[2021] WASAT 82

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and METAXAS [2021] WASAT 82
MEMBER	**:**	JUDGE K GLANCY, DEPUTY PRESIDENT DR S WILLEY, SENIOR MEMBER MS M CONNOR, MEMBER
HEARD	**:**	29 APRIL 2021
DELIVERED	**:**	14 JUNE 2021
FILE NO/S	**:**	VR 176 of 2019
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND ARTHUR METAXAS Respondent

Catchwords:

Unsatisfactory professional conduct - Legal practitioner commencing, serving, maintaining and prosecuting proceedings which were always doomed to fail

Legislation:

Civil Law (Wrongs) Act 2002 (ACT), s 188(3)
Commercial Arbitration Act 2012, s 11(3), s 11(4)
Legal Profession Act 2008 (WA), s 402, s 404, s 438(1)

Legal Profession Conduct Rules 2010 (WA)
Legal Profession Uniform Law Application Act 2014 (NSW), Sch 2 cl 4(1)

Result:

Finding of unsatisfactory professional conduct made

Category: B

Representation:

Counsel:

Applicant	:	Ms P Cahill SC & Mr S Merrick
Respondent	:	Mr M McCusker QC

Solicitors:

Applicant	:	Legal Profession Complaints Committee
Respondent	:	Metaxas Legal

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

Briginshaw v Briginshaw (1938) 60 CLR 336
Degman Pty Ltd (In Liq) v Wright (No 2) [1983] 2 NSWLR 1
Fountain Selected Meat (Sales) Pty Ltd v International Produce Merchants Pty Ltd (1988) 81 ALR 397
J-Corp Pty Ltd v Australian Builders Labourers Federation Union of W**o**rkers (No 2) [1993] FCA 70; 46 IR 301
Legal Profession Complaints Committee and Amsden [2014] WASAT 57
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; (1992) 67 ALJR 170, 171
Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129 [10]

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 In 2018 the Practitioner acted for a party to a dispute arising under a contract to which the *Commercial Arbitration Act 2012* (WA) (**CA Act**) applied. The terms of the contract provided that disputes arising under the contract would be resolved by an arbitrator. The contract also provided that in the event of a dispute arising either party could nominate an arbitrator and, where they had not agreed to the appointment of an arbitrator, either party could request the President of the Law Society of WA (**the President**) to appoint the arbitrator seven days after the initial nomination of an arbitrator by a party.

2 In this case, a request that the President appoint an arbitrator was properly made by the Practitioner after the parties were unable to agree to an arbitrator. Before receiving any response from the President, the Practitioner brought proceedings in the Supreme Court seeking that the Court appoint an arbitrator. The day after those proceedings were commenced the President appointed an arbitrator. Despite knowing that, the Practitioner then served the proceedings. The solicitor for the defendant then informed the Practitioner that his client agreed to the arbitrator appointed by the President resolving their dispute. Despite that, the Practitioner appeared at a hearing before then Chief Justice Martin and sought an order that the defendant pay the costs of the proceedings on an indemnity basis. That order was refused by the Chief Justice, who instead ordered the plaintiff to pay the defendant's costs fixed at $700.

3 The former Chief Justice was critical of the Practitioner's conduct. He expressed the view that:

> (a) any party reasonably advised would have appreciated that the proceedings had no prospect of success at the time they were instituted on the basis of the information then available;
>
> (b) at the time the proceedings were served the Practitioner had no basis for believing that the defendant would not accept the arbitrator who by then had been nominated by the President and in those circumstances, the service of a proceeding, which he considered was in any event doomed to fail, was entirely inappropriate and resulted

in the dissipation of the limited resources of the court and in the incurring of unnecessary expense by all of the parties to the proceedings; and

(c) the problem referred to in (b) was compounded by the futile pursuit of the proceedings for the sole purpose of recovering costs on behalf of the plaintiff.

4 In these proceedings the Legal Profession Complaints Committee (**LPCC**) claims that the Practitioner commenced, served, maintained and prosecuted the proceedings in the Supreme Court on behalf of his client without any reasonable basis for doing so. It says that that conduct amounts to unsatisfactory professional conduct within the meaning of s 402 and s 438 of the *Legal Profession Act 2008* (WA) (**LP Act**).

5 The Practitioner accepts that he commenced, served, maintained and prosecuted the relevant proceedings in the Supreme Court but does not accept that he had no reasonable basis for doing so. Indeed, the Practitioner gave evidence in cross-examination that, having reflected upon the matter, he maintains that he has always acted in the best interests of his client and in accordance with his professional obligations.

6 The Practitioner also submits that even if we were to find that he had no reasonable basis for his action we might still be unable to find that his conduct either:

(a) fell short of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence; and

(b) fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner,

such that we would be unable to find that it amounted to unsatisfactory professional conduct.

7 Accordingly, while the ultimate issue to be determined is whether the conduct of the Practitioner amounted to unsatisfactory professional conduct, we must first determine whether the Practitioner had any reasonable basis for any or all of the steps he took in the Supreme Court proceedings and whether his conduct could be said to be of a kind set out in (a) or (b) of paragraph 6 above.

Conclusion

8 For the reasons set out below we have concluded that:

1. the Practitioner's conduct in commencing, serving, maintaining and prosecuting the proceedings in the Supreme Court was done without any reasonable basis; and

2. that conduct constitutes unsatisfactory professional conduct because it was conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

Applicable legislation, onus and standard of proof

9 This proceeding against the Practitioner has been brought under s 438(1) of the LP Act. Section 438(1) of the LP Act confers jurisdiction upon the Tribunal to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

10 The Committee bears the onus of proving its allegations of professional misconduct against the Practitioner. The civil standard of proof ('on a balance of probabilities') applies together with the ***Briginshaw***[1] approach which requires cogent evidence to be adduced and for the Tribunal to feel an actual persuasion of the occurrence or existence of relevant facts. As the High Court explained the position in ***Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd***[2] the significance of ***Briginshaw*** is that the seriousness of the matter and of its consequences do not affect the standard of proof, but the strength of the evidence necessary to establish a fact required to meet that standard on the balance of probabilities may vary according to the nature of what is sought to be proved.

11 The term 'unsatisfactory professional conduct' is defined in s 402 of the LP Act. The definition, for the purposes of the LP Act is:

> **unsatisfactory professional conduct** includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of

[1] ***Briginshaw v Briginshaw*** (1938) 60 CLR 336.
[2] ***Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*** [1992] HCA 66; (1992) 67 ALJR 170, 171 (Mason CJ, Brennan, Deane and Gaudron JJ).

> the public is entitled to expect of a reasonably competent Australian legal practitioner.

12 The definition of professional misconduct, which is the more serious form of unprofessional conduct, is found in s 403(1). As the applicant has only alleged that the Practitioner's conduct amounts to unsatisfactory professional conduct it is not necessary to recite that definition.

13 Section 404 of the LP Act sets out particular conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct. None of the kinds of conduct set out in that section is of the kind which the applicant says was committed by the Practitioner. But that is not the end of the matter because s 404 expressly provides that the conduct set out in that section is not the only conduct which can be found to be unsatisfactory professional conduct or professional misconduct. That is, conduct which is not mentioned in s 404 may nevertheless amount to either unsatisfactory professional conduct or professional misconduct.

14 In its application to the Tribunal the LPCC has stated that the Practitioner's conduct was unsatisfactory professional conduct because it:

> (a) fell short of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence; and
>
> (b) fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

15 The criteria in (a) above does not form part of the definition in s 402 of the LP Act. Why it was asserted that the Practitioner's alleged conduct fell short of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence was not particularised in the application (by reference for example to any standard of practice set out in the *Legal Profession Conduct Rules 2010 (WA)*). Nor were any submissions advanced by the LPCC as to how falling short of that standard would bring the conduct within the definition of unsatisfactory professional conduct. In her opening, Senior Counsel for the LPCC referred only to the conduct coming:

> …within the inclusive definition of unsatisfactory professional conduct in section 402 of the Legal Profession Act as conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonable competent practitioner.[3]

Chief Justice's views

16 We have referred to the view which the former Chief Justice took of the Practitioner's conduct when he heard the application on 8 May 2018. That view does not determine these proceedings and we are entitled to take a view contrary to that of the Chief Justice because we must form our own conclusions as to the facts and the characterisation of the Practitioner's conduct as we find it to have been.

17 The transcript of the proceedings before the Chief Justice on 8 May 2018 is, however, material to which we can have regard in coming to a view about the Practitioner's intentions and beliefs at that time because he made certain statements to the Chief Justice about those matters.

Relevant facts

18 The facts of this matter were largely agreed between the parties. Some facts which were not agreed were not in dispute.

19 We make the following findings of relevant and uncontroversial facts:

1. The Practitioner was at all relevant times an Australian legal practitioner within the meaning of s 5 of the LP Act.

2. The Practitioner has been in practice for approximately 45 years, having been admitted in December 1976.

3. In around March 2018 the Practitioner was instructed to act for a client in relation to a dispute arising under a contract for the sale of a rent roll. His client was the seller. The dispute concerned the sum payable under the contract.

4. The contract provided that disputes arising under the contract were to be resolved by an arbitrator.

[3] ts 7, 29 April 2021.

5. Specifically, clause 20.3 of the contract provided that the arbitrator was to be agreed between the parties but that:

> [I]n default of agreement as to the Arbitrator within seven (7) days after nomination in writing by any party the Arbitrator shall be a person appointed by the President of the Law Society of Western Australia.

6. The contract did not expressly prescribe a period of time within which the President was required to make an appointment of an arbitrator.

7. On 19 March 2018 the Practitioner nominated a person to be the arbitrator to resolve the dispute in accordance with clause 20.3 of the contract.

8. The buyer did not accept that nomination and communicated that view to the Practitioner via its solicitor.

9. The parties, via their respective solicitors, continued to discuss the issue of how the dispute was to be resolved and who might be appointed as arbitrator until 9 April 2018.

10. On 9 April 2018 the Practitioner wrote to the President requesting her to appoint the arbitrator as required by clause 20.3 of the contract. That was, self-evidently, significantly more than seven days after the Practitioner had nominated to the buyer his client's proposed arbitrator.

11. That same day (9 April 2018) following receipt of a copy of the Practitioner's letter to the President, the buyer's solicitor emailed the President and copied that email to the Practitioner. In the email he informed the President that the appointment of an arbitrator was premature and requested the President defer the appointment of an arbitrator.

12. On 12 April 2018 the Practitioner sent an email to the President, which he copied to the buyer's solicitor, in which he indicated that he disagreed with the proposal to defer the appointment of the arbitrator and

asked that the President appoint an arbitrator 'at her earliest convenience'. No specific request for an acknowledgement of receipt of the email or for a response within a specified time was made by the Practitioner.

13. Despite the Practitioner's email to the President, the parties' solicitors continued to correspond about the possibility of reaching agreement as to the appointment of an arbitrator.

14. On 16 April 2018:

    (a) the Practitioner wrote to the buyer's solicitor and informed him that unless he withdrew his email to the President requesting deferral of the appointment of an arbitrator by 5 pm that day he would the following day commence proceedings in the Supreme Court for the appointment of an arbitrator pursuant to s 11(3) of the CA Act;

    (b) the buyer's solicitor responded saying that he would not withdraw his letter to the President; and

    (c) the parties subsequently exchanged emails regarding the manner of service of the foreshadowed proceedings.

15. On 18 April 2018 the parties corresponded about whether they could reach agreement as to the appointment of an arbitrator but when the buyer's solicitor indicated that he would not provide the name of a person he was prepared to have appointed as the arbitrator, the Practitioner sent an email to him stating that the seller would commence proceedings in the Supreme Court in the event that the buyer did not either agree to the Practitioner's original nominee or nominate another arbitrator suitable to the Practitioner. Neither of those things were done by the buyer's solicitor.

16. On 19 April 2018 the Practitioner caused to be filed an originating summons and supporting affidavit commencing Supreme Court proceedings ARB 6 of

2018 seeking an order under s 11(3)(b) of the CA Act that the Court appoint as the arbitrator the same barrister he had previously nominated to the buyer's solicitor.

17. On 20 April 2018 the Law Society of Western Australia sent an email to the Practitioner attaching a letter from the President informing him that she had appointed an arbitrator. That arbitrator appointed by her was a different barrister to that nominated by the Practitioner.

18. On 20 April 2018 the Practitioner served the proceedings on the other party by email and attached to that email a copy of the President's letter appointing the arbitrator.

19. On 20 April 2018 the buyer's solicitor emailed the Practitioner endorsing the President's appointment of the arbitrator.

20. The Practitioner came to know of that endorsement by about 2 pm on 20 April 2018.

21. The Court listed the originating summons for a directions hearing before the then Chief Justice on 8 May 2018.

22. Prior to the directions hearing the Practitioner prepared and filed affidavits sworn by him on 1 and 2 May 2018 in support of an application that the defendant (buyer) pay the plaintiff's (seller's) cost of the proceedings on an indemnity basis.

23. At the directions hearing on 8 May 2018 an application for indemnity costs was made by the Practitioner on behalf of the plaintiff (seller) while the defendant's (buyer's) solicitor applied for an order that the plaintiff (seller) pay the defendant's (buyer's) costs of the proceedings. The Court dismissed the proceedings and the plaintiff's costs application and ordered that the plaintiff (seller) pay the defendant's (buyer's) costs fixed in the sum of $700.

20 We also accept the Practitioner's evidence that at the time he brought the proceedings he considered that the buyer and his solicitor

had been trying to frustrate the timely payment to the seller of the proper amount owing under the contract by various means, including by:

1. positing the view that the issue of how much was owed to the seller by the buyer was an issue to be resolved by accounting methodologies rather than a dispute arising under the contract;

2. refusing to agree to the nominated arbitrator;

3. refusing to propose an alternative arbitrator; and

4. seeking to have the President defer the appointment of an arbitrator.

21 It is not necessary for the purposes of these proceedings to determine whether the Practitioner's view about the buyer's conduct was correct. We note though, for the purposes of rounding out the factual background, that the buyer's solicitor ultimately accepted that the dispute was a dispute about the interpretation of the terms of the contract and that the dispute was resolved in the seller's favour.

The Practitioner's evidence on crucial matters

22 We do not accept that the Practitioner was entirely honest in his evidence before us about matters crucial to the resolution of this matter. Instead, we find that the Practitioner has endeavoured to justify or explain aspects of his conduct with the benefit of hindsight and in a way which would now put the best light upon particular actions taken or statements made by him in the course of his representation of his client and his dealings with the LPCC.

23 Of importance to the resolution of this case is the issue of whether the Practitioner intended to commence proceedings under s 11(3) or s 11(4) of the CA Act. This matters because it goes to the issue of whether the Practitioner had any reasonable basis for commencing the proceedings or whether the proceedings were doomed to fail. Although the Practitioner's evidence at the hearing before us was that he intended to commence proceedings under s 11(4) of the CA Act, we are unable to accept that evidence. Our reasons for coming to that view are set out below.

24 First, the Practitioner accepted that before he commenced the Supreme Court proceedings he made no inquiries of the President about whether, despite having received the buyer's solicitor's request to defer

the appointment, she intended to appoint an arbitrator or about the time in which any such appointment might be made. The Practitioner gave evidence in his witness statement, and maintained under cross-examination, that the reasons for not having done so were that:

(a) there was no procedure in place pursuant to which a party seeking the President to appoint an arbitrator could contact the President to make inquiries about the progress of the appointment of the arbitrator; and

(b) he had a 'strong conviction' that having a private communication with the President would have been improper because it would have been embroiling her in a dispute between the parties about the appointment.

25 We are unable to accept that explanation in light of the following:

(a) while no procedure was in place for following up with the President as to her progress or intentions in respect to an appointment of an arbitrator, the solicitors for each of the parties had been in contact with the President about matters related to the appointment after the initial request for appointment had been made: the buyer's solicitor, to request the deferral of appointment and the Practitioner, to urge the President to disregard that request and proceed 'at her earliest convenience';

(b) neither of those approaches to the President were 'private communications' in that each solicitor copied the other into the communications; and

(c) in cross-examination the Practitioner accepted that writing to the President and copying the communication to the other party would not amount to a private communication and agreed that adopting that course would not have been inappropriate.[4]

26 It is clear to us from those circumstances and we find that the Practitioner had not been concerned about embroiling the President in a dispute about appointment only some days earlier and had been able to contact the President on that occasion without the existence of a formal

[4] ts 45, 29 April 2021.

protocol and in a manner which did not amount to a private or improper communication.

27 In the result, we find that the evidence given by the Practitioner about his reasons for not making inquiries of the President was disingenuous and cannot be accepted as a truthful account of the reasons for not making inquiries of the President at the time.

28 Second, the originating summons states that the proceedings were brought under s 11(3) of the CA Act. That section provides that where the parties have not agreed on the process for the appointment of an arbitrator, and have been unable to agree on the arbitrator, an arbitrator is to be appointed, on the request of a party, by the Court.

29 In contradistinction, s 11(4) of the CA Act permits a party to an agreement to apply to the Court for the appointment of an arbitrator in circumstances where the parties had agreed an appointment process but that process had failed.

30 The Practitioner gave evidence that although the originating summons and his correspondence made reference to s 11(3) of the CA Act, he had, at the time of commencing the proceedings, intended to bring the proceedings under s 11(4) because he considered that the appointment process which the parties had themselves agreed, had failed. He said he came to that view because, by the time the proceedings were commenced, the President had not appointed an arbitrator and had not responded to any of the three communications about it which the parties had sent to her. He says it was reasonable in the circumstances to regard the time taken by the President to appoint an arbitrator as evidencing the failure of the agreed process.

31 We are unable to accept the Practitioner's evidence to that effect for the following reasons:

(a) it is not consistent with the statements made to the Chief Justice on 8 May 2018 where the Practitioner said, truthfully in our view, that he had no reason to believe either that the President would or would not appoint an arbitrator. He accepted at that time that he simply had no idea what she was going to do;

(b) it is not consistent with the reference to commencing proceedings under s 11(3) of the CA Act in both the

communications which preceded the commencement of the action and in the originating summons itself;

(c) it is inconsistent with the content of the Practitioner's letter to the LPCC dated 19 October 2018 in which he stated that he gave advice to his client:

> that he was entitled to seek relief under section 11(3) of the Commercial Arbitration Act 2012 in circumstances where [the Buyer's solicitor] had sought to delay the appointment of an arbitrator without any basis under the contract and had on 3 occasions contended that the dispute was in effect to be resolved by accountants…which he knew or should have known was incorrect.[5]

He did not, in that letter say that he was intending to bring the proceedings under the provision which applied when the agreed appointment process had failed (s 11(4)) even though, by the time that letter was written, he had had time to reflect upon his actions having been put on notice of the Chief Justice's views about his conduct some five months earlier;

(d) it is inconsistent with the Practitioner's statement at paragraph 13 of the Response to the Application and Statement of Issues, Facts and Contentions[6] (Response), which was prepared by the Practitioner himself, that his client was entitled to seek an order from the Court and 'was not obliged to await an appointment by the [P]resident', which suggests that both at the time the application was made to the Supreme Court and at the time the Response was prepared he did not consider that the process by which the President would appoint an arbitrator had 'failed';

(e) it is inconsistent with the statement the Practitioner made at paragraph 38 of his witness statement dated 2 September 2020[7] to the effect that he would have advised his client to await the appointment of an arbitrator if the buyer's solicitor had withdrawn the

[5] Letter from Metaxas to LPCC dated 19 October 2018 para 32 in Exhibit 3: LPCC Book of documents pages 203-216.
[6] Exhibit 2.
[7] Exhibit 5.

request that the President defer the appointment. Had the Practitioner truly believed the process had failed either because the President had refused to appoint or had not appointed within a reasonable time, then withdrawing the request could not have remedied that failure. In our view the statement in paragraph 38 of the Practitioner's witness statement supports a conclusion that the Practitioner did not believe the process had failed but rather that the process was being delayed or protracted by the approach taken by the buyer; and

(f) that the Practitioner had in fact intended to proceed under s 11(3) of the CA Act, where no failure of the agreed appointment process is required, is consistent with the Practitioner having made no inquiries of the President as to her intentions prior to commencing the proceedings.

Were the proceedings commenced in circumstances where they were doomed to fail?

32 The LPCC submits that in commencing proceedings under s 11(3) of the CA Act the Practitioner was endeavouring to bypass the procedure for the appointment of the arbitrator which had been agreed between the parties to the dispute, and instead to have the Court appoint the arbitrator. The LPCC submits that the proceedings were always doomed to fail because s 11(3) of the CA Act can only be engaged where the parties have not agreed the process for the appointment of an arbitrator to resolve their dispute. Where, as was the case here, the parties had agreed a process, s 11(3) had no application.

33 The LPCC submits that if we find that the Practitioner had intended to proceed under s 11(3) of the CA Act we will also find that the commencement, service, maintenance and prosecution of the Supreme Court proceedings was doomed to fail from the outset. We accept that submission as to the consequence of the finding urged upon us.

34 The Practitioner submits that he had intended to proceed under s 11(4) of the CA Act and that there was a reasonable basis for him to do so and that he had simply made a typographical error in referring to s 11(3) of the CA Act as he did in both his correspondence with the buyer's solicitor and in the originating summons. The Practitioner submits that in circumstances where seven days had passed since the

request for appointment had been made and having heard nothing at all from the President as to her intentions over that time despite there having been three communications sent by the parties to the President about the request, he was entitled to conclude that the agreed appointment process had failed and therefore to commence proceedings under s 11(4) of the CA Act.

35 For the reasons we have set out above we have rejected the Practitioner's evidence about his intentions and concluded that at the time the proceedings were commenced the Practitioner intended to bypass the President and seek to have the Court appoint an arbitrator as he thought he could do pursuant to s 11(3) of the CA Act. We also find that such an action was always doomed to fail because the parties had agreed an appointment process and therefore, s 11(3) had no application.

36 It follows from that conclusion that we also find each subsequent step taken by the Practitioner in those proceedings was also doomed to fail.

37 Even if we were wrong about the Practitioner's intentions and were to accept the Practitioner's evidence that he had intended to proceed under s 11(4) of the CA Act, we do not accept that he would have had a reasonable basis for commencing the proceedings when he did so. There was no reasonable basis for the Practitioner to have concluded that the agreed appointment process had failed. Although it may be regrettable that there had been no communication from the President despite the fact that she had received three pieces of correspondence in relation to the appointment of an arbitrator, it cannot be said that taking seven days to respond to a request amounted to such delay that it was reasonable to conclude, in the absence of any inquiry as to her intentions, that the President had no intention of appointing an arbitrator. While it may be that it was not a difficult appointment to make, in the sense that the dispute was not a complex one at law and only required the appointment of a barrister with experience in general commercial law, seven days is not an unreasonable time to have taken to have attended to the request when regard is had to the President's other roles and responsibilities and the need for her, in making an appointment, to first make inquiries as to the availability of those she regarded as suitable. The seller's desire to receive the monies due to it under the contract and the delay in obtaining those monies which predated the request to the President and Practitioner's view that the buyer was improperly delaying making the payment owed to the seller does not colour the timeliness or otherwise of the President's action.

38 Having made no inquiries of the President and there having only been seven days between the making of the request of her and the commencing of the Supreme Court proceedings, we would have concluded that the practitioner had no reasonable basis for commencing proceedings when he did even if we were to have accepted that he intended to bring them under s 11(4) of the CA Act (which we do not).

39 It follows from what we have said above that the proceedings instituted by the filing of the originating summons had no prospect of success and were doomed to fail regardless of whether the Practitioner had intended to commence them under s 11(3) or s 11(4) of the CA Act.

40 Further, once the appointment of the arbitrator had been made by the President and the Practitioner had been informed that the arbitrator was agreed to by the buyer, the making of an application for indemnity costs was of itself unjustified and doomed to fail. Even if the Practitioner had been justified in bringing the application to the Supreme Court in the first instance (which we do not accept) the need to do so could not be attributed to the buyer's conduct irrespective of whether the application was intended to have been made under s 11(3) or s 11(4) of the CA Act.

41 Indemnity costs orders are made where there is some special feature of the case that justifies a departure from the usual position that the costs are awarded to the successful party on a party and party basis. In ***Swansdale Pty Ltd v Whitcrest Pty Ltd***[8] the Court of Appeal pointed out that an order for indemnity costs will only be made in exceptional circumstances and set out a number of relevant principles. It is usually where there has been misconduct by a party that indemnity costs are ordered to be paid. For example, they may be ordered to penalise a party where they have maintained a cause of action with no real prospect of success;[9] or for some ulterior motive; or with wilful disregard for known facts or clearly established law;[10] or have made deliberately false allegations of fact.[11]

42 The proceedings were brought under s 11(3) of the CA Act. It could not have been possible to properly assert that there was some misconduct of the buyer that necessitated the making of an application which plainly could not be maintained under that section. We find that

[8] ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129 [10].
[9] ***Fountain Selected Meat (Sales) Pty Ltd v International Produce Merchants Pty Ltd*** (1988) 81 ALR 397.
[10] ***J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA) (No 2)*** [1993] FCA 70; 46 IR 301.
[11] ***Degman Pty Ltd (in liq) v Wright (No 2)*** **[1983]** 2 NSWLR 1 at 34.

the costs application was therefore always doomed to fail in those circumstances.

43 Even if the Practitioner had intended to bring the proceedings under s 11(4) of the CA Act, the costs application was doomed to fail. Not only was there no reasonable basis upon which to have commenced the application but, even if there had been, any failure of the President to appoint within a reasonable time (although we do not say there was such a failure) could not justify the making of an indemnity costs order against the buyer. There was, in our view, no basis at all upon which the Practitioner could have reasonably formed the view that the costs of bringing the action because of a failure of the President to appoint an arbitrator was somehow attributable to misconduct by the buyer. Whatever the reasons for the conduct of the buyer and his solicitor prior to the request of the President to appoint an arbitrator, in our view the Court could never have been satisfied that there had been any misconduct on the part of the buyer in the course of the President's appointment process which was so egregious that it needed to be marked by the making of an indemnity costs order against the buyer.

Was the Practitioner's commencement, service, maintenance and prosecution of the proceedings unsatisfactory professional conduct?

44 Given we have found that the proceedings were always doomed to fail there is no need to separately consider whether the service of them after the appointment of the arbitrator and the costs application made on 8 May 2018 were separate acts of unsatisfactory professional conduct. We need only to decide whether the commencement, service, maintenance and prosecution of the proceedings as a whole amounts to unsatisfactory professional conduct.

45 A practitioner must not commence civil proceedings which lack a legal foundation. To do so squanders valuable court time and resources and results in the practitioner's own client incurring unnecessary costs and places them at risk of adverse costs orders being made against them. It also puts the opposing party to unwarranted cost and inconvenience. In New South Wales and the Australian Capital Territory the law specifically provides that the provision of legal services without a reasonable prospect of success is capable of being unsatisfactory professional conduct or professional misconduct.[12] While that is not the case in Western Australia, the institution and

[12] *Legal Profession Uniform Law Application Act* 2014 (NSW) Sch 2 cl 4(1); Civil Law (Wrongs) Act 2002 (ACT) s 188(3).

maintenance of legal proceedings which have no prospect of success is undoubtedly a serious matter involving, as it does, a breach of a duty of propriety to the court[13] not to commence and prosecute proceedings with no founding cause of action is capable, depending on the circumstances, of constituting either unsatisfactory professional conduct or professional misconduct.

46 The LPCC contends that the Practitioner's conduct in commencing the proceedings which had no prospect of succeeding whatsoever, is conduct which amounts to unsatisfactory professional conduct. The LPCC submits that this is so because it is conduct which:

(a) caused the Practitioner's client unnecessary expense (although we accept the Practitioner's evidence that after the proceedings were concluded the Practitioner wrote off or waived the costs of the application);

(b) put his client at risk of costs orders being made against it, as it in fact occurred (although again we accept the Practitioner's evidence that he paid those costs himself); and

(c) used the court's limited resources for no legitimate purpose.

47 The LPCC contends that the public, who funds the legal system, is entitled to expect that proceedings will not be commenced when there is no basis for doing so for all of those reasons and submits that we should conclude, therefore, that the Practitioner's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner and hence amounts to unsatisfactory professional conduct. We accept that submission and find that the Practitioner's conduct did constitute unsatisfactory professional misconduct.

48 We have already referred to the fact that in its application to the Tribunal the LPCC also asserted that we could find the Practitioner's conduct amounted to unsatisfactory professional conduct on the grounds that it fell short of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence.[14] Why that was so was not particularised in the application

[13] ***Legal Profession Complaints Committee and Amsden*** [2014] WASAT 57, [48] - [49].
[14] Exhibit 1 Annexure A.

by reference, for example, to any standard of practice set out in the *Legal Profession Conduct Rules 2010* (WA). No submissions were advanced by the LPCC as to how a falling short of that standard comes within the definition of unsatisfactory professional conduct. The LPCC did not rely on that conduct meeting that test in its case at hearing.

49 The Practitioner's Queens Counsel did refer to both limbs of what he said was the test applied to determine whether conduct constitutes unsatisfactory professional conduct. In his opening he submitted that:

> whichever of those two tests is applied, it must be looked at in the context of the facts in this case. It may have been conduct that some practitioners would say, I wouldn't have done that without contacting the Law Society President first, if you could.[15]

50 He later said:

> And, secondly, his client was pressing him. You're talking, when one refers to the standard of conduct observed and approved by members of the legal profession with reputed problems, there's also a standard of confidence and diligence required of a legal practitioner by a member of the public, and the member of the public in this case was Mr Deek [sic][16] who wanted things done properly in the sworn affidavit in support of the application. And I'm not suggesting for a moment that Mr Metaxas acted because he was under pressure from his client, but he was certainly under the clear understanding that the client needed that matter to be resolved after six weeks prior to previously of trying to get it resolved.
>
> And, then, there is – I said there were two things, and the second is that putting that to one side, although it's of major importance, there's also to you – is it appropriate – and Mr Metaxas has raised and I will call him to give evidence – is it appropriate in those circumstances to actually approach the President of the Law Society? Now, it used to be the case that you couldn't find out from the Supreme Court or District Court who the judge was going to be the next day if you were in trial. It has changed now, but the view that used to be taken – and Mr Metaxas has been in practice for some decades - - -
>
> …You shouldn't be approaching someone who is going to make some form of adjudication or nomination in this case. So Mr Metaxas will tell you that it didn't even occur to him that it was appropriate to contact (indistinct) Law Society (indistinct) as to whether it was or was not appropriate to do that, or proper to do that, may differ.

[15] ts 25-26, 29 April 2021.
[16] In fact his client's family name was spelt Dique.

> It's the kind of issue on which – about which one may say, well reasonable minds may differ on that question. [17]

51 And when referring in his opening to the question of whether the costs application ought to have been made, the Practitioner's Queens Counsel said:

> Now the – he failed on that application for costs, the court rejected the application, but that does not mean that that was a doomed application because his client had been driven to incurring legal costs for the purposes of seeking to have an arbitrator appointed to resolve a dispute. And that's one view that could well be taken by any competent practitioner: my client has incurred costs, wouldn't have had to incur them if it had not been for Mr Williams' client in effect obstructing the appointment of the arbitrator.[18]

52 It seems from those submissions then that the Practitioner accepts that a practitioner's conduct is capable of being characterised as unsatisfactory professional conduct if it is conduct that falls short of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence.

53 It has not been necessary to consider whether the Practitioner's conduct might also constitute unsatisfactory professional conduct on that basis because we have already concluded it is unsatisfactory professional conduct on the alternative basis contended for by the LPCC.

Orders

54 Subject to hearing from the parties we would propose to make the following orders:

1. The Tribunal finds that between about 19 April 2018 and about 8 May 2018 Arthur Metaxas engaged in unsatisfactory professional conduct within the meaning of sections 402 and 438 of the Legal Profession Act 2008 (WA) in that he commenced, served, maintained and prosecuted proceedings in the Supreme Court of Western Australia on behalf of his client without any reasonable basis to do so.

[17] ts 27-28, 29 April 2021.
[18] ts 29, 29 April 2021.

2. The parties are to confer and by 28 June 2021 are to file an agreed minute of orders programming the matter for hearing of the issues of penalties and costs.

3. If the parties cannot provide an agreed minute by 28 June 2021 each party is to file and serve its own minute of proposed orders programming the matter for hearing of the issues of penalties and costs.

55 Finally, we invite the parties during their conferral to consider whether the issues of costs and penalties might be able to be resolved between them such that a minute of proposed orders dealing with penalty and costs could be filed for the Tribunal's consideration. The Tribunal would be very willing to assist in that process by the referral of the matter to mediation should the parties wish to seek an order referring the matter to mediation.

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

CH
Associate to Judge Glancy

11 JUNE 2021