

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : VOCATIONAL REGULATION

**ACT** : LEGAL PROFESSION ACT 2008 (WA)

**CITATION** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE and VANDERFEEN  
[2011] WASAT 118

**MEMBER** : JUSTICE J A CHANEY (PRESIDENT)  
JUDGE T SHARP (DEPUTY PRESIDENT)  
MS S GILLETT (MEMBER)

**HEARD** : 27 APRIL 2011

**DELIVERED** : 4 AUGUST 2011

**FILE NO/S** : VR 182 of 2010

**BETWEEN** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE  
Applicant

AND

SALLY MARJORIE VANDERFEEN  
Respondent

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*Catchwords:*

Legal practitioners - Professional misconduct - Misleading Court - failure to advise Court of third party interest in subject matter of consent orders - Failure to notify third party of proposal to obtain consent orders affecting third party's rights

*Legislation:*

*Legal Profession Act 2008 (WA), s 403, s 403(1), s 442*

*Result:*

Finding of professional misconduct

*Category:* B

**Representation:**

*Counsel:*

Applicant : Ms P Cahill SC and Ms P Le Miere  
Respondent : Mr GR Donaldson SC

*Solicitors:*

Applicant : Law Complaints Officer  
Respondent : Self-represented

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

Briginshaw v Briginshaw (1938) 60 CLR 336

Legal Practitioners Complaints Committee and Segler [2009] WASAT 205

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449

**REASONS FOR DECISION OF THE TRIBUNAL:**

*Summary of Tribunal's decision*

1           The Legal Profession Complaints Committee made a number of allegations against a legal practitioner, Ms Sally Vanderfeen, of professional misconduct in connection with obtaining and attempting to implement consent orders in the family court for the purposes of defeating a claim to specific performance by a third party in relation to one of the properties the subject of the consent orders.

2           The conduct essentially concerned failure to notify the Court or the third party of the orders and of the practitioner's client's interest in the property pursuant to those orders. The Complaints Committee also made an allegation that the practitioner had misled the Committee in the context of the Committee's enquires into the relevant events.

3           Ms Vanderfeen acknowledged that aspects of her conduct involved 'serious errors of judgment', but denied that her conduct was designed to defeat the third party's claims. The Tribunal reviewed the documentary records of relevant events and concluded that they established that Ms Vanderfeen's actions were motivated by an intention to improve the prospects that the third party would not pursue a claim for specific performance, and that the Complaints Committee's allegations in relation to those matters were established.

4           The Tribunal also examined the correspondence between Ms Vanderfeen and the Complaints Committee, and concluded that when properly construed, it could not be said that Ms Vanderfeen misled the Complaints Committee.

*The allegations*

5           The Legal Profession Complaints Committee (Complaints Committee) alleges that, between about 7 December 2004 and 15 September 2006, a legal practitioner, Ms Sally Marjorie Vanderfeen engaged in professional misconduct by:

(a) Filing a minute of consent orders in the Family Court of Western Australia for the transfer of a property situated at [property address], Ardross ('the property'). [sic] from the registered proprietor of the property to the practitioner's client:

(i) in circumstances where the practitioner knew that a third party claimed, or may claim, rights as a third party

- purchaser of the property, including a right to a transfer of the property to the third party;
- (ii) without notifying, or attempting to notify, the third party of the practitioner's intention to file the minute of consent orders or the fact that the minute had been filed;
  - (iii) without notifying, or attempting to notify, the Family Court of Western Australia of the fact that a third party claimed, or may claim, rights as a third party purchaser of the property;
- (b) Intentionally, alternatively, recklessly misleading the Family Court of Western Australia:
- (i) as to the reasons why the registered proprietor of the property and the practitioner's client sought to have orders made urgently by the Court in terms of the minute of consent orders;
  - (ii) that there was no third party who ought be heard by the Court before orders were made in terms of the minute of consent orders;
- (c) Failing to notify, or attempt to notify, the third party who had, to the practitioner's knowledge, reserved his rights as a third party purchaser of the property, that orders had been made by the Family Court of Western Australia in terms of the minute of consent orders for the transfer of the property from the registered proprietor to the practitioner's client;
- (d) Subsequent to orders being made by the Family Court of Western Australia in terms of the minute of consent orders, failing to notify, or attempt to notify, the Court that a third party had reserved his rights as a third party purchaser of the property, in circumstances where the practitioner knew that the third party had expressly so reserved those rights;
- (e) Attempting to have the property transferred from the registered proprietor of the property to her client for the purpose of defeating any right by the third party to have the property transferred to the third party;
- (f) Intentionally, alternatively, recklessly misleading the applicant in her responses to the applicant's inquiries in the course of its investigation of the practitioner's conduct referred to in (a) and (b) above; or
- (g) all of the conduct referred to in (a) - (t).

6 Ms Vanderfeen denies the allegations.

*The facts*

7 At all relevant times, Ms Vanderfeen was employed as a legal practitioner by the law firm, Patterson and Dowding. From about March 2004, she acted on behalf of a client (the client) in proceedings brought by the client in the Family Court of Western Australia against her husband (the husband) for an alteration of their property interests.

8 One of the assets of the marriage was a property situated in Ardross (the property). On or about 14 November 2004, the husband entered into a written contract with a third party, W, for the sale of the property to W (the contract). By about 22 November 2004 the contract became unconditional. At about the same time, the practitioner was informed by the client that the husband had sold the property. Accordingly, on about 26 November 2004, the practitioner on behalf of her client lodged a caveat over the property.

9 On 30 November 2004, the practitioner attended an informal conference between the client and the husband for the purposes of attempting to resolve some or all of the matters in issue in the proceedings. In the course of that informal conference:

- a) The husband proposed, in effect, that he transfer the property to the client;
- b) The practitioner enquired of the husband, in effect, about the state of the contract he had entered into to sell the property to a third party;
- c) The husband stated in response, in effect, that there was a clause in the contract which would enable the husband to be released from the contract, or for the contract to be discharged and the worst that would happen would be that the husband may have to pay some damages to the third party;
- d) The practitioner requested from the husband a copy of the contract he had entered into to sell the property, but the husband informed her that he did not have a copy with him;
- d) The husband and the practitioner on behalf of the client agreed, in effect, that any settlement of the proceedings

would provide that the husband would pay any damages claimed by the third party as a consequence of the contract the husband had entered into to sell the property not proceeding;

- f) The husband and the practitioner on behalf of the client agreed, in effect, that the husband would check to see whether it was possible for him to be released from the contract or for the contract to be discharged;
- g) The husband and the practitioner on behalf of the client agreed, in effect, that the practitioner would prepare a draft minute of consent orders to dispose of the proceedings, for discussion between the husband and the practitioner.

The husband is, and was at all relevant times, a legal practitioner.

10 Ms Vanderfeen accepted the husband's advice that there was a clause in the contract that would enable him to be released from the contract, although she was initially a little sceptical about its existence.

11 Between 1 December 2004, and 3 December 2004, the practitioner prepared and caused to be signed by the client and the husband a minute of consent orders that provided for the transfer of the property from the husband to the client, and for the husband to indemnify the client in respect of any damages or liabilities arising from the contract (minute of consent orders).

12 The practitioner says, and we accept, that, during the course of these negotiations, the husband was emotional, and at times aggressive.

13 On 3 December 2004, the husband informed the practitioner in a telephone conversation that the purchaser was 'causing some hassles on' the Ardross property and was threatening to seek specific performance of the contract. He also advised the practitioner that there was no clause in the contract which would enable the husband to be released from the contract or for the contract to be discharged. 3 December 2004 was a Friday, and the husband advised the practitioner that he was going to be talking to the purchaser over the weekend, and would let her know on Monday what the outcome was. Ms Vanderfeen then telephoned the client and advised her of the content of the conversation with the husband.

14 On 6 December 2004, the husband informed the practitioner in a telephone conversation that he intended to tell the purchaser that he (the husband) was not going to proceed with the sale of the property. He also told Ms Vanderfeen that he wanted to go ahead with the transfer of the property to the client.

15 Ms Vanderfeen then telephoned the client. In that conversation, she discussed with the client the possibility that the husband would not be able to get out of the contract with W, and an option that, were that to occur, the client would get the proceeds of sale which she could use to pay off a mortgage on another matrimonial property which she could then retain.

16 On 7 December 2004, Ms Vanderfeen had a further two telephone discussions with the husband. Her note of one of those telephone attendances reads (in effect):

Would like minute of agreed orders filed as soon as possible to deflect specific performance by purchaser.

17 It was common ground that that note recorded a statement to that effect by the husband to the practitioner, and that words to that effect were said in another telephone call on the same day.

18 On the same day, Ms Vanderfeen drew a letter to the Acting Principal Registrar of the Family Court. The letter, which was marked 'urgent', enclosed the signed minute of agreed orders. It would appear to have been sent to the Family Court on 7 December 2004. It is the content of that letter, and the filing of the minute of consent orders which give rise to the alleged misconduct referred to paragraph (a) and paragraph (b) of the allegations. The letter requested that the minute be referred to a Registrar for orders to be made in Chambers, and continued:

It is requested that the matter be dealt with as a matter of urgency. There are pressing tax liabilities which needed attending to. The parties need to give effect to the terms of the Minute in order to meet these liabilities.

We also seek that once orders are made, the orders be extracted on an urgent basis so that settlement of the terms of the order can take place as soon as possible.

This matter is listed in the maintenance list for 14 December 2004, and for a pre-trial conference on 13 January 2005. Upon orders being made, these listings can be vacated.

19 The minute of consent orders provided for the transfer of the Ardross property to the client subject to a mortgage, and the transfer by the client to the husband of her interest in two other properties subject to mortgages. Paragraph 4 of the minute provided that:

The husband indemnify the [client] with respect to any damages or liabilities arising from the offer and acceptance dated 14 day of November 2004 with respect to the [Ardross] property.

20 Ms Vanderfeen said that she had been made aware of the husband's tax liabilities at the meeting on 30 November 2004. She said that there was also urgency in the situation by reason of impending hearings, and her concern that the husband may change his mind and not proceed with the transfer of the Ardross property to the client, which Ms Vanderfeen considered to be in the client's interests. She did not consider it either necessary or appropriate to refer to those reasons for urgency in her letter. She said that the idea of deflecting a specific performance application by W was not 'in her thinking at all' when she wrote the letter of 7 December 2004. We will return to that evidence in more detail below.

21 On 9 December 2004, the Family Court made orders in terms of the minute of consent orders.

22 On 22 December 2004, solicitors acting for W, Mackinlays, sent a facsimile to Law West, an associated firm of Patterson and Dowding, noting that a search had revealed a caveat on the property, and seeking confirmation that Law West acted for the client. By facsimile of the same date, Ms Vanderfeen replied confirming that Patterson and Dowding acted for the client and advising that the caveat was registered on behalf of the client to protect her interest in the Ardross property.

23 On 24 December 2004, Mackinlays sent a facsimile to Patterson and Dowding, marked to the attention of Ms Vanderfeen. The facsimile referred to the contract and said 'Because of the caveat (the husband) cannot give good title and settlement has not taken place'. Mackinlays suggested that the settlement of the contract proceed, and that the settlement proceeds be lodged in an appropriate account to enable the client and the husband to resolve their respective claims to the proceeds. It concluded that if the matter were protracted and involved court action, losses to the husband might impact on the nature of the settlement between him and the client.

24 Patterson and Dowding then sought to arrange settlement of the transfers pursuant to the Family Court order. The transfers were to be effected within 28 days of the making of the orders.

25 On 6 January 2005, the practitioner wrote to the husband concerning completion of the necessary documents for settlement. The letter enclosed a copy of the facsimile from Mackinlays dated 24 December 2004, and said:

Quite apart from the time limit in the Family Court order, the letter from Mackinlays would suggest there is an element of urgency in having the properties transferred. This particularly relates to the [Ardross] property.

26 The husband responded by facsimile on the same day. He complained that certain things he was asked to do in the facsimile of 6 January 2005 from Patterson and Dowding were the responsibility of the client, and not him, and concluded:

In the event your client / your office does not do what is necessary to give effect to the settlement, I will make application and have it set aside, and proceed to trial.

27 It is apparent that attempts were then made to have the husband sign transfers of all the properties the subject of the consent order, and some difficulties were encountered in that regard.

28 On 12 January 2005, Ms Vanderfeen sent an email to the conveyancing clerk within Patterson and Dowding dealing with the matters concerning execution of the transfers. In that email she said:

Also so you know, I have had Mackinlays on the phone (have ignored), so we need to do this quickly, can you get on to [the client] to get those tsfrs asap. If she has signed them, then I suggest we do fresh ones to send to him to sign first.

29 On the following day, 13 January 2005, Ms Vanderfeen wrote to the husband enclosing transfer of land forms and seeking his signature. The letter concluded:

We have again been contacted by Mackinlays with respect to this property. Given that our client is ready to proceed with respect to this property, and that Mackinlays is pushing for a response, can this property be transferred to our client notwithstanding that you are not ready to proceed with respect to the refinancing of the other two properties.

30 On 14 January 2005, Mackinlays sent a further facsimile to Patterson and Dowding. The letter referred to telephone calls made on

11 January and 12 January 2005 which had not been returned. Mackinlays advised that they had instructions to issue proceedings in respect to W's contract to buy the Ardross property, and again suggested that settlement proceed so that the proceeds become available for distribution between the husband and the client. They sought a reply within seven days.

31 On 17 January 2005, the settlement clerk telephoned the client. Her note records:

Told her we are getting persistent letters from Mackinlays and the matter is urgent.

32 In a subsequent telephone call on the same day, Mackinlays' letter of 14 January was read to the client by the settlement clerk.

33 Eventually, on 31 January 2005, Ms Vanderfeen did speak to a solicitor from Mackinlays. She told him that she was not in a position to give details of her client's interest in the property, and that the client was 'using [the Ardross property] to put pressure on the husband'. In cross-examination, Ms Vanderfeen explained that that was because she did not want to complicate the matter by having Mackinlays dealing with the client when they were also dealing with the husband. She could not recall what she meant by the comment about putting pressure on the husband.

34 On 9 February 2005, Mackinlays issued a notice of default addressed to both the husband and the client. Ms Vanderfeen became aware of that notice when told about it by the client on 10 February 2005. Ms Vanderfeen took no steps at that point to notify Mackinlays of the proposed transfer, nor to notify the Family Court of the claim by W.

35 In late February 2005, the responsibility for the file was transferred to another solicitor within Patterson and Dowding, and Ms Vanderfeen's involvement with the matter was limited to executing an affidavit in late 2005 in the context of proceedings commenced in the Family Court by W to set aside the order for transfer of the Ardross property. What finally occurred, after many months of litigation, was not clear from the evidence before the Tribunal, but we were advised that W ultimately succeeded in having the property transferred to him.

*The practitioner's purpose in seeking transfer of the Ardross property*

**The Complaints Committee's contention**

36 The Complaints Committee maintains that the conduct identified in paragraphs (a) to (d) of the allegations is not dependent upon the determination of the practitioner's state of mind or intentions alleged in paragraph (e). Rather, the Complaints Committee maintains that the conduct identified in each of paragraphs (a) to (d) amounts to professional misconduct, or at least unsatisfactory professional conduct, regardless of whether Ms Vanderfeen intended to defeat the rights of W to have the property transferred to him. It is nevertheless logical to deal with the question of her intention first, as determination of that issue informs at least some of the conclusions which should be reached in relation to the conduct identified in paragraphs (a) to (d).

37 The Complaints Committee's case relies heavily on an inference as to Ms Vanderfeen's intention to be drawn from the documentary records and the admitted facts. The matters upon which the Complaints Committee relies to draw the inference as to Ms Vanderfeen's state of mind are as follows:

- i) her knowledge, from the telephone conversation on 3 December 2004 with the husband, that the purchaser was threatening specific performance;
- ii) the husband's request made in two telephone conversations on 7 December 2004 to file the minute of agreed orders as soon as possible 'to deflect specific performance by the purchaser' and the fact that the minute of agreed orders was submitted under covering letter that day with a request for urgent attention;
- iii) the lack of any basis for concluding that potential tax liabilities gave rise to urgency for the orders to be made more quickly than in the ordinary course;
- iv) the absence of any other cogent explanation for an apparent change of position by Ms Vanderfeen whereby she changed from a view that her client would not be entitled to a transfer of the Ardross property until W's claim was resolved, to a position of seeking to urgently have the property transferred, notwithstanding her

knowledge that W was maintaining his claim for specific performance.

- v) the practitioner's refusal to provide any information to Mackinlays concerning the orders of the court in relation to the Ardross property despite Mackinlays' numerous communications;
- vi) the assertion, in Ms Vanderfeen's letter to the husband of 6 January 2005, that Mackinlays' letter of 24 December 2004 suggested an element of urgency in having the properties transferred;
- vii) Ms Vanderfeen's letter to the husband of 13 January 2005, seeking transfer of the property because the client was ready to proceed and 'given ... that Mackinlays is pushing for a response';
- viii) the notes by the settlement clerk on 17 January 2005 of telephone conversations with the client which referred to the matter being urgent because of persistent letters from Mackinlays.

### **Ms Vanderfeen's evidence**

38 As mentioned above, Ms Vanderfeen told the Tribunal that, when she wrote the letter to the courts seeking the urgent issue of the orders, the idea of deflecting specific performance was not in her thinking. She said that the tax liabilities which were referred to in the letter had been discussed leading up to the conference on 30 November 2004. She also considered the matter to be urgent because of the impending hearings and her concern that the husband may renege on his agreement.

39 As to the question of deflecting an application for specific performance, Ms Vanderfeen said that that could not have been her intention because, as she understood it, the making of orders would not defeat the purchaser's claim for specific performance for any claim under the contract.

40 Ms Vanderfeen was cross-examined at some length in relation to her state of mind as at December 2004. She said that she inserted the indemnity in paragraph 4 of the minute of agreed orders to protect the client against any liability in relation to damages that the husband might be required to pay to W to compensate him for the failure on the part of

the husband to complete the sale. She agreed that she thought it most unlikely that W would press for specific performance if the husband was offering him damages in lieu of specific performance. Ms Vanderfeen acknowledged that there was no discussion at the meeting on 30 November 2004 about the dates by which the husband's tax liabilities had to be paid.

41 Ms Vanderfeen accepted that she was told on 3 December 2004 that there was no clause in the contract which entitled the husband to discharge the contract. Having been so advised, her view was then that her client had no entitlement to a transfer of the property unless or until W's claim was resolved by the payment of damages in lieu of specific performance.

42 Ms Vanderfeen acknowledged that, when the husband told her in two conversations by telephone on 7 December 2004 that he wanted the minute of consent orders filed so as to deflect specific performance, she was aware that the husband's efforts to reach agreement with W had not progressed positively, and that there was a possibility that W would continue to press his claim for specific performance. She said, however, that at that stage, she still thought it likely that the husband would resolve matters with W. She denied that she thought that if the client moved in, W might more likely be prepared to accept damages in lieu of specific performance.

43 Ms Vanderfeen also acknowledged that, on 7 December 2004, there was no discussion about any pressing tax liabilities that required the urgent extraction of the orders.

44 It was put to Ms Vanderfeen that, given her view that the client had no entitlement to a transfer of the property whilst W's claim remained unresolved and her knowledge that W was maintaining his claim, there was no basis to submit a consent order to the Court for transfer of the property. She responded that the basis was that the parties (that is, the client and the husband) had reached an agreement, that she wanted that agreement to stand and that she was leaving it to the husband to negotiate his way out of the contract. She did not consider it necessary to advise the Court of the third party's rights under the contract because, at the time, she did not consider that what she was doing was interfering with the third party's rights under the contract. She acknowledged that that belief was incorrect. Her evidence in that respect was inconsistent with evidence which she gave in the Family Court (in proceedings commenced by W) where she acknowledged, in a response to the trial judge, that she knew

that there was a very good possibility that the consent order would affect the rights of a third party.

45 Ms Vanderfeen expressly denied that the reason she wished to have the orders made and extracted quickly was to endeavour to deflect a claim for specific performance, and that pressing tax liabilities were not the true reason for the urgency. She stressed that she was concerned that the husband might change his mind, and said that, in the Family Court, the fact that he had signed a minute of consent orders would not mean that he was bound to the agreement, but could simply indicate his wish not to proceed with the settlement so that the matter would then proceed to hearing.

46 Ms Vanderfeen accepted in cross-examination that it was a serious error of judgment on her part not to have told the Court about the third party interest, and not to have disclosed the position to W or his solicitors.

47 Ms Vanderfeen was asked about her failure to mention, in her facsimile of 22 December 2004 to Mackinlays, the existence of the consent orders or the proposed transfer pursuant to those orders. She did not do so, she said, because she wished to leave it to the husband to deal with W and his representatives. She said that she became increasingly uncomfortable with her failure to respond to Mackinlays, but wanted to leave it up to the husband to deal with the issues concerning the contract and W's claims under it.

48 As noted above, in her letter of 6 January 2005, Ms Vanderfeen asserted that 'the letter from Mackinlays would suggest there is an element of urgency in having the properties transferred'. She denied that that assertion was based upon her underlying purpose to obtain a transfer of the property for the client in order to defeat W's claim for specific performance. Rather, she said that her concern was that if the agreement with the husband was not given effect, 'there would be no incentive for [the husband] to negotiate his way out of the contract because Mackinlays were telling me that [W] wanted the contract given effect to'. She maintained that her reasons for avoiding speaking to Mackinlays was that she did not want to complicate the matter by having the question of W's claim discussed with her as well as the husband.

49 In Ms Vanderfeen's email of 12 January 2005 she said 'I have had Mackinlays on the phone (have ignored), so we need to do this quickly'. She explained that the reason she linked Mackinlays' contacts and the need to effect the transfers speedily was because she was trying to get the

husband to talk to Mackinlays and to get the damages claim resolved. She accepted a proposition that, in attempting to get the transfers registered, she was 'trying to get in first' but said that that would not have defeated W's claim. In response to a question from the Tribunal, Ms Vanderfeen said that the point of getting the transfer to the client effected quickly was that 'she would have then had the property (and the husband) would have negotiated out of the contract'. She said that the husband's thinking of the time was that, if the property were transferred, it would put him in a stronger negotiating position, but that that was not her position (although at one point she suggested she may have shared that thought).

### Conclusions on purpose

50 We are mindful that, in considering the allegations against the practitioner, the Tribunal must, in accordance with what is often referred to as the *Briginshaw* standard, feel an actual persuasion of the occurrence or the existence of a relevant fact in determining whether or not the case has been made out: *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 - 362; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449.

51 The documented records identified by the Complaints Committee demonstrate a connection between Ms Vanderfeen's attempts to have the orders made urgently, and the transfer of the Ardross property effected quickly, on the one hand, and W's continuing intention to obtain performance of the contract on the other hand. It is difficult to conclude other than that Ms Vanderfeen's motivation was to interfere with W's claim given:

- the request by the husband to have the orders extracted urgently so as to 'deflect' W's claim;
- Ms Vanderfeen's quite inappropriate failure to respond to Mackinlays' repeated communications;
- the connection between those failures and the need to obtain speedy transfer of the Ardross property which is referred to in the letter of 6 January 2005 to the husband;
- the reference in the email of 12 January 2005 to the need to effect the transfers quickly because 'I have had Mackinlays on the phone (have ignored)', the reference in the letter of 13 January 2005 to 'Mackinlays ... pushing for a response' as a reason for transferring the Ardross property before the other properties;

- the failure by Ms Vanderfeen to disclose the true situation to Mackinlays in a conversation with the solicitor from Mackinlays on 31 January 2005, and after the issue of the default notice on 9 February 2005; and
- the inconsistency between the evidence given to the Tribunal on this point and her evidence in the Family Court (referred to in [44] above).

52 Ms Vanderfeen's explanation was, in essence, that she did not wish to interfere with the dealings between the husband and W and his solicitors in relation to the contract. Her explanation for the urgency in obtaining the transfer focused, in her evidence at the hearing, on the concern that the husband might resile from the agreement if the consent orders were not made quickly, or might not use his full endeavours to negotiate a resolution with W if the transfer had not been effected. Those explanations do not, however, explain the practitioner's repeated references to Mackinlays' attempts to contact her as a reason for urgency, nor her failure to disclose W's claim to the Court. If, as the practitioner maintained, she held the view that the transfer would not affect W's ultimate entitlement to a transfer were he to pursue his claim for specific performance and that, so long as W maintained his claims, the client would ultimately have to surrender the property to W, it is very difficult to see why, and it was not explained by Ms Vanderfeen, she would have allowed the client to incur the expense of settlement, moving into the property, and expending (as she did) money on the property, at the risk that the whole transaction would be unwound.

53 Whilst it is undoubtedly true that, given the client's knowledge of W's prior equitable interest, W was bound to succeed in obtaining a transfer of the property if he were to pursue his rights, the registration of the client as proprietor of the property undoubtedly complicated the action which W would necessarily have to take to enforce his rights. So long as the property remained in the name of the husband, specific performance could be obtained by a simple action on the contract in the Supreme Court. The client was not a party to the contract. Alternative remedies would have been required as against the client to obtain re-transfer. As it turned out, the client commenced proceedings in the Family Court to set aside the consent orders, no doubt as a preliminary step to an action for specific performance in the Supreme Court. It follows that, even if registration of the client as proprietor of the Ardross property would not have defeated W's ultimate rights, it undoubtedly put additional obstacles in W's way, and thus was likely, at least, to provide a

disincentive to him pursuing specific performance instead of a damages claim against the husband.

54 Ms Vanderfeen said that her motivation for her conduct was a desire to have the transfer proceed, so that her client's desire to receive and live in the Ardross property could be met. The possibility of the husband changing his mind, or not achieving a resolution with W, threatened that objective. Ms Vanderfeen said, and we accept, that she was anxious to avoid those threats to the settlement. That may well have been her primary motivation for her conduct. However the evidence strongly supports, and we find, that Ms Vanderfeen was also motivated, in seeking urgent extraction of the orders and speedy transfer of the Ardross property, by an intention to defeat, if only by making more difficult, W's claim to a transfer of the property pursuant to the contract.

55 We accept her evidence that she believed that the husband would ultimately settle W's claim, but we find that the course of conduct upon which Ms Vanderfeen embarked was intended to enhance that prospect.

56 Against that finding, we turn to consider the particular allegations of professional misconduct. Before doing so, it is necessary in light of the respondent's submissions, to consider the definitions of professional misconduct.

### ***Professional misconduct***

57 During the course of his closing submissions, counsel for Ms Vanderfeen submitted that a finding of professional misconduct, in essence, requires a finding that a practitioner is not a fit and proper person to engage in legal practice. That proposition overlooks para (a) of the definition of professional misconduct found in s 403 of the *Legal Profession Act 2008* (WA) (LP Act). That subsection provides:

(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.

58 The relationship between para (a) and para (b) of s 403(1) was discussed by the Tribunal in *Legal Practitioners Complaints Committee and Segler* [2009] WASAT 205 at [97] - [99] where the Tribunal said:

97 The use of the word 'includes' in the definition in s 403 of the 2008 Act suggests that (a) and (b) are intended to be examples of conduct which will constitute 'professional misconduct' and are not intended to be exhaustive of what constitutes 'professional misconduct': see DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) at 239 [6.56] and the cases cited therein. In that context, we view (a) and (b) as discrete examples of conduct which will constitute professional misconduct. In order to constitute 'professional misconduct', it is not necessary that the conduct both meets the description in (a) and justifies a finding that Mr Segler is not a fit and proper person to engage in legal practice under (b). Para (b) of the definition in s 403 of the 2008 Act clearly covers a far wider range of conduct than that described in (a) of that definition, including conduct which occurs otherwise than in connection with the practice of law. The essential characteristic of the range of conduct which is encompassed by s 403(1)(b), however, is that that conduct justifies a finding that a practitioner is not a fit and proper person to engage in legal practice. That is not an essential characteristic of the conduct described in s 403(1)(a) of the 2008 Act. In other words, not all instances of 'professional misconduct' will involve the conclusion that a practitioner is not a fit and proper person to engage in legal practice.

98 The view we take of s 403(1) is also consistent with the fact that the orders which may be made by the Tribunal upon making a finding that a practitioner is guilty of professional misconduct are not confined to orders which would preclude the practitioner from legal practice: see s 438(2) and s 439, s 440 and s 441 of the 2008 Act.

99 There may, however, be instances of conduct which justifies a finding that a practitioner is not a fit and proper person to engage in legal practice for the purposes of the definition in s 403(1)(b) but where the factual context for that conduct involves a substantial failure to reach or maintain a reasonable standard of competence and diligence. That was the basis on which we understood the LPCC to put its case against Mr Segler.

59 That is the approach we adopt for present purposes. As we understand the Complaints Committee's case, it puts the allegations against Ms Vanderfeen on the basis of para (a) of s 403(1) of the LP Act.

We note, in passing, that it is open to the Tribunal to find a person guilty of unsatisfactory professional conduct even though a referral to the Tribunal alleges professional misconduct - LP Act s 442.

***Complaint (a) - Filing consent orders without disclosure to the third party and the Court***

60 It is not in dispute that, at the time the minute of consent orders was filed, the practitioner knew of W's claim to an entitlement to transfer the property. Nor is it in dispute that Ms Vanderfeen did not notify W of her intention to file the minute or the fact that it had been filed, or that she did not notify the Family Court of the claims of the third party. In her response, the practitioner, Ms Vanderfeen, describes sending the letter of 7 December 2004 as 'a serious error of judgment'. In her evidence, she accepted that her failure to notify the Court of W's interest, and her failure to notify W also amounted to serious errors of judgment. Those acknowledgments were made, however, on the basis of the practitioner's contention that it was no part of her thinking to interfere with the exercise by W of his rights under the contract. Having concluded that it was part of Ms Vanderfeen's motivation that the consent orders would deflect the claim for specific performance, we consider that the filing of the minute in the circumstances referred to in the complaint does amount to conduct which involves a substantial failure to reach or maintain a reasonable standard of competence and diligence.

61 Legal practitioners perform a vital role in the administration of the law. Orders of a court affect rights and liabilities of parties, and potentially impact on persons who are not parties to the particular proceedings. Courts depend upon legal practitioners to disclose information within their knowledge which might impact upon the propriety or appropriateness of orders being sought. It is trite to observe that a legal practitioner's duty to the Court overrides their duty to the client.

62 In this case, if proper disclosure were made to the Family Court at the time the consent orders were submitted, it can be confidently be said that the Court would not have made the orders without providing the affected third party, W, with the opportunity to be heard. The non-disclosure by Ms Vanderfeen prevented the Court from pursuing that course.

63 Undoubtedly, Ms Vanderfeen took the action that she did in the mistaken belief that, by doing so, she was furthering her client's interests. She failed, however, in her higher duty to the Court.

64 Notifying W of the proposal to obtain consent orders would have enabled W to take steps to preserve his interests by seeking some appropriate remedy to prevent the orders being made. In the context where the Court had no notice of the third party's interests, we consider the failure to notify W to be also a serious failure of Ms Vanderfeen's professional duty.

65 For those reasons, we find complaint (a) is established.

***Complaint (b) - Misleading the Family Court***

66 The practitioner is alleged to have intentionally or recklessly misled the Court in two respects. The first relates to the reasons for the urgency in having the Court's orders made. The reason given in the letter to the Court of 7 December 2004 was that pressing tax liabilities needed to be attended to, and that the parties needed to give effect to the terms of the minute in order to meet those liabilities.

67 Tax liabilities had been the subject of discussion between the husband and Ms Vanderfeen and the client before and at the meeting of 30 November 2004. Although it is not readily apparent to us how the consent orders would operate to provide immediate funds to the husband to meet those liabilities, we accept that a reason for endeavouring to resolve the matrimonial property dispute was to enable the parties to arrange their affairs and, undoubtedly, to enable the husband to deal with his tax liabilities. As was conceded by Ms Vanderfeen, however, she had no information as to precisely when the outstanding tax was to be paid, and as to whether obtaining the orders within a few days, as distinct from within (possibly) up to six weeks, was critical to payment of the outstanding tax liabilities. Thus, while we accept that resolution of taxation issues was an objective of the matrimonial settlement, and that a speedy resolution was desirable from that aspect, it was not, in our view, the sole or main reason for the urgency in having the consent orders made.

68 Rather, we consider that the overwhelming inference to be drawn from the coincidence of the husband's request to have the orders extracted urgently in order to deflect specific performance, and the letter the same day to the Court seeking the urgent extraction of the order, is that one reason for urgency was that expressed by the husband and adopted by Ms Vanderfeen.

69 It follows that the reason expressed in Ms Vanderfeen's letter of 7 December 2004 for the urgency of the extraction of the orders was not, by itself, the reason for urgency. It was not irrelevant to the question of

urgency, but given Ms Vanderfeen's lack of information as to how pressing the liabilities were, it ought not have been proffered as the sole motivation for urgency. In that sense, the letter was misleading.

70 The letter was also said to be misleading in that it failed to disclose that there was a third party who ought to be heard by the Court. That is, in essence, an allegation of misleading by silence. Having concluded that Ms Vanderfeen had a duty to the Court to disclose the claims of W, and that a Court, in exercising its functions relies on practitioners fulfilling their duty, we consider that the failure to disclose W's interests was misleading. The Court undoubtedly proceeded on the assumption that there was no impediment to the parties giving to its orders.

***Complaint (c) and Complaint (d) - failures to notify W and the Court after orders had been made***

71 Allegation (c) is of a failure to notify W that the order had been made by the Court, and allegation (d) is a failure to notify the Court after the orders were made that W had reserved his rights in relation to the property. These are allegations in essence, of conduct which is a continuation of the conduct which constitutes allegation (a).

72 Ms Vanderfeen does not dispute that she failed to notify W or his solicitors of the fact that the order was made, nor does she dispute that she failed to advise the Family Court, after the orders were made, that W reserved his rights as purchaser of the property. Those failures undoubtedly occurred for the same reasons that the practitioner engaged in the conduct referred to in allegation (a). The ongoing failure to convey the relevant information to both the Court and W should, in our view, therefore be characterised in the same way as we have characterised the conduct referred in allegation (a). Accordingly, we find that allegation (c) and allegation (d) are established.

***Complaint (e) - intending to defeat the third party's rights***

73 For reasons which we have addressed above, this allegation is made out.

***Complaint (f) - misleading the Complaints Committee***

74 This allegation is based upon the contents of two letters written by Ms Vanderfeen to the Complaints Committee in response to the complaints.

75 The first letter which is the subject of complaint is a letter dated 3 July 2006. That letter was written in response to a letter from the Complaints Committee dated 15 May 2006. In the Complaints Committee's letter, it set out, in numbered paragraphs, the facts as understood by the Committee. Paragraph 8 of the Complaints Committee's letter referred to the negotiations between the practitioner, the client and the husband which led to the preparation of the minute of consent orders. In her response to that paragraph, Ms Vanderfeen made reference to the informal conference on 30 November 2004, and said:

During the conference I asked [the husband] about the state of the contract he made with the purchaser. [The husband] said that he would check whether he could get out of the sale of the property. He told me that there was a clause in the contract which would enable him to get out of the contract and the worst that could happen was that he may have to pay some damages to the purchaser. I asked [the husband] for a copy of the contract but he said he did not have one with him.

76 The Complaints Committee's letter then recited that Ms Vanderfeen had failed to make it known to the Court that the property had been sold and of W's interest, and proceeded by paragraph 14 to assert:

Both [the husband] and the practitioner Ms Vanderfeen were at all times fully aware that the fact of the said sale and the existence of the said interest in the equity of the purchaser thereunder were matters which ought to have been brought to the attention of the Court when a request was made that consent orders be made by the Court.

77 In response to that assertion, Ms Vanderfeen said:

14. As noted above, I was misled by [the husband] as to the nature of the contract made by him with the purchaser. I relied upon his representations as to the status of the contract. Both [the client] and I were led to believe that [the husband] had an 'escape clause' and that he could get out of the contract. [The husband] subsequently admitted to me that there was no such escape clause, but continued to represent that he could and would get out of the contract.

Relying upon [the husband's] representations, I considered the inclusion of the indemnity clause in paragraph 4 of the Minute to be sufficient notice to the Court. At no stage did I deliberately or knowingly conceal the interests of the purchaser from the Court. If I had known the true position and had not relied upon [the husband] as to the status of the contract, I would have advised [the client] that no settlement could be reached in relation to the [street address] property without the purchaser being informed of any

proposed orders which touched on that property and having the opportunity to be represented before the Court when such orders were considered.

78 Ms Vanderfeen's letter concluded:

With the benefit of hindsight I appreciate that I should have taken the precaution of obtaining a copy of the contract from [the husband] before the Minute of Consent Orders was signed by [the husband] and [the client]. If I had been dealing with an unrepresented layman, I most certainly would have done so. However, because I was dealing with a fellow solicitor, I made the mistake of relying on his advice as to the terms of the contract and the question of whether he could bring it to an end. I have never knowingly misled the Family Court and did not do so on this occasion.

79 The Complaints Committee alleges that the assertions by Ms Vanderfeen set out above, namely that she had been misled by the husband's representations, and as to what she would have done if she had known that the husband would not be released from the contract, were misleading.

80 In her response to the complaints filed with the Tribunal, Ms Vanderfeen asserted that the allegation that she had been misled by the husband's representations was accurate. As to the complaint that she would have acted differently if she knew the true position, she asserted that by that passage of the letter 'she sought to convey that if prior to agreeing to the terms of the consent order with [the husband] (this is the reference to 'settlement') she knew that [the husband] would not be able to arrange for the contract with W to be terminated she would not have filed the orders without W having an opportunity to be heard'.

81 In her written witness statement, Ms Vanderfeen dealt with the matter this way:

As to my letter of 3 July 2006 to the LPCC I advised them that I had relied upon [the husband's] representations. I stated that I had been led to believe that there was an 'escape clause', and that he could get out of the contract. I went on to say that he had subsequently told me there was no such clause, but that he continued to represent he could and would get out of the contract. Also in that letter I sought to distinguish between the situation when I was relying on representations made by [the husband] and what my position would have been without those representations. What I was trying to say was that if I had known prior to 7 December 2004 that [the husband] would not be able to get out of the contract I would have insisted that the purchaser be advised of the proposed orders.

82 As we understand the practitioner, what she was saying was that, notwithstanding that she knew that W was pursuing his claim for specific performance, she accepted that the husband would ultimately be able to negotiate the resolution with W, and that if she had known that that would not occur, she would have advised her client that no settlement could be reached in relation to the property without W being informed of the proposed consent orders.

83 Ms Vanderfeen's letter does not set out all of the events in detail. It is clear, however, that the 'representations' referred to in paragraph 14 of Ms Vanderfeen's letter were the representation that the husband could and would get out of the contract made after he had admitted to her that there was no 'escape clause'.

84 In our view, the letter did not assert that she did not know of the absence of a clause which would enable the husband to be released from the contract prior to her lodging the minute of consent orders with the Court. The reference to having been misled by the husband was not misleading if it was a reference to the initial situation as asserted by the husband up until the time that the husband 'subsequently admitted' that there was no such clause. Although the letter is not particularly well drafted, we consider that it does not convey an assertion that, when she submitted the minute of consent orders, she was under the belief that a 'get out' clause was in the contract. We do not consider that aspect of the complaint to be made out.

85 The second aspect of the complaint is that Ms Vanderfeen misled the Complaints Committee in asserting that she would have acted differently if she knew the true position. We have accepted that, when she lodged the minute of consent orders, Ms Vanderfeen did believe that the husband would be able to resolve W's complaint so that W would not pursue his claim for specific performance. In our view, Ms Vanderfeen's letter, properly construed, asserted that had she known the husband would not be able to complete that negotiation, she would have acted differently. That was consistent with her evidence at the hearing, and we accept that it was likely that had she thought the husband would not ultimately extricate himself from the contract, she would not have proceeded to obtain the orders. We therefore find that the second aspect of the complaint concerning the letter of 3 July 2006 is not made out.

86 In reaching that finding, we acknowledge that Ms Vanderfeen knew, at the time she filed the minute of consent orders, that there was no guarantee that the husband would in fact resolve the matter with W, and

that W was continuing to press his claims for specific performance at that point in time. It would have been appropriate for Ms Vanderfeen to have set out more fully all of the circumstances in her response to the Complaints Committee and to have drawn her response with more care. Although the response is amenable to criticism in that respect, we do not consider it, on strict analysis, to be misleading.

87 The second letter which is the subject of complaint is a letter from Ms Vanderfeen to the Complaints Committee dated 15 September 2006.

88 That letter was written in response to an enquiry for further information from the Complaints Committee by letter dated 8 September 2006. That letter commenced by advising that the Complaints Committee had resolved neither to deal with the matter of enquiry in the exercise of its summary professional disciplinary jurisdiction nor to refer it to the State Administrative Tribunal. The letter explained the reason for that conclusion and cautioned the practitioner in relation to what was described as 'such a serious error of judgment having such significant consequences'. The letter then concluded:

The Committee further directed that I invite you to go to your letter to the Acting Principal Registrar of 7 December 2004 and particularly to the paragraph commencing 'It is requested ...'. The Committee would like you to explain the circumstances that brought about your making these statements to the Acting Principal Registrar. Perhaps if your present duties permit you could let me have something within the next 14 days.

89 The paragraph in respect of which comment was sought is set out above at [18] above. It deals with the need to give effect to the terms of the minute in order to meet pressing tax liabilities.

90 Ms Vanderfeen responded by letter of 15 September 2006. That letter reads:

Thank you for your letter of 8 September 2006.

In response to your query about the letter to the Acting Principal Registrar, from documents provided by [the husband], I was aware that he had substantial outstanding income taxation liabilities. [The husband] had on a number of occasions expressed the concern that the liabilities were outstanding, incurring interest and needed to be paid. [The husband] was concerned that if the debts were not paid promptly then the taxation office would take steps to recover the debt.

At the informal conference, if not also previously, [the husband] made it clear to me his desire to resolve financial matters with his wife. He saw it as necessary to quickly enter into the Consent Order and have the order

pronounced so that he could attend to the payment of his debts. From the information disclosed by [the husband] as to his financial affairs, it appeared to me that the matter between the parties needed to be resolved before he would be in a position to pay the debt.

It was on this basis that I made the request that the matter be dealt with urgently.

91 Ms Vanderfeen's letter was written in a somewhat unusual context. The Complaints Committee's letter of 8 September 2006 suggests that the outcome of the Committee's decision had been determined. It then sought information about a particular passage in the practitioner's initial response. Ms Vanderfeen's evidence to the Tribunal was that she saw the enquiry as focused upon her knowledge about the husband's tax liabilities. She responded accordingly. There is nothing in Ms Vanderfeen's response of 15 September 2006 which is inconsistent with the facts as we have found them.

92 The Complaints Committee's concern is, in essence, that the practitioner's letter implicitly asserts that the pressing tax liabilities were the true reason for urgency. In our view, however, the way the request for further information was couched, and the context in which the enquiry was made, leaves some doubt as to the focus of the enquiry. If, as is apparently the case, Ms Vanderfeen misunderstood the point of the enquiry, we do not consider it reasonable to conclude that Ms Vanderfeen intended to mislead the Complaints Committee, or indeed that the response can fairly be said to be misleading.

93 Accordingly, we find that allegation (f) is not made out.

***Complaint (g) - all of the conduct referred to in (a) - (f)***

94 This aspect of the complaint is essentially that, even if the individual matters of complaint do not by themselves amount to professional misconduct, taken together, they do. Given our findings in relation to complaints (a) - (e), it follows that the conduct referred to in those paragraphs together, would amount to professional misconduct. For the purposes of penalty, we consider that it is appropriate to see the conduct in complaints (a) - (e) as elements of the same misguided objective.

***Character references***

95 At the conclusion of the hearing, counsel for Ms Vanderfeen tendered a number of character references for Ms Vanderfeen from professional colleagues of high standing. They were tendered on the basis

that they may be relevant to an assessment of Ms Vanderfeen's credibility which had been challenged in cross-examination. In essence, the referees asserted that conduct of an unprofessional nature would be quite out of character, and that Ms Vanderfeen is held in high regard by professional colleagues in the family law area.

96 We have had regard to those references, but in our view, they do not provide any basis for us to depart from our findings based on our detailed review of the evidence, both oral and written that was presented to the Tribunal.

### *Conclusion*

97 For the reasons set out above, we find that the practitioner, Sally Marjorie Vanderfeen, engaged in professional misconduct between about 7 December 2004 and 31 January 2005 in the manner alleged in paragraphs (a) - (e) of the Complaints Committee's allegation.

### *Orders*

1. There is a finding that the practitioner Sally Marjorie Vanderfeen ('the practitioner') between about 7 December 2004 and 31 January 2005 engaged in professional misconduct by:
  - (a) Filing a minute of consent orders in the Family Court of Western Australia for the transfer of a property situated at [property address], Ardross ('the property') from the registered proprietor of the property to the practitioner's client:
    - (i) in circumstances where the practitioner knew that a third party claimed, or may claim, rights as a third party purchaser of the property, including a right to a transfer of the property to the third party;
    - (ii) without notifying, or attempting to notify, the third party of the practitioner's intention to file the minute of consent orders or the fact that the minute had been filed;
    - (iii) without notifying, or attempting to notify, the Family Court of Western Australia of

the fact that a third party claimed, or may claim, rights as a third party purchaser of the property;

- (b) Intentionally, alternatively, recklessly misleading the Family Court of Western Australia:
  - (i) as to the reasons why the registered proprietor of the property and the practitioner's client sought to have orders made urgently by the Court in terms of the minute of consent orders;
  - (ii) that there was no third party who ought be heard by the Court before orders were made in terms of the minute of consent orders;
- (c) Failing to notify, or attempt to notify, the third party who had, to the practitioner's knowledge, reserved his rights as a third party purchaser of the property, that orders had been made by the Family Court of Western Australia in terms of the minute of consent orders for the transfer of the property from the registered proprietor to the practitioner's client;
- (d) Subsequent to orders being made by the Family Court of Western Australia in terms of the minute of consent orders, failing to notify, or attempt to notify, the Court that a third party had reserved his rights as a third party purchaser of the property, in circumstances where the practitioner knew that the third party had expressly so reserved those rights;
- (e) Attempting to have the property transferred from the registered proprietor of the property to her client for the purpose of defeating any right by the third party to have the property transferred to the third party;
- (f) all of the conduct referred to in (a) - (e).

2. The matter is listed for directions at 10 am on 6 September 2011 in order to make directions as to the determination of penalty.

I certify that this and the preceding [97] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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**JUSTICE J A CHANEY, PRESIDENT**