[2007] WASC 211

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	FULL BENCH
CITATION	**:**	THE LEGAL PRACTITIONERS COMPLAINTS COMMITTEE -v- LASHANSKY [2007] WASC 211
CORAM	**:**	WHEELER JA McLURE JA EM HEENAN J
HEARD	**:**	11 APRIL 2007
DELIVERED	**:**	5 SEPTEMBER 2007
FILE NO/S	**:**	LPD 1 of 2001
BETWEEN	**:**	THE LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND ROBERT JAMES LASHANSKY Respondent

ON APPEAL FROM:

Jurisdiction	**:**	LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
Coram	**:**	THE HON MR B W ROWLAND QC (CHAIRMAN) MS N JOHNSON QC MR J G SYMINTON MRS M GADSON (COMMUNITY REPRESENTATIVE)
File No	**:**	R 14A & B of 1999, R 5 6 7A 7B & 12 of 2000

Catchwords:

Legal practitioners - Disciplinary proceedings - Removal from Roll of Practitioners - Turns on own facts

Legislation:

Legal Practitioners Act 1893 (WA), s 30

Result:

Practitioner struck off Roll of Practitioners

Category: B

Representation:

Counsel:

Applicant	:	Mr R J Davies QC & Mr R M Ferguson
Respondent	:	In person

Solicitors:

Applicant	:	Minter Ellison
Respondent	:	In person

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

Lashansky v Legal Practitioners Complaints Committee [2005] WASCA 217
Law Institute of Victoria Ltd v Bernstein [2005] VLPT 3
Law Society of New South Wales v Moulton [1981] 2 NSWLR 736
Legal Practitioners Complaints Committee and Cullen [2005] WASAT 211
Legal Practitioners Complaints Committee and Wiese [2007] WASAT 64
Legal Practitioners Complaints Committee v De Alwis [2006] WASCA 198
Legal Practitioners Complaints Committee v Weston [2005] WASCA 81
Legal Practitioners Conduct Board v Trueman [2003] SASC 58; (2003) 225 LSJS 503
New South Wales Bar Association v Evatt (1968) 117 CLR 177
Prothonotary of the Supreme Court of New South Wales v P [2003] NSWCA 320

Re A Barrister and Solicitor (1979) 40 FLR 1
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12
Ziems v Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279

1 **JUDGMENT OF THE COURT**: This is a motion by the applicant, the Legal Practitioners Complaints Committee, for orders that the respondent, Mr Lashansky, be struck off the Roll of Practitioners, or otherwise dealt with pursuant to s 30(2) of the *Legal Practitioners Act 1893* (WA).

Application in relation to the coram, in relation to Mr Davies QC and in relation to Minter Ellison

2 At the hearing of this application, and before we heard from the applicant, the respondent advised us that he had a number of applications which he wished to make. One was that the Court appointed to hear this matter be comprised of judges other than current or past members of this Court. Another was that Senior Counsel for the applicant be restrained from acting in the matter and the third was that the solicitors for the applicant be restrained from acting. We heard argument in relation to each of those applications, dismissed them, and advised that we would give reasons when we delivered judgment in this matter. We therefore now briefly give reasons for those rulings.

3 So far as the composition of the coram was concerned, there appeared to be broadly two strands to the respondent's objections. The first was to the effect that he had been treated so badly in the past in a number of decisions of this Court that he considered that any reasonable person, looking at that background of treatment, would come to the conclusion that he would not be dealt with fairly. The second was that, in his words, 'too many of the people that sit on this Court … have had links to the Legal Practitioners Complaints Committee'. It was therefore his submission that there was a reasonable apprehension that any member of the Court would be biased in favour of the Committee.

4 To take the second of the objections first, it was apparent however from the way in which the respondent developed this application that it was one which he made selectively. At 156 of the transcript there occurs the following exchange:

> Too many of the people that sit on this court - too many of the honourable justices - have had links to the Legal Practitioners Complaints Committee. We have had his Honour Len Roberts-Smith J sign the Colonnade reference in R12 of 2000. We have had Mr Michael Buss attempt to strike me off on 5 December 2003. He is now sitting as a judge. We have had his Honour Pullin J, who is a former chairman of the committee, appointed to the bench. Then, ma'am, it comes into the issue as to the lack of respect. Her Honour Justice - - -

> **EM HEENAN J:** Mr Lashansky, if you take this objection to Wheeler JA, you can take it to me. I was a member of the Legal Practice Board and of the Legal Practitioners Complaints Committee from 1985 until I was appointed to this court in 2004. I was then one of Her Majesty's counsel and like every Queen's Counsel in this state, I was a member of the board. There is nothing in the least way unusual that judges of this court have been members of the Legal Practice Board or the complaints committee or the Barristers Board before that. Indeed, it's to be expected, but that doesn't seem to me to be a reason to disqualify myself from hearing this application.
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> **LASHANSKY, MR:** No, sir, because you happen to be one of the judges who actually helped me in my absence. On 31 October you turned around and said to Mr Goetze, 'But this problem is with the report.' Now, Mr Goetze at the end of the day didn't seem to take that on board, didn't seem to take anything on board so, sir, at the end of the day - - -

5 In reality, it appears that this objection is no more than a variation on the main theme that the respondent had been treated badly in the past and wished to be dealt with by judges whom he considered would treat him well. The difficulty with both limbs of the submission was that neither of them addressed in any sensible way the test for apprehended bias applicable in such a case.

6 It is convenient to set out the relevant principles, and to notice the way in which those principles were applied, as they appear in ***Legal Practitioners Complaints Committee v De Alwis*** [2006] WASCA 198, in which a rather similar application was made by another legal practitioner the subject of a reference. At [64] – [68], the Court made the following observations:

> 64 The foundation upon which the practitioner's request was based is one of apprehended bias. The test, in such a case, is that of whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide: ***McCreed v The Queen*** (2003) 27 WAR 554 at 557 [8]; ***Johnson v Johnson*** (2000) 201 CLR 488 at 492; ***Vakauta v Kelly*** (1989) 167 CLR 568 and ***Forge v Australian Securities and Investments Commission*** [2006] HCA 44 at [67]. The principle gives effect to the requirement that justice should be done and be seen to be done and that a court is an independent and impartial body. Justice can only be done if there is no bias and it can only be seen to be done if there is no appearance of bias: ***McCreed*** at 557 [7].
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> 65 In ***Livesey v New South Wales Bar Association*** (1983) 151 CLR 288 at 294, the High Court said:

> 'In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters 'of degree and particular circumstances may strike different minds in different ways' (per Aickin J in ***Shaw* [*Re Shaw; Ex parte Shaw*** (1980) 55 ALJR 12 at 16]). If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court.'

66 More recently, in ***Ebner v Official Trustee in Bankruptcy*** (2000) 205 CLR 337 at 348, Gleeson CJ, McHugh, Gummow and Hayne JJ said:

> 'Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.
>
> This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for

> practical purposes, individual parties could influence the composition of the bench. That would be intolerable.'

67 In our opinion there is no reasonable basis upon which a fair-minded lay observer might apprehend that Pullin JA might not bring a fair and impartial mind to this case. The suggestion that there is a reasonable apprehension of bias is based solely upon the proposition that Pullin JA had previously served as Chairman of the Law Society's Complaints Committee prior to his appointment to the bench in 2001. The evidence before the Court (in the form of the affidavit of Ms Diane Howell sworn on 29 March 2006) suggests that the only interaction Pullin JA may have had with the practitioner during his time as Chairman of the Complaints Committee was in chairing a meeting at which it was resolved that information regarding the practitioner be published to the Law Society of the Northern Territory. There is no suggestion from the practitioner that Pullin JA had any greater involvement than this although, as will be apparent from what we have earlier said, Pullin JA also heard, and refused, an application by the practitioner to stay the order that there be publication of the reasons of the Tribunal on 26 September 2003. However, the practitioner contends that, even if this involvement is insufficient to justify his claim of apprehended bias, then the fact of Pullin JA's past association with members of the Complaints Committee and the Tribunal may affect his ability to decide the case on the merits, more especially in circumstances in which the practitioner has made a number of complaints concerning the behaviour of some of those persons.

68 In our opinion, Pullin JA's very limited involvement with matters concerning the practitioner (he has no independent recollection of them) are insufficient to give rise to any reasonable apprehension of bias. As to the suggestion that his association with members of the Complaints Committee and Tribunal is likely to affect his ability to decide the case on its merits, it seems to us that, in circumstances in which his association with these persons was limited to an official capacity and is now some five years distant, this, too, is incapable of giving rise to any reasonable apprehension of bias, whether viewed in isolation or together with the other matters relied upon. It has been said that the administration of justice is a practical business which relies to a very great extent on judges putting aside whatever personal professional associations they may have had and doing justice as they are sworn to do: see ***Western Australia v Watson*** [1990] WAR 248 at 264. It should also be remembered that the fair-minded observer is taken to be reasonable and that the person being observed is 'a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial': ***Vakauta***, at 527, per McHugh JA, quoted with approval by

> Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in ***Johnson***. There is no reason to think that a fair-minded observer would doubt that Pullin JA would be able to do so in this case.

7 Applying those observations to the present case, the respondent in effect suggests that because he has been unsuccessful in most (although not all) of the applications which he has made in this Court, a fair-minded observer would have a reasonable apprehension of bias. The difficulty with that submission, of course, is that the reasons for his lack of success might more probably be thought by a fair-minded observer to be related to the merits of the applications made. That is particularly so, in circumstances where the respondent has a right either to appeal (in the case of decisions of single judges of this Court) or to apply for special leave to appeal (in the case of decisions of the Full Court) but has either chosen not to exercise that right or has been unsuccessful on appeal, as has been the case with this respondent.

8 So far as any association with the Legal Practitioners Complaints Committee is concerned, none of the three Judges hearing this motion has had an involvement with any of the complaints against the respondent.

9 So far as Mr Davies QC was concerned, there appeared to be three principal areas of submission made by the respondent. The first is that it was suggested that Mr Davies has a flamboyant style of advocacy which the respondent described as 'completely over the top'. In that respect, it seemed to us that it would be open to the respondent to object to any unduly prejudicial advocacy during the course of this hearing, and that a personal objection to Mr Davies' style was an insufficient reason to restrain Mr Davies from acting.

10 The second was that it was said that Mr Davies could not act in the matter because his own conduct was the subject of attack. However, it is not the case that it is open to a litigant to ensure that counsel is unable to act simply by mounting a personal attack upon counsel, however misconceived, and then arguing that the fact of the attack means that counsel is unable to act. There needs to be some credible basis for the attack, and the attack needs to be in some way relevant to the proceedings.

11 Finally, the respondent complains of two things which were said by Mr Davies during the course of the proceedings the subject of the reasons in ***Lashansky v Legal Practitioners Complaints Committee*** [2005] WASCA 217. One of the matters of which the respondent complains is that which is described at [252] of the reasons for decision in that case. The statement, to the extent that it was relevant to those proceedings, was

dealt with at [252] of those reasons, and we are unable to see how it could be relevant to these proceedings. The second was the concession, referred to in [120] of the reasons in that case, to the effect that the respondent's prior appeal had been 'reinstated'. For some reason, the fact that Mr Davies made a concession, which was favourable to the respondent, but which the Court did not accept is considered by the respondent to indicate that Mr Davies will not act fairly in this case. We are simply unable to see how any reasonable person could reach such a view.

12 So far as Minter Ellison are concerned, again it is not entirely easy to understand the basis of the respondent's submission. It is perhaps most convenient both to set out the submission, and the answer to it, by reference to a passage at 177 - 178 of the transcript of the hearing before us:

> **EM HEENAN J:** Mr Lashansky, let me see if I understand it. You say that in several respects in the past, Minter Ellison have failed to comply with obligations which you say rest upon solicitors and as a consequence have obtained relief which is prejudicial to you and you didn't have an opportunity to oppose, and not only that, that when the solicitor was appointed to manage your practice, there was a trespass and there is a potential liability by those involved in the trespass. What has that got to do with Minter Ellison being instructing solicitors on the present application?
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> **LASHANSKY, MR:** It goes exactly to it. I'm standing here today because I'm sitting facing the decision of the court on 4 December 2002 to strike out my appeal. On 4 December 2002 my appeal was struck out pursuant to a springing order. I never had a chance to argue my appeal. I never got a day in court. All that happened is I was told, 'You're out.' I was in South Africa. I wasn't even here for the delivery of judgment.
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> **EM HEENAN J:** No, I know about that. At the moment the court is waiting to hear an application under the Legal Practice Act following a report by the Legal Practitioners Complaints Committee. Minter Ellison are the solicitors acting for the complaints committee on that application. Why do you say they shouldn't be permitted to act?
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> **LASHANSKY, MR:** Let's start at 29 November two thousand - - -
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> **EM HEENAN J:** No, no. I know what you say about past episodes, that you complain about the conduct of Minter Ellison, but even assuming that your complaints were well founded, what is there about that to prevent solicitors acting for the complaints committee today?

13 The question posed by EM Heenan J was never answered. Rather, the respondent then turned to deal at some length with the fact that

original exhibits or motion books or something of that kind had at one stage 'gone missing' and that he regarded this as very sinister. No evidence was placed before us which suggested that the solicitors had in fact failed to comply with any obligations with which they should have complied. That application had therefore no factual foundation.

14 It was for the reasons given above that we dismissed all of the preliminary applications made by the respondent, and proceeded to hear the motion.

The present motion

15 The matters out of which the motion arises, and the finding made by the Legal Practitioners Disciplinary Tribunal, upon which the motion is founded, are summarised in the reasons of this Court delivered in relation to an application in which the respondent had sought to reinstate an appeal which he had instituted against the orders of the Tribunal. That decision was ***Lashansky v Legal Practitioners Complaints Committee*** [2005] WASCA 217 (***Lashansky v LPCC***).

16 Those reasons are lengthy, but it is convenient to incorporate them into these reasons for decision, so that these reasons can be properly understood, without too much unnecessary cross-referencing to the earlier decision. We therefore set out verbatim [5] - [70] inclusive of those reasons, which we adopt as a summary of the proceedings which is adequate for present purposes. Those paragraphs are as follows:

> 5 The background to the various references to the Tribunal is as follows. The relevant Act at the time was the *Legal Practitioners Act 1893* (WA) as amended ('the Act'). Part V of the Act deals with practitioners' trust accounts. Section 38 permitted the Legal Practice Board (a body constituted under Pt I) to appoint and authorise an accountant having certain defined qualifications to examine the books of account and records of a practitioner relating to any trust account. Such a person was commonly referred to, although the statutory term was the 'examiner', as a 'Trust Account Inspector'. Section 39 gave that person power to require the practitioner or the practitioner's staff to produce books, papers and documents relating to trust money or trust accounts and to require bank officers to disclose details of accounts. The Trust Account Inspector, or persons employed by the Inspector, were not to disclose any matter which comes to their knowledge in the course of an examination, other than in the course of a report to the Board (s 40). Upon receipt of the Trust Account Inspector's report, the Board could itself inquire into matters revealed by the report and

could request the Complaints Committee, a body established under Pt IV, to inquire into the matter (s 41).

6 In October 1998, the Legal Practice Board engaged a Mr Novell as Trust Account Inspector to investigate the records of the applicant. His initial inspection of the applicant's documents noted that certain files were not properly identified and that some contained documents from other files being handled for the client. He could not reconcile moneys paid into the general practice account, and formed a preliminary view that there were breaches of the Act regarding the accounting for costs paid on account. Mr Novell, of course, sought further information, and had a number of conversations with the applicant. The Complaints Committee was asked to consider the matter, and Mr Jordan, the Complaints Committee's legal officer, engaged in correspondence with the applicant and met the applicant on a number of occasions. It was out of those matters that the various references arose.

7 Briefly, the procedure in relation to each of the references was as follows. Section 28C of the Act provided that where the Complaints Committee determined that a matter should be heard by the Disciplinary Tribunal, the Committee initiated proceedings against the practitioner. That was done by a number of separately numbered references, the details of which we shortly describe. The Tribunal was created by s 28D of the Act. Pursuant to s 29A, it had jurisdiction to make a variety of findings, and power to transmit a report to the Full Court. A report was, by s 30, taken to be conclusive as to all facts and findings therein mentioned, and the Court could, without further evidence, fine, suspend from practice, or strike off the roll the practitioner the subject of the report.

8 The Tribunal consisted of a Chairman appointed by the Governor with prescribed qualifications, members of the Legal Practice Board for the time being, with certain exclusions, and one or more representatives of the community. The Tribunal's Rules required a practitioner to file an answer to a reference (*Legal Practice Board Rules 1949* (WA), r 68). Part of the difficulty with these proceedings was that the applicant did not file an answer in relation to any of the references. At the commencement of the proceedings, then, the Tribunal did not know what it was that the applicant said in relation to any matter the subject of any of the references. Indeed, as it will appear, it is difficult to this day to understand what it is that the applicant says is his answer to a number of the references.

9 The various references were heard together in October and November 2000 by a Tribunal which comprised the Chairman, the Hon B W Rowland QC, two legal practitioners and a community representative.

2.1 R14A of 1999 - Mrs Tailor

10 This reference alleged that, on 3 September 1998, the applicant was guilty of unprofessional conduct in that he knowingly and improperly permitted his client, Mrs Tailor, to lend him $85,533. It was alleged, and was not disputed, that he attended with Mrs Tailor to collect a cheque in her favour for that amount from the Real Estate and Business Agents' Supervisory Board, which amount was awarded to her by the Board as a result of improper conduct by an agent. The cheque was immediately endorsed by Mrs Tailor in favour of the applicant.

11 The Law Society's *Professional Conduct Rules* provide, in r 8.1, that except where it is part of the client's normal business to lend money, a practitioner is not to advise or knowingly permit a client to lend money to the practitioner unless, prior to the loan, the client has acknowledged certain matters in writing. Those matters are: that the practitioner has advised that it is desirable that the client should obtain independent legal advice; as to the nature of the loan; that in the event of default the client may have no recourse to the solicitor's guarantee fund; and that the practitioner may benefit financially. Those rules do not have statutory force. They reflect, however, the view taken by members of the profession of the appropriate professional conduct in particular circumstances, and are persuasive evidence of the appropriate standard of behaviour.

12 There were certain documents brought into existence in relation to that loan. There was a letter of 1 November 1998, some two months after the date of the endorsement of the cheque to the applicant, in which Mrs Tailor states that she authorises the practitioner to use that cheque 'to aid in financing the Colonnade matter'. The letter continues: 'This is a loan and will be repaid to me once the Colonnade matter is finalised.' We describe the Colonnade matter later, in relation to reference R12 of 2000.

13 On 31 December 1998, the Trust Account Inspector wrote to the applicant with certain queries about entries in the books relating to the sum received from Mrs Tailor. In response, he received a brief letter from the applicant advising that the cheque had been endorsed over to him by Mrs Tailor, and that that 'arrangement' was done at Mrs Tailor's request. It accompanied a longer letter from Mrs Tailor herself. She stated in that letter that some weeks prior to payment of the cheque, she had been made aware that the Real Estate and Business Agents' Supervisory Board would pay her. While waiting for the issuing of the cheque, she decided to loan the moneys to the applicant in his personal capacity as she realised he was under considerable financial strain. That strain she described as having been caused mainly by his agreeing to assist people such as Mrs Tailor without seeking payment for his services. She stated that there was 'never any question' of there being anything other

than a personal loan, that there was no question of interest or of any claim against the fidelity fund, and that she had been made fully aware of the consequences of making a personal loan should the applicant be unable to repay. She also briefly described the circumstances leading up to the payment of the money to her. Those circumstances involved an agent called Frances Chan who had mortgaged Mrs Tailor's home without Mrs Tailor's knowledge. It appeared that the applicant had expended a considerable amount of time and effort in endeavouring to have Mrs Chan's affairs investigated and to recover funds for Mrs Tailor; those efforts were not in dispute before the Tribunal.

14 In a follow-up letter of January 1999, the Trust Account Inspector asked the applicant whether Mrs Tailor had been advised to seek independent legal advice. There was no reply from the applicant himself, but a letter of 5 February 1999 from Mrs Tailor to the Trust Account Inspector stated: 'I was offered the opportunity of taking independent legal advice.' This is, of course, not quite the same thing as being advised to seek such advice, a distinction of particular importance in a situation where, as Mrs Tailor went on to explain in her letter, she had 'absolute faith' in the applicant.

15 Because no answer had been made by the applicant at the hearing of the references, with the agreement of the applicant, the Tribunal took the course of permitting counsel for the Law Complaints Officer to ask him what his response to each reference was, prior to the calling of evidence. During the course of questioning, it was established that Mrs Tailor became aware at some time prior to September 1998 that she was to receive the money from the Real Estate and Business Agents' Supervisory Board. To assist in understanding the proceedings in the Tribunal, we reproduce part of the applicant's response. To convey the flavour adequately, it is necessary to set out a number of pages. They are pages 15 to 18, as follows:

> 'And when she became aware she was to receive those moneys, she offered to lend them to you?---She never offered to lend.
>
> She said she would lend them to you?---No. Mr Ley, you see, this is the whole problem. It's explained already to Mr Novell on three or four occasions. Mrs Tailor was refused legal aid. When I went to court on behalf of Mr and Mrs Karena - - -
>
> Mr Lashansky, rather than getting into all of that, can you just answer my question?---No, no, no; you have got to understand the whole issue. The whole issue is Mrs Tailor - - -

I don't want to know about the whole issue. I want you to answer my questions?---Well, you either want to get to the truth - - -

Did she lend you 85,533.55?---Most certainly she did. Mrs Tailor's exact words - - -

THE CHAIRMAN: I'm sorry, she did?---Yes, sir.

Right?---Mrs Tailor originally said to me I can take what I want out of the cheque. I said, 'It's your money.' I said, 'The Colonnade people are in need of money' and 'Will you lend me the money?'

MR LEY: The Colonnade litigation has to be funded. Is that what you mean?---Yes, well, that was the point. Mrs Tailor's money funded the Colonnade litigation.

She wasn't any part of that, was she?---No, she worked in my office at the time. She was helping me out. Shirley had no money to pay. Legal aid was refused. I fought for Shirley for 4 years and when Shirley got her money, she said to me, 'Take what you want,' because Shirley was aware of the situation. There was a Mr Wright, who you are well aware of because you were acting on the other side in that defamation case and you're well aware of the fact - what went on with Mr Wright and how he was forced into a 17-day arbitration because that's the defence in the defamation. Mr Wright owed a substantial amount of money. He had no money to pay. The Colonnade people had no money to pay. Joseph Lieberfreund had given an account for 13 and a half thousand and whacked it up to 50.

In any event, Mr Lashansky, the money was lent and the way it was lent was that you and Ms Tailor went along to the board's office on 3 September 1998 when she got her cheque?---I can seem to remember that, yes.

And the way that the moneys were lent was that she had got the cheque from the board for that amount and she endorsed it over to you on the back?---Yes, and there was a good reason for that too.

We will just stick to the facts, if we may. It was endorsed over to you so then you took the cheque and you paid the cheque into your bank account?---Into my general account.

Yes?---And if you want to know the reason, let me explain to you the reason.

No, I'm not interested in the reason?---No, there is a reason.

Mr Lashansky, you can give the reason when you're presenting your defence. All I'm interested in at the moment - I'm trying not to cross-examine you?---No; no, but I want to - - -

What I'm trying to do is just trying to put the allegations to you?---The board has got to hear my side of the story too.

They will when you give your defence.

THE CHAIRMAN: Let him tell us what his defence is, Mr Ley?---Let me just explain the situation. Mrs Tailor was put under Wayne Martin QC in order to progress Mrs Tailor's claim because there happened to be criminal trials against Seng Fai Chan and Frances Mary Chan and possibly other parties involving in how Shirley lost her house. Mr Wayne Martin QC in order to agree to have the claim progressed, Mr Ley, went and at the request of Wayne Bellew insisted upon deeds of confidentiality being drawn up. Those deeds of confidentiality were entered into and duly signed and as a result of that there was no sending of Mrs Tailor, as would normally have been the case, for independent legal advice because of the outcome and the Wayne Martin deed of confidentiality. That was the condition put upon it, otherwise they were not prepared - the board - because of its previous policy to progress the compensation claim for Mr and Mrs Waldron. Mr Waldron had a stroke at that time. He was in desperate straits. Mrs Waldron is pushing into her seventies and Shirley's a rather elderly lady. In those two exceptions the board agreed to change its policy and allow the claims to be progressed without the criminal conviction of the defalcating real estate agent.

LEY, MR: This is the claim against the fund you're talking about?---This is the claim against the fund. Part of that is Wayne Martin QC drew up deeds of confidentiality. Mrs Tailor, myself and Val Waldron had to agree to sign the deeds of confidentiality. Under normal circumstances of course I would have sent Mrs Tailor out to have gone and got legal assistance from somebody else. I didn't have an objection to that. Shirley is the most kind person in the world. She will give you the shirt off her back. Shirley understood that I had worked. She was there. There was a further thing that Mrs Tailor also understood. The fund, as you will understand it - and Doug Shave is now claiming the credit for having changed it. The fund says that you get a claim only if you bring your claim within 1 year. As a result of entreaties made by me, Mr Kim Beasley senior to Doug Shave, Doug Shave agreed to change the law and he made it

6 years which saw Shirley getting paid. I would never have normally asked Shirley for the money. Shirley was aware of the desperate straits because the Colonnade - - -

Did you ask her for the money?---Shirley offered it. As far as I understand, Shirley offered. She said take what I want out of the cheque. I could have taken what I wanted out of the cheque. I said no.

It is just that you said then that you asked her for the money?---I said to Shirley - when Shirley said take what I want out of the cheque, I said, 'No, it's your money. You need it Shirley at the end of the day. I need some money for the Colonnade people. The Colonnade people - - -'

So in the end you agreed to take the money?---Mr Ley, listen to me. The Colonnade people - - -

I'm just trying to understand what you're saying, Mr Lashansky?---No, in about January of 1997 I started working on the Colonnade case. You're now talking about August 1997, the first bill. In about January of 1997 I started working on the Colonnade case.

Sorry, I wasn't talking about that at all. I was talking about what happened in September 1998?---Well, it all goes to what happened in September 1998. In about January of 1997 Mr Gentilli attended a meeting with a whole lot of tenants from the Colonnade shopping centre. The tenants asked Mr Gentilli, 'How much will the litigation cost?' and Mr Gentilli said, 'Somewhere between 10 and 14 thousand dollars.' At the time Shirley had lent it to me that litigation was already running into its hundreds of thousands of dollars and nobody had any money. The three litigation funders who had promised to fund the litigation - Conrad Tye had been bought out. He had gone. Sam Novatscov who would have put the money in had a quintuple bypass and he wasn't well enough to fund the matter, let alone - there was doubt whether he would get to court. Joe Bruni who was the other litigation funder had bought other premises in Morley and he had no money in which to pay for Miss Gilchrist, David Wood and a few of the other people that were desperate for money.

When she offered to lend you the money, did you advise her that she should take independent legal advice?---No.

When she offered to lend you the money, did you tell her that it would be a purely personal loan and you couldn't give her any security for repayment?---Most certainly, yes.

> You told her that?---Of course, and that was relayed to Mr Novell.
>
> Did you tell her at the time when she offered to lend you the money and you agreed in the event you failed to repay the loan she would have to look to you for repayment of the loan debt and would have no recourse against the solicitors guarantee fund?---Shirley was informed that if I went down, that was the end of her money.'

16 The applicant then went on to explain that he had given Mrs Tailor, in exchange for the endorsement of her cheque, 10 cheques each in the sum of $8533 and each otherwise blank. It is somewhat difficult to follow his explanation, but, so far as we can understand it, the idea seems to have been that since Mrs Tailor worked in his office, she would know when his financial situation was improving, and would be able to fill the cheques in from time to time and be repaid in that way. In fact, it seems she was repaid directly.

17 During the course of explaining that arrangement, the applicant said, apparently in reference to his general account, 'my bank account was overdrawn, as Mr Novell knows and the bank manager was refusing to meet the cheques. He bounced a cheque, as Mr Novell can tell you, for the Australian Taxation Office'.

18 Pausing there, there are a number of aspects of these questions and answers which are characteristic of the applicant's approach to the references both before the Tribunal and in all proceedings in this Court, which make it peculiarly difficult to understand what defence, if any, he wishes or wished to make.

19 It is apparent that he assumes that the listener, be it the Tribunal or the Court, is intimately familiar with, or at least will be able to follow, references to many persons and occasions which are not the subject of evidence, which are not in issue in the proceedings, and which have only peripheral, if any, relevance to them. For example, in the passage quoted, there is some reference to a Mr Wright; he does not appear to be one of the 'Colonnade clients', and what he had to do with Mrs Tailor's loan is a mystery to us.

20 There is a detailed reference to a deed of confidentiality required by a Mr Bellew, although who Mr Bellew might be is not explained. So far as one can discern, although the proposition is not clearly articulated, the relevance of all that may be that Mrs Tailor was not sent for independent legal advice because the applicant formed the view that the deed of confidentiality might have prevented her from revealing to another solicitor how much money she had obtained. The problem with that as a defence, or even as a circumstance of mitigation, is that no deed of confidentiality was ever produced, so that the Tribunal had no

opportunity to consider its terms; it would be surprising if such a document had any relevance to independent advice about a loan to a solicitor. The reference to Mr Gentilli and litigation funders and so on, might, if one knew the background, explain why the applicant accepted the money, but would be no answer to the reference.

21 Finally, it is apparent that the applicant's preoccupation is his role as a 'crusader for justice'. That is, he explains at length, and with confusing detail, what efforts he has made on behalf of his various clients to ensure that they obtain some redress, often emphasising that he either received no payment for those services, or was prepared to accept a payment which was considerably reduced, or long delayed. As was repeatedly pointed out to him in the Tribunal, however, the focus of the Tribunal's inquiries was upon irregularities in dealing with, or accounting for, money which he did receive from clients. It is not surprising therefore, that the Tribunal formed the view that the applicant's responses and evidence generally missed the point of the references.

22 Turning to Mrs Tailor's evidence, she gave evidence that she thought very highly of the applicant and that it was her view that without his efforts, she would never have got her money back. In relation to the money, she was asked whether she offered to lend it to the applicant and her evidence was that she told him 'that he could have that money'. She said that he replied that it was Mrs Tailor's money and that it was up to her what happened to it and that he did say that there was some difficulty with the Colonnade matter that she could help with. Her evidence was that he could do what he liked with it, so that he could either pay her back or not. She did not think that he at any point said that she should take independent legal advice before proceeding with the transaction. She said that when he won the Colonnade case, he would pay the money back. She said that she was very cross that there was an inquiry into the payment, because she considered it to be a private matter between herself and the applicant.

23 When asked about her letter in which she said she was given the opportunity of having independent legal advice, she said that she was excited about getting her money and that she could not remember, but that he could have said 'something like that' to her. In cross-examination, she reiterated that she could not remember whether there was a discussion about independent legal advice. In response to a question from the applicant suggesting that he did not think she was a client at the time at which payment was made, she agreed: 'When that money was paid to me I was not your client any more,' (although that seems to us a question of law, and that her answer was incorrect). The evidence suggested that the letter dated 1 November 1998 was a 're-creation' of an original Mrs Tailor may have signed, but that she had signed the document

which was in evidence because the original, whatever its date, was unable to be found in the applicant's office.

24 On 1 November 2000, the applicant conceded that he had 'broken the Act' in relation to reference 14A. He called a witness in mitigation, who gave evidence that she had suggested to Mrs Tailor that it was undesirable for her to give or lend money to her solicitor, and that Mrs Tailor had become very angry at that suggestion. In his submissions in mitigation, he suggested to the Tribunal that Mrs Tailor would have given him the money even if she had been sent for independent advice.

25 The Tribunal found in relation to this reference that the applicant acknowledged that, at no time prior to the loan being made had there been the relevant acknowledgement in writing. It noted his concession that he did not give oral advice that it was desirable that Mrs Tailor should obtain independent legal advice. It accepted that Mrs Tailor was very fond of the applicant and was prepared to give the money to him, although it was in due course made as a loan. The Tribunal also found that the documents making reference to the loan which were signed by Mrs Tailor were brought into existence only after Mr Novell had drawn the applicant's attention to r 8.1 of the *Professional Conduct Rules*, and that those documents were prepared for Mrs Tailor by the applicant. The Tribunal's view was that the failure to comply with r 8.1 amounted to unprofessional conduct. It noted that the basis of the rule was that a solicitor would be in a situation of conflict of interest where there was a loan from a client and that, although Mrs Tailor was supportive of the applicant, it was often in precisely those circumstances that it was desirable that there should be independent advice. All of those findings were plainly open.

2.2 R14B of 1999 - Mr Aurthaveekul

26 The statutory background to this reference should be briefly set out. It is also relevant to the later R12 of 2000 (Gilchrist). Under the Act 'trust moneys' were defined as moneys entrusted to a practitioner in the course of legal practice for the use or benefit of a person or persons other than the practitioner, but so as to be under the exclusive control of the practitioner. Section 34 of the Act required every practitioner who received trust moneys, unless then dealing with them as directed by the person from whom they were received, to forthwith deposit them to the credit of a trust account. Section 34A provided that a practitioner might apply trust moneys towards the payment of costs and disbursements charged against the person for whose use or benefit the moneys were held if:

> '(a) that is authorised by the client under the terms on which the moneys are so held under the control of that practitioner; and

> (b) the practitioner within 14 days thereafter causes to be served upon that person a bill of costs in respect of those costs and disbursements showing that trust moneys have been applied by the practitioner towards the payment of those costs and disbursements.'

27 It is also desirable to bear in mind, in relation to references 14B and 12 of 2000, that s 58ZB of the Act provided that the remuneration of practitioners was regulated by determinations as to costs made by the Legal Costs Committee, save that, pursuant to s 59, a practitioner could make a written agreement with a client for the manner in which the practitioner was to be paid, including an agreement for lump sum payments. Such an agreement could be reviewed by the Supreme Court, pursuant to s 59.

28 It is also convenient to mention in relation to this reference an issue raised by the applicant which was common to a number of the references, being the unfortunate state of his records. That issue had, as we understand it, four distinct elements. As is common with the majority of legal practitioners, the applicant, of course, relied upon a computer system to maintain detailed records.

29 The first element relevant to this issue was that he asserted that he had limited computing skills and understanding, and that the 'inputs' into his computer system were done by others - that is, by members of his staff. He asserted that he was not therefore responsible for what was found on that system.

30 The second element of this issue also relates to the computerised system. Mr Novell agreed with the applicant, during cross-examination, that the system maintained on the computer was 'in a shocking state'.

31 So far as paper records were concerned, the third element of this issue related to what the applicant described as the 'torching' of his car. There does not seem to have been any evidence of this before the Tribunal, but it seems to have been generally accepted that there was a car and that there was a fire affecting the car in or about August 1998. As we understand it, the applicant's suggestion has always been that there was a substantial quantity of records contained in that car which, of course, were destroyed. The Tribunal appears to have accepted this. Tribunal members suggested to the applicant a number of times during the course of the hearing that it would be desirable if he directed his efforts towards obtaining, from other former clients, records which might assist the Tribunal in reconstructing the way in which he generally ran his practice, but he did not produce any relevant records. Subsequent to the torching of the applicant's own vehicle, there seems also to have been some damage to a rental car which he

hired, but whether there was any issue relating to records contained in that car is not clear.

32 The fourth element of this issue which was asserted by the applicant was that there was a file, or series of files, containing documents which were, or may have been, of importance to one or more of the references, which went missing at an early stage during Mr Novell's inspection. During cross-examination by the applicant, Mr Novell agreed that there was a morning in January of 1999 on which he had gone to the applicant's office and on which the applicant had been told by an employee, a Ms Lucas, that a file, or something of that nature, was missing. Mr Novell's evidence was that he understood that there had been an extensive search for that material. In relation to this particular reference, we should add that it was put to Mr Novell by the applicant, during cross-examination, that as well as a file going missing, a computer-generated copy of certain material had been deleted from the computer by a person unknown, but Mr Novell was, of course, not in a position to comment on that allegation.

33 The allegation in this reference was that on two occasions when acting for Mr Aurthaveekul, the applicant received trust moneys and failed to deposit them into his trust account.

34 The first amount is one of $6000. In a letter dated 11 August 1998, the applicant requested payment of $6000 to cover what, from the terms of the letter, are clearly estimated disbursements in relation to work to be done by two experts, in the sum of $3000 and $2000, together with an additional $1000 which is described as an amount required to cover the applicant's costs 'to date'. On 22 September 1998, a cheque for $6000 was received from Mr Aurthaveekul and was banked into the applicant's general practice account. The only bill of costs which can be located which may relate to this amount is one which is undated, but which is headed: 'Account for Legal Services June-August 1998.' The body of the account simply reads '[o]n agreed fee of $6,000.00', so that it is not a bill of the type contemplated by s 34A(b) of the Act. The evidence of Mr Novell was that when he went to the applicant's computer system, the only record of any date in relation to that account which he could find was a record of the file being opened on the computer on 7 March 1999, the day before his inspection. It was alleged that on 15 October 1998, the applicant paid accounts raised by the two experts in question of $1160 and $2799 respectively from the general practice account. Those amounts do not appear to be featured on any bill of costs.

35 As to the second amount, it was alleged that on 29 October 1998, the applicant received a further $8000, which was banked into his general account. Again, the only bill which may be relevant to this payment is one which is undated, but headed: 'Account for Legal

Services 1 September-25 October 1998.' It deals with solicitors' and secretarial costs and photocopying, and is expressed to be in the sum of $8000. Again, the only date which can be found is the date of the computer record of 7 March 1999.

36 What the applicant said about this reference in his preliminary oral answers to the Tribunal was, as the Tribunal noted, 'confused and conflicting'. In relation to the $6000, he agreed that he requested it, but was not sure of the date, and he agreed that it was paid to him. He asserted that he had done over $10,000 worth of work at the time and that the $1000 requested was a 'token fee'. It is not clear what relevance the applicant thought those assertions had.

37 He said that he had paid the money into the general account because that was 'the arrangement'. There were conflicting accounts of the arrangement, but the thrust of it seemed to be that the consultants had required that the amount go into the general account, in order that they could be certain that they would be paid, and that Mr Aurthaveekul, who was present at a meeting at which this was discussed (although he had limited English) 'had no objection'. The applicant said that he was not at liberty to tell the Tribunal why such an arrangement had been made, because that matter was confidential, but indicated that it was something to do with a 'bad experience' that the consultants had had in relation to another matter.

38 The applicant's answers at pages 24 and 25 of the transcript display complete confusion on his part as to what is required by s 34A of the Act. He seemed to be unable to distinguish between a bill of costs, and a request for money to be paid in advance on account of costs and disbursements. The relevant questions and answers are as follows:

> 'At the time you received the moneys from Mr Aurthaveekul and paid them into your general account you hadn't rendered him a bill, of course, for your fees and disbursements, had you?---I think he was. I think he had received a bill for $6000.
>
> In relation to these fees or not?---In relation to these specific fees.
>
> Are you sure about that? You don't have any papers in front of you?---I don't have the papers in front of me.
>
> So you think from your recollection that you may have sent him a bill?---Of course. I think a letter was sent to Thailand telling him to produce the 6000 or nobody would be doing any work.

> That wasn't quite what I asked?---No.
>
> I didn't ask whether you wrote him a letter requesting the money. I asked you whether you sent him an account?---I believe he was given an account and he was told it would be $6000, and at that stage there must have been on the file on the time cost billing the better part of $20,000 worth of work done at least. Mr Aurthaveekul has got the habit of inviting people to the restaurant. We sat in the restaurant for 5 or 6 hours while he went and discussed in detail what he thought had gone on and what had gone wrong.'

39 As to the $8000, the applicant said it was 'already owed' and that there had been a bill rendered for more than $8000. As to both amounts, the applicant said that Mr Aurthaveekul never paid in advance, and that he might have paid the $6000 in advance, but that the applicant did not think so. He said there had been accounts rendered for $6000, $8000 and $12,000. He said that there was a written authority from Mr Aurthaveekul to pay the money into his general account, but that Mr Aurthaveekul took that with him when he returned to Thailand. However, he appeared to suggest that the written authority was signed only at the completion of the matter in which he was acting.

40 In relation to this reference, and in relation to other references, particularly R12 of 2000, the applicant raised an issue of legal professional privilege. When Mr Novell gave evidence that he inspected client files of Mr Aurthaveekul in order to attempt to ascertain whether there had been any bills of costs rendered in respect of the $6000 or the $8000, the applicant objected that those documents were privileged. There was some legal argument in relation to that issue, and the Tribunal ruled that material which Mr Novell had obtained as a result of his inspection of the files of the applicant was admissible.

41 On 31 October, the applicant conceded to the Tribunal that in respect of this reference, there was $6000 that 'shouldn't have been dealt with in the way that I dealt with it'. On 1 November, he conceded that in relation to the first $6000, there was 'no defence'. He further said that in relation to that reference, there was an account, or series of accounts, given to Mr Aurthaveekul, but he conceded that there was no accounting 'in terms of section 34'.

42 He called one of the expert consultants to give evidence which the Tribunal understood to be directed to matters of mitigation. That witness gave evidence that he would not have accepted any arrangement which would have required him to have to wait for payment to be authorised.

43 As to the $8000, the Tribunal did not accept the applicant's assertions that he was instructed to pay it, or any other sum, into the general practice account. It found that the payment of the sums into the general account was in breach of the Act, a finding which appears plainly to have been open.

2.3 R12 of 2000 - Ms Gilchrist

44 This reference alleged that between 14 August 1997 and 25 November 1998, the applicant failed to pay into his trust account certain moneys set out in an annexed schedule, and which represented wholly future costs and disbursements, or alternatively, partly future costs and disbursements and partly costs and disbursements already accrued, but in respect of which no bill of costs had been raised. In the form in which it was finally placed before the Tribunal, it was alleged that upon requests made of Ms Gilchrist by the applicant, she from time to time paid to him cheques (12 in total) in an amount of $22,450 (submissions in reply of the Legal Practitioners Complaints Committee), for which no bill of costs had been raised. It was further alleged that those were paid into the practice bank account or cashed by him, rather than paid into the trust account.

45 The reference arose out of what was called either the 'Colonnade' or the 'shopping centre' action. Ms Gilchrist was one of a number of clients, each of whom was apparently the lessee of a shop in a shopping centre which went under the name of 'The Colonnade'. They all had a complaint of a similar nature against the former owners and managing agents of that shopping centre. It was the subject of an action in the Federal Court in which those clients instructed the applicant. It was in due course settled.

46 It is even less clear in respect of this reference than it is in respect of the others, what the applicant's answer was. In the oral answers he gave at the outset of the Tribunal hearing, the applicant said, in effect, that there had been many payments in that action. He could not recall the particular ones about which he was first asked. He certainly had requested money, not only for his own fees, but for the forensic accountant he engaged. He could not recall whether at the relevant time he had sent Ms Gilchrist any bill of costs for his fees. He said that the car which had been destroyed by fire had contained 'the Colonnade files'. A little later, he said that '[m]ost certainly' she had accounts rendered. He said that there were five statements by five other clients in that action to the effect that 'every cent has been accounted for' and that they had been given accounts. He said the money to pay counsel was paid directly to Jackson McDonald. He said that the clients had had 'accountings' of the money and that every couple of weeks there was a meeting at which all of the clients were present.

47 The applicant did agree that most of the cheques from Ms Gilchrist were placed into the general account, although he had a recollection of one being cashed to meet some pressing expense connected with the litigation. It should be noted that it is impossible to tell from the answers given at this point by the applicant whether, in saying that money was 'accounted for', he meant that money was only paid to him after he had rendered a proper bill of costs for it, or whether he was simply indicating that he had told the clients what their money would be spent on, or had been spent on, at the various meetings to which he referred.

48 Ms Gilchrist's evidence was that she had received a number of accounts which she identified. She paid an amount in the order of a little over $67,000 by way of costs. The Tribunal mentioned from time to time the calculations it made in respect of various amounts of costs for which there both were, and apparently were not, bills rendered. It was clear that not all of the payments made by Ms Gilchrist were, on her evidence, the subject of bills of costs.

49 It appeared that Ms Gilchrist had at times worked in the applicant's office in order to keep costs down. A letter from the applicant to all the Colonnade clients dated 9 November 1998 refers to his gratitude to Ms Gilchrist both for her assistance in keeping secretarial hours down, and for the loan of some bookshelves.

50 The applicant called a witness who was one of the clients in the Colonnade action. She said she had been given accounts. She said the payments that she made to the applicant were in response to accounts, but that she did not have the accounts with her and that she would object to producing them on the basis that at a meeting attended by the applicant and the Colonnade clients other than Ms Gilchrist in April 2000, it was agreed that those accounts were confidential. That objection was said somehow to be linked to the settlement of the action and the deed of confidentiality signed, but there was no evidence to suggest why accounts rendered by the applicant to his own clients would have been dealt with as confidential in that deed. It appeared that the witness had not been present at the meeting where that decision had been made, but had been informed about it by her husband, so that she was not really able to assist.

51 In the applicant's cross-examination of Ms Gilchrist, his focus was upon whether he had had accounts to pay from other people (such as counsel or the forensic accountant), whether he had done the work, and whether clients had meetings at which they were informed about the progress of the action. In response to a question from the Chairman during the course of his cross-examination, the applicant indicated the following, at page 182 of the transcript:

> 'I think these funds were taken - moneys were taken out of my general account, paid to keep Mr Christie's - a classic case in point. I paid moneys out and when the moneys were received back from the client there was only reimbursement of moneys that I had in fact paid.' [Mr Christie was an expert of some kind.]

52 It seems to us that the applicant was saying that when he asked Ms Gilchrist for money, he only did so when he had already disbursed his own funds out of the general account in relation to the Colonnade litigation and that he was able to put payments from Ms Gilchrist into his general account, because that was only reimbursement of what he had already paid. It appears that he took a similar view in relation to work done; that is, that there was no difficulty with his asking Ms Gilchrist to pay moneys provided that he had already somewhere recorded that he had done work at least equivalent in value to the money sought.

53 The problem with all of this, as the Chairman and other members of the Tribunal repeatedly sought to explain to him, was that it was not being suggested by the reference that he had stolen the money, but rather that he had failed to pay it to his trust account, or render proper bills of costs. After a short adjournment on 24 October, the applicant said that after discussion with his office administrator, it appeared to him that he 'might not have an answer' to the proposition that he had not properly accounted for the moneys paid to him by Ms Gilchrist, and that, in particular, there had not been appropriate bills of costs raised in relation to them.

54 There was issue taken by the applicant with Ms Gilchrist's evidence that she had on more than one occasion asked him to provide an account showing where the moneys had gone. Although it occupied some time, it was not strictly in issue on the reference. On a number of occasions, the Tribunal suggested to the applicant that he should, if he had provided accounts to other clients in relation to all of the sums paid in respect of the Colonnade matters, ask those clients for copies of the accounts, since it appeared that he sent similar, or identical, accounts and letters to each client. He repeatedly indicated his willingness to do so, but did not.

55 On 1 November 2000, the applicant conceded that Ms Gilchrist 'wasn't given an accounting for the moneys'. He also said that there seemed to be a problem with the accounts in the sense that he had searched his 'post out' books to see if accounts had been sent, but could not find entries for them. In the end, he made that concession only in relation to about $20,000 worth of costs, there being three payments in August and September of 1998 which he said had been paid into his general account properly after accounts had been rendered.

56 The Tribunal found this matter proved.

2.4 R5 of 2000 - Failure to respond

57 This reference alleges that between 29 January 2000 and 19 June 2000, the applicant was guilty of unprofessional conduct in that he failed to give to the Complaints Committee within the time limited in that regard, or within a reasonable time, a full and frank response to certain inquiries made of him by the Committee. The inquiries related to Ms Gilchrist. The Law Society's *Professional Conduct Rules*, r 1.4, state that it is the duty of every practitioner to respond within time and in the manner required by the Legal Practice Board to any requirement of the Board for comments or information on a complaint. That body had by the relevant time been replaced by the Complaints Committee, so the rule should be read as applying to that body.

58 By letter dated 27 January 2000, Mr Jordan advised the applicant that the Complaints Committee had received an enquiry from Ms Gilchrist. The letter said that the matter was 'as an enquiry only' at that stage and not as a formal complaint; it foreshadowed, however, that there were certain matters which appeared to be 'highly unusual', and that it was not unlikely that there would be further investigation as a complaint, or pursuant to s 25(1)(c) of the Act. A series of detailed allegations was made and a written response was sought within 14 days. A further letter of 1 February 2000 from Mr Jordan to the applicant referred to a telephone conversation of 31 January 2000 and confirmed that the applicant would provide certain materials to Mr Jordan. A letter of 10 February 2000 referred to the earlier letters and noted that there had been no response, other than the telephone conversation. It advised that the matters the subject of the first letter were now the subject of a 'formal enquiry without complaint', pursuant to s 25(1)(c), and further advised that unless a full and frank response was received by 5 pm on 14 February, there would be referred to the Complaints Committee the question of whether an application should not be made to the Supreme Court for an order suspending the applicant from practice pending the conclusion of the inquiry.

59 There was apparently then some discussion between the applicant and Mr Jordan. On 15 February, the applicant provided a variety of computer-generated documents and a covering facsimile. By letter dated 29 February 2000, Mr Jordan sought elaboration of, and clarification of, the material contained in those documents. Mr Jordan then wrote on 19 April 2000, seeking a full and frank response to the letter of 29 February. There was apparently a discussion on 5 May and some documents were provided to Mr Jordan, but in Mr Jordan's view (and in the view taken in due course by the Tribunal) nothing in that material addressed the matters raised in the earlier letters.

60 In his oral answers before the Tribunal, the applicant said in relation to the letter of 27 January 2000 that he did not recall seeing it and that he had moved from one office suite to another, apparently within the same building, so there was a possibility of misdelivery. He did, however, see a letter of 28 January, which made a small correction to the matters contained in the first letter. He did receive the letter of 1 February. He recalled 'dozens' of telephone conversations with Mr Jordan. He also recalled 'dozens' of letters. The applicant said that although there had only been one written response, in the form of the covering facsimile and the provision of a variety of documents, there had been 'dozens' of oral responses to the inquiries made of him. Further, a Mr Novatscov, who was apparently one of the clients providing a disproportionate amount of funding towards the Colonnade action, refused to provide information relating to his accounts to the Complaints Committee. It is not clear why this meant that no written response could be provided.

61 The applicant asserted to the Tribunal, apparently in connection with this reference, that he had made complaints about a number of people which had not been properly investigated, and that others had made complaints about him which had no substance. He agreed with a suggestion from the Chairman that he was suggesting that there was a conspiracy against him. The applicant also cross-examined Mr Jordan for some time about why certain complaints against him had been followed up and what had been done in relation to other complaints made by him. Much of that cross-examination is difficult to follow, because the details of the various complaints are not in evidence, and are not explained by the applicant. In relation to this and a number of 'non-response' references, the applicant said, during the course of cross-examining Mr Jordan, that at some stage he went to the Complaints Committee's office and explained to Mr Jordan that he was 'outraged' that a particular complaint had come in against him, and informed Mr Jordan that that was 'the final straw that broke the camel's back'.

62 On 1 November 2000, the applicant conceded that he had not provided a full and frank response to the inquiries referred to. He added: There were attempts, as Mr Jordan's evidence, to accommodate him, but it's clearly that it has not been good enough.'

63 The Tribunal found that there was a failure to give a full and frank response to those inquiries. The inquiries were, the Tribunal found, related in the main to financial aspects of the Colonnade litigation and were queries as to why the applicant had failed to pay moneys to his trust account, or to give accounts required by law. The Tribunal found, as in our view it was open to it to find, that the conduct disclosed either a deliberate attempt to conceal the true state of affairs regarding the way the applicant dealt with moneys

received from various tenants, or a complete lack of understanding of the duties of a solicitor in relation to the keeping of trust moneys.

2.5 R7A and R7B of 2000 - Failure to comply with orders

64 These references related to failure to comply with the orders made by the Tribunal to file answers to references 14A and 14B of 1999. The only response the applicant made in relation to these references appears to have been that he had lost many of his records when his car was set on fire and when certain files disappeared. He apparently made no attempt to seek an extension of time within which to file answers, and nor did he attempt to file even partial answers.

2.6 R6 of 2000 - Failure to respond (Fergus)

65 This is another allegation that between stated dates, the applicant failed within the time requested, or a reasonable time, to give a full and frank response to certain inquiries made by the Complaints Committee. Oddly, the failure was in relation to a complaint made by a client of the applicant, supported by the applicant, concerning another person.

66 The applicant and his client had alleged that the other person had misappropriated $100,000 from the applicant's client. By letter to the applicant dated 26 April 2000, the Complaints Officer sought a response to a question as to whether the applicant had issued a writ in connection with that matter, which he had said he was going to issue, and as to how far a police inquiry into the matter had progressed. That letter also advised the applicant that the other person had lodged a complaint against the applicant and inquired whether those matters were to be the subject of litigation. The reason for that letter was, as it was explained in evidence, that the Committee would generally refrain from investigating a matter which was the subject of uncompleted litigation or of a police inquiry, until those other matters had been finalised. There were follow-up letters seeking the same information. No response was ever received.

67 The applicant's response to this reference before the Tribunal was to agree that he had received some letters. However, it was his view, and his client's view, that nothing would be done about his complaint and, that he was being singled out by a conspiracy against him. The 'camel's back' was mentioned by the applicant. In addition, in his cross-examination of Mr Jordan, the applicant asserted that his complaint in relation to this person was not missing money, but that the person was 'going around uncertificated and practising as a lawyer'. Mr Jordan's response was that for him that would have 'paled into insignificance' when

he was also told that a practitioner, certificated or not, had stolen $100,000 from his client. It may be then, that the applicant thought the gravamen of his complaint about this person was that the person was acting as a legal practitioner while uncertificated, while Mr Jordan thought that the gravamen of the complaint was the theft of the money. Even if that is so, it does not justify or explain a failure to respond in relation to an inquiry about a matter initially raised by the applicant himself.

68 On 1 November, the applicant conceded that he failed to give a full and frank response to those inquiries. The Tribunal, of course, found that matter proved.

2.7 The Tribunal's conclusions generally

69 Having made the findings which we have outlined, the Tribunal found that, notwithstanding the support he received from some of his clients, the applicant's apparent lack of understanding of his obligations as a solicitor made him unfit to practise. That lack of understanding was, the Tribunal found, related to the necessity to keep proper accounts, to separate his own money from money held on trust for others, to have proper agreements for costs if acting on special arrangements, to give a proper accounting to his clients, and to comply generally with his obligations under the Act. The Tribunal therefore determined that it should make and transmit a report on the references to the Full Court and, pending the determination of the Full Court, suspended the applicant from practice.

70 The submission which was made to the Tribunal by counsel for the Complaints Officer was that normally each of the references would be such as to warrant the imposition of a fine. However, it was submitted that the applicant's conduct of the references was such as to demonstrate no understanding of his responsibilities to his clients, to other members of the profession, or to the Tribunal. A submission was sought to be developed to the effect that the basic incompetence and lack of efficiency in the conduct of the reference itself demonstrated that the applicant was not a person who should be permitted to represent clients. However, the Tribunal, during the course of argument, rejected that latter submission, noting that what was sought was the imposition of a penalty for specific allegations, and that there was no general allegation of incompetence.

Proceedings between the proceedings in the Tribunal and this motion

17 It can be seen that between the date of the hearing in the Tribunal in late 2000, and the present motion, there has been a very lengthy delay. A variety of applications have been made during that period. Some of them

are summarised in [71] – [109] of ***Lashansky v LPCC***. It is not, however, necessary to recount them, since they are only of peripheral relevance for present purposes. What may be of some relevance, is to mention that during the intervening period, the respondent has been suspended from practising.

The role of the Court

18 Section 30 of the *Legal Practitioners Act 1893* provided that, subject to s 29B (which dealt with appeals) if the Tribunal made and transmitted a report to the Full Court, the report 'shall be taken … to be conclusive as to all facts and findings therein mentioned or contained'. It further provided that the Court had power, upon reading the report and without further evidence, to fine the practitioner, suspend the practitioner from practice, to strike the practitioner off the Roll or to make any order which the Disciplinary Tribunal might have made pursuant to s 29A(3). It is not necessary to set out those other powers. The 1893 Act has been replaced by the *Legal Practice Act 2003* (WA), but these proceedings were commenced, and continue, under the former Act.

19 The Court's task, in these proceedings, is that of determining whether the respondent is a fit and proper person to remain on the Roll of Practitioners. In broad terms, the principles underlying proceedings of this kind are clear, and we do not understand them to be in dispute. Proceedings of this kind are not instituted in order to punish the practitioner, but to protect the public and maintain proper standards in the legal profession. Since the object is to protect the public and the reputation of the profession, the consequences for the practitioner may be either more or less severe than they would be if the only object of the proceedings was one of punishment (see ***Ziems v Prothonotary of the Supreme Court of New South Wales*** (1957) 97 CLR 279, ***Re A Barrister and Solicitor*** (1979) 40 FLR 1, ***Re Maraj (a Legal Practitioner)*** (1995) 15 WAR 12).

20 In what follows, we should note that we have had regard only to the motion books, papers handed up by Mr Lashansky, and submissions based upon those materials. The applicant submitted that we should also have regard to Mr Lashansky's conduct in other matters, in this and other Courts, and produced an affidavit containing some evidence of that conduct. The respondent objected. We have not found it necessary to take account of that material, and have not done so.

The respondent's unfitness to practise

21 Looking at the respondent's conduct first in terms of its intrinsic seriousness, and in isolation from any matters which might be regarded either as aggravating or mitigating, two things may be said about it. The first is that it is plainly serious. So far as the obtaining of the loan from Mrs Tailor is concerned, the following observations are relevant:

> In cases such as the present one, it is essential to remember, indeed to emphasize, that a solicitor stands in a fiduciary relationship to his clients. If he is to have business dealings with them on his own account, and in particular if he is to borrow money from them, the requirements of the law are rigorous. The need for the rigour is obvious. Commonly to a great extent, always to some extent, the solicitor is in a position of special influence in respect of his client. Clients must be able to rely upon the professional advice of their solicitor and to place in him the fullest confidence that he will protect them and handle their affairs in their interests. Where a solicitor wishes to borrow from a client, the client must be put in a position to make a free and informed decision about the proposed transaction. Since in these circumstances the interests of the client and of the solicitor can and generally must conflict, the best and easiest way to achieve this result is to insist that the client have independent and informed advice. If this does not happen, a heavy burden indeed lies upon the solicitor to show that he has done everything in his power to protect the interests of his client and to ensure that the client is aware of every circumstance that is or might be relevant to his decision.

Law Society of New South Wales v Moulton [1981] 2 NSWLR 736 at 739 - 740 per Hope JA.

22 So far as the references concerning Mr Aurthaveekul and Ms Gilchrist are concerned, again they are of a serious nature in the sense that they involved a breach of the protection which the law affords to the clients of legal practitioners in financial matters. Clients entrust legal practitioners with sums of money which are often significant, and frequently in circumstances where clients are not in a position adequately to protect their own interests. It is the duty of every practitioner to be scrupulous in ensuring that his or her responsibilities relating to the maintenance and use of trust accounts, and the rendering of accounts, are strictly observed.

23 However, it must also be observed that although the conduct, the subject of the Tailor, Aurthaveekul and Gilchrist references is of a serious nature, it is not conduct which necessarily and in all circumstances requires that a practitioner, who engages in it, should be struck off. There have been cases - and we shortly mention some of them - in which practitioners who have been guilty of misconduct in relation to clients'

funds have incurred a substantially more lenient penalty. Much depends, not only upon the nature of the misconduct, but upon the circumstances in which it occurred, and upon the legal practitioner's acknowledgement or otherwise of wrongdoing, and the practitioner's taking or failure to take steps to ensure that the misconduct is not repeated.

24 So far as the failure to co-operate with the Legal Practitioners Complaints Committee is concerned, that too is to be regarded seriously. The Complaints Committee is the body charged with the protection of the public, and it is the duty of practitioners to facilitate, and not to obstruct or fail to respond to, its inquiries. In ***Legal Practitioners Conduct Board v Trueman*** [2003] SASC 58; (2003) 225 LSJS 503, the practitioner in question had been guilty of a variety of different types of misconduct. However, in relation to failure to respond to inquiries from the relevant disciplinary body, Doyle CJ observed:

> In relation to the Board, the conduct involved frequent failure to respond at all, or within a reasonable time, to requests by the Board for information or explanations. This group of findings is particularly serious. It is serious because of the prolonged and repeated failure to respond properly to inquiries from the Board. It is well established that the professional obligations of a practitioner include the obligation to cooperate with the Board when it exercises its statutory powers. (at [8]).

We agree with those observations.

25 However, again it must be observed that this is not conduct of a kind which would necessarily and in all circumstances require that a practitioner be struck off. Much will depend not only upon the degree to which the practitioner fails to co-operate, or obstructs inquiries, but also upon the reasons, if any, which the practitioner gives for doing so, the personal circumstances of the practitioner at the time, and any subsequent conduct which suggests that the practitioner will, if placed in such a situation again, be co-operative.

26 In the case of Mr Lashansky, there are, it must be said, a number of factors which could properly be regarded as mitigating. Accepting, for present purposes, favourable evidence which was before the Tribunal, and accepting also many assertions made by Mr Lashansky from the Bar table at face value, we would identify the following mitigating factors.

27 So far as Mrs Tailor was concerned, Mr Lashansky had, it appears, been instrumental in enabling her to recover a very significant sum of money in circumstances where others had been unable, or unwilling, to assist her. Mrs Tailor was very grateful to Mr Lashansky and the

likelihood is that she would have been happy to lend him the money even had she been provided with independent advice pointing out the disadvantages of that course.

28 So far as Mr Aurthaveekul was concerned, Mr Lashansky had a genuine belief that he was entitled to deal with some or all of the sums referred to in the reference as he did. So far as Ms Gilchrist is concerned, the position is somewhat less clear, but it could at least be said that for a significant amount of the time when she was represented by Mr Lashansky, Ms Gilchrist was happy with his services. Further, it appears that although Mr Lashansky did not account for sums received from Ms Gilchrist in the conventional way, there were at least regular meetings involving Ms Gilchrist and other persons involved in the same litigation, at which some verbal reports were made about what Mr Lashansky was doing and why funds were required. In relation to all of the references dealing with the funds of clients, there was no finding that Mr Lashansky had stolen the money, or that he was motivated by personal gain.

29 So far as the 'failure to respond' references are concerned, it appears that Mr Lashansky was aggrieved - whether with any reasonable cause, it is impossible to say - by what he perceived to be the Complaints Committee's lack of even-handedness in the way in which it had dealt with complaints concerning his conduct, as compared with complaints concerning others. It was this irritation or sense of injustice which motivated him to fail to respond.

30 Finally, it should be noted that Mr Lashansky provided us with a number of examples of occasions on which he had expended considerable time and trouble in acting for persons who were disadvantaged and who were either not in a position to pay for his services, or who would be unlikely to be in such a position. Conduct of that kind is commendable.

31 If, together with the various mitigating factors to which we have referred, Mr Lashansky had been able to demonstrate an understanding of how it was that his behaviour had amounted to unprofessional conduct, had demonstrated contrition, and had been able to point to steps which he had taken or proposed to take to ensure that such conduct was not repeated, there might be a good case for a penalty which fell short of striking off, notwithstanding that the references were concerned with more than one type of conduct and that they extended over a period of time. That is particularly so, given that Mr Lashansky has been, as we noted, suspended from practice for a considerable period of time.

32 However, the difficulty in the present case is that the heart of the adverse finding relates not so much to Mr Lashansky's conduct, but to his lack of understanding of the obligations of a solicitor. That lack of understanding was, the Tribunal found, related to the necessity to keep proper accounts, to separate his own money from money held on trust for others, to have proper agreements for costs if acting on special arrangements, to give a proper accounting to his clients and to comply generally with his obligations under the Act. Having regard to the protective nature of the jurisdiction of this Court on an application such as the present, it is difficult to see how a practitioner who lacks understanding of such basic matters can be permitted to remain upon the Roll. It was therefore particularly important to us to ascertain from the respondent what, if anything, he had to say about his present understanding of those obligations.

33 Rather than attempt to summarise the somewhat diffuse submissions made by Mr Lashansky in response to repeated questions from the Court about what he wished to put forward in mitigation, and about what he now understood about his conduct, it is preferable, in our view, to set out some rather extensive passages from the transcript of the hearing before us. Those passages give a better idea than any summary could do about the nature of the respondent's response to this application, and about his present state of mind concerning the conduct, the subject of these references. Those passages appear as an annexure to these reasons.

34 It seems to us that a number of matters emerge from the submissions made by Mr Lashansky in relation to these references. One is that, to the present day, he has difficulty in appreciating the seriousness of the obligations which he has breached which relate to the handling of clients' moneys and the accounting for them. Another is that it appears that he regards his commendable conduct in acting for the disadvantaged as in some way able to be set off against, or to cancel out the conduct the subject of the references; it is almost as if he suggests that it does not matter so much what he actually did, because he is at heart a good person. That view misunderstands entirely the protective nature of this Court's jurisdiction and the necessity for legal practitioners to act not only honestly, but also competently and carefully. Finally, we would note that in his own words his attitude to the Legal Practitioners Complaints Committee - and indeed, it seems to us, towards the entire apparatus of professional discipline - remains one of defiance.

35 It is, in our view, clear that a practitioner's failure to understand the impropriety of his conduct, may be a factor of very great importance in

determining whether he or she is permitted to remain on the Roll. There are a number of cases to that effect. In ***New South Wales Bar Association v Evatt*** (1968) 117 CLR 177, the conduct of the practitioner was different from that found in these references. He was a party to the organising of the charging by a solicitor of extortionate fees, from which he in part benefited. His justification was that he considered the amount which a solicitor could charge his client was a matter for private arrangement between the solicitor and client. The Supreme Court of New South Wales had ordered his suspension from practice for a period of two years but, in concluding that he should not have been suspended, but should have been struck off, the High Court made these observations:

> The Supreme Court thought, moreover, that as the exercise of its disciplinary powers was, to some extent, a punishment for wrongdoing, mercy might be shown towards a young man who had not understood the error of his ways. The power of the Court to discipline a barrister is, however, entirely protective, and, notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved. This has already been pointed out by this Court in *Clyne v New South Wales Bar Association* **[**(1960) 104 CLR 186 at 201 - 202]. The respondent's failure to understand the error of his ways of itself demonstrates his unfitness to belong to a profession where, in practice, the client must depend upon the standards as well as the skill of his professional adviser. (at 183 – 184).

36 Another case which is instructive for present purposes is ***Law Society of New South Wales v Moulton*** (*supra*). In that case, the Supreme Court was dealing with the activities of a solicitor who had obtained loans from his clients to either himself or to companies which he controlled or in which he had a substantial interest. There were mitigating factors, which were in some ways similar to those in the present case. In all instances, Mr Moulton's clients appeared to be aware that they were in fact lending to him and were happy to do so, although they had not been advised that they should obtain independent advice. The clients had no qualms concerning their investments; the clients had been made fully aware of the nature of the security and the terms of the loan; the rate of interest was equal to or better than that commercially available; the practitioner had given evidence that he was ignorant as to the precise nature of the restrictions imposed upon him as a trustee (in relation to certain borrowings from an estate); and arrangements had been made for all the clients to be paid in full and it seems that none suffered loss. Nevertheless, in that case, as Hope JA observed, the ignorance which the practitioner displayed was not ignorance of some esoteric or difficult corner of the law, but was an ignorance of general principles applicable to

common activities of a solicitor (at 741). Hope JA concluded that '[s]uch an unawareness of and lack of care about the most elementary propositions of law concerning the responsibility he had taken on and the standards required of solicitors are themselves sufficient to justify the protection of the public by his removal from the roll' (at 743, Reynolds JA agreeing, and see Hutley JA at 759).

37 For completeness, it is desirable to deal with the cases referred to by the respondent as being relevant to categorisation of his conduct. He refers to the following.

38 ***Legal Practitioners Complaints Committee v Weston*** [2005] WASCA 81. This case was very different from the respondent's. It related to a sum of a little under $30,000 paid by the practitioner into his trust account and then without any authority withdrawn from it. There was a further sum of $3650 which was received on account of costs from a client and which was not paid into the trust account but was paid into a private trust of the practitioner unrelated to his practice. The practitioner had sought to blame his accounts manager (who was also apparently his de facto wife) for the deficiency, but the Tribunal found that that explanation could not be sustained. Further, the practitioner had simply abandoned his practice without ensuring that it would be properly administered. He was, not surprisingly, struck off. As the respondent points out, the respondent's misconduct was certainly not as gross as that of Weston. However, it is no answer to the proposition that the protection of the public requires that the respondent be struck off, to demonstrate that others have engaged in behaviour which was worse than his.

39 In ***Prothonotary of the Supreme Court of New South Wales v P*** [2003] NSWCA 320 a solicitor had pleaded guilty to importing a traffickable quantity of cocaine and had served a sentence of imprisonment. As the respondent points out, this is very serious behaviour. The solicitor was not struck off, but the Court accepted an undertaking from her to submit to urinalysis or medical examination as required for a period of two years. Again the conduct was very different from the respondent's and was, clearly 'worse' in the sense of being serious criminal conduct. However, that practitioner's attitude towards her wrongdoing was very different from the respondent's. She was, it was accepted, very contrite, the steps which she had taken towards rehabilitation were set out in some detail, she had been drug-free for almost four years (despite certain personal pressures) and there was substantial character evidence in her favour. The difference between P's situation and the respondent's is that, while her conduct was arguably

worse, she plainly demonstrated that she understood the seriousness of her wrongdoing and had taken convincing steps to remedy it.

40 ***Law Institute of Victoria Ltd v Bernstein*** [2005] VLPT 3 concerned a practitioner who had misappropriated various significant amounts of money over a period of time. He had been in a difficult situation following the dissolution of his professional partnership and found himself in financial difficulties. He felt unable to disclose his problems to his wife. He was very ashamed by his conduct, to the extent that he had apparently tried to commit suicide on two occasions. He had good character references, pleaded guilty, and had immediately surrendered his practising certificate when a receiver of his practice was appointed. Although he was 63 years of age, unlikely to easily return to employment, and would suffer severe financial consequences, he was suspended from practising for a period of approximately four years in order to mark the seriousness of that conduct. Again, it was much more serious conduct than that of the respondent, but the practitioner in that case was plainly vividly aware of the seriousness of his wrongdoing.

41 ***Legal Practitioners Complaints Committee and Cullen*** [2005] WASAT 211 involved unsatisfactory and improper maintenance of, and dealings with, a trust account. However, it was accepted in that case that the circumstances which gave rise to the conduct were a series of bank errors without any fault on the part of either the practitioner or his staff. Those errors were compounded by the failure of the practitioner's auditors to identify the problem and the failure of the practitioner's bookkeeper to correct it and bring it to the practitioner's attention. There was no allegation of dishonesty on the part of the practitioner. Further, and distinguishing that case from the respondent's, that practitioner promptly and properly conceded that, as a practitioner, he was responsible for the failure to identify and correct the bank's errors and for the consequent creation of negative balances in his client's trust ledger accounts. Once the problem was brought to his attention he corrected it promptly. Notwithstanding that the irregularities arose without the practitioner's knowledge or fault, and notwithstanding his prompt acceptance of responsibility and remedial steps, he was reprimanded, fined, and certain conditions were imposed upon his practice for a period in relation to the maintenance of trust accounts. This case, far from being one which suggests that the respondent should not be struck off, is a case which demonstrates how very seriously the responsibilities of practitioners in relation to trust accounts are regarded, for the purpose of proceedings of this kind.

42 Finally, ***Legal Practitioners Complaints Committee and Wiese*** [2007] WASAT 64 concerns receipt of trust money and failure to deposit it to the credit of trust accounts on 13 occasions, and the application of trust moneys towards payment of costs and disbursements without prior authority of the client or without serving a bill of costs within 14 days. The practitioner was fined $3000 and required to pay costs of $1000 in respect of each complaint. It is true that the conduct involved is not dissimilar from the conduct involved in some of the references against the respondent. There had been some early lack of appreciation on her part of her responsibilities as a legal practitioner, and there were also issues of poor administration. However, that practitioner had admitted responsibility, apparently understood that poor administration of her practice had resulted in serious breaches of the relevant legislation, had employed a competent bookkeeper, set up a system to deal properly with client funds, and ensured that she personally checked the banking each day. The case is illustrative of the weight to be given to the assessment of a practitioner's understanding of their responsibilities, and the weight to be given to any steps which the practitioner might have taken to ensure that, notwithstanding past breaches, the public is protected in future.

43 In our view, all of the cases analysed support the conclusion that, in the light of the respondent's lack of insight into his behaviour it is necessary for the protection of the public that he be struck off the Roll of Practitioners. We do not find that the respondent is a dishonest or dishonourable person. That is, we make no finding as to any moral guilt. However, it is our view that the facts and findings contained in the report of the Tribunal, taken together with the respondent's complete lack of understanding of the seriousness of those matters, have the effect that the protection of the public demands that he not be permitted to remain on the Roll.

44 We would therefore order that the respondent be struck off the Roll.

ANNEXURE

(Transcript excerpts from 11 April 2007, some explanatory matter inserted in square brackets.)

Transcript 216 - 218:

EM HEENAN J: Mr Lashansky, I wouldn't want you to misunderstand the gravity of what I am putting to you at the minute. If you want to make an impression on me in this court, then the things that you should address are your present circumstances, what you have been doing in the last seven years, what your hopes and aspirations are and why you want to continue to be on the roll as a practitioner. If you keep telling me about circumstances which led to the findings made by the Legal Practice Board of course I will listen, but it will make very little impression.

LASHANSKY, MR: Sir, the only thing that actually says it all is three documents that say it all about why I should be on this roll and shouldn't - will you hand this up, please.

EM HEENAN J: I have seen that document in one of the papers. What you are saying is that you have a reputation for helping underprivileged and disadvantaged people in the past and that you take pride in the work that you have done. Is that right?

LASHANSKY, MR: Sir, I don't only take pride in it. I would say that in all honesty probably the seven years that have passed have been a very bitter experience for me, the most bitter I have seen. Client after client that I could have won matches for I have watched just actually fall in a heap. The chairman of the tribunal seemed to believe that people will just come around and they will help other people and that there is a supposed notion of mateship that rules in Australia. Well, believe you me, if you are down you are down in this place.

Sir, one of the things that the Legal Practice Board couldn't return was a file belonging to a Mr Rodney Hedlam. That is in Mr Goetze's correspondence in 1768 which I will take you to, sir. Mr Rodney Hedlam lives in the Supreme Court garden. He didn't have a lawyer. He came to me. He is an Aboriginal gentleman. He had nothing in life. He had gone, he had taken his money in all good faith that he had earned as a day labourer in Mandurah and he had gone to some rather sharp motor vehicle sales people in Maddington that had sold him a vehicle at twice its cost. He came to me. He had nothing. I acted for him. Eventually I got the sale set aside on the basis they would reaccept the rubbish that they had given him and give him something that was more or less attractive. Those are the types of people I help, sir. I go out of my way to help people. Mr Davies is well aware - - -

EM HEENAN J: Just a minute, Mr Lashansky. Your proposition is that you have dedicated a lot of your life and time to helping the underprivileged and that they are in dire need of assistance and when it comes to legal assistance it is very hard for them to come by it. All that is laudable and I can understand why you would take pride in it, but what are you saying about the findings which have been made and what should be done with your future?

LASHANSKY, MR: Sir, I can't resile from the fact. I turned around and I said to Mrs Howell - not to Mrs Howell, to Mr Jordan, 'The last straw, it's broken the camel's back.' I subpoenaed Mrs Howell and Mr Jordan [of the Legal Practitioners Complaints Committee] to bring those complaint files. Until you see what is on those complaint files that caused me to adopt this, sir, you are taking a very bad approach. I beg you to read those complaint files.

I went to Mrs Howell and had sent out - and in her own letter to me on 30 April 2002 - I went to Mrs Howell several times in 1996 and I said, 'Mrs Howell, there is something rotten in here. Please help me. There's an issue that we've got now which the Full Court of this court has decided unanimously Mr Seng Fai Chan had a conflict of interest. Two elderly unrepresented people came along, went to Mr Chan and were lent 70 or 80 thousand dollars, is my memory, from the solicitor, the family trust of a solicitor working in Mr Chan's office, T.V. Sukumar.

These are facts, sir. These facts were found by Master Bredmeyer, Master Bredmeyer, a magnificent judicial officer the like of which you will never see again and who it was an absolute privilege pleasure to have always appear in front of, turned around and he said, 'You get summary judgment, Mrs Chan.' Mrs Chan then went to Rob Viner, Rob Viner signs this saying, 'Bredmeyer has gone off the rails,' and she then went and she managed to get Mrs Waldron to agree to $1000 a month. That never happened.

I take the judgment - and the letter is here - and I go to Mrs Howell and I say to Mrs Howell, 'Don't do anything, Mrs Howell, because what Mr Chan has done in this matter is criminal. His client, Frances Mary Chan, has gone and defrauded all of these people. Please - but I'm asking you, Mrs Howell, 86 per cent interest to an elderly 84-year-old and a 74-year-old from the family trust of a solicitor as found by Master Bredmeyer in a judgment,' and Master Bredmeyer didn't make many mistakes. He was a great judicial officer, and if I ever come out of this - and all I ever got was Master Bredmeyer's letter to me in appreciation because when he retired I sent him a bottle of Chivas Regal for his - Wallwork J, one of the finest men that you will ever appear in front of. I will appear in my home courts in South Africa again and one of these days you will see - - -

Transcript 220 - 222:

EM HEENAN J: Mr Lashansky, you must accept that our duty is to deal with this application on the basis of the facts as they have been found in the report. I am going to concentrate on what's in the report and what is in the findings of the board. I can't draw any conclusions which are inconsistent with or which qualify the findings of the board. I want you to tell me what you think I should conclude about the orders to be made against you in the face of those findings.

LASHANSKY, MR: Well, sir, the first and most important thing that you have to look at, sir, with the greatest respect - if you have a look at Ziems and that's the common law of this country - is that you have to look at the whole circumstances in which - - -

EM HEENAN J: Yes, I know that very well.

LASHANSKY, MR: So let's concede Ziems. So let's start off now with the Aurthaveekul reference, where the $8000 was not pursued. So there's only one amount of 6000 that's in issue. I could take you through the transcript, sir, but - - -

EM HEENAN J: No, the transcript is no more use to us than any of these other papers. It's the findings that are critical.

LASHANSKY, MR: Okay. I beg leave to hand that up, sir. That's the affidavit of 14 July in matter 1768 of 2004.

WHEELER JA: All right. Just for the transcript, you have given us a copy of an affidavit you have sworn in CIV 1768 of 2004, and the page you have opened to is annexure RJL23, which is a photocopy of a page of the Sunday Times, which appears to have on it an article dealing with the use of a first home buyer's grant to purchase a very expensive home. All right. What did you want to tell us?

LASHANSKY, MR: Ma'am, could you have a look just over the page. It's either the preceding page - there's a gold medallion.

WHEELER JA: This is the photocopy of - yes, there's a gold medallion, which I understand to be - and I may be wrong, but which I understand to be a photocopy of a medallion which you have, in evidence on other occasions, indicated was given to you by Mr Aurthaveekul. Yes, all right. Now, what submission did you want to make?

LASHANSKY, MR: The submission is that the property of Mr Aurthaveekul was sold for $6.8 million, ma'am. Mr Aurthaveekul's - the reference against me is 6000. The 6000 revolves into 3000 to Mr Peacock, 2000 to Mr Dryka [experts engaged for the Aurthaveekul matters] and $1000 to myself. Mr Novell's [the trust account inspector] letter to me, which is one of the exhibits over there in connection - it's the letter of the 26th of - I think it's 26 Feb.

WHEELER JA: Yes, carry on.

LASHANSKY, MR: Mr Novell said after a substantial amount of work had been done on the Aurthaveekul file.

WHEELER JA: So is this submission directed to the proposition that the moneys of Mr Aurthaveekul, with which the tribunal found you had not dealt appropriately, constituted what would be for a person of his means a very small sum. Is that where this is going?

LASHANSKY, MR: Ma'am, it's not - the $8000 was not found against me. It was not pursued. So there's only 6000 of which three of it went to - or Dryka and Peacock. Effectively there was a $1000 amount there that Robert Lashansky got that he ought not to have got. Now, one looks at the value of that home at 6.8 million. There's no complaint here from Mr Aurthaveekul that 'You've taken my money and you've dudded me.' Just - - -

EM HEENAN J: No, Mr Lashansky. The point is that a solicitor acting in those circumstances, paid money by a client, should pay it into his trust account. It doesn't matter whether it's $10 or a thousand or a million. It wasn't your money to pay into your account. It should have been paid into your trust account, and the fact that it wasn't suggests that you're not aware of or that you don't respect the obligations on a practitioner. That's the point.

LASHANSKY, MR: Sir, I come back to the answer to that, and it's dealt with sometimes in the transcript. The procedure that was adopted in Mr Aurthaveekul's matter was put to Mr Angelo Pisano at Jackson McDonald. He then contacted two of his senior partners, Mr Gentilli and Mr Fyfe, and we believe that the procedure was lawful. So if it subsequently turned out to be unlawful, as your Honour is now suggesting and which the tribunal has found against me, well, unfortunately, I was acting on improper legal advice. I should have not done it, sir. In the circumstances the amount of money that's involved in it is absolutely minuscule compared to what was in issue at the house. An amount of work had been done.

Transcript 223 - 224:

EM HEENAN J: The problem about that is that you set yourself in defiance of a lawfully appointed authority who has an obligation to supervise your conduct and you seem to be doing it still. The fact that you do set yourself at defiance of a lawfully appointed authority is far more alarming than what may be one or two otherwise minor transgressions.

LASHANSKY, MR: Sir, if one reads the transcript that's what Mr Ley said. These are minor transgressions and would normally get a fine et

cetera but I come back to it, sir. This is not an act of defiance that took place by somebody in vacuo. This is not - - -

EM HEENAN J: You do admit it's an act of defiance.

LASHANSKY, MR: Of course it was an act of defiance.

EM HEENAN J: Well, there you go.

LASHANSKY, MR: And I stood my ground, sir, and I carry on standing my ground. I will tell you why it's not an act of defiance to the extent that you, sir, would wish it to be portrayed against me. The point of the matter is that there comes a time and a point in life that you have to say, 'enough is enough'. At the end of the day if it has cost me my practice certificate and if it has cost me being on the roll, sir, I will have to wear it and I will cop it; but I can't cop Mr Jordan phoning me up when he has got a written formal complaint from Ms Gilchrist dated 15 December 1999. He then turns around to me and he says:

> Telephone attendance on Mr Lashansky. He confirms he is in his trust account 240 and he's expecting it to be cleared today. He undertook to teach each of the clients -

sir.

> In the interim -

et cetera, et cetera, and then he says:

> I said to Lashansky that everything was in order.

Meanwhile, he was sitting with a formal complaint from Ms Gilchrist.

Transcript 232:

LASHANSKY, MR: I don't go around over here, I don't deserve to be struck off. I don't deserve to join the scum of the earth that's been struck off over here and has not been struck off like Mr Oates. I sat around here and I did my very best to uphold justice as I see fit and I'll carry on to uphold justice and I carry on to have the greatest respect for the judges like Owen Dixon, and if I go back to South Africa only learning how great a judge Sir Samuel Griffith was, then at the end of the day, you know what, I'm a better man for it. And if I had to stand over here and lie to you and say, 'Do this, don't do that' - look, I'm sorry, sir, that it landed up like this. I really didn't ask that it happen this way.

I will get you your witnesses that I shouldn't be struck off. Try Wallwork J, try Bredmeyer M, try Kerr J, those are the people I appeared of - I went over there, sir, and I did my work. I worked myself absolutely

into the ground. It didn't work and it didn't happen, but at the end of the day, sir, I did my very best; and when you've done your very best in life - I shouldn't have perhaps borrowed Mrs Tailor's money, but when you read Mrs Tailor's letter of 17 December 1999 you will know why that money was borrowed. I don't think I am guilty of that offence.

I have sat down again, sir, and I have had a good long look at the rule 9. There is no personal benefit to me. Mrs Tailor sets it out. She has written to the Colonnade people when she found out, and this is at a time when she had heard it from me, 'Oh, don't worry about it. Surely, there's nothing wrong. Peter Jordan has assured me.' She wrote to the Colonnade people, she was so upset about the circumstances on which it happened. You have to read that letter, sir.

Transcript 241 - 245:

LASHANSKY, MR: Sir, somebody has come along and they have removed the sovereign. I'm told that the sovereign has been removed but, sir, when you go and stand in the High Court and you argue and you listen in the High Court they still say, 'God save the Queen,' and the issue is the crown prosecutes, and on 6 November 1999, sir, the people of Australia unanimously said, 'We want our sovereign. Please keep our sovereign.'

Somebody has come along here through the back door in a Legal Practice Amendment Act and started changing judicial oath. I don't think that it's a matter that Mr Davies trivialises. You took an oath, sir, Mr McGinty has gone and changed that oath. You take an oath to the State of Western Australia that doesn't exist.

WHEELER JA: Mr Lashansky, I am having difficulty seeing what this has to do with the question of what we should do in relation to the report.

LASHANSKY, MR: Ma'am, I have to tell you, and that's the reason why one should never make insincere apologies. The sovereign, her Majesty, was asked to apologise in February 2005 for the bombing of Dresden and her Majesty turned around and she said, 'No.' She stood by the men of bomber command that had gone there and 58,000 of them had lost their lives, and she wouldn't apologise. She wouldn't make an apology, but the Dresden cathedral that was destroyed - her Majesty sent her own money to help in the reconstruction of it.

One turns around - I'll help. I'll help in the reconstruction like her Majesty did but, sir, I want justice and I won't apologise. I shouldn't do this and I really - I know exactly what I'm doing is - may be evidence of lack of contrition et cetera, but at the end of the day I'm upset that her Majesty has been removed. I'm upset that dieu et mon droit is not - prosecutions should still go ahead in the name of the crown, those that have gone ahead since Governor Macquarie arrived here. That's the way it is, sir, and if you

want to go ahead and you want to make constitutional changes, by all means, but first go and - - -

EM HEENAN J: I think you mean Governor Phillip.

LASHANSKY, MR: I mean Governor Phillip, sir. I apologise, sir. I'm getting carried away, but that's the issue, sir. I see these things that happen and it upsets me, it really does, and I can't turn around and say to you it doesn't upset me, because it does, and if I have to say to you the biggest change that Mr McGinty brought in was he is now allowing people what I complained about Mr Novell - he is allowing people to go ahead during the course of an investigation and he has made it quite clear that the legal professional privilege is now capable of being abrogated. That's wrong, sir. Every time a client comes in to me now if I have to practise - - -

EM HEENAN J: Mr Lashansky, what has this got to do with the decision that we have to make in relation to these seven findings against you?

LASHANSKY, MR: Sir, at the end of the day you should always do like the great Henry Wallwork used to do - you temper your justice with mercy and you temper your mercy with justice, and at the end of the day Wallwork J was a champion at that and he did it. At the end of the day you can have a look, sir. I didn't get any financial gain - 394 and - there's no misappropriation.

EM HEENAN J: Is there any point in me asking you again, and for the final time, what you suggest we should do with you?

LASHANSKY, MR: Well, you should give me exactly the punishment Mr de Barran Cullen got, $8000 fine for I don't know how many thousands on his second offence, sir, maybe a thousand-dollar fine on the matters, sir. I believe that no more than a reprimand is warranted - a thousand dollars in the wrong account on a $7-million home. Mrs Tailor's loan - unfortunately IMF didn't exist and at that time I still believed the old law, but there's another problem with Mrs Tailor.

EM HEENAN J: Anyway, you have answered the question, you say a fine or a reprimand.

LASHANSKY, MR: Sir, at the end of the day, even a fine is - bearing in mind that I have lost seven years income, plus a couple of hundred thousand dollars which I'm still trying to recover in fees when my files got suspended, but there's another issue, sir. Mrs Tailor, was she actually a client of mine at the time this loan was made? Mr Wayne Martin QC was approached by the Ministry of Fair Trading and Mr Wayne Martin set up a regime because the two criminal trials still had to take place and the claim of Mrs Tailor was subrogated to the Ministry of Fair Trading.

So at the end of the day there's a dispute as to whether Mrs Tailor was actually a client but, more importantly, sir, under normal circumstances I probably would have sent Mrs Tailor immediately, in fact, I actually believed earlier in the piece, when I actually got the good news, that I told Mrs Tailor to take advice and that she repeated to Mrs Fussell and go and take it, but then this Wayne Martin confidentiality regime took place and Mrs Tailor was paid back.

She bought the house that she was living in in Maddington and sold it for double and she wouldn't have had nothing. When I found her she was sitting in one room in her mother's premises. Nobody wants to do anything, sir. I would say to you that I do a bit of community work et cetera but, sir, really and truly, I don't think I have got any hunger left in me for the law.

EM HEENAN J: The finding is that Mrs Tailor was a client of yours.

LASHANSKY, MR: Yes; but at the end of the day, should that have been admitted? Mrs Tailor's father went to the Ministry of Fair Trading - - -

EM HEENAN J: That's the finding.

LASHANSKY, MR: Yes, I know, sir, but the point of the matter is that those hearings didn't proceed the way they ought to have proceeded. There was a whole lot of material that I had been desperate to have - I would have loved to have put to Ms Gilchrist - and Ms Gilchrist's own letter of complaint, why wasn't that sent to me, sir? Why did I have to wait until Malcolm CJ gave an undertaking two and a half years later? Why wasn't it given to me when Ms Gilchrist complained?

The Legal Practice annual report always says that these complaints are given to practitioners unless there's a good reason. Why wasn't that complaint given to me? Maybe Mrs Howell could tell you. And the reason it wasn't given to me, sir, is a despicable reason. There was $241,000 in my trust account; had I known the identity of Ms Gilchrist - and this is actually sitting in the document - I would never have released Ms Gilchrist's money. I would have gone immediately, taxed up her account and then Ms Gilchrist wouldn't have got the money. That's plain and simple, if I had known that she had complained. Mrs Tailor's letter, sir, I have to come back to that.