
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and STAFFA [2020] WASAT 58 (S)

MEMBER : JUDGE K GLANCY, DEPUTY PRESIDENT
MR D AITKEN, SENIOR MEMBER
MS M CONNOR, MEMBER

HEARD : 4 NOVEMBER 2020

DELIVERED : 15 DECEMBER 2020

FILE NO/S : VR 25 of 2019

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

KEVIN COLIN BENEDICT STAFFA
Respondent

Catchwords:

Legal practitioner - Professional misconduct and unsatisfactory professional conduct - Acting in a position of conflict - Rendering invoices to incorrect party - Advising client to transfer funds to which he was not entitled and in respect of which he had no authority to transfer - Failing to be open and honest in dealing with Legal Profession Complaints Committee - Appropriate penalty

Legislation:

Legal Profession Act 2008 (WA), s 439, s 440, s 441, s 438(2), s 438(2)(a)
Legal Profession Conduct Rules 2010 (WA)
State Administrative Tribunal Act 2004 (WA), s 78(2)

Result:

Report on Tribunal findings of professional misconduct and unsatisfactory professional conduct to Supreme Court (full bench) with recommendation that name of practitioner be removed from roll of practitioners admitted to legal profession under *Legal Professional Act 2008 (WA)*
Practitioner to pay Legal Profession Complaints Committee costs

Category: B

Representation:

Counsel:

Applicant : Mr MD Cuerden SC and Ms CC Paterson
Respondent : Mr GD Cobby SC

Solicitors:

Applicant : Legal Profession Complaints Committee
Respondent : Legal Success Pty Ltd

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

Khosa v Legal Profession Complaints Committee [2017] WASCA 192
Legal Profession Complaints Committee and Staffa [2020] WASAT 58
Legal Profession Complaints Committee v Detata [2012] WASCA 214
Legal Profession Complaints Committee v Love [2014] WASC 389
Vogt v Legal Practitioners Complaints Committee [2009] WASCA 202

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction and background

1 On 2 June 2020, following a hearing which took place over three days, the Tribunal made findings in relation to the conduct of Mr Kevin Colin Benedict Staffa (the Practitioner) as a practitioner:

2 At the hearing on liability the applicant had sought, amongst other things, an order that the Tribunal make a finding that the Practitioner had engaged in professional misconduct pursuant to s 438(2) of the *Legal Profession Act 2008* (WA) (LP Act). The applicant set out four grounds upon which it alleged that was the case. The Tribunal's findings on liability¹ are made with reference to those four grounds. For the sake of consistency the Tribunal will, in these reasons, continue to adopt that terminology.

3 The Tribunal's findings were:²

... that Kevin Colin Benedict Staffa, a legal practitioner, director of an incorporated legal practice, Legal Success Pty Ltd, trading as 'Legal Success',

- (a) engaged in professional misconduct as defined in s 403(1) of the *Legal Profession Act 2008* (WA) by providing legal services to a client when the Practitioner and the Practitioner's law practice was engaged by another client in the same or related matter and the interests of the client and the other client were adverse and there was a conflict of the duties to act in the best interests of each client contrary to r 14(2) of the *Legal Profession Conduct Rules 2010* (WA) [findings in relation to Ground 1];
- (b) engaged in unsatisfactory professional conduct as defined in s 402 of the *Legal Profession Act 2008* (WA) by rendering two invoices to a client in respect of work carried out for another client [findings in relation to Ground 2];
- (c) engaged in professional misconduct as defined in s 403(1) of the *Legal Profession Act 2008* (WA) by advising a client to transfer money belonging to another client to a bank account controlled by the first client without the consent or authority of the other client [findings in relation to Ground 3]; and
- (d) engaged in professional misconduct as defined in s 403(1) of the *Legal Profession Act 2008* (WA) by failing to be open and candid in his dealing with the Legal Profession Complaints Committee

¹ *Legal Profession Complaints Committee and Staffa* [2020] WASAT 58 (*Reasons*).

² See orders at page 43 of *Reasons*.

in breach of r 50 of the *Legal Profession Conduct Rules 2010* (WA) [findings in relation to Ground 4].

4 The Tribunal adjourned the matter to allow the parties to make submissions to the Tribunal on penalty and costs.

5 On 4 November 2020 the Tribunal, which was differently constituted, heard the parties in relation to penalty and costs.

6 In summary, the applicant submits that having regard to the Tribunal's findings, the Practitioner is unfit to practice and that the Tribunal should, therefore, make and transmit a report on its findings to the Supreme Court (full bench) with a recommendation that the Practitioner's name be removed from the roll of practitioners. The Practitioner, on the other hand, submitted that a period of suspension was the appropriate penalty in all of the circumstances.

7 Both parties submitted that in the event that the Tribunal were to make a referral to the Supreme Court (full bench), the Practitioner's practising certificate should ultimately be suspended pending the Supreme Court (full bench)'s determination of the matter, but that the suspension should not take effect immediately. Both parties submitted that the Practitioner's practising certificate should be conditioned in such a way that would allow him, for a time, to continue to act for the plaintiffs in a Supreme Court matter (CIV 1337 of 2014), in respect of which he is acting on a deferred fee basis and where the trial is due to commence in January 2021. The parties were not in agreement as to the period of time for which the Practitioner should be permitted to continue to act in that matter or as to the particular conditions which should be imposed on the practising certificate to give effect to that intention.

Conclusion

8 For the reasons set out below the Tribunal has determined:

- (1) that a report will be made and transmitted to the Supreme Court (full bench) in respect of the findings in relation to Grounds 1 - 4 set out at [3] above, with a recommendation that the Practitioner's name be removed from the roll of practitioners;
- (2) the Practitioner's local practising certificate should be suspended pending the Supreme Court (full bench)'s determination of the matter. No provision will be made to allow the Practitioner to continue to act in relation to

the Supreme Court matter CIV 1337 of 2014 for any period of time; and

- (3) that the Practitioner is to pay the applicant's costs fixed in the sum of \$58,000.

9 The precise form of orders giving effect to the above conclusions are matters upon which the Tribunal will hear from the parties. A draft form of proposed orders is set out at the conclusion of these reasons for decision.

Principles to be applied to penalty

10 The *Legal Profession Act 2008* (WA) (LP Act) sets out the various orders which the Tribunal may make consequent upon a finding that a practitioner is guilty of unsatisfactory professional conduct or professional misconduct. Section 438(2) permits the Tribunal to make and transmit a report to the Supreme Court (full bench) on the findings or to make any one or more of the orders specified in s 439, s 440 and s 441 of the LP Act. Among other things, s 439 of the LP Act permits the Tribunal to suspend a local practising certificate for a specified period of time or to cancel it.

11 The principles to be applied in determining the appropriate disciplinary sanction are well established and were not in dispute between the parties. They were set out by the Court of Appeal in *Khosa v Legal Profession Complaints Committee* [2017] WASCA 192 at [188]-[195] (*Khosa*). Those principles are:

- (a) the purpose of a disciplinary proceeding against a legal practitioner is the protection of the public by the maintenance of proper standards within the profession rather than the punishment of the practitioner;
- (b) the protection of the public includes both personal deterrence and general deterrence of other practitioners who may be tempted to engage in the conduct;
- (c) where the conclusion is reached that the practitioner is presently unfit to practice and the choice is between suspension and striking off, the Tribunal must consider that the practitioner will again be fit to practice after the proposed suspension period comes to an end before a term of suspension can be ordered. This is because,

when a period of suspension is concluded, the practitioner's name will be on the roll of practitioners and the practitioner will be able to resume practice;

- (d) suspension is a serious form of discipline which is usually imposed where a practitioner has been found to have engaged in an act of unprofessional conduct, but who, in the opinion of the Tribunal will be a fit and proper person to practice law after the suspension period is ended. In the context of suspension, present unfitness to practice may be understood to include a serious breach of professional obligations reflecting, to a significant degree, upon the practitioner's fitness to practice;
- (e) striking off is likely to be the appropriate response when the circumstances of the conduct amounting to the current unfitness to practice demonstrate that the practitioner lacks the character and trustworthiness necessary to discharge the responsibility of legal practice;
- (f) a failure to appreciate the impropriety of the practitioner's conduct may support a finding that the practitioner is unfit to practice. This is because the failure to appreciate the impropriety increases the risk of a recurrence of the improper conduct; and
- (g) the Tribunal is to determine the appropriate penalty, including fitness to practice, at the time of the hearing rather than at the time of the conduct.

12 In summary, where an order for removal from the roll is contemplated the ultimate question is whether the impugned conduct of the practitioner, and all of the surrounding circumstances, demonstrates that the practitioner is not a fit and proper person to remain a member of the legal profession. Where the conduct of the practitioner indicates that he or she lacks the qualities of honesty and integrity, striking off is likely to be the penalty because those character deficiencies are unlikely to be remedied during a period of suspension. In contrast, suspension would generally be appropriate where:

- (a) the Tribunal considers that although the practitioner has fallen below the high standards required of a

practitioner, the circumstances are such that his or her current unfitness to practice will be overcome during a period of suspension; or

- (b) although the Practitioner is thought to be fit to practice, the seriousness of the Practitioner's conduct is such that the appropriate outcome is a period of suspension in order to protect the public, through general deterrence, and to maintain the standards of the profession.

13 It is not necessarily the case that every incident of professional misconduct involving misleading a court will result in the striking off of the practitioner: *Legal Profession Complaints Committee v Love* [2014] WASC 389. But a finding that a practitioner has deliberately misled a court raises serious questions about that practitioner's fitness to practice and must attract a significant penalty: *Vogt v Legal Practitioners Complaints Committee* [2009] WASCA 202 at [70].

14 In the Tribunal's view, misleading, or acting with the intention of misleading the Legal Profession Complaints Committee is to be viewed as seriously as is misleading, or acting with the intention of misleading a client, court or Tribunal. The Legal Profession Complaints Committee performs an important role in ensuring the regulation of legal practitioners, which is the purpose of the LP Act³, pursuant to which the Legal Profession Complaints Committee is established. Unless practitioners' duties of honesty and candour to the Legal Profession Complaints Committee is regarded in that way, its ability to effectively regulate the profession is undermined.

15 The purpose of the making of penalty orders is the protection of the public through the maintenance of proper standards within the profession. As such, the impact that the appropriate penalty would have upon a practitioner who is found to have committed misconduct, and personal hardship that may be occasioned to a practitioner by the imposition of a particular penalty are necessarily secondary considerations: *Legal Profession Complaints Committee v Detata* [2012] WASCA 214 at [47] and *Khosa* at [66] and [213].

The Practitioner's personal circumstances

16 The Practitioner filed two affidavits in support of his position which were read at the penalty hearing. The first was sworn on 22 September

³ See long title to the *Legal Profession Act 2008* (WA).

2020 and the supplementary affidavit was sworn on 27 October 2020. The Practitioner was not cross-examined on either affidavit.

17 From the affidavits the Tribunal makes the following relevant findings in respect of the Practitioner's personal circumstances:

- (1) The Practitioner is currently 71 years of age. He was sent to Australia in 1956 at the age of five under the Assisted Child Migrant Scheme and lived in an orphanage before he was reunited with his mother at 14 years of age.
- (2) In 1968 he was awarded a Commonwealth Scholarship which enabled him to attend university where he chose to study law.
- (3) During his studies he was conscripted into the Australian Army during the Vietnam War and although he completed advanced infantry training and trained as an interpreter he was not deployed to Vietnam because the election of the Whitlam Government in 1972 resulted in the plan to send his battalion to Vietnam being cancelled.
- (4) He completed his law degree and was admitted to practice on 14 February 1978 and has practiced continually since that time.
- (5) He intends to retire from the legal profession on 30 June 2021 but intends to work outside the law after that time.
- (6) During his time in practice he has been regularly involved in the provision of pro bono legal advice;
- (7) During his time in practice he has only had one prior disciplinary proceeding brought against him. It resulted in a finding of unsatisfactory professional conduct being made in 2011.⁴
- (8) He is married and although his wife works part time, she is financially dependent upon him. He has no other dependants.

⁴ Affidavit of 22 September 2020 para 19. The action was 2011 VR 175.

- (9) He presently has a mortgage over his residence. His income from legal practice last year amounted to just less than \$80,000. He expects to earn fees of about \$4,000 until his retirement.
- (10) His superannuation fund owns the property from which he practices law. He is paid a pension from the superannuation fund which equates to the rent which his practice pays to the superannuation fund less expenses. There is no mortgage over that property. The property is estimated to be worth \$600,000. He intends to sell it to enable the mortgage on his home to be paid off.
- (11) He currently has only four files open. They are:
- (a) Supreme Court action CIV 1337 of 2014;
 - (b) Supreme Court action CIV 2476 of 2015 (the Mining Action). He states that 74% of his income for the last year was generated by this matter;
 - (c) District Court action CIV 4140 of 2016 (the Accountant Action); and
 - (d) District Court action CIV 2454 of 2019 (the Farm Action).
- (12) Another solicitor has now been appointed in relation to the Mining Action because of the Practitioner's intention to retire. In his affidavit of 22 September 2020 the Practitioner deposed that despite that, he intended to continue to assist with the preparation of witness statements 'in the short term' because of the complexity of the facts.⁵ In his later affidavit he deposed that his instructions in the matter have been put on hold for now.⁶ The reasons for that change in position were unstated and it is not clear whether the Practitioner will provide further assistance in the conduct of the Mining Action.

⁵ Affidavit of 22 September 2020 para 28.

⁶ Affidavit of 27 October 2020 para 8.

- (13) 'The Accountant Action' is a claim against his client for the sum of less than \$200,000. There is a pleadings battle going on presently. It is unlikely that the matter will get to trial before his proposed retirement on 30 June 2021 and the practitioner is keen to ensure that pleadings, discovery and outlines of witness statements are completed by him before new solicitors are appointed with a view to saving his client considerable legal costs.⁷
- (14) 'The Farm Action' is a debt recovery action which he expects will be completed prior to 30 June 2021.⁸

The references filed with the practitioner's submissions dated 27 October 2020

18 In support of his position the Practitioner has provided references from the following persons:

- (a) Ms Anne Payne. Ms Payne is a legal practitioner who states that between 2011 and 2019, other than for a period of two years, she and the practitioner belonged to a professional networking group together. She stated that she would refer clients to the Practitioner where their issues related to matters outside her expertise and within his and that the feedback from those clients was that he provided them with services promptly and professionally. She considers the findings made against him to be in respect of conduct which she regards as out of character based on her knowledge of him in a personal and professional capacity.
- (b) Mr Anthony Goldfinch. Mr Goldfinch is a legal practitioner who has known the Practitioner in a professional capacity since the early 1990s. He stated that he has found the Practitioner to be hard working and dedicated to achieving the best results for his clients, particularly if he considers that there has been an injustice done to them. He says that over all of their professional interactions he has found the Practitioner to be friendly and personable.

⁷ Affidavit of 22 September 2020 paras 26(c) and 29.

⁸ Affidavit of 22 September 2020 para 30.

- (c) Ms GiGi Visscher. Ms Visscher is a barrister who is acting on a deferred fee basis on Supreme Court action 1337 of 2014. She states that the Practitioner has, in the course of this Supreme Court matter CIV 1337 of 2014, demonstrated a willingness to go above and beyond, has been diligent and hardworking, dependable, knowledgeable and in her view, a true asset.
- (d) Ms Rebecca Lee. Ms Lee states that she met the Practitioner when he briefed her in 2017 and the two have worked closely in the three and a half years since then. She opines that the Practitioner is hard working and diligent in acting in his clients' best interests and that she has not had cause to have any concerns about his integrity.

19 From those references the Tribunal finds that the Practitioner is regarded, by those referees, as being hardworking, of good repute and competent in the law.

Applicant's position on penalty

20 The applicant submitted that the Tribunal's findings in relation to the Practitioner's conduct encompassed in Grounds 1 - 3 while bearing upon his competence, were not, either individually or in combination, capable of justifying a conclusion that the Practitioner is not fit to practice law. The applicant submitted that had the findings in relation to Ground 4 not been made, the applicant would have submitted that a disciplinary outcome less than the making and transmission of a report to the Supreme Court (full bench) would have been appropriate.

21 The applicant submitted that it was the Tribunal's findings in relation to Ground 4 together with the Practitioner's lack of insight, demonstrated by his denial of the alleged conduct and its seriousness and the absence of remorse, which necessitated the Tribunal concluding that the Practitioner is not fit to practice law and, therefore, resolving to make and transmit a report to the Supreme Court (full bench) with a recommendation that the Practitioner's name be removed from the roll of practitioners. The applicant submitted that such a conclusion was especially warranted when those matters are taken together with the conduct found in relation to Grounds 1 - 3. The applicant submitted that a global penalty, being the making and transmission of a report to the Supreme Court with a recommendation that the Practitioner's name be removed from the roll was appropriate.

22 Despite its submission that the Tribunal should find that the Practitioner is not fit to practice law, the applicant submitted that particular circumstances existed that meant that the Practitioner should be allowed a limited right to practice pending the resolution of the referral to the Supreme Court (full bench). The special circumstances which are said to exist are that CIV 1337 of 2014 is very close to trial, being listed for 10 days from 18 to 28 January 2021 and replacing the Practitioner at this late stage would be very difficult, in particular because he is acting on a deferred fee basis because the plaintiffs cannot afford legal representation.⁹

23 It was submitted that the limited right to practice would allow the Practitioner to remain involved in CIV 1337 of 2014 until the anticipated conclusion of the trial, following which (subject to any extension of that limited right to practice which might be granted to the Practitioner by the Tribunal) his practising certificate would be suspended pending the determination of the Supreme Court (full bench).

24 The applicant submitted that in the event that the Tribunal determined that a period of suspension was the appropriate penalty, that suspension should not take effect until after 28 January 2021 (or such later date as may be ordered pursuant to an order that there be liberty to apply) in order to allow the Practitioner to continue to act in CIV 1337 of 2014 for the same reasons as already stated.

Practitioner's position on penalty

25 The Practitioner submitted:

- (1) a referral to the Supreme Court (full bench) is not necessary in all of the circumstances;
- (2) a significant term of suspension from practice is the appropriate penalty having regard to the actual conduct engaged in by the Practitioner and to his personal circumstances;
- (3) alternatively, if the Tribunal does resolve to refer the matter to the Supreme Court (full bench) then, rather than making an order for the interim suspension of the Practitioner's local practising certificate, it should be conditioned in a manner not dissimilar to that proposed by the applicant but those conditions should also allow

⁹ Those facts are set out in the letter from Ms Visscher to which the Tribunal referred at [18] of these reasons.

the practitioner to continue to act for the defendants in the Accounting Action and for the plaintiffs in the Farm Action so that that he can earn an income which would allow him to fund his involvement in Supreme Court action CIV 1337 of 2014. The Practitioner also submitted that rather than limit his restricted right to practice to 28 January 2021, the entitlement to practice in that limited way should be expressed to continue until judgment is delivered in respect of CIV 1337 of 2014 (subject to an earlier resolution of the referral by the Supreme Court (full bench)). Two reasons were advanced for that position. First, because there was a real prospect that the trial of CIV 1337 of 2014 would not conclude on 28 January 2021 and the matter would be part heard necessitating the Practitioner's continued involvement beyond 28 January 2021. Second, even if the trial is concluded by 28 January 2021, the judgment would not be delivered by that time and the Practitioner will need to be involved in taking judgment.

26 The Practitioner submitted that whether he was suspended for a significant period of time or was struck from the roll made little practical difference because any period of suspension would be for a period which went past 30 June 2021, when the Practitioner intended to retire in any event. That is, either outcome would mean that the Practitioner would not be able to return to unrestricted practice before his retirement.

The penalty orders which should be made

27 In his affidavits of 22 September 2020 and 27 October 2020 the Practitioner deposes that it has been, and remains, his intention to cease the practice of law at the end of June 2021. He says he is not taking any new instructions and currently only has instructions in respect of the four matters referred to in [17(11)] above. However, no undertaking to cease practice from 1 July 2021 has been given by the Practitioner. In that circumstance, while the Tribunal has no reason to doubt that the Practitioner's intention to retire is genuine, the Tribunal has proceeded to consider the question of suspension on the basis that the Practitioner may in fact decide to continue to practice after a period of suspension has been served if one were to be imposed.

28 The Tribunal accepts that the unsatisfactory professional conduct found in relation to Ground 2, the rendering of bills by the Practitioner

to the Australian company when the client was not the Australian company but rather W, which the Tribunal characterised as unsatisfactory professional conduct, is not of a kind which bears upon the Practitioner's competence in relation to matters of law.

29 However, the Tribunal considers that the findings in respect to the Practitioner's conduct made by the Tribunal in relation to Grounds 1, 3 and 4, do bear upon the question of the Practitioner's competence.

30 First, the Tribunal found, in respect of Ground 1 that the Practitioner's conduct, which involved a failure to appreciate the existence of a conflict of interest was a 'substantial failure on his part' which amounted to professional misconduct rather than merely unsatisfactory professional conduct because it fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian Legal practitioner.¹⁰ The Tribunal considers that that failure goes directly to the Practitioner's competence.

31 Second, in relation to Ground 3, at the liability hearing before the Tribunal the Practitioner accepted that his advice to W to transfer funds from the Australian company to W's own account so as to preserve in Australia funds that would meet the termination payments which it the Australian Company might owe to W was 'negligent'.¹¹ The Tribunal found that conduct amounted to professional misconduct under the LP Act.¹² In so doing the Tribunal concluded that 'it was entirely inappropriate to advise W to take the money'¹³ and that the Practitioner's conduct, in giving that advice, 'is conduct that could be reasonably regarded as disgraceful and which, to a substantial degree, falls short of the standard of professional conduct observed or approved by members of the legal profession of good repute and competence'.¹⁴ Such a finding necessarily calls into question the Practitioner's legal ability or competence.

32 The Tribunal has real concerns about the Practitioner's competence to practice in light of the findings in relation to Grounds 1 and 3 particularly having regard to the Practitioner's long experience in the law and the obvious nature of the mistakes made.

¹⁰ *Reasons* [123]-[125].

¹¹ *Reasons* [79].

¹² *Reasons* [141].

¹³ *Reasons* [140].

¹⁴ *Reasons* [141].

33 Despite those misgivings, in light of the Practitioner's many years of satisfactory practice, the Tribunal is of the view that the failings identified in relation to Grounds 1, 2 and 3 could be dealt with by way of a disciplinary outcome less than a referral to the Supreme Court (full bench).

34 Had these been the only matters involved, the Tribunal would be satisfied that a period of suspension from practice would achieve the object of the protection of the public through the maintenance of the standards of the profession and appropriately mark the seriousness of that conduct.

35 However, the Tribunal is of the view that when taken together with the professional misconduct found in relation to Ground 4, the appropriate disciplinary outcome is that all of those matters should be dealt with by the making of a report and its referral to the Supreme Court (full bench) with a recommendation that the Practitioner's name be removed from the roll of practitioners.

36 The Tribunal finds that the lack of honesty and integrity displayed by the Practitioner by his conduct in Ground 4 together with his failure to even offer to return the money paid to him by the Australian company is such that, when regard is had to all of the circumstances, it is appropriate that a referral is made to the Supreme Court (full bench) with a recommendation that his name be removed from the roll of practitioners. We go on to explain our reasoning in relation to that conclusion in the following paragraphs.

37 In respect of Ground 4, the Practitioner was found to have engaged in professional misconduct by failing to be open and candid in his dealings with the Legal Profession Complaints Committee.

38 The Tribunal found that during the course of its investigation into a complaint made in respect of the Practitioner's conduct, the Legal Profession Complaints Committee wrote to the Practitioner and asked him whether he had given advice to W to transfer \$378,000 from the Australian Company's account to W's account and that the Practitioner had responded saying that the Legal Profession Complaints Committee was mistaken that he had given advice to W to transfer \$378,000 from the Australian Company's account to W's account. In his evidence before the Tribunal the Practitioner endeavoured to explain that response by claiming that he misunderstood the Legal Profession Complaints Committee's question and that he was responding to it that

he had not given advice to transfer the specific sum of money referred to in their correspondence rather than his response being a denial of having given advice to transfer any funds from the Australian Company's account to W's account. The Practitioner's evidence was that his answer was not, therefore, intended to mislead the Committee.¹⁵

39 In its findings the Tribunal rejected the Practitioner's explanation for his response, finding that the Practitioner's evidence was disingenuous, that the Practitioner knew the response was false and that, in giving it, he intended to and did mislead the Committee.¹⁶

40 From those findings the Tribunal now concludes that the Practitioner's disingenuous explanation for the answer given by him to the Committee which he gave in evidence before the Tribunal was demonstrative of:

- (i) a further attempt to evade the consequence of his wrongful conduct; and
- (ii) a lack of remorse for the misconduct.

41 Further, the Tribunal has had regard to the fact that the Practitioner has not returned to the Australian Company the fees which it paid to him when they should have been paid by W.

42 In his written submissions dated 22 September 2020, which were drafted and filed by the Practitioner himself, and so must be regarded as reflective of his own thinking, the Practitioner contends that it is relevant to the penalty proceedings that no complaint was made by any client or the shareholders of the company about the inadvertent error in issuing the invoices and neither W nor the Australian company has sought reimbursement of any of the fees.¹⁷

43 While those matters are relevant to the Tribunal's considerations, in the Tribunal's view, once his billing error was known to him, the Practitioner ought at least to have offered to refund the fees to the Australian company. From an ethical point of view the Practitioner should not be entitled to adopt the position that he can simply retain the money unless the Australian company is proactive in asking for it back.

¹⁵ *Reasons* [161]-[164].

¹⁶ *Reasons* [164]-[166].

¹⁷ Submissions dated 22 September 2020 para 11.

The Tribunal considers that this attitude shows a lack of appreciation for his wrongdoing and is also demonstrative of a lack of remorse.

44 In circumstances where:

- (a) the Practitioner was not candid in his response to the Legal Profession Complaints Committee of 2 May 2017;
- (b) was disingenuous in his evidence before the Tribunal in an effort to explain away his original answer to the Legal Profession Complaints Committee;
- (c) was a very experienced practitioner;
- (d) because of his disciplinary history, he could be expected to be aware of his obligations to the Committee, which he did not meet when he failed to be candid in his answers to their questions, answered 'no comment' in part of his response to their inquiry and suggested that they could ask W directly for answers rather than asking him;¹⁸
- (e) his professional misconduct and unsatisfactory professional conduct, although all related to essentially one matter, persisted over a period of time and is therefore unable to be regarded as a one off event; and
- (f) the Practitioner has not demonstrated insight or remorse,

the Tribunal finds that the Practitioner's conduct encompassed in Ground 4 was incompatible with the characteristics of honesty and integrity that are required for the maintenance of proper standards of the profession.

45 That is the case notwithstanding:

- (a) the Practitioner's stated intention to retire from practice on 30 June 2021;
- (b) that the Practitioner is not taking any new instructions and is currently acting only on the four matters referred to in [17(11)] above;

¹⁸ *Reasons* [165].

- (c) the Practitioner's prior good standing in the profession;
and
- (d) the Practitioner's favourable personal antecedents.

46 The Tribunal finds that the Practitioner's conduct in relation to Ground 4, which goes to his character, means that those who would deal with him in the law cannot be assured that he will act with integrity at all times. The Tribunal finds that that is not the kind of concern that could be remedied during a period of suspension. In that circumstance the Tribunal concludes that the maintenance of proper standards of the profession and the protection of the public necessitates that it exercise the discretion reposed in it under s 438(2)(a) to make and transmit a report on the findings to the Supreme Court (full bench) with a recommendation that his name be struck from the roll of practitioners.

47 As we have already adverted to, the parties have each submitted that in the event that a referral to the Supreme Court (full bench) is to be made, an interim suspension of the Practitioner's practising certificate should also be made but not until the Practitioner has been permitted (pursuant to conditions to be imposed on the practising certificate) to continue to act for a specified period of time in the Supreme Court matter CIV 1337 of 2014.

48 Several matters tell against the conditioning of the Practitioner's practising certificate in either the way proposed by the applicant or the way proposed by the respondent.

49 First, although it was submitted that judgment may not be delivered in the Supreme Court action before 30 June 2021, when asked what the Practitioner intended to do in relation to continuing to practice in that event, his counsel, after taking instructions from the Practitioner, informed the Tribunal that the Practitioner had not considered that possibility and would make a decision about it if and when it becomes an issue. The inference to be drawn, and which the Tribunal does draw from that answer is that the Practitioner is not committed to seeing CIV 1337 of 2014 to its conclusion. So the plaintiffs in that litigation may in fact find themselves in a position where the matter is part heard or judgment is reserved and the Practitioner retires leaving them without an instructing solicitor. The mischief which the proposed interim step is designed to cure may, therefore, still arise before the litigation is concluded.

50 Second, the submission that the Practitioner should be entitled to continue to act in respect of the two fee paying District Court matters in order that he can obtain a source of funds which will allow him to continue to act in CIV 1337 of 2014 also gives the Tribunal reason to be concerned that the Practitioner may not be committed to continuing to act in that matter if he cannot continue to act in the District Court matters. The Tribunal appreciates that the Practitioner has not said that he would not do so, but the Tribunal notes that there has not been any unequivocal commitment from the Practitioner that he would do so.

51 Third, in the event that the Practitioner's practising certificate were conditioned in the way the Practitioner proposes and the three actions are concluded before the decision of the Supreme Court (full bench) in respect of the referral (as he acknowledges might be the case), and the Practitioner then does not renew his practising certificate and so ceases to be entitled to practice on 30 June 2021, the Practitioner will, in effect, have suffered no consequence for the conduct in question. That is because he will have been allowed to conclude his practice in accordance with his presently expressed intentions. In our view the Tribunal ought to be slow to put in place a regime which would deliver such an outcome.

52 Fourthly, in this case, where there is little information before the Tribunal about the importance or complexity of CIV 1337 of 2014 and no information about any attempts having been made to find solicitors who may be willing to act on a deferred fee basis in place of the Practitioner, and where the plaintiffs could apply to the Supreme Court to vacate the trial dates in order to allow time for alternative solicitors to be identified and to become properly acquainted with the matter (which might have the additional benefit of allowing for the hearing to be listed for sufficient hearing days that will ensure that it can be concluded in one sitting) the Tribunal is not persuaded that it would be appropriate to limit the Practitioner's entitlement to practice for a period of time before an order for interim suspension would come into effect as has been proposed by both parties.¹⁹

53 Finally, in light of the nature of the Practitioner's impugned conduct the Tribunal considers that it would be an unprincipled approach to take to find that the Practitioner's conduct was such that he ought to be suspended from practice pending a decision of the Supreme Court (full bench) but to allow him a limited right to practice for a period of time for specific clients should they, knowing of the Tribunal's findings

¹⁹ Although the precise terms of those conditions are in issue between them.

and determination, choose to continue to have him act for them. This is not the kind of case where the Tribunal might limit a practitioner's right to practice to a certain area of law satisfied of their expertise in that particular area but concerned that they should not be allowed to practice in another. The Practitioner's impugned conduct went to his integrity generally. That concern is as apposite to his conduct in CIV 1337 of 2014 as it is to other matters.

Costs

54 Although the applicant originally sought an order that the Practitioner pay its costs in the sum of \$68,012.50, an agreement was reached between the parties such that at the hearing the parties consented to the making of an order in the following terms:

Pursuant to s 78(2) of the *State Administrative Tribunal Act 2004* (WA), Kevin Colin Benedict Staffa must pay the applicant's costs of the proceedings fixed in the sum of \$58,000, such costs to be paid to the Legal Practice Board of Western Australia within 30 days of the date of this order or as otherwise agreed between the Practitioner and the Legal Practice Board.

55 Having regard to the nature of this matter and the manner in which it proceeded, the Tribunal is satisfied that the sum agreed between the parties to be paid by the Practitioner to the Legal Practice Board is reasonable. Accordingly, the Tribunal is satisfied that it is appropriate to make the order sought.

Orders

56 The Tribunal proposes to make the following orders:

1. Pursuant to s 438(2) and s 438(4) of the *Legal Profession Act 2008* (WA) the Tribunal:
 - 1.1. makes and transmits a report to the Supreme Court (full bench) on its findings that that Kevin Colin Benedict Staffa:
 - (a) engaged in professional misconduct as defined in s 403(1) of the *Legal Profession Act 2008* (WA) by providing legal services to a client when the Practitioner and the Practitioner's law

practice is engaged by another client in the same or related matter and the interests of the client and the other client were adverse and there was a conflict of the duties to act in the best interests of each client contrary to r 14(2) of the *Legal Profession Conduct Rules 2010* (WA);

- (b) engaged in unsatisfactory professional conduct as defined in s 402 of the *Legal Profession Act 2008* (WA) by rendering two invoices to a client in respect of work carried out for another client;
 - (c) engaged in professional misconduct as defined in s 403(1) of the *Legal Profession Act 2008* (WA) by advising a client to transfer money belonging to another client to a bank account controlled by the first client without the consent or authority of the other client; and
 - (d) engaged in professional misconduct as defined in s 403(1) of the *Legal Profession Act 2008* (WA) by failing to be open and candid in his dealing with the Legal Profession Complaints Committee in breach of r 50 of the *Legal Profession Conduct Rules 2010* (WA);
- 1.2 makes a recommendation that Kevin Colin Benedict Staffa's name be removed from the roll of practitioners admitted to the legal profession under the *Legal Profession Act 2008* (WA) for that professional misconduct and unsatisfactory professional conduct; and
- 1.3 orders that the Tribunal's report to the Supreme Court (full bench) is to comprise the Tribunal's

reasons in *Legal Profession Complaints Committee and Staffa* [2020] WASAT 58, the Tribunal's orders made on 2 June 2020 in this application, the Tribunal's reasons in *Legal Profession Complaints Committee and Staffa* [2020] WASAT 58 (S), the transcript of the hearing of the Tribunal on 30 and 31 January 2020 and 6 March 2020 and copies of the exhibits tendered at that hearing, the transcript of the hearing of 4 November and the copies of exhibits and affidavits tendered at that hearing and these orders.

2. Pursuant to s 438(3)(a) Kevin Colin Benedict Staffa's local practising certificate is suspended with effect from [] days after the date of this order, until determination by the Supreme Court (full bench).
3. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) Kevin Colin Benedict Staffa must pay the Legal Profession Complaints Committee's costs of the proceedings fixed in the sum of \$58,000, such costs to be paid to the Legal Practice Board of Western Australia within 30 days of the date of this order or as otherwise agreed between Kevin Colin Benedict Staffa and the Legal Practice Board.

57 The Tribunal will hear the parties as to the time at which suspension referred to in proposed order 2 should take effect as some time may be required to allow the Practitioner to hand over his files.

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

CH
Associate to Judge Glancy

15 DECEMBER 2020