to meet accepted professional standards with a substantial fine. In this way, it will be clear to the profession what maintenance of standards requires. It will also be understood by the community that the profession holds itself to high standards in the conduct of legal practice, and it can maintain its confidence in practising lawyers.

36 In the result, we very much take into account the prior good standing of the practitioner in the legal profession generally, his commitment to professional affairs over a number of years, and we also bear in mind the fact that he personally has met the deficiency of $24 000, or thereabouts. Nonetheless, we think that, having regard to the maximum fine which can be imposed in circumstances such as these in respect of each of the findings made, of $25,000, a fine which is significant, albeit not at the top of that range, should be imposed.

Findings and orders

37 In the end, therefore, we make these findings and impose these penalties:

1) In respect of VR 39 of 2007, the Tribunal finds the practitioner guilty of unsatisfactory conduct by neglect between June 2004 and July 2006, in the administration of a deceased estate.

2) In respect of the first finding in VR 39 of 2007, the Tribunal fines the practitioner $6000, which fine is to be paid to the Legal Practice Board.

3) In VR 39 of 2007, the Tribunal orders the practitioner to pay the Complaints Committee's costs in the sum of $1500.

4) In VR 40 of 2007, the Tribunal finds the practitioner guilty of unsatisfactory conduct by unprofessional conduct between May 2005 and July 2006, in failing to rectify, in a timely manner, a deficiency in trust monies held by his firm for a deceased estate.

5) In VR 40 of 2007, the Tribunal fines the practitioner $8000, which fine is to be paid to the Legal Practice Board.

6) In VR 40 of 2007, the Tribunal orders the practitioner to pay the Complaints Committee's costs in the sum of $1500.

Issue of non-publication of practitioner's name

38 We have further considered an application by counsel for the practitioner that in circumstances such as these the Tribunal consider

making a non-publication order in respect of the name of the practitioner. That is put forward on various bases, which have regard to the good standing to this point of the practitioner, his involvement in professional affairs and his appointment as a Magistrate in February 2007.

39 The Tribunal is able to make a non-publication order under s 62 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) if grounds referred to in s 61(4) are made out. Counsel for the practitioner drew particular attention to s 61(4)(c) of the SAT Act, which refers to avoiding prejudicing the administration of justice, and also to s 61(4)(h) of the SAT Act, which refers to any other reason in the administration of justice.

40 In the end, the Tribunal's approach to this question on non-publication, which has been set out in some of its earlier decisions, is that, in a primary way, the SAT Act contemplates that proceedings of the Tribunal and reasons for decision will be public, and that it will only be in exceptional circumstances that a non-publication order should be made: see, for example, ***C and Chief Executive Officer, Department for Community Development*** [2007] WASAT 116; ***Medical Board of Western Australia and A Medical Practitioner*** [2007] WASAT 20 at [51] - [58].

41 In times gone by, different disciplinary proceedings, under different Acts, provided for decisions to be kept confidential. However, with the passing of the SAT Act and related legislation, that position has fundamentally changed. There is a primary public interest in Tribunal proceedings being open to the public. In all the circumstances, we see no compelling reason why there should be a non-publication order made in this case. Accordingly, we decline to make any such order.

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

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JUSTICE M L BARKER, PRESIDENT