
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and TANG [2021] WASAT 117

MEMBER : JUDGE D R PARRY, DEPUTY PRESIDENT
DR S WILLEY, SENIOR MEMBER
MS M CONNOR, MEMBER

HEARD : 25 JUNE 2021 - FURTHER WRITTEN
SUBMISSIONS FILED 9 JULY 2021

DELIVERED : 3 SEPTEMBER 2021

FILE NO/S : VR 58 of 2020

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

KELVIN KA CHUEN TANG
Respondent

Catchwords:

Vocational regulation - Legal practitioners - Professional misconduct - Whether practitioner solicited payment of \$12,500 as a 'kickback' from engineering business engaged by practitioner's client on practitioner's recommendation for benefit of company controlled by practitioner's father in connection with engineering business's engagement by practitioner's client and/or future work engineering business may receive - Whether practitioner knowingly made false and misleading statements to Legal Profession Complaints Committee when

investigating complaint by principal of engineering business - Findings of professional misconduct - Penalty - Dishonesty - Report on findings of professional misconduct to Supreme Court (full bench) with recommendation that name of practitioner be removed from the roll of persons admitted to legal profession - Costs

Legislation:

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

Legal Profession Act 2008 (WA), s 403, s 403(1)(b), s 428(1), s 438, s 438(1), s 438(2)(a), s 438(3)(a), s 438(4)(b), s 468, s 520(1), s 520(1)(a), s 520(1)(c), s 520(3), s 521(3)

Criminal Code (WA), s 529

Result:

Report on Tribunal's findings of professional misconduct made and transmitted to Supreme Court (full bench) with a recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008* (WA)

Practitioner's local practising certificate suspended until determination of the Supreme Court (full bench)

Practitioner ordered to pay Legal Profession Complaints Committee's costs in terms of disbursements fixed in the amount of \$11,750

Category: B

Representation:

Counsel:

Applicant : Mr MD Cuerden SC and Ms CC Paterson

Respondent : Mr M Howard SC

Solicitors:

Applicant : Law Complaints Officer

Respondent : Lawfield Legal Practice

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

Attorney-General for Hong Kong v Reid [1994] 1 AC 324

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115;
(1999) 21 WAR 56
Legal Profession Complaints Committee and A Legal Practitioner [2013]
WASAT 37; (2013) 84 SR (WA) 158
Legal Profession Complaints Committee and A Legal Practitioner [2013]
WASAT 37 (S)
Legal Profession Complaints Committee and Amsden [2014]
WASAT 57 (S)
Legal Profession Complaints Committee v Bachmann [2011] WASC 309
Legal Profession Complaints Committee and Chang [2019] WASAT 67
Legal Profession Complaints Committee and Chang [2019] WASAT 67 (S)
Legal Profession Complaints Committee v Love [2014] WASC 389
Legal Profession Complaints Committee and Lee-Steere [2010]
WASAT 189

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REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The Legal Profession Complaints Committee (Committee or applicant) has referred this matter, concerning two allegations of professional misconduct against a legal practitioner, Mr Kelvin Ka Chuen Tang (practitioner or respondent), to the Tribunal under s 428(1) of the *Legal Profession Act 2008* (WA) (LP Act). The Committee alleges that the practitioner engaged in professional misconduct in terms of the following two grounds:¹

Ground 1

That the practitioner, KELVIN KA CHUEN TANG (practitioner), between about 27 February 2015 and about 4 March 2015 at the time of providing legal services to TFC in respect of a property development (Development), engaged in professional misconduct within the meaning of [s] 403 and [s] 438 of the [LP Act], in that his conduct would be reasonably regarded as disgraceful or dishonourable by legal practitioners of good repute and competence and/or would justify a finding that the practitioner is not a fit and proper person to engage in legal practice within the meaning of s 403(1)(b) of the LP Act, by soliciting from Mr B, the proprietor of a consulting engineering business trading as 5R engaged by TFC in respect of the Development (and in respect of which engagement the practitioner acted on behalf of TFC), a payment in the sum of \$12,500 in cash (Cash Payment) for the benefit of a company controlled by his father (the Trustee), as trustee for F Trust, which company owed fiduciary obligations to TFC and causing the Cash Payment to be received through an employee of his legal practice, Ms K, which conduct was:

- 1.1 to the practitioner's knowledge, engaged in without the knowledge or authority of TFC;
- 1.2 dishonest;
- 1.3 in breach of the fiduciary duties to TFC owed by the practitioner by his position with F Trust; and
- 1.4 understood by the practitioner to be in connection with Mr B's engagement by TFC in respect of the Development and/or future work which Mr B may receive.

¹ Orders sought to be made (Exhibit 5) (deidentified) (original emphasis).

Ground 2

That the practitioner, between about 1 November 2016 and about 7 August 2017, engaged in professional misconduct within the meaning of [s] 403 and [s] 438 of the LP Act, in that his conduct fell short to a substantial degree of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and/or would be reasonably regarded as disgraceful or dishonourable by legal practitioners of good repute and competence and/or would justify a finding that the practitioner is not a fit and proper person to engage in legal practice within the meaning of [s] 403(1)(b) of the LP Act, in that by his correspondence to the Legal Profession Complaints Committee (Committee) in response to the Committee's letter of 30 September 2016, the practitioner:

2.1 prepared and sent a letter dated 1 November 2016 to the Committee in which the practitioner stated:

"2. Query 2 – "kickback"

2.1 I confirm that both myself and Tang Law did not receive the "kickback" referred to by [Mr B].

2.2 The acknowledgement (if it is in fact signed by [Ms K]) would be a personal matter between [Mr B] and [Ms K]."

(together, the Statements)

in circumstances in which:

- a) Mr B had paid the Cash Payment at the practitioner's direction and Ms K, who was an employee of the practitioner's legal practice, had received the Cash Payment at the practitioner's direction at the legal practice's office and the Cash Payment did not relate to a personal matter between Mr B and Ms K but to the arrangement as to payment of the Cash Payment made between the practitioner and Mr B;
- b) the practitioner well knew that the Statements were false and misleading and had the potential to mislead the Committee and the practitioner intended that the Committee rely on and be misled by the Statements and that the Committee thereby be obstructed in its investigation into his conduct;
- c) the practitioner failed to correct the Statements until his further letter of 7 August 2017, which the practitioner wrote in response to the Committee's further letter of 22 June 2017 in which the Committee provided the practitioner with copies of photographs of text messages

from the practitioner's phone of 3 and 4 March 2015 evidencing the solicitation by the practitioner of the Cash Payment;

2.2 further, was not open and candid in his dealings with the Committee and failed until 7 August 2017 to provide a full and accurate account of his conduct in relation to matters covered by requests by the Committee to provide comments or information in relation to the practitioner's conduct or professional behaviour contrary to [r] 50(2) and [r 50](3) of the *Legal Profession Conduct Rules 2010* [(WA)].

2 Although some of the facts asserted by the Committee in relation to the practitioner's alleged conduct are not agreed by the practitioner, there is no contest between the parties in relation to any of the facts concerning the practitioner's alleged conduct. There is also no contest between the parties that the facts agreed by the parties and the facts asserted by the Committee and not agreed, but also not contested, by the practitioner (and which we find below are established on the documentary evidence), should result in findings of professional misconduct on each of the two grounds alleged by the Committee (which findings we make for the reasons set out below).

3 The only substantive dispute between the parties in this proceeding is as to what should be the appropriate disciplinary consequence of the practitioner's alleged (and accepted) professional misconduct, which, as the Committee notes, is 'colloquially[,] but misleadingly[,] referred to as the question of penalty'.² Although commonly referred to as 'penalty', this term is in fact a misnomer for the appropriate outcome in vocational disciplinary proceedings where conduct is admitted or proved, because the fundamental purpose and object of the vocational disciplinary jurisdiction is protective, rather than punitive. In particular, the purpose and object of disciplinary proceedings under the LP Act is the protection of the public in their dealings with lawyers and the maintenance of the reputation and standards of the legal profession.

4 In these circumstances, we (unusually) heard and have determined the issues of conduct and 'penalty' (and costs) concurrently.

5 The Committee contends that the appropriate disposition of this matter involves an order, pursuant to s 438(2)(a) of the LP Act, that the Tribunal make and transmit a report to the Supreme Court (full bench) on the Tribunal's findings that the practitioner is guilty of professional

² ts 5, 25 June 2021.

misconduct, with a recommendation, pursuant to s 438(4)(b) of the LP Act, that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the LP Act, and a consequential order, pursuant to s 438(3)(a) of the LP Act, that the practitioner's local practising certificate be suspended pending the determination of the Supreme Court (full bench).³ In contrast, the practitioner submits that the appropriate disposition of this matter is the imposition of a 'lengthy suspension'.⁴

- 6 For the reasons given below, we have determined that the appropriate disciplinary consequence of the practitioner's serious professional misconduct is for the Tribunal to make and transmit a report on the findings of professional misconduct to the Supreme Court (full bench) with a recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the LP Act. We have also determined that the practitioner's local practising certificate should be suspended until the determination of the Supreme Court (full bench).

Legal framework and principles in relation to conduct

- 7 The legal framework and principles in relation to findings of professional misconduct are not in dispute and were reviewed and stated by the Tribunal⁵ in ***Legal Profession Complaints Committee and Chang*** [2019] WASAT 67 at [7] - [12] as follows:⁶

- 7 The Committee has determined that this matter should be heard by the Tribunal and has referred the matter to the Tribunal under s 428(1) of the LP Act. Section 438(1) of the LP Act confers jurisdiction on the Tribunal in this proceeding in the following terms:

The State Administrative Tribunal has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

- 8 The Committee bears the onus of proof in relation to the allegations of professional misconduct it makes against the practitioner. The civil standard of proof ('on a balance of probabilities') applies together with the *Briginshaw* approach,

³ Applicant's submissions as to orders as to conduct and penalty and costs filed pursuant to order 3 of orders made 4 March 2021 (as varied 16 March and 7 April 2021) dated 30 April 2021 (Committee's submissions) [55] - [56].

⁴ Outline of practitioner's submissions dated 10 June 2021 (practitioner's submissions) [5].

⁵ Judge Parry DP, Mr D Aitken SM and Ms S Gillett SessM.

⁶ Footnotes reproduced in square brackets in the text of the quote.

which requires clear and cogent evidence to be adduced by the Committee and for the Tribunal to feel an actual persuasion of the occurrence or existence of relevant facts before it can find the practitioner guilty of professional misconduct (or unsatisfactory professional conduct) [See *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-362 (Dixon J) (a case concerning a petition for the dissolution of a marriage on the grounds of adultery)]. The *Briginshaw* approach applies in disciplinary proceedings, because of the nature and seriousness, and potential consequences, of allegations of wrongdoing (or incompetence) made in such proceedings. As Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361 - 362:

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

- 9 Section 402 and s 403 of the LP Act contain non-exhaustive definitions of the terms 'unsatisfactory professional conduct' and 'professional misconduct', respectively [*Legal Practitioners Complaints Committee and Segler* [2009] WASAT 205; (2009) 67 SR (WA) 280 at [97]]. Section 402 of the LP Act states as follows:

For the purposes of this Act –

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

- 10 Section 403 of the LP Act states as follows:

(1) For the purposes of this Act –

professional misconduct includes –

- (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
 - (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- (2) For the purpose of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission or for the grant or renewal of a local practising certificate.

11 As the statutory definitions of the terms 'professional misconduct' and 'unsatisfactory professional conduct' in s 403(1) and s 402 of the LP Act, respectively, are non-exhaustive definitions, conduct which constitutes 'unprofessional conduct' (sometimes expressed as 'professional misconduct', signifying more serious misconduct) at common law can constitute professional misconduct (or unsatisfactory professional conduct) under the LP Act [*Legal Profession Complaints Committee and Caine* [2010] WASAT 178; *Legal Profession Complaints Committee and in de Braekt* [2012] WASAT 58; (2012) 80 SR (WA) 134; *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37; (2013) 84 SR (WA) 158].

12 The common law concept of unprofessional conduct was restated by Parker J in *Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56 at [61] (Ipp J at [1] and Steytler J at [22] agreeing) as follows:

... This Court has long accepted and applied, in this context, the understanding of the notion of unprofessional conduct which was expressed by the Full Court of the South Australian Supreme Court in *Re a Practitioner of the Supreme Court* [1927] SASR 58: see, eg, *Re a Practitioner* (unreported, Supreme Court, WA, Full Court, Library No 4989, 18 July 1983). It was usefully summarised (at 3) by the Full Court as conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, or that, to a substantial

degree, fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence. The first limb of this summary includes, but is not confined to, conduct which occurs in the course of legal practice. The other limb necessarily relates to conduct in the course of legal practice because of the reference to 'professional conduct'. While the words should not be taken as necessarily an exhaustive or codified statement, the essence of the notion of unprofessional conduct is usefully revealed in these decisions.

8 As is apparent from the expression of the grounds of alleged professional misconduct set out at [1] above, the Committee contends, in relation to each of the grounds, that the practitioner's alleged conduct constitutes 'professional misconduct' under the LP Act, because it falls within the first limb of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56 at [61]⁷ ('conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence') and, further or alternatively, because it falls within the statutory definition of 'professional misconduct' in s 403(1)(b) of LP Act ('conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice'). As Parker J held in *Kyle v Legal Practitioners' Complaints Committee* at [61], the first limb of the restatement of the common law concept of unprofessional conduct in that case 'includes, but is not confined to, conduct which occurs in the course of legal practice'. The statutory definition of 'professional misconduct' in s 403(1)(b) of the LP Act also expressly states that it applies to conduct 'whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law'. As is apparent from the expression of ground 2 set out at [1] above, the Committee also contends that the practitioner's alleged conduct the subject of that ground constitutes professional misconduct under the LP Act, further or alternatively, because it falls within the second limb of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61] ('conduct ... that, to a substantial degree,

⁷ Parker J, Ipp J [1] and Steytler J [22] agreeing.

fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence').

9 The alleged conduct the subject of ground 1 did not occur in the course of legal practice, but nevertheless can constitute 'professional misconduct' under the first limb of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61] and, further or alternatively, under the statutory definition of 'professional misconduct' in s 403(1)(b) of the LP Act. It is well established that a lawyer's conduct outside the provision of legal services to a client is capable of constituting professional misconduct within the meaning of s 403 of the LP Act.⁸ The alleged conduct the subject of ground 2 occurred in the course of legal practice, because it involved responding to the Committee, as a vocational regulation body of the legal profession, when it was investigating a complaint made about the practitioner under the LP Act, and can constitute 'professional misconduct' under either or both limbs of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61] and under the statutory definition of 'professional misconduct' in s 403(1)(b) of the LP Act.

10 Significantly, in terms of ground 1, as the Tribunal⁹ recognised in *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37; (2013) 84 SR (WA) 158 at [123] - [124], a charge and finding of professional misconduct (or unsatisfactory professional conduct) against a lawyer does not need to be – and is often not – based on (a breach of) a particular written and prescribed legal or ethical rule, obligation or duty. Furthermore, as the Tribunal recognised there, professional misconduct includes a serious impropriety, whether proscribed or not, affecting a practitioner's character, which is indicative of a failure either to understand or to practise the precepts of honesty and fair dealing that are essential to the privilege and responsibilities of practising as a legal practitioner. As the Tribunal said in *Legal Profession Complaints Committee and A Legal Practitioner* at [123] - [124]:

123 Even in the absence of an express authority on point, we have no doubt such duty exists. As Rich J said in *Kennedy v The Council*

⁸ See, for example, *Legal Profession Complaints Committee and Amsden* [2014] WASAT 57 (S) (Judge Parry DP, Mr H Dembo SSessM and Ms K Kemp SessM) and *Legal Profession Complaints Committee and Chang*.

⁹ Judge Parry DP, Mr J Mansveld M and Mr C Edmonds SC SSessM.

of the *Incorporated Law Institute of New South Wales* (1939) 13 ALJR 563:

... a charge of misconduct as relating to a solicitor need not fall within any legal definition of wrong doing. It need not amount to an offence under the law. It was enough that it amounted to grave impropriety affecting his professional character and was indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to the courts, his clients or the public.

124 Similarly, the High Court of Australia observed in *Clyne v New South Wales Bar Association* [1960] HCA 40; (1960) 104 CLR 186 at 200 that certain rules (or duties) which govern the conduct of legal practitioners, which their Honours described as 'fundamental' and contrasted with rules which are 'merely conventional in character':

... are, for the most part, not to be found in writing. It is not necessary that they should be reduced to writing, because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness.

11 Ground 2 refers to r 50 of the *Legal Profession Conduct Rules 2010* (WA) (LPCR), which states as follows:

(1) In this rule —

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

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

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

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

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

12 Significantly, in terms of ground 2, as the Tribunal¹⁰ said in *Legal Profession Complaints Committee and Lee-Steere* [2010] WASAT 189 at [22] - [24]:

22 The reputation of the legal profession in the eyes of the public and among its members depends to a large extent upon the power and ability of the Board and the Committee to regulate effectively the activities of all legal practitioners. The purpose of the Act is expressly stated in its long title 'to provide for the regulation of legal practice in Western Australia'.

23 It is incumbent upon all legal practitioners to ensure that the above purpose is realised in all respects. To that end, legal practitioners are obligated to cooperate with the reasonable requests of their regulatory body to the fullest extent. It is a duty owed to the Board and the Committee in a measure not less than the duty owed by a practitioner to his or her client and to a Court or Tribunal.

24 In our view it is unacceptable, both to members of the public and to the profession, for a practitioner to undermine the authority of a regulatory body by ignoring its requests for information or failing to respond to those requests with alacrity and with complete honesty. To flaunt that authority is to fly in the face of the legislative intent and disables the body from executing its statutory functions. Such conduct is viewed by this Tribunal in a most serious light and will not be countenanced.

Findings of fact in relation to conduct

13 The Committee filed, and relies in relation to conduct on, a statement of facts agreed by the parties (agreed facts),¹¹ a statement of facts that the Committee asserts but are not agreed by the practitioner (asserted facts),¹² and a book of documents¹³ providing the evidentiary basis for the asserted facts (book of documents).¹⁴

14 Asserting his privilege against self-incrimination, the practitioner declines to agree to the asserted facts. However, the practitioner does not contest the asserted facts and has not opposed findings being made in terms of the asserted facts. As the Committee submits, '[q]uite plainly,

¹⁰ Judge Sharp DP, Ms F Child M and Mr M Odes QC SSessM.

¹¹ Statement of agreed facts filed pursuant to order 1 of orders made 4 March 2021 (as varied 16 March 2021) dated 23 March 2021 (Exhibit 2).

¹² Statement of facts which the applicant asserts but which are not agreed filed pursuant to order 1 of orders made 4 March 2021 (as varied 16 March 2021) dated 22 March 2021 (Exhibit 3).

¹³ Legal Profession Complaints Committee Book of Documents dated 22 March 2021 (Exhibit 4).

¹⁴ The Committee submits that 'the Tribunal ought not make any finding, based on [the] documents [in the book of documents], beyond the fact[s] asserted in the [asserted facts]' (Committee's submissions [7]).

no adverse inference or conclusion can, or should, be made against the [p]ractitioner as a result of him exercising his right to privilege against self-incrimination' and his decision to exercise his right 'is not relevant to the question of disciplinary outcome' in this case.¹⁵

15 The agreed facts are – and we make findings of fact in relation to conduct – as follows:¹⁶

1. The practitioner was admitted to legal practice in Western Australia on 4 September 2001 and at all material times the practitioner was an Australian legal practitioner within the meaning of [s] 5(a) of the [LP Act].
2. Between 1 October 2002 and 31 June 2016 the practitioner practised as a sole practitioner in Perth under the trading name Tang Legal (firm) and from 1 July 2016 has practised under the trading name Tang Law.
3. On 3 October 2013 Mr S and Mr M (Mr S's migration agent) signed a costs agreement for the provision of legal services by the firm.
4. Also on 3 October 2013, TFC was registered by ASIC and Mr S and Mr M were the directors of, and Mr S the sole shareholder in, TFC.
5. On 4 October 2013 Mr S and TFC (as "Owner") entered into a project management agreement (PMA) with a company (Trustee) as trustee for the F Trust (as "Manager"). By the terms of the PMA, F Trust provided project management services for the development of land owned by Mr S and TFC (Development).
6. The practitioner's father (father) was the director, secretary and held half of the shares in the Trustee. The other half of the shares in the Trustee were held by the practitioner's mother.
7. At all material times the practitioner had the day to day management of the affairs of F Trust.
8. The practitioner had a series of retainers with TFC and Mr S for the provision of legal services, relevantly:
 - 8.1 with Mr S and Mr M dated 4 October 2013 for incorporation of a new company, which was TFC;

¹⁵ Committee's submissions [5].

¹⁶ Exhibit 2 (deidentified) (original emphasis).

- 8.2 with Mr S and Mr M dated 4 October 2013 for settlement in relation to the purchase of the Property;
 - 8.3 with TFC dated 30 January 2014 for the provision of commercial law advice and to draft and prepare employment agreements; and
 - 8.4 with TFC dated 7 February 2014 for drafting and preparing off-the-plan contracts, application for strata titles and settlement in respect to the Property.
9. By a written contract dated 5 February 2015 (Contract) and on the recommendation of the practitioner, TFC engaged Mr B, trading as 5R[,] to provide consulting engineering services in relation to the Development for a fixed fee of \$50,000 plus GST, half of which was due and payable at the time the Contract was entered into and the other half due and payable once Development Approval for the Development had been obtained from the local authority.
 10. The practitioner had acted on behalf of TFC in negotiating the terms of the Contract including Mr B's fee thereunder.
 11. Mr B had been introduced to the practitioner through a mutual friend and business associate, Mr K, in or about 2013.
 12. The Development was the first time that either the practitioner, F Trust, TFC or Mr S had worked with Mr B.
 13. The practitioner undertook all communications and correspondence with Mr B in relation to the Contract and the Development on behalf of TFC and F Trust.
 14. **Paragraphs 1 to 7 of the [asserted facts, reproduced at [16] below,] are relevant here. The terms as defined in the asserted facts are used below.**
 15. At all relevant times, the practitioner owed fiduciary obligations to TFC in respect of the Development, which obligations arose from the practitioner's role in F Trust and F Trust's relationship with TFC.
 16. In early April 2016 Mr B contacted the [Committee] about the practitioner including, relevantly, in respect to the Cash Payment.
 17. By letter dated 30 September 2016 the Committee wrote to the practitioner, relevantly, in respect of the Cash Payment and enclosing a copy of the Acknowledgement of Receipt, and requested the practitioner's explanation as to the circumstances in which Ms K signed the Acknowledgement of Receipt for the \$12,500 [C]ash [P]ayment and whether the Cash Payment was in

fact received by the firm and, if so, to explain into which account the sum was deposited and against which matter it was credited.

18. On 1 November 2016 the practitioner provided a response to the Committee's 30 September 2016 letter in which he stated:

18.1 *"I confirm that both myself and Tang Law did not receive the "kickback" referred to by [Mr B]"; and*

18.2 *that the Acknowledgement of Receipt ["](if it is in fact signed by [Ms K]) would be a personal matter between [Mr B] and [Ms K]"*.

19. The practitioner's statements were:

19.1 at paragraph 18.1, not candid in respect to the Cash Payment and failed to state the basis on which the practitioner had solicited the Cash Payment and for whom;

19.2 at paragraph 18.2, false and misleading as in fact Ms K had received the Cash Payment at the practitioner's direction and at the firm's office and the Cash Payment did not relate to a personal matter between Mr B and Ms K but to the arrangement as to payment of the Cash Payment made between the practitioner and Mr B,

and the practitioner well knew the statements lacked candour and were false and misleading and that they had the potential to mislead the Committee and the practitioner intended that the Committee rely on and be misled by the statements and that its investigation into his conduct be obstructed. It was only after the Committee had obtained and put to him for comment the text messages referred to in paragraph 20.2 below that the practitioner changed his position in respect of these statements.

20. By letter dated 22 June 2017 the practitioner was:

20.1 formally notified that Mr B's complaint in respect of the Cash Payment was being investigated;

20.2 provided with copies of photographs taken by Mr B of the exchange of text messages between the practitioner and Mr B on 3 and 4 March 2015 (text messages);

20.3 provided with a photograph of Mr B's iPhone showing the mobile phone number for "Kelvin";

20.4 informed of his right to make submissions to the Committee in respect to the conduct complained of;

- 20.5 requested to make submissions to the Committee in respect to the conduct complained of; and
- 20.6 reminded of his obligations under [r] 50(2) and [r 50](3) of the [LPCR] to be open and candid in his dealing with the Committee and to provide a full and accurate account of his conduct in relation to the matters covered in the 22 June 2017 letter.
21. By letter dated 7 August 2017 in response to the 22 June 2017 letter, the practitioner provided his response to the Committee (7 August 2017 Letter) stating that "*With regrets*" he admitted:
- 21.1 F Trust "*did receive the sum of \$12,500 ("Commission") from [Mr B]*";
- 21.2 he "*did assist [F Trust] with communicating with [Mr B] in relation to the accepting and collecting the Commission*";
- 21.3 the text messages had been sent by the practitioner to Mr B;
- 21.4 Mr B had passed the Cash Payment to his firm where it was collected by Ms K; and
- 21.5 the receipt of the Cash Payment "*was for and on behalf of [F Trust] (not for myself)*".
22. The practitioner enclosed with his 7 August 2017 Letter a letter from his father, also dated 7 August 2017 and addressed to the Committee (Father's Letter), in which his father stated, relevantly: "*[Mr B] agreed to pay my company commission \$12,500 and I accept. So I asked Kelvin to tell him to pass money to [Ms K]*".
23. By letter dated 8 November 2018 the Committee requested the practitioner provide, relevantly:
- 23.1 a full and accurate written account in chronological order of how the practitioner assisted the Trust as trustee for F Trust as stated in his 7 August 2017 Letter;
- 23.2 a full and accurate written account of the circumstances surrounding the request for a receipt by Ms K of the Cash Payment from Mr B at the firm's office on 4 May [sic - March] 2015, including the practitioner's role in soliciting and receiving the Cash Payment, the instructions he gave Ms K about collecting the Cash Payment and directions as to what do with the cash sum on receipt and what happened to the Cash Payment sum,

including whether the practitioner received any part of it and if so, how much and what he did with it;

- 23.3 all documents relevant to the circumstances surrounding the request for and receipt by Ms K of the Cash Payment, including copies of any bank records recording any deposit of all or any part of the cash comprising the Cash Payment;
 - 23.4 all documents relevant to his communications with the directors of TFC about the Cash Payment and to state whether the directors of TFC were aware of his role in respect of the Cash Payment;
 - 23.5 a full and accurate explanation to the Cash Payment as to why he made the statements in the 1 November 2016 letter in light of the admissions made in the 7 August 2017 Letter.
24. On 30 January 2019 the practitioner's senior counsel met with the [a]pplicant and discussed, amongst other things, how the practitioner could cooperate with the [a]pplicant in the resolution of the matters then under investigation.
 25. On 15 February 2019 the Committee issued to the practitioner a summons to provide written information verified by statutory declaration and to produce documents (Summons) pursuant to [s] 520(1)(a), [s] 520(1)(c) and [s] 520(3) of the LP Act.
 26. At paragraph 1 in the Summons the practitioner was referred to:
 - 26.1 statements he made in his 7 August 2017 Letter in which he said, amongst other things, that "*I did assist [F Trust] with communicating with [Mr B] in relation to accepting the Commission*";
 - 26.2 statements made in the Father's Letter in which the father said, amongst other things, that "*[Mr B] agreed to pay my company commission \$12,500 and I accept. So I asked Kelvin to tell him to pass money to [Ms K]*";

and asked to:

- a) provide a full and accurate written factual account of how he assisted F Trust in respect of:
 - i) the agreement between the father's company (F Trust) and Mr B (Agreement) referred to in the Father's Letter;

- ii) a full and accurate written account of the circumstances surrounding the request for a receipt by Ms K of the Cash Payment from Mr B at the firm's office on 4 May [sic - March] 2015, including the practitioner's role in soliciting and receiving the Cash Payment, the instructions he gave Ms K about collecting the Cash Payment and directions as to what to do with the cash sum on receipt and what happened to the Cash Payment sum, including whether the practitioner received any part of it and if so, how much and what he did with it;
 - b) produce all documents relevant to the circumstances surrounding the request for and receipt by Ms K of the Cash Payment, including copies of any bank records recording any deposit of all or any part of the cash comprising the Cash Payment;
 - c) produce all documents relevant to his communications with the directors of TFC about the Cash Payment and to state whether the directors of TFC were aware of his role in respect of the Cash Payment;
 - d) provide a full and accurate explanation to the Committee as to why he made the statements in the 1 November 2016 letter in light of the admissions made in the 7 August 2017 Letter.
27. By letter dated 4 March 2019 the practitioner provided his response to the Summons which information was not verified by statutory declaration as required by the Summons and in which at paragraph 7, he apologised for his conduct in "*asking for the payment of the \$12,500 at all*".
28. By letter dated 25 March 2019 the Committee requested from the practitioner, amongst other things:
- 28.1 that his response to the Committee be provided by statutory declaration, as required by the Summons; and
 - 28.2 a more fulsome response to paragraph 1 of the Summons than that which was provided in his letter of 4 March 2019, in particular in relation to the Agreement, including details of the practitioner's involvement in the Agreement and details of the communications between the practitioner and his father, the practitioner and Mr B

and what the practitioner knew about any communications between his father and Mr B.

29. On 9 April 2019 the practitioner, under compulsion pursuant to s 520(1) of the LP Act and making objection to answering the questions posed by the Committee on the grounds that his answers may incriminate him within the meaning of [s] 468 and [s] 521(3) of the LP Act, provided to the Committee his statutory declaration made on 9 April 2019, annexed to which and marked "Annexure A" was a letter from the practitioner to the Committee dated 9 April 2019 (Statutory Declaration).
30. In the Statutory Declaration the practitioner stated that:
- 30.1 he "*undertook all communication on behalf of [F Trust] with [Mr B]*";
- 30.2 "*To the best of my knowledge and belief there were no communications at that time (whether relating to the \$12,500.00 or otherwise) between [his father] and [Mr B]*";
- 30.3 "*As I previously have said, I sent the text message to [Mr B] with the request for the \$12,500*";
- 30.4 "*To the best of my memory, I had discussed the request with [Mr B] before I sent the text message/s. I am unable to say now when those discussions took place and how many there were. I do not recall now the substance of what was discussed between me and [Mr B] before I sent the text message. I do not remember who started the communications between me and [Mr B] as to the payment of the 12,500.00*";
- 30.5 "*I have no recollection of ever discussing, and do not believe it was discussed, the exact purpose of the \$12,500 with [Mr B]*";
- 30.6 "*I am sure that it was understood by both of us that it was being sought in connection with both the engagement [5R] ([Mr B's] entity) had received, and future work it may receive. That is, it was to encourage [F Trust] to regard [Mr B] and his entity favourably for possible future work which [F Trust] may be able to send [Mr B] (and his entity's) way*";
- 30.7 "*I informed [Ms K] that [Mr B] would be delivering the \$12,500 to the office of my law firm and asked her to receive the cash as I was not in Perth during that time*";
- 30.8 "*I told [Ms K] to pass the cash to my father*";

- 30.9 "I did not receive any of the cash";
- 30.10 "I had no communication with [TFC] regarding the \$12,500. As far as I am aware, [TFC] did not know about the payment of the \$12,500"; and
- 30.11 "In my responses above ... I think I have fully dealt with this question".

16 The documents in the book of documents establish each of the seven asserted facts.¹⁷ The asserted facts are – and we make findings of fact in relation to conduct – as follows:¹⁸

1. On or about 27 February 2015 the practitioner met with Mr B at Mr B's business premises to discuss the Development. Towards the end of the meeting the practitioner requested from Mr B a payment in the sum of \$12,500 in cash (Cash Payment) as a commission for (at least) F Trust's referral of Mr B to TFC and for Mr B to be favourably considered by F Trust for future projects.
2. On Tuesday 3 March 2015 and while the practitioner was in Kuala Lumpur [(KL)] in Malaysia, the practitioner and Mr B had the following text message exchange:

Practitioner: *Hey mate, can you please draw \$12,500 in cash? I will ask [Ms K] to collect from you tomorrow. Thanks, buddy.*

Mr B: *Are u in Northbridge now?*

Practitioner: *I am in KL man.*

Mr B: *Oh.*

Practitioner: *Wait, call my Malaysia number.*

Mr B: *What's the 12500 for? Do you have viber. I can call that"*

Practitioner: *Yes, I can download it. Hold on.*

3. Shortly following the above text message exchange, Mr B and the practitioner spoke by telephone, using the mobile phone

¹⁷ Asserted fact [1] is established by documents 1, 3, 6, 7, 9, 10, 11 and 12 in the book of documents; asserted fact [2] is established by documents 1, 9, 10, 11 and 12 in the book of documents; asserted fact [3] is established by documents 1, 10, 11 and 12 in the book of documents; asserted fact [4] is established by documents 1, 9, 10, 11 and 12 in the book of documents; asserted fact [5] is established by documents 1, 2, 7 and 9 in the book of documents; asserted fact [6] is established by documents 1, 9, 10, 11 and 12 in the book of documents; and asserted fact [7] is established by documents 10, 11 and 12 in the book of documents.

¹⁸ Exhibit 3 (deidentified) (original emphasis).

application "Viber", at which time the practitioner said to Mr B words to the effect that the Cash Payment requested by the practitioner was by way of a "kickback" or "commission", and conveyed the impression to Mr B that if he did not pay the Cash Payment the practitioner would not refer Mr B to any of his or trust's clients again and/or would not consider Mr B for any future projects being managed by F Trust on behalf of its clients.

4. On 3 or 4 March 2015 the practitioner instructed an administrative assistant employed by the firm, Ms K, that Mr B would be delivering \$12,500 in cash to the firm and asked her to receive the cash from Mr B, as the practitioner was not in Perth.
5. On Wednesday, 4 March 2015 Mr B attended the premises of the firm and paid the Cash Payment by paying \$12,500 in cash to Ms K. Following Mr B's request for a receipt Ms K typed and signed a document entitled "Acknowledgement of Receipt" dated 4 March 2015 (Acknowledgement of Receipt) in which she confirmed that she received "\$12,500 (cash) from [Mr B]". The Acknowledgement of Receipt was not on the firm's letterhead.
6. After delivering the Cash Payment to Ms K, Mr B on 4 March 2015 sent a text message to the practitioner in which he stated:

"Just dropped off the cash with [Ms K] and also got her to count and receipt (sic) the total".
7. The practitioner did not disclose to TFC (or Mr S) the fact of the Cash Payment or the communications between the practitioner and Mr B regarding the Cash Payment, and to the practitioner's knowledge neither TFC nor Mr S consented to the practitioner receiving the Cash Payment.

Findings of professional misconduct

17 We are satisfied on a balance of probabilities and feel an actual persuasion in accordance with the *Briginshaw* approach¹⁹ on the agreed facts and the asserted facts, and find under s 438(1) of the LP Act, that the practitioner has engaged in 'professional misconduct', within the meaning of s 403 and s 438 of the LP Act, in terms of each of the two grounds alleged by the Committee. Indeed, we are satisfied that the practitioner committed serious professional misconduct in terms of each of the grounds.

18 In terms of ground 1, the agreed facts and the asserted facts show that the practitioner solicited a secret profit or secret commission,

¹⁹ See *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361 - 62 (Dixon J).

colloquially known as a 'kickback'²⁰ or a bribe. The practitioner solicited the kickback of \$12,500 (one quarter of the contract price charged by 5R for its work on the Development) in cash for the benefit of the Trustee, which was a company controlled by the practitioner's father. TFC had engaged Mr B trading as 5R to provide consulting engineering services in relation to the Development on the recommendation of the practitioner,²¹ the practitioner acted on behalf of TFC in negotiating the terms of the Contract, including Mr B's fee,²² and the practitioner undertook all communications and correspondence with Mr B in relation to the Contract and the Development on behalf of TFC and the F Trust.²³ The practitioner owed fiduciary obligations or duties to TFC in respect of the Development, which arose from the practitioner's role in the F Trust and the F Trust's relationship with TFC (not by reason of his provision of legal services to TFC).²⁴ The practitioner solicited the kickback from Mr B as a commission for (at least) the F Trust's referral of Mr B to TFC and for Mr B to be favourably considered by the F Trust for future projects.²⁵

19 In these circumstances, the practitioner's conduct involved a serious breach of his fiduciary obligations or duties to TFC²⁶ and arguably constituted an offence of an agent corruptly soliciting a reward contrary to s 529 of the *Criminal Code* (WA) (Criminal Code). Section 529 of the Criminal Code states as follows:

If any agent corruptly receives or solicits from any person, for himself or for any other person, any valuable consideration —

- (a) as an inducement or reward for, or otherwise on account of, doing or forbearing to do or having done or forborne to do any act in relation to his principal's affairs or business; or
- (b) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business,

he shall be guilty of a crime.

²⁰ Indeed, the practitioner himself referred to the Cash Payment requested by him from Mr B as a 'kickback' or 'commission'; asserted facts [3].

²¹ Agreed facts [9].

²² Agreed facts [10].

²³ Agreed facts [13].

²⁴ Agreed facts [15].

²⁵ Asserted facts [1].

²⁶ See *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 (Lord Templeman delivering the judgment of the Privy Council) and Heydon, Leeming & Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th edition 2015) [5-145].

20 As indicated earlier, a charge and finding of professional misconduct against a lawyer does not need to be – and is often not – based on (a breach of) a particular written and prescribed legal or ethical rule, obligation or duty. We have no doubt that the practitioner's conduct the subject of ground 1 involves serious dishonesty and thus serious impropriety affecting his character, which is indicative of a failure either to understand or to practise the precepts of honesty and fair dealing that are essential to the privilege and responsibilities of practising as a legal practitioner.

21 In relation to ground 2, it is an agreed fact that the practitioner's response in his letter dated 1 November 2016 to the Committee's letter dated 30 September 2016 that 'I confirm that both myself and Tang Law did not receive the "kickback" referred to by [Mr B]' was not candid in respect of the Cash Payment and failed to state the basis on which the practitioner had solicited the Cash Payment and for whom.²⁷ The practitioner plainly breached his ethical duties under r 50(2) and r 50(3) of the LPCR. It is also an agreed fact that the practitioner's response in his letter dated 1 November 2016 to the Committee's letter dated 30 September 2016 that the Acknowledgment of Receipt '(if it is in fact signed by [Ms K]) would be a personal matter between [Mr B] and [Ms K]' was false and misleading as in fact Ms K had received the Cash Payment at the practitioner's direction and at the firm's office and the Cash Payment did not relate to a personal matter between Mr B and Ms K, but rather to the arrangement as to the payment of the Cash Payment made between the practitioner and Mr B.²⁸ It is also an agreed fact that the practitioner 'well knew the [practitioner's] statements lacked candour and were false or misleading and that they had the potential to mislead the Committee and the practitioner intended that the Committee rely on and be misled by the [practitioner's] statements and that its investigation into the conduct be obstructed'.²⁹ The practitioner did not correct his false and misleading statement to the Committee for nine months (that is, prior to 7 August 2017) and only did so when presented with overwhelming and irrefutable documentary evidence in the form of copies of his own text messages in which he solicited the kickback from Mr B.³⁰

22 The practitioner's conduct in terms of ground 2 also involves serious dishonesty (as well as a lack of candour) and therefore serious

²⁷ Agreed facts [19.1] (original emphasis).

²⁸ Agreed facts [19.2].

²⁹ Agreed facts [19].

³⁰ See agreed facts [19] - [21].

impropriety affecting his character, which is indicative of a failure either to understand or to practise the precepts of honesty and fair dealing that are essential to the privilege and responsibilities of practising as a legal practitioner. It also 'undermine[d] the authority of a regulatory body'³¹ to effectively investigate the complaint made by Mr B about the practitioner's conduct and thereby to seek to protect the public in their dealings with lawyers and to maintain the reputation and standards of the legal profession.

23 It follows that we accept (as does the practitioner³²) the Committee's submission that the practitioner's conduct in terms of each of the two grounds constitutes 'professional misconduct', as defined in s 403(1) of the LP Act, 'on three bases'.³³ First, the practitioner's conduct in terms of each of the grounds would be reasonably regarded as disgraceful or dishonourable by legal practitioners of good repute and competence under the first limb of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61]. Secondly, the practitioner's conduct in terms of each of the grounds would justify a finding that the practitioner is not a fit and proper person to engage in legal practice, within the meaning and for the purposes of the statutory definition of 'professional misconduct' in s 403(1)(b) of the LP Act. Thirdly, the practitioner's conduct in terms of ground 2 is also conduct which, to a substantial degree, fell short of the standard of professional conduct observed or approved by members of the legal profession of good repute and competence under the second limb of the restatement of the common law concept of unprofessional conduct in *Kyle v Legal Practitioners' Complaints Committee* at [61].

24 We therefore make the following findings of professional misconduct under s 438(1) of the LP Act:

1. The practitioner, Kelvin Ka Chuen Tang (practitioner), between about 27 February 2015 and about 4 March 2015 at the time of providing legal services to TFC in respect of a property development (Development), engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA), in that his conduct would be reasonably regarded as disgraceful or dishonourable by legal practitioners of good repute and competence and would justify a finding that the practitioner is not a fit and proper person to

³¹ *Legal Professional Complaints Committee and Lee-Steere* [24].

³² Practitioner's submissions [3].

³³ Committee's submissions [24].

engage in legal practice within the meaning of s 403(1)(b) of the *Legal Profession Act 2008*, by soliciting from Mr B, the proprietor of a consulting engineering business trading as 5R engaged by TFC in respect of the Development (and in respect of which engagement the practitioner acted on behalf of TFC), a payment in the sum of \$12,500 in cash (Cash Payment) for the benefit of a company controlled by his father (the Trustee), as trustee for F Trust, which company owed fiduciary obligations to TFC, and causing the Cash Payment to be received through an employee of his legal practice, Ms K, which conduct was:

- 1.1 to the practitioner's knowledge, engaged in without the knowledge or authority of TFC;
 - 1.2 dishonest;
 - 1.3 in breach of the fiduciary duties to TFC owed by the practitioner by his position with F Trust; and
 - 1.4 understood by the practitioner to be in connection with Mr B's engagement by TFC in respect of the Development and/or future work which Mr B may receive.
2. The practitioner, Kelvin Ka Chuen Tang (practitioner), between about 1 November 2016 and about 7 August 2017, engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA), in that his conduct fell short to a substantial degree of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be reasonably regarded as disgraceful or dishonourable by legal practitioners of good repute and competence and would justify a finding that the practitioner is not a fit and proper person to engage in legal practice within the meaning of s 403(1)(b) of the *Legal Profession Act 2008*, in that by his correspondence to the Legal Profession Complaints Committee (Committee) in response to the Committee's letter of 30 September 2016, the practitioner:
- 2.1 prepared and sent a letter dated 1 November 2016 to the Committee in which the practitioner stated:

2. Query 2 – "kickback"

2.1 I confirm that both myself and Tang Law did not receive the "kickback" referred to by [Mr B].

2.2 The acknowledgement (if it is in fact signed by [Ms K]) would be a personal matter between [Mr B] and [Ms K].'

(together, the Statements)

in circumstances in which:

- a) Mr B had paid the Cash Payment at the practitioner's direction and Ms K, who was an employee of the practitioner's legal practice, had received the Cash Payment at the practitioner's direction at the legal practice's office and the Cash Payment did not relate to a personal matter between Mr B and Ms K, but to the arrangement as to payment of the Cash Payment made between the practitioner and Mr B;
- b) the practitioner well knew that the Statements were false and misleading and had the potential to mislead the Committee and the practitioner intended that the Committee rely on and be misled by the Statements and that the Committee thereby be obstructed in its investigation into his conduct;
- c) the practitioner failed to correct the Statements until his further letter of 7 August 2017, which the practitioner wrote in response to the Committee's further letter of 22 June 2017 in which the Committee provided the practitioner with copies of photographs of text messages from the practitioner's phone of 3 and 4 March 2015 evidencing the solicitation by the practitioner of the Cash Payment;

2.2 further, was not open and candid in his dealings with the Committee and failed until 7 August 2017 to provide a full and accurate account of his conduct in relation to matters covered by requests by the Committee to

provide comments or information in relation to the practitioner's conduct or professional behaviour contrary to r 50(2) and r 50(3) of the *Legal Profession Conduct Rules 2010* (WA).

Principles in relation to 'penalty'

25 The legal framework and principles in relation to the determination of the appropriate disciplinary consequence of professional misconduct (which, as indicated earlier, is commonly, although inaccurately, referred to as 'penalty') are not in dispute and were reviewed and stated by the Tribunal³⁴ in *Legal Profession Complaints Committee and Chang* [2019] WASAT 67 (S)³⁵ at [69] - [72] as follows:³⁶

69 Sections 438-441 of the LP Act concern the Tribunal's jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct and the penalties it may impose if it makes such a finding. Sections 438-441 of the LP Act state as follows:

438. Jurisdiction of SAT

- (1) The State Administrative Tribunal has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct.
- (2) If, after it has completed a hearing in relation to a referral under this Part in respect of an Australian legal practitioner, the State Administrative Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may —
 - (a) make and transmit a report on the finding to the Supreme Court (full bench); or
 - (b) make any one or more of the orders specified in sections 439, 440 and 441.
- (3) If the State Administrative Tribunal transmits a report in respect of a legal practitioner to the Supreme Court (full bench) under subsection (2)(a), the Tribunal

³⁴ Judge Parry DP, Mr D Aitken SM and Ms S Gillett SSessM.

³⁵ Referred to below as *Legal Profession Complaints Committee and Chang (S)*.

³⁶ Footnotes (other than footnotes 46 - 48) reproduced in square brackets in the text of the quote.

may, pending the determination of the Supreme Court (full bench), make the following orders —

- (a) an order that the Australian legal practitioner's local practising certificate be suspended for a specified period;
 - (b) an order that specified conditions be imposed on an Australian legal practitioner's local practising certificate restricting the entitlement of an Australian legal practitioner to practise for a specified period.
- (4) Where appropriate, a report forwarded under subsection (2)(a) may include either or both of the following —
- (a) a record of the evidence taken at the hearing;
 - (b) a recommendation that the name of the practitioner be removed from the local roll.

439. Orders requiring official implementation in this jurisdiction

The State Administrative Tribunal may, under section 438(2)(b), make any one or more of the following orders —

- (a) an order that the practitioner's local practising certificate be suspended for a specified period or cancelled;
- (b) an order that a local practising certificate not be granted to the practitioner before the end of a specified period;
- (c) an order that —
 - (i) specified conditions be imposed on the practitioner's practising certificate granted or to be granted under this Act; and
 - (ii) the conditions be imposed for a specified time; and
 - (iii) specifies the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed;

- (d) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner.

440. Orders requiring official implementation in another jurisdiction

The State Administrative Tribunal may, under section 438(2)(b), make any one or more of the following orders —

- (a) an order recommending that the name of the practitioner be removed from an interstate roll;
- (b) an order recommending that the practitioner's interstate practising certificate be suspended for a specified period or cancelled;
- (c) an order recommending that an interstate practising certificate not be granted to the practitioner before the end of a specified period;
- (d) an order recommending that —
 - (i) specified conditions be imposed on the practitioner's interstate practising certificate, or existing conditions be amended; and
 - (ii) the conditions be imposed or amended for a specified time; and
 - (iii) the conditions specify the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed.

441. Orders requiring compliance by practitioner

The State Administrative Tribunal may, under section 438(2)(b), make any one or more of the following orders —

- (a) an order that the practitioner pay a fine to the Board of a specified amount not exceeding \$25 000;
- (b) an order that the practitioner undertake and complete a specified course of further legal education;
- (c) a compensation order;

- (d) an order that the complainant pay the amount of legal costs in dispute or that the amount of legal costs be reduced by a specified amount (not exceeding the amount in dispute);
 - (e) an order that the practitioner provide specified legal services to the complainant either free of charge or at a specified cost;
 - (f) an order that the practitioner undertake a specified period of practice under specified supervision;
 - (g) an order that the practitioner do or refrain from doing something in connection with the practice of law;
 - (h) an order that the practitioner's practice, or the financial affairs of the practitioner or of the practitioner's practice, be conducted for a specified period in a specified way or subject to specified conditions;
 - (i) an order that the practitioner's practice be subject to periodic inspection for a specified period;
 - (j) an order that the practitioner undergo counselling or medical treatment or act in accordance with medical advice given to the practitioner;
 - (k) an order that the practitioner use the services of an accountant or other financial specialist in connection with the practitioner's practice;
 - (l) an order that the practitioner seek advice in relation to the management of the practitioner's practice from a specified person;
 - (m) an order that the practitioner not apply for a local practising certificate before the end of a specified period.
70. If the Tribunal decides to 'make and transmit a report on the finding[s] [that the practitioner is guilty of professional misconduct] to the Supreme Court (full bench)', under s 438(2)(a) of the LP Act, then it may include, under s 438(4)(b) of the LP Act, 'a recommendation that the name of the practitioner be removed from the local roll'. Under s 3 of the LP Act, the expression 'local roll' has the meaning given in [s] 28(1) [of the LP Act]'. Section 28(1) of the LP Act states that the Supreme Court 'must maintain a roll of persons admitted to the legal profession under this Act (the *local roll*)' [Original

emphasis]. Thus, the 'local roll' from which the Tribunal may make a recommendation that the name of the practitioner be removed (if it decides to make and transmit a report on the findings that the practitioner is guilty of professional misconduct to the Supreme Court (full bench)) is the 'roll of persons admitted to the legal profession under [the LP] Act' maintained by the Supreme Court under s 28(1) of the LP Act.

71. In *Khosa v Legal Profession Complaints Committee* [2017] WASCA 192, the Court of Appeal [Murphy and Beech JJA] set out the following principles in relation to penalty at [188] - [195] [Citations omitted]:

188 The court's, and the Tribunal's, jurisdiction with respect to the regulation of the profession is not to be exercised for the purpose of punishing the practitioner concerned, but for the protection of the public and the maintenance of the reputation and standards of the legal profession.

189 The protection of the public includes both general deterrence of other practitioners who might otherwise be tempted to engage in such conduct, as well as personal deterrence.

190 In *New South Wales Bar Association v Hamman*, Mason P said, with reference to the decision of Giles AJA in *Law Society of New South Wales v Foreman (No 2)*:

Giles AJA described the basis of the court's jurisdiction: at 470-1. Citing *Bannister* and other cases, he referred to the protective function of general deterrence in the following terms (at 471):

'But the object of protection of the public also includes deterring the legal practitioner in question from repeating the misconduct, and deterring others who might be tempted to fall short of the high standards required of them. And the public, and professional colleagues who practise in the public interest, must be able to repose confidence in legal practitioners, so an element in deterrence is an assurance to the public that serious lapses in the conduct of legal practitioners will not be passed over or lightly put aside, but will be appropriately dealt with.'

These references to the public's perception of the court's reaction to the professional misconduct do not make the court hostage to the public's assumed sense of anger at the misconduct uncovered. The court

must be satisfied that its enunciated views give proper weight to widely and reasonably held public attitudes to practitioners in the context of the administration of justice generally and in the particular case.

- 191 In general terms, where the conclusion is reached that a practitioner is presently unfit to practise, a choice may be made between suspension and striking off. If an order for suspension is made in that event, it must be made on the basis that, at the termination of the period of suspension, the practitioner will no longer be unfit to practise because, at the end of the relevant period, the practitioner's name will still be on the roll of practitioners and may resume practise. Suspension is a 'serious form of discipline which is usually imposed to discipline the legal practitioner, who has committed an act of unprofessional conduct but who, in the opinion of the court, at the end of the period of suspension, will be a fit and proper person to practise the law'. In the context of suspension, present unfitness to practise may be understood to include a serious breach of professional obligations 'reflecting, to a significant degree, upon the practitioner's fitness to practise'.
- 192 Where, however, the present unfitness to practise reveals that the practitioner lacks the character and trustworthiness necessary to discharge the responsibilities of legal practice, or that the practitioner is permanently or indefinitely unfit to practise, striking off rather than suspension will (at least ordinarily) be the appropriate response.
- 193 A failure on the part of the practitioner to appreciate the impropriety of his or her conduct may support a finding of unfitness to practise. A reason for this is that the lack of appreciation of impropriety and the lack of insight increases the risk of recurrence of the improper conduct.
- 194 A suspension order may also be a valuable measure by way of general or personal deterrence, for the protection of the public and the maintenance of the reputation and standards of the legal profession, even without concluding that the conduct demonstrated or should be characterised as indicating that the practitioner was not a fit and proper person. A suspension order entails greater denunciatory and deterrent effect than a reprimand and fine.
- 195 Fitness to practise for the purpose of penalty orders is to be determined at the time of the relevant hearing, and not at the time of the misconduct. The same is true of the question of the appropriate penalty generally.

72 In *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37 (S), a case in which a practitioner was found to have engaged in professional misconduct by, among other things, intentionally causing a court to be misled that there was no third party who ought to be heard before orders were made in terms of a minute of agreed orders, the Tribunal referred to authorities and principles in relation to penalty, which are also relevant in this case, as follows at [21] - [27]:

- 21 A report and recommendation for a strike off order, as proposed by the Committee, would be appropriate where we regard the misconduct as so serious as to mean that the practitioner is permanently or indefinitely unfit to practise: *New South Wales Bar Association v Cummins* [2001] NSWCA 284; (2001) 52 NSWLR 279 at [26] - [28]. In assessing the appropriate disciplinary consequence of the practitioner's conduct, other remedies which we must consider include suspension of the practitioner's local practising certificate (s 439(a) of the LP Act) or (more appropriately here, as the practitioner does not have a current practising certificate) that a local practising certificate not be granted to the practitioner (s 439(b) of the LP Act) / not be applied for (s 441(m) of the LP Act) before a certain time, that conditions be placed on his practising certificate (s 439(c) of the LP Act), that the practitioner be reprimanded (s 439(d) of the LP Act), or that he pay a fine of up to \$25,000 to the Legal Practice Board (s 441(a) of the LP Act) (see orders specified in s 439, s 440 and s 441 of the LP Act). ...
- 22 The relevant principles in this type of case were set out by the Supreme Court (full bench) in *Legal Profession Complaints Committee v Brickhill* [2013] WASC 369 at [18] - [21] as follows:

The principles to be applied in an application of this kind are well established. The court's jurisdiction with respect to the regulation of the legal profession is not to be exercised for the purpose of punishing the practitioner concerned, but for the protection of the public and the maintenance of the reputation and standards of the legal profession: *Re Maraj (a legal practitioner)* (1995) 15 WAR 12, 25 (Malcolm CJ, Kennedy and Franklyn JJ agreeing); *Ziems v Prothonotary of the Supreme Court of New South Wales* [1957] HCA 46; (1957) 97 CLR 279, 286 (Dixon CJ, McTiernan, Fullagar and Kitto JJ agreeing); *Legal Profession Complaints Committee v Masten* [2011] WASC 71 [16] (Martin CJ, Murray

and EM Heenan JJ); *Legal Profession Complaints Committee v Brennan* [2010] WASC 198 [10] (Martin CJ, Murray and Hall JJ agreeing); *Legal Profession Complaints Committee v Fitzpatrick* [2011] WASC 320 [43] (Martin CJ, EM Heenan and Jenkins JJ).

Where the motion is to remove a practitioner from the Roll, the critical question for the court is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner: *Ziems* (297-298); *A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1; (2004) 216 CLR 253 [15] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); *Legal Practitioners Complaints Committee v Thorpe* [2008] WASC 9 [43] (Steytler P, Wheeler JA and Newnes J). Fitness to practice [sic] law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges: *In re Davis* [1947] HCA 53; (1947) 75 CLR 409, 420 (Dixon J); *Legal Practitioners Complaints Committee v Thorpe* [43] (Steytler P, Wheeler JA and Newnes J); *Legal Profession Complaints Committee v Brennan* [11] (Martin CJ, Murray and Hall JJ agreeing).

Striking off is an order reserved for very serious cases, where the character and conduct of the practitioner is seen to be 'inconsistent with the privileges of further practice': *Barristers' Board v Darveniza* [2000] QCA 253; (2000) 112 A Crim R 438 [38] (Thomas JA, McMurdo P and White J agreeing).

Integrity and honesty are essential characteristics expected of a practitioner, and therefore, the court has generally taken a very serious approach when dealing with dishonesty by a practitioner: *Brennan* [15]; *Legal Profession Complaints Committee v Bachmann* [2011] WASC 309 [47] (Martin CJ, EM Heenan and Jenkins JJ); *Legal Practitioners Complaints Committee v Palumbo* [2005] WASCA 129 [22]-[23] (Steytler P, Wheeler and McLure JJA agreeing); *Kyle v Legal Practitioners Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56 [69] (Parker J); *Re Maraj* (25) (Malcolm CJ, Kennedy and Franklyn JJ agreeing). In *Barristers' Board v Darveniza*, Thomas JA observed that:

[T]he quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner, or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system which he or she practices [sic] [33].

- 23 These principles were recently adopted and restated in *Legal Profession Complaints Committee v Segler* [2014] WASC 159 (*Segler*) at [6]. In *Segler*, the Court added at [7] (citing *A Solicitor v Council of the Law Society of NSW* [2004] HCA 1; (2004) 216 CLR 253):

The critical question is, therefore, whether [the practitioner] is a fit and proper person to be a legal practitioner. That question is to be decided at the time of the hearing not at the time the conduct was engaged in[.]

- 24 The practitioner submits also that, in determining the appropriate penalty, care needs to be taken that the penalty reflects the matters with which the practitioner is charged and not other conduct including the defence of the action by the practitioner which is ultimately held to be unsuccessful: *Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256 (*Smith*) at 267 - 268 and 271 - 272. That principle may generally be accepted, but it is subject to this qualification expressed by Ipp JA in *Barwick v Council of the Law Society of New South Wales* [2004] NSWCA 32 at [108] - [109]:

The relevant time for determining the fitness of a practitioner to practise is the time of the determination by the disciplinary body seized with the question: cf *A Solicitor v The Law Society of New South Wales* [2004] HCA 1; (2004) 204 ALR 8. The misconduct charged will have taken place before the decision is made; there will inevitably be a gap between the date of the misconduct and the date of the determination. It will not be unusual for the practitioner concerned to submit that circumstances have changed since the misconduct charged; arguments as to remorse, reform, character change and subsequent good deeds are not uncommon. The practitioner's conduct of the defence and the veracity and candour of his or her testimony will often be the best evidence as to whether these mitigating circumstances are to be accepted.

- 25 As we understand the position, the principle in *Smith* does not preclude the Tribunal's consideration of matters relevant to the practitioner's fitness to practise and other matters which may be regarded as aggravating the conduct or mitigating its seriousness. Both parties made submissions on this premise.

Strike off as against suspension

- 26 The Committee refers in this context to the decision in *Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39. This passage appears at [12]:

Where the choice presented is, as in this case, effectively between suspension and striking off, useful guidance can be obtained from the judgment of Thomas JA, McMurdo P and White J agreeing, in *Barristers' Board v Darveniza* [2000] QCA 253; (2000) 12 A Crim R 438 at 446 - 447 [38]:

Striking off is of course reserved for the very serious cases where the character and conduct of the practitioner is seen to be inconsistent with the privileges of further practice. Suspension is a less serious result, firstly because a limited period is specified and secondly because the right to resume practice is then preserved without any further onus upon the practitioner to prove that he or she is now a fit and proper person to practice [sic].

The proper use of suspension is, in my opinion, for those cases in which a legal practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that he lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner. (*In Re A Practitioner* (1984) 36 SASR 590 at 593 per King CJ.)

- 27 Another way to express this distinction is to say that striking off is reserved to those cases where the practitioner is found to be permanently or indefinitely unfit to practise, whereas suspension is suitable where the Tribunal is satisfied that, upon completion of the period of suspension, the practitioner will be fit to resume practice.

26 In *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37 (S),³⁷ the Tribunal³⁸ said the following in relation to a 'global' approach to penalty in disciplinary proceedings at [18] - [19]:

18 Whilst the imposition of separate penalties for each ground is the preferable course, there are circumstances in which a 'global' approach to penalty may be more appropriate in vocational disciplinary proceedings: *Stirling v Legal Services Commissioner* [2013] VSCA 374 (*Stirling*) at [72] - [75]. This is such a case.

19 As revealed in the conduct reasons, the practitioner's professional misconduct formed part of a course of conduct over several months such that it is convenient to impose a global penalty in respect of the separate findings of professional misconduct, rather than seeking to impose separate penalties for each charge. That is the basis upon which the parties proceeded and it was also the course followed by the Tribunal when it imposed a penalty in respect of Ms B's conduct in relation to the consent orders and Mr A's interest. ...

27 Referring to the passage in *Legal Profession Complaints Committee and A Legal Practitioner (S)* set out immediately above, the Committee submits (and the practitioner does not contest) that:³⁹

Given the gravity of the dishonesty findings against the [p]ractitioner, and where [ground] 2 follows the conduct in [ground] 1 as an attempted 'cover up' of that conduct, there is a close factual relationship between the misconduct findings such that this is a situation in which it is both convenient and preferable to impose a global penalty ... [.]

28 We accept what is, in effect, the joint position of the parties that, in the circumstances of this case, it is both convenient and appropriate to impose a global penalty in respect of the separate findings of professional misconduct, rather than seeking to impose separate penalties for each of the findings, given that they both involve serious dishonesty and there is a close factual relationship between them. As the Committee submits, the practitioner's lack of candour and dishonesty the subject of ground 2 involved a (misguided) attempt to 'cover up' his professional misconduct in soliciting the kickback the subject of ground 1.

³⁷ Referred to below as *Legal Profession Complaints Committee and A Legal Practitioner (S)*.

³⁸ Judge Parry DP, Mr J Mansveld M and Mr C Edmonds SC SSessM.

³⁹ Committee's submissions [54].

Practitioner's evidence and character references

29 The practitioner gave evidence in the form of an affidavit with annexures⁴⁰ and was not required for cross-examination by the Committee. We make the following findings of fact and note the following matters based on the practitioner's evidence.

30 The practitioner was born in Sabah, Malaysia on 10 September 1975, and is of Chinese descent. He migrated to Perth with his parents in January 1988 and, after completing Years 8 to 12 in Perth, completed tertiary studies at the University of Western Australia.

31 The practitioner has been married twice. He has a daughter from his first marriage who is now 10 years old. The practitioner separated from his first wife in September 2012. The practitioner married his second wife in March 2015 and they have two daughters who are now four and one-and-a-half years old.

32 At the beginning of 2018, the practitioner sought advice from Mr Matthew Howard SC in relation to his application to renew his practising certificate. In November 2018, the practitioner sought advice from Mr Howard in relation to the Committee's investigation of Mr B's complaint about the practitioner and the letter he received from the Committee dated 8 November 2018 (which he received on that day) referred to in the agreed facts at [23]. To the best of the practitioner's recollection, he had not sought Mr Howard's advice in relation to the Committee's investigation before then. The practitioner recognises that '[w]ith the benefit of hindsight, I should have engaged counsel at a much earlier time and certainly prior to responding to the questions asked by the [Committee] in 2016, 2017'.⁴¹

33 The practitioner 'fully recognise[s] and accept[s] that [his] conduct (as stated by the [Committee]) was wrong',⁴² is 'deeply remorseful' and 'deeply ashamed', recognises that he 'deserve[s] to be punished' and 'regret[s] the shame which [his] actions will bring on [his] family',⁴³ and 'accept[s] that [his] conduct should have the consequence that [he] ought not continue to hold a practising certificate'.⁴⁴ The practitioner 'feel[s] deeply apologetic for not having done the right thing as a legal

⁴⁰ Affidavit of Kelvin Ka Chuen Tang sworn on 10 June 2021 (Exhibit 6).

⁴¹ Exhibit 6 [2.3].

⁴² Exhibit 6 [2.4].

⁴³ Exhibit 6 [2.10].

⁴⁴ Exhibit 6 [2.11].

practitioner' and he 'sincerely apologise[s] for [his] conduct'.⁴⁵ We accept that the practitioner is now genuinely remorseful and shows genuine insight into his wrongdoing.

34 In his affidavit, the practitioner 'seek[s] to provide information to provide some context; but not an excuse for [his] conduct'⁴⁶ and states that, at the time the Committee commenced investigating Mr B's complaint about him in 2016, 'I was in a terrible condition, mentally and financially'⁴⁷ and 'I was under significant financial stress, and I was suffering from emotional issues during those several years' and had 'a complete lack of consequential thinking during those times, and I made wrong decisions'.⁴⁸ We will refer to the practitioner's evidence in relation to his personal circumstances, including his emotional and mental condition and financial stress, below. However, as we find when we consider and determine the appropriate disciplinary consequence of the practitioner's professional misconduct below, the circumstances referred to by the practitioner in his evidence do not provide a reasonable explanation (much less an excuse) for his professional misconduct.

35 Notwithstanding that his firm's business has recently recovered, 'in recognition that [he] should not hold a practising certificate [the practitioner] ... [has] decided to sell [the] law firm'.⁴⁹ The practitioner has recently applied to renew his practising certificate for the sole purpose of a smooth transition of the firm to a new entity. The practitioner said that, once the transition is completed, 'I will voluntarily give up my practising certificate, regardless of the decision of the Tribunal'.⁵⁰ However, the practitioner wishes to ultimately return to legal practice. He said the following:⁵¹

I do not wish to be struck off. I hope to be given an opportunity to make good what I have done wrong so that I can contribute more to the society:

- (a) I have been seeing other small business owners in financial stress due to past years of bad economy and recently due to COVID-19. In fact, some of them are also going through family issues partly due to financial stress.

⁴⁵ Exhibit 6 [2.16].

⁴⁶ Exhibit 6 [2.5].

⁴⁷ Exhibit 6 [2.6].

⁴⁸ Exhibit 6 [2.7].

⁴⁹ Exhibit 6 [2.12].

⁵⁰ Exhibit 6 [2.13].

⁵¹ Exhibit 6 [2.15].

- (b) I fully understand the stress they are going through, and as much as I could, I have been assisting them, encouraging them to stay strong, and offering my help and legal assistance either free of charge or at a heavily discounted rate.

36 By the headings and text in his affidavit, the practitioner intimates that four factors contributed to his 'Bad Conduct'.⁵² The first factor is his acrimonious relationship and break-up with his first wife in September 2012. The practitioner's first wife was verbally abusive, rude and disrespectful to him and to his parents and was not able to control her emotions. However, the break-up occurred over two-and-a-half years before the professional misconduct in question.

37 The second factor referred to by the practitioner is financial stress that affected the firm and himself personally during the period 2015 - 2018. As at 2016, the practitioner was in debt by approximately \$1.6 million in personal loans and mortgages, the firm had an unsecured debt of approximately \$300,000 owed to friends, family, short-term lenders and the Australian Taxation Office, his parents' trusts had loans of approximately \$1.8 million, and the group comprising his parents, sister and brother-in-law, and himself, had loans of approximately \$560,000 as well as his sister and brother-in-law's mortgage on their residential property. During the period 2015 - 2018, the practitioner also had to pay approximately \$3,100 per month for the mortgage of the property where his first wife and eldest daughter lived, approximately \$1,000 per month in child maintenance and approximately \$4,000 per month for his first wife's and eldest daughter's living expenses. Even after their separation, the practitioner and his first wife 'continued to have heated arguments as she would constantly demand more money and refused to let [him] see [his daughter] unless [he] agreed to pay her'.⁵³ The practitioner became involved in a property dispute with his first wife and that matter was settled in around November 2019.

38 The third factor referred to by the practitioner is his 'aging parents'.⁵⁴ After his separation from his first wife in 2012, the practitioner moved back to be with his parents. After he got remarried in 2015 and his wife moved to Perth in 2016, they lived with his parents, and were 'financially unable to move out of parents' home t [sic] until May 2020'.⁵⁵

⁵² Exhibit 6, page 6.

⁵³ Exhibit 6 [4.14].

⁵⁴ Exhibit 6, page 12.

⁵⁵ Exhibit 6 [4.54].

39 The fourth factor referred to by the practitioner is under the heading 'Mental Health'.⁵⁶ The practitioner said that, during the period December 2012 (when he met his second wife) to March 2015 (when they married), they had arguments which had 'a huge impact on [him] emotionally especially in the backdrop of everything that was happening finding the cash to buy air-tickets and to take time away from work' to visit his future second wife, who lived in China, which 'added to the financial strain'.⁵⁷ The practitioner also said that, between 2012 and 2017, 'all of these factors [which appears to be a reference to his acrimonious relationship and break-up with his first wife, financial stress, and having to travel to see his future second wife in China] took a lot out of [him] emotionally', such that he was 'mentally weak and unstable, and to the point where [he] even had thoughts of committing suicide on several occasions', he committed self-harm, he blamed himself for not being able to give his eldest daughter 'a normal family', and his 'ability to rationally deal with issues in [his] life was seriously affected'.⁵⁸ However, other than the practitioner's general assertions, there is no evidence that the practitioner has suffered from any mental health (psychiatric or psychological) condition at any relevant time. No medical or psychological evidence was called or presented on behalf of the practitioner.

40 The practitioner has had significant community involvement, including in providing and facilitating pro bono assistance. The practitioner's voluntary contributions to the community include:

- joining Chung Wah Association as a committee member and legal advisor in 2002 and 2003;
- being a committee member of the Western Australia Chinese Chamber of Commerce since 2016 and connecting with overseas business associations to foster relationships and open channels for business between Western Australia and other countries;
- volunteering in around late 2017 to assist the Consulate of Malaysia in Perth in relation to immigration issues;
- volunteering the firm to participate in the Red Cross Wills Service for several years;

⁵⁶ Exhibit 6, page 14.

⁵⁷ Exhibit 6 [4.57].

⁵⁸ Exhibit 6 [4.60].

- sponsoring and supporting the Buddhist Temple and the Buddah's Light International Association of Western Australia for over 10 years;
- sponsoring the Asian Australian Lawyers' Association (AALA) annual events each year between 2018 and 2021;
- providing pro bono work for clients, including referrals from the Law Society of Western Australia;
- participating in the mentorship programmes organised by the Murdoch University law school and the AALA; and
- during the COVID-19 lockdown in 2020, asking lawyers in his firm to participate in giving free legal advice to anyone who called them, providing at least 100 phone consultations in which they gave free legal advice over the two months of the lockdown.

41 Finally, the practitioner gave evidence under the heading 'Self-Reflection'⁵⁹ about having been involved in a major airplane incident, while he was a passenger on a flight from Perth to Kuala Lumpur on 25 June 2017, when the left engine caught fire and failed. For a period of approximately two hours, while the pilot flew the plane back to Perth and ultimately landed safely at Perth Airport, the plane was 'shaking like a "washing machine"'.⁶⁰ The pilot told the passengers that, '[i]n his 40 years' flying experience, he had never been in this situation' and said the words '*Let's pray together*'.⁶¹ The practitioner wrote his 'final words' to his wife and loved ones and tried to send them by SMS.⁶² The practitioner gave the following evidence:⁶³

Meaning of life took a complete change since that day. Life is about being able to be with your loved ones and just make them happy. It is that simple.

I also had a better understanding of myself and what "success" means. Success is no longer about what I have or how much I have, success is

⁵⁹ Exhibit 6, page 17.

⁶⁰ Exhibit 6 [6.5].

⁶¹ Exhibit 6 [6.7] (original emphasis).

⁶² Exhibit 6 [6.10].

⁶³ Exhibit 6 [6.12] - [6.15].

about how many people I have helped along the way, and how many people become better because of me.

I realised that I must stay healthy and to find the strength in me to carry on for my young family. My wife does not work. My wife and my children are all dependent on me financially.

Having been through the emotional cycles, anxiety and stress, and being able to come out of it, I believe I have become a more mature and wiser person.

42 The practitioner also relies on five character references.⁶⁴ Each of the character referees has read the agreed facts and the asserted facts.

43 Mr Vincent Schepis, who has been running a business in the earthmover tyres industry for over 28 years, and has been a client of the practitioner for 12 years, describes the practitioner as 'very knowledgeable' and 'loyal, reliable and trustworthy'. The practitioner has assisted Mr Schepis several times in negotiating with businesses in China and Mr Schepis states that '[i]t was difficult to find a competent and trustworthy lawyer who is also fluent in Chinese'. Mr Schepis 'will not hesitate in recommending [the practitioner] as a lawyer to anyone who needs legal assistance'. He also states that the practitioner is 'a generous person and always willing to help'. The practitioner helped Mr Schepis when he was struggling and the practitioner 'carried out legal work for [him] on [a] pro-bono [sic] basis'.

44 Mr Craig McIntosh, who has been a legal practitioner since 1982 and a barrister since 2002, and who has known the practitioner (and many of the solicitors that he has employed) for almost 20 years, both on a personal and professional level, states that, having read the agreed facts and asserted facts, 'I am, indeed, very surprised that the practitioner has acted so inappropriately'. Mr McIntosh states 'I can confirm that the practitioner fully understands the seriousness of the matter and is genuinely remorseful for his conduct'. Mr McIntosh states that throughout the period that he has known the practitioner he has 'never had any reason to doubt his honesty, integrity or his competence' and that 'I believe that the practitioner's conduct is totally out of character'. Mr McIntosh also observes that the practitioner has been 'generous to his clients and a great mentor to the many practitioners that he has employed over the years'.

⁶⁴ Exhibit 7.

45 Mr Patrick Lim, who operates a business consulting and project managing business, and who has known the practitioner for over 20 years as a friend and as a client, states that the practitioner has 'always given me excellent legal and commercial advice' and describes him as a 'generous and very genuine and respectful person'. Having read the agreed facts and the asserted facts, Mr Lim states 'I verily believe that the conduct in question was out of [the practitioner's] character'.

46 Mr Kevin Ngan, who works in banking and was the President of the Hong Kong Australia Business Association from 2012 to 2014, describes the practitioner as 'the most approachable and practical lawyer'. Mr Ngan states that the practitioner 'is willing to give guidance to me and my clients without charging all the time' and the practitioner 'genuinely wants to help'. Feedback from Mr Ngan's clients about the practitioner 'has been consistently excellent'. Mr Ngan also notes that it is convenient for his clients who are Chinese-speaking that the practitioner is fluent in both Cantonese and Madarin. Like Mr McIntosh and Mr Lim, Mr Ngan, having read the agreed facts and the asserted facts, believes that 'the conduct outlined in the [agreed facts and asserted facts] is out of [the practitioner's] character'.

47 Finally, Mr Kevin Lee, who is the practitioner's brother-in-law and has known him for over 20 years, describes the practitioner as 'a very kind and generous person ... [who] is always prepared to look after and support his family'. Mr Lee states that the practitioner has 'on numerous occasions financially assisted myself and my wife'. Having read the agreed facts and the asserted facts, and based on his understanding of the practitioner's character, Mr Lee 'strongly believe[s] that [the practitioner] would not repeat [the professional misconduct] again'.

Practitioner's disciplinary history

48 The practitioner has a disciplinary history involving two matters. On 24 September 2008, in proceeding VR 163 of 2008, the Tribunal made orders, on the basis of the practitioner's admission, that he was guilty of unsatisfactory conduct in the course of acting for a client in September and October 2005 by unprofessional conduct in that he charged grossly excessive fees to the client in respect of retainers in both family law and criminal matters and failed to give written costs disclosure. The practitioner was reprimanded and fined \$2,000 and was also ordered to pay the Committee's costs fixed in the sum of \$1,000.

49 On 12 November 2010, in proceeding VR 151 of 2010, the Tribunal made an order finding that the practitioner engaged in unsatisfactory

professional conduct between June 2005 and October 2007 by charging grossly excessive fees to a client. The practitioner was ordered to pay a fine of \$3,500, ordered to refund the sum of \$9,000 (of the \$22,689 charged to the client), and required to be subject to two inspections by a costs consultant approved by the Committee, with reports to be provided to the Committee. The amount of the fine took into account the costs of the inspections by the costs consultant which were to be paid by the practitioner. The practitioner was also ordered to pay the Committee's costs of the proceeding fixed in the sum of \$3,500.

50 The Committee does not submit that the practitioner's conduct the subject of the previous disciplinary findings was of a similar nature to the conduct now in question. However, the Committee submits that the practitioner's disciplinary history is 'relevant in one limited way, namely that when the [p]ractitioner dealt with the Committee in respect of this matter and chose to seek to mislead it, he was not completely unaccustomed to responding to communications from the Committee'.⁶⁵ Mr Matthew Howard SC submits on behalf of the practitioner that 'the lack of a relevant disciplinary history' is one of four factors which 'should lead here to a suspension rather than a strike-off referral'.⁶⁶ The other three factors referred to by Mr Howard are the practitioner's insight and remorse, factors personal to the practitioner 'which indicate that there is unlikely to be any repetition of the misconduct',⁶⁷ and the practitioner 'is not permanently unfit to be on the [r]oll'.⁶⁸

51 The practitioner's disciplinary history is of a different nature to the conduct now in question. His disciplinary history is not an aggravating factor in relation to penalty in the circumstances of this case. We do not accept the Committee's submission that the practitioner's disciplinary history is relevant in that the practitioner was 'not completely unaccustomed to responding to communications from the Committee'. Regardless of whether a legal practitioner has had to respond to correspondence from the Committee in the past, it is incumbent on a practitioner to respond to a regulatory authority investigating a complaint with candour. It should go without saying that it is incumbent on a practitioner to respond to a regulatory authority honestly and without seeking to mislead it in relation to an inquiry.

⁶⁵ Committee's submissions [52].

⁶⁶ Practitioner's submissions [15].

⁶⁷ Practitioner's submissions [15.3].

⁶⁸ Practitioner's submissions [15.4].

52 While the practitioner's disciplinary history is of a different nature to the professional misconduct the subject of this proceeding, in light of his disciplinary history, he does not have the benefit of an unblemished record as a mitigating factor in relation to penalty. Nevertheless, we take into consideration all of the circumstances of the practitioner, including that he does not have a disciplinary history of the nature of the conduct in this matter, in determining the appropriate disciplinary consequence of the professional misconduct and in particular in determining whether the consequence should be a suspension of his practising certificate or a referral to the Supreme Court (full bench) with a recommendation that his name be removed from the roll of persons admitted to the legal profession under the LP Act.

What is the appropriate disciplinary consequence of the practitioner's professional misconduct?

53 As indicated earlier, the Committee contends that the appropriate disciplinary consequence of the practitioner's professional misconduct is that the Tribunal should make and transmit a report to the Supreme Court (full bench) on the findings of professional misconduct with a recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the LP Act. In contrast, as also indicated earlier, Mr Howard submits on behalf of the practitioner that the appropriate disposition of this matter is the imposition of a lengthy suspension. It is submitted that such an outcome would:⁶⁹

- [i] objectively recognize and communicate the seriousness of the [p]ractitioner's conduct;
- [ii] properly protect the public; [and]
- [iii] strike the appropriate balance between the protection of the public and the orders made not being unduly punitive.

54 As indicated earlier, it is submitted on behalf of the practitioner that the factors that should lead to a suspension rather than a referral for a strike off are the practitioner's insight and remorse, the lack of a relevant disciplinary history, factors personal to the practitioner ('which indicate that there is unlikely to be any repetition of the misconduct') and the practitioner 'is not permanently unfit to be on the roll'.⁷⁰ As Mr Howard correctly submits, a key question for the Tribunal is 'with [his] insight

⁶⁹ Practitioner's submissions [6].

⁷⁰ Practitioner's submissions [15].

and remorse, is the [p]ractitioner *at this time* permanently unfit to be on the [r]oll'.⁷¹

55 For the reasons which follow, we find that the practitioner is not a fit and proper person to practise law and remain on the roll of persons admitted to the legal profession under the LP Act. Moreover, we find that the practitioner is permanently or indefinitely unfit to practise law and would not be a fit and proper person to engage in legal practice after the termination of any period of suspension of his practising certificate.

56 Honesty and integrity are essential characteristics for the privilege and responsibilities of legal practice. Fitness to practise law requires that a practitioner must command the personal confidence of his or her clients, fellow practitioners and judicial officers.⁷² Put simply, if legal practitioners cannot be trusted to act and speak with honesty and integrity, the effective and efficient provision of legal services and administration of justice would be fundamentally undermined.

57 As the Committee submits, 'to solicit and then accept a secret commission in breach of one's fiduciary duties is conduct which goes to the heart of a person's character, honesty and integrity'⁷³ and 'is conduct which, of its nature, demonstrates the [p]ractitioner to [not] have the character, honesty [and] integrity to be a legal practitioner'.⁷⁴

58 Had the practitioner recognised and owned up to his dishonesty in terms of ground 1 when he received notification of Mr B's complaint and was asked by the Committee to explain the circumstances in which Ms K signed a receipt for the \$12,500 Cash Payment and if the funds were received by the firm, we may have come to the view that, notwithstanding the practitioner's serious dishonesty in terms of ground 1, he is not permanently or indefinitely unfit to practise law and will be a fit and proper person to engage in legal practice after a lengthy period of suspension of his practising certificate. However, the practitioner did not do so. Not only was he not open and candid with the Committee (in breach of r 50(2) and r 50(3) of the LPCR), but he actively lied when he wrote to the Committee in relation to the alleged kickback and stated that the Acknowledgement of Receipt '(if it is in fact signed by [Ms K]) would be a personal matter between [Mr B] and [Ms K]'. It was a lie to suggest that the Acknowledgement of Receipt involved

⁷¹ Practitioner's submissions [18.2] (original emphasis).

⁷² *Legal Profession Complaints Committee v Bachmann* [2011] WASC 309 [46] (Martin CJ, EM Heenan J and Jenkins J).

⁷³ Committee's submissions [38]

⁷⁴ Committee's submissions [39].

'a personal matter' between Mr B and Ms K, because in fact Ms K had received the Cash Payment at the practitioner's direction and at the firm's office and the Cash Payment did not relate to a personal matter between Mr B and Ms K, but rather to the arrangement for the payment of the kickback made between the practitioner and Mr B.

59 Even then, the practitioner could have recognised and owned up to his dishonesty by writing to the Committee to tell them the truth. However, he did not do so. While the practitioner ultimately did tell the Committee the truth in his letter dated 7 August 2017, that was only after the Committee provided him with copies of photographs taken by Mr B of the exchange of text messages between the practitioner and Mr B on 3 and 4 March 2015 and a photograph of Mr B's iPhone showing the mobile number for 'Kelvin', that is irrefutable documentary evidence demonstrating the practitioner's solicitation of the kickback. As the Committee submits, '[b]efore being confronted with that evidence, [the practitioner] had had 9 months to volunteer the truth, but did not do so'.⁷⁵

60 We also accept the Committee's submission that:⁷⁶

... [T]he [p]ractitioner's conduct must be considered as a whole, not in isolation. Looked at as a whole: The [p]ractitioner solicited and received (on behalf of his father's company) a secret commission. When directly asked about it by the Committee, he lied to the Committee in order to obstruct the investigation into his conduct and to conceal his wrongdoing. He had 9 months to reconsider his actions and tell the Committee the truth, but did not do so. Only when confronted with evidence which made his position untenable, and which left him no other option, did he tell the Committee the truth.

61 Furthermore, in light of the practitioner's dishonesty, not only in soliciting the kickback, but also in seeking to cover it up and obstruct the Committee's investigation into it, and then failing to tell the Committee the truth for nine months, we do not accept the character referees' opinions that the professional misconduct was 'out of character' for the practitioner. We consider that, notwithstanding the mitigating factors (and other matters) to which we refer below, the serious dishonesty reflected in each of the grounds of professional misconduct, when viewed together, demonstrates that the practitioner lacks the character, honesty and integrity necessary to discharge the responsibilities of legal practice and that he is permanently or indefinitely unfit to practise law.

⁷⁵ Committee's submissions [44].

⁷⁶ Committee's submissions [46].

62 There are three mitigating factors in relation to penalty in this case (and there are also other matters personal to the practitioner referred to in his affidavit) and we take those factors (and matters) into consideration.

63 The first mitigating factor in relation to penalty is the practitioner's genuine remorse for his misconduct and genuine insight into his wrongdoing. His remorse and insight is reflected in his letter to the Committee dated 4 March 2019, in which he apologised for his conduct in asking for the Cash Payment, and in his evidence, in which, as indicated earlier, the practitioner expresses his deep remorse and shame for his conduct and again apologises for it. The practitioner has also fully cooperated with the Committee's investigation since 30 January 2019 and with the referral of the matter to the Tribunal since the referral took place on 30 June 2020. This also reflects remorse and insight. However, the weight to be given to the practitioner's remorse and insight is reduced by the fact that not only was it not volunteered in response to the Committee's letter dated 30 September 2016, but his first admission only came after he was presented with irrefutable documentary evidence, and even then, while expressing 'regrets' in his letter dated 7 August 2017,⁷⁷ his first genuine expression of remorse and contrition was in his letter dated 4 March 2019, over a year-and-a-half later and some two years and five months after he was first notified of the allegation that he solicited a kickback.

64 A second mitigating factor in relation to penalty is the practitioner's record of pro bono and community work. As indicated earlier, the practitioner has held several committee positions in community organisations, has sponsored community events, and has both provided and facilitated pro bono work by other lawyers in the firm. This is to his credit. Such work and involvement affords access to justice and upholds the reputation of the legal profession in the community.

65 The third mitigating factor in relation to penalty is that the character references indicate that the practitioner is competent and that his legal services are valued by his clients. In particular, the practitioner's ability to speak Cantonese and Mandarin has been of assistance to Chinese-speaking clients and clients wishing to do business in China. However, there is no evidence that the practitioner has unique or highly specialised competence or ability such that, if his name were removed from the roll of persons admitted to the legal profession under the

⁷⁷ Exhibit 4, page 21.

LP Act, his clients could not obtain comparable legal services from other practitioners.

66 We also take into consideration the practitioner's personal circumstances referred to in his affidavit, including his acrimonious relationship and break-up with his first wife in 2012, their ongoing conflict over the next seven years, and the financial stress that he was under during the period 2015 - 2018. However, none of the circumstances referred to by the practitioner in his evidence provide a reasonable explanation (much less an excuse) for the practitioner's professional misconduct. Furthermore, although the practitioner gave evidence that between 2012 and 2017 he was 'mentally weak and unstable' and feels that his 'ability to rationally deal with issues in [his] life [was] seriously affected',⁷⁸ there is no cogent evidence that the practitioner suffered from a mental health (psychiatric or psychological) condition at the time of the professional misconduct or that his mental health caused or contributed to the misconduct or is otherwise relevant to the appropriate disciplinary consequence of that conduct.

67 In his submissions on behalf of the practitioner, Mr Howard understandably described the airplane incident as 'a very significant event to the emotional and psychological position of the practitioner'.⁷⁹ Mr Howard submits that the airplane incident resulted in 'a reset for the practitioner and that reset has been carried into effect through 2018 by the seeking of independent advice and then seeking to cooperate with the Committee from that point forward'.⁸⁰ The airplane incident was obviously a significant and traumatic event for the practitioner. However, we are not satisfied on the evidence that the airplane incident resulted in the acquisition of the character, honesty and integrity that the practitioner previously lacked. The practitioner sought and obtained independent legal advice in relation to applying for a practising certificate in February 2018. However, he only sought and obtained legal advice in relation to the complaint the subject of this proceeding in November 2018, some 16 months after the airplane incident. He then commenced cooperating with the Committee in relation to the investigation in February 2019, over a year-and-a-half after the airplane incident.

68 Finally, we note the submission made on behalf of the practitioner that 'his personal factors indicate there is a low likelihood of any

⁷⁸ Exhibit 6 [4.60].

⁷⁹ ts 14, 25 June 2021.

⁸⁰ ts 14, 25 June 2021.

repetition of the conduct'.⁸¹ However, unfortunately, in light of the practitioner's serious and repeated dishonesty disclosed by the conduct findings, including his (misguided) effort by the second instance of dishonesty to cover up the first instance of dishonesty, we do not accept the submission that there is 'a low likelihood of any repetition of the conduct'. As the Committee submits, '[a] person either has integrity or they do not'.⁸² Integrity is a fundamental prerequisite to the privilege and responsibilities of legal practice. The serious dishonesty reflected in each of the grounds of professional misconduct, when viewed together, demonstrates that the practitioner lacks the character, honesty and integrity necessary to discharge the responsibilities of legal practice and that he is permanently or indefinitely unfit to practise law.

69 As the practitioner submits, 'the penalty of striking off is an extreme one and there are many other sanctions available for professional misconduct'.⁸³ However, as we have found that the serious dishonesty reflected in each of the grounds of professional misconduct, when viewed together, demonstrates that the practitioner lacks the character, honesty and integrity necessary to discharge the responsibilities of legal practice and that he is permanently or indefinitely unfit to practise law, notwithstanding the mitigating factors and matters personal to the practitioner in relation to which he gave evidence, suspension of his practising certificate (whether with or without any other available order under s 439 - s 441 of the LP Act) is not an appropriate disciplinary consequence of the practitioner's serious professional misconduct in the circumstances of this case. Rather, in our view, the appropriate professional disciplinary consequence of the practitioner's professional misconduct is that the Tribunal should make and transmit a report to the Supreme Court (full bench) on the findings of professional misconduct with a recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the LP Act.

Interim suspension

70 The Committee submits that, if the Tribunal determines that the practitioner is not fit to remain on the roll of persons admitted to the legal profession under the LP Act, then it should make an order, under s 438(3)(a) of the LP Act that the practitioner's local practising certificate

⁸¹ Practitioner's submissions [23].

⁸² Committee's submissions [40].

⁸³ Practitioner's submissions [14.3] referring to *Legal Profession Complaints Committee v Love* [2014] WASC 389 [31] (Beech, Kenneth Martin and Edelman JJ).

be suspended for a specified period, in particular until the Court's determination of the question of strike off. The practitioner does not oppose such an order in the event that the Tribunal is satisfied that a report should be made and transmitted to the Supreme Court (full bench).

71 In accordance with an order that we made at the conclusion of the hearing, the parties filed a joint submission as to when any period of suspension should commence to enable the orderly transfer of the firm and clients' matters. In their further written submissions filed on 9 July 2021, the parties agree that a suspension of the practitioner's practising certificate should not commence before 20 August 2021 to enable those matters to occur.

72 As we have determined that the practitioner is not a fit and proper person to remain a legal practitioner, we consider that it is appropriate to make an order, pursuant to s 438(3)(a) of the LP Act, that the practitioner's local practising certificate is suspended until the determination of the Supreme Court (full bench). Notwithstanding the parties' expectation that the practitioner will have transferred all clients' matters to other lawyers by 20 August 2021, in case there are any outstanding matters that need to be transferred, the suspension of the practitioner's local practising certificate should commence on 10 September 2021.

Costs

73 The Committee seeks an order, pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), for the payment by the practitioner of its costs of this proceeding in terms of its disbursements. The practitioner consents to the making of a costs order under s 87(2) of the SAT Act. In their further written submissions filed on 9 July 2021, the parties also agree the amount of costs that should be fixed by the Tribunal in its costs order is \$11,750.

74 The legal framework and principles in relation to an application for costs and in relation to the fixing or assessment of the amount of costs if an order for costs is made were reviewed by the Tribunal in *Legal Profession Complaints Committee and Chang (S)* at [127] - [129], [135] and [137] - [138], and need not be repeated here. In our view, in the circumstances of this case, it is fair and reasonable that the practitioner should pay the Committee's costs of this proceeding, because the referral and prosecution of this matter promotes the public interest in terms of the protection of the public and the maintenance of the reputation and standards of the legal profession. The amount of costs

sought by the Committee and agreed by the practitioner, namely \$11,750, reflects the work that was reasonably required to commence and prosecute the proceeding, based on the maximum hourly and daily rates for senior counsel under the *Legal Profession (State Administrative Tribunal) Determination 2020* (WA), which is a useful guide as to the maximum rates that might be allowed in fixing or assessing party/party costs in SAT proceedings, noting that the Committee does not seek any costs for work undertaken by solicitors employed by it.

Orders

75 For the reasons set out above, we made the following orders:

1. The practitioner, Kelvin Ka Chuen Tang (practitioner), between about 27 February 2015 and about 4 March 2015 at the time of providing legal services to TFC in respect of a property development (Development), engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA), in that his conduct would be reasonably regarded as disgraceful or dishonourable by legal practitioners of good repute and competence and would justify a finding that the practitioner is not a fit and proper person to engage in legal practice within the meaning of s 403(1)(b) of the *Legal Profession Act 2008*, by soliciting from Mr B, the proprietor of a consulting engineering business trading as 5R engaged by TFC in respect of the Development (and in respect of which engagement the practitioner acted on behalf of TFC), a payment in the sum of \$12,500 in cash (Cash Payment) for the benefit of a company controlled by his father (the Trustee), as trustee for F Trust, which company owed fiduciary obligations to TFC, and causing the Cash Payment to be received through an employee of his legal practice, Ms K, which conduct was:
 - 1.1 to the practitioner's knowledge, engaged in without the knowledge or authority of TFC;
 - 1.2 dishonest;
 - 1.3 in breach of the fiduciary duties to TFC owed by the practitioner by his position with F Trust; and

- 1.4 understood by the practitioner to be in connection with Mr B's engagement by TFC in respect of the Development and/or future work which Mr B may receive.
2. The practitioner, between about 1 November 2016 and about 7 August 2017, engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA), in that his conduct fell short to a substantial degree of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be reasonably regarded as disgraceful or dishonourable by legal practitioners of good repute and competence and would justify a finding that the practitioner is not a fit and proper person to engage in legal practice within the meaning of s 403(1)(b) of the *Legal Profession Act 2008*, in that by his correspondence to the Legal Profession Complaints Committee (Committee) in response to the Committee's letter of 30 September 2016, the practitioner:
 - 2.1 prepared and sent a letter dated 1 November 2016 to the Committee in which the practitioner stated:
 - '2. Query 2 – "kickback"
 - 2.1 I confirm that both myself and Tang Law did not receive the "kickback" referred to by [Mr B].
 - 2.2 The acknowledgement (if it is in fact signed by [Ms K]) would be a personal matter between [Mr B] and [Ms K].'
 - (together, the Statements)
 - in circumstances in which:
 - a) Mr B had paid the Cash Payment at the practitioner's direction and Ms K, who was an employee of the practitioner's legal practice, had received the Cash Payment at the practitioner's direction at the legal practice's office and the Cash Payment did not relate to a personal matter between Mr B and Ms K, but to the arrangement as to

payment of the Cash Payment made between the practitioner and Mr B;

- b) the practitioner well knew that the Statements were false and misleading and had the potential to mislead the Committee and the practitioner intended that the Committee rely on and be misled by the Statements and that the Committee thereby be obstructed in its investigation into his conduct;
- c) the practitioner failed to correct the Statements until his further letter of 7 August 2017, which the practitioner wrote in response to the Committee's further letter of 22 June 2017 in which the Committee provided the practitioner with copies of photographs of text messages from the practitioner's phone of 3 and 4 March 2015 evidencing the solicitation by the practitioner of the Cash Payment;

2.2 further, was not open and candid in his dealings with the Committee and failed until 7 August 2017 to provide a full and accurate account of his conduct in relation to matters covered by requests by the Committee to provide comments or information in relation to the practitioner's conduct or professional behaviour contrary to r 50(2) and r 50(3) of the *Legal Profession Conduct Rules 2010* (WA).

- 3. Pursuant to s 438(2)(a) of the *Legal Profession Act 2008* (WA) a report be transmitted to the Supreme Court (full bench) on the findings of professional misconduct in orders 1 and 2 above comprising the Tribunal's reasons for decision in *Legal Profession Complaints Committee and Tang* [2021] WASAT 117, with the exhibits, transcript and parties' written submissions, and with a recommendation, pursuant to s 438(4)(b) of the *Legal Profession Act 2008*, that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008*.
- 4. Pursuant to s 438(3)(a) of the *Legal Profession Act 2008* (WA) the practitioner's local practising certificate is

suspended from 10 September 2021 until the determination of the Supreme Court (full bench).

5. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) the respondent must pay to the applicant its costs of this proceeding in terms of disbursements fixed in the amount of \$11,750 within 30 days or within such further period as agreed by the applicant.

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

JUDGE D R PARRY, DEPUTY PRESIDENT

3 SEPTEMBER 2021