[2017] WASAT 48

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and NEIL [2017] WASAT 48
MEMBER	**:**	JUSTICE J C CURTHOYS (PRESIDENT) MR M SPILLANE (SENIOR MEMBER) MS R MOORE (MEMBER)
HEARD	**:**	13 FEBRUARY 2017
DELIVERED	**:**	17 MARCH 2017
FILE NO/S	**:**	VR 193 of 2015
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND PETER CHRISTISON NEIL Respondent

Catchwords:

Professional misconduct - Failing to provide advice - Charging for advice not provided

Legislation:

Legal Profession Act 2008 (WA), s 5(a), s 402, s 403, s 438, s 438(1)
State Administrative Tribunal Act 2004 (WA), s 47, s 48, s 50

Result:

Practitioner found to have engaged in professional misconduct

Summary of Tribunal's decision:

On 17 November 2015, the Legal Profession Complaints Committee filed an application against Mr Peter Christison Neil, a legal practitioner, alleging that Mr Neil had engaged in professional misconduct pursuant to s 438(1) of the *Legal Profession Act 2008* (WA).

The hearing of this matter took place on 13 February 2017, after the Tribunal granted an extension of five months from the original hearing date in order to accommodate Mr Neil's health issues. Mr Neil did not attend the hearing on 13 February 2017 and the matter proceeded in his absence.

The Tribunal determined that Mr Neil engaged in professional misconduct in consistently failing to provide the advice required by his client under the terms of the retainer and despite repeated requests by the client that he provide her with advice.

The Tribunal determined that Mr Neil also engaged in professional misconduct in seeking to charge the client when he had not complied with the terms of the retainer.

Category: B

Representation:

Counsel:

Applicant	:	Mr AJ Musikanth and Ms C Paterson
Respondent	:	No Appearance

Solicitors:

Applicant	:	Legal Profession Complaints Committee
Respondent	:	N/A

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

Briginshaw v Briginshaw (1938) 60 CLR 336

Legal Profession Complaints Committee and Wells [2014] WASAT 112
NOM v Director of Public Prosecutions (2012) 38 VR 618
Rejfek v McElroy (1965) 112 CLR 517

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 17 November 2015, the Legal Profession Complaints Committee (Committee) filed an application naming Mr Peter Christison Neil, a legal practitioner, as respondent. The Committee sought an order that the Tribunal find that Mr Neil had engaged in professional misconduct pursuant to s 438(1) of the *Legal Profession Act 2008* (WA) (LP Act). The grounds for such a finding were set out in the application.

2 On 8 September 2016, the Tribunal gave leave to the Committee to amend its grounds. The effect of the amendments was to slightly narrow the scope of the matters alleged by the Committee. Mr Neil was ordered to file an amended response by 22 September 2016. Mr Neil failed to do so.

3 Essentially, Mr Neil's client, JL, sought advice from Mr Neil arising from her commercial dealings with DF.

4 On 21 December 2013, Mr Neil sent JL an invoice for $1,495 (Exhibit A page 240).

5 The Committee alleged that Mr Neil failed to provide advice and charged for the giving of advice when, by reason of his failure to provide advice, he was not entitled to charge for it.

The grounds

Ground 1

6 The Committee alleged that Mr Neil, between about 13 August 2013 and 17 October 2013, engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act by engaging in conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, and which involved a substantial and consistent failure to reach or maintain a reasonable standard of competence and diligence, in that he did not provide any or any adequate legal advice to JL in relation to a dispute with DF regarding a property development at the Property that Mr Neil had been retained to, and had agreed to, provide.

Ground 2

7 The Committee alleged that Mr Neil, between about 21 December 2013 and 9 January 2014 engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act by engaging in conduct that fell short, consistently or by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence or alternatively engaged in unsatisfactory professional conduct within the meaning of s 402 and s 438 of the LP Act in that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner by rendering a lump sum invoice on 21 December 2013 for legal fees to the client in the sum of $1,495 and further by rendering an itemised invoice on 9 January 2014 for legal fees to the client, in substitution of the lump sum invoice, in the sum of $2,006.40 which were not fair and reasonable as Mr Neil did not adequately or at all, carry out or perform the legal work for which he was retained and was not therefore entitled to charge the client at all.

Onus and standard

8 The Committee bears the onus of proof. In ***Legal Profession Complaints Committee and Wells*** [2014] WASAT 112 at [8] and [9], the Tribunal stated:

> The Committee bears the onus of proof. It is to the civil, not criminal standard but the principles of *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*) apply. That is, while needing to be proved only on the balance of probabilities, the nature and seriousness of the allegations are relevant to the question whether the issues are proved to the reasonable satisfaction of the Tribunal and the process by which reasonable satisfaction is attained.
>
> By reason of the nature of the allegations, the Tribunal must feel an actual persuasion of the occurrence or existence of the relevant facts in determining whether or not the case against the practitioner is made out: *Medical Board of Western Australia and Wright* [2010] WASAT 48 at [31]; and see *Medical Board of Western Australia and Bham* [2006] WASAT 190 at [144].

(See also ***Rejfek v McElroy*** (1965) 112 CLR 517 (***Rejfek***))

9 In ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 (***Briginshaw***) at 362, Dixon J, as he then was, observed '[i]n such matters "reasonable

satisfaction'' should not be produced by inexact proofs, indefinite testimony or indirect inferences'.

10 The standard of proof required in a civil case where serious allegations are made was stated in ***Rejfek*** where Barwick CJ, Kitto, Taylor, Menzies and Windyer JJ observed at 521 that:

> The 'clarity' of the proof required, where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved. …
>
> But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused.

11 In ***NOM v Director of Public Prosecutions*** (2012) 38 VR 618 at [124], the Victorian Court of Appeal stated:

> … mere mechanical comparison and probabilities independent of a reasonable satisfaction will not justify a finding of fact. The fact finder must feel an actual persuasion of the occurrence or existence of the fact in issue before it can be found. Where, as in the present case, the standard of proof is to be applied to circumstantial evidence, satisfaction as to a reasonable and definite inference is required.

Professional misconduct

12 Professional misconduct' is defined by s 403 of the LP Act inclusively as follows:

> (1) For the purposes of this Act -
>
> 'professional misconduct' includes -
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

> (2) For the purpose of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission or for the grant or renewal of a local practising certificate.

Unsatisfactory professional conduct

13 Section 402 of the LP Act provides:

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

The evidence

14 The Committee's Book of Documents was admitted as Exhibit A. The witness statement of JL dated 23 September 2016 was admitted as Exhibit B. Her supplementary witness statement dated 14 September 2016 was admitted as Exhibit C.

15 JL gave oral evidence supplementing her witness statements.

16 Mr Neil did not attend the hearing and did not give evidence.

Formal matters

17 At all material times Mr Neil was an Australian Legal Practitioner within the meaning of s 5(a) of LP Act and practising as a sole legal practitioner under the name of Peter Neil Barristers and Solicitors. (Committee's amended statement of facts and contentions dated 8 September 2016 (CSFC) paragraph 1; Admitted Neil Response (CSFC (Neil) paragraph 1).

The meeting of 13 August 2013

18 On 13 August 2013, JL met with Mr Neil in a café in Perth for an 'obligation free initial free consult' (the Meeting) regarding an investment in a property development (Property) with DF. The dispute with DF concerned a $200,000 loan and a $500,000 down payment which JL and her then, husband, had made in relation to a proposed development of the Property. The Property had not proceeded as planned (CSFC paragraph 2; Admitted Neil paragraph 1). JL provided Mr Neil with a

seven page summary of events (Exhibit A pages 1-7) but he did not read it during the Meeting (T:6; 13.02.17).

19 The Meeting lasted about 30 minutes (Exhibit B paragraph 24).

20 Since this was an obligation free initial consultation (Exhibit A page 13), Mr Neil was not entitled to charge a fee for the consultation.

21 The Committee alleged that during the Meeting, JL informed Mr Neil that she required legal advice in relation to three issues:

a) a strategy to recover her $200,000 loan and $500,000 down payment;

b) advice as to whether she could lodge a caveat over the Property, and if so whether a caveat would withstand legal challenge; and

c) how she should respond to an allegation made by DF that she and DF were in a 'business partnership'.

(the advice required)

22 Mr Neil acknowledged in his response to the submissions that this was the advice required.

23 Mr Neil also admitted that at the Meeting, JL retained Mr Neil to provide the advice required (the Retainer) and provided him with a detailed summary of the factual background to her dispute with DF (Summary Document).

24 The Committee further alleged that at the Meeting, Mr Neil recommended that, in the meantime, JL ask DF to sell the Property. JL did so by an email to DF on 13 August 2013 (Exhibit A page 86).

25 It was not in issue that at the Meeting:

i) JL informed Mr Neil that she did not have the funds to pay substantial legal fees and did not wish, and could not afford to, take legal proceedings against DF;

ii) Mr Neil advised that he would endeavour to keep his legal fees below $1,500, which JL said she could afford;

iii) Mr Neil advised JL that in order to keep her costs as low as possible, he would, from time to time, ask her

to undertake enquiries on her own behalf to minimise the time he would have to undertake in assisting her; and

iv) JL agreed to do so to keep her costs as low as possible.

26 Whether or not JL wished to keep her costs as low as possible is essentially irrelevant to the issues between the Committee and Mr Neil since the allegation is that Mr Neil failed to provide any advice in accordance with the Retainer. JL's wish to keep her costs as low as possible did not permit Mr Neil to abdicate his agreement to provide the advice required in accordance with the Retainer.

27 JL was entitled to advice as to her prospects so she could make an informed decision. It is no answer to a failure to provide advice to say the client could not afford court proceedings. There is a substantial difference between the costs of an opinion and the costs of court proceedings. There is no suggestion that JL was unable to afford an opinion.

28 During the Meeting, Mr Neil also said words to the effect that he had experience in, or was an expert in, partnership law, having worked for Gina Rinehart (see also Exhibit B page 13). Nothing turns on whether he said he had 'experience in' or whether he said he was 'an expert in' partnership law.

29 Mr Neil alleged that during the Meeting, further matters were also discussed, namely:

1) JL informed him that DF had presented her with a number of options, each of which which were unacceptable to her, as each option would result in JL losing a substantial part of her investment;

2) He informed JL that based upon the information she had provided to him he considered that:

a) there was no 'business partnership' between JL and DF;

b) if the agreement between JL and DF did not permit her to lodge a caveat over the Property, she would be unable to do so;

c) if JL and DF had entered into a joint venture to develop the Property, as opposed to a

partnership, she may be obliged to proceed with the development of the Property with DF;

d) DF did not appear to have funds to complete the development of the Property and, in his opinion, it appeared that the best way to resolve the dispute between the client and DF would, be for the Property to be sold for the best possible price; and

e) absent JL and DF reaching an agreement as to how their dispute would be resolved, JL would have to commence court proceedings (which JL said, she did not wish to do and could not afford).

30 JL gave evidence that these further matters were not discussed at the Meeting (T:7; 13.02.17).

31 The Meeting only lasted 30 minutes. JL did not provide the documentation referred to in the Summary Document. The Tribunal does not accept that Mr Neil could have given any advice as alleged, bearing in mind the fact that he had not read the seven page Summary Document, that he did not have the relevant documentation and that the other matters stated above were discussed. The Tribunal does not accept that Mr Neil could have given the alleged advice without having read the Summary Document and without the relevant documentation. The Tribunal finds that it was essentially an introductory meeting where the main focus was on the advice sought.

32 JL's evidence was that the further matters alleged by Mr Neil were not discussed at the Meeting. The Tribunal accepts JL's evidence. She gave her evidence in a very frank and open manner. The Tribunal finds that no advice relevant to the Retainer was provided to JL by Mr Neil at the Meeting.

33 Apart from the Meeting, Mr Neil and JL communicated entirely by email. This makes it relatively easy to determine whether the advice required was given thereafter by a consideration of the contents of the emails.

The 13 August 2013 emails

34 At 2.26 pm on 13 August 2013, following the initial consultation, JL sent three emails to Mr Neil. The covering email stated:

> Thank you so much for meeting with me today. I really like your approach and appreciate your advice as it sits much better with me than handing over all my power to a litigious process!
>
> Enclosed I hope are the loan agreement of $200k and the letter confirming the down payment of $500k.
>
> …
>
> I have sent the email as you advised, and will be in contact when I receive a reply.

(Exhibit A page 14)

35 The Tribunal notes that JL's reference to 'advice' in her email of 13 August 2013, is consistent with keeping costs down rather than a reference to advice relevant to the Retainer being given at the Meeting as alleged by Mr Neil. JL also gave evidence to that effect (T:7; 13.02.17).

36 The emails sent by JL to Mr Neil attached relevant documents and information, including copies of:

1) by email sent at 2.26 pm, an unsigned Loan Particulars Schedule which specified the lenders as JL and her then husband, the borrower as DF Pty Ltd and the guarantor as DF (Loan Agreement);

2) by the same email sent at 2.26 pm, an unsigned letter from DF to JL and her then husband dated 16 June 2009 confirming their payment of $500,000 as down payment for a unit at the Property (Down Payment Letter);

3) by further email sent at 2.28 pm, a 'without prejudice' email JL had received from DF dated 9 July 2013, attaching a construction cost estimate for the Property and in which DF offered the client $150,000 (subparagraph 4.3 amended CSFC paragraph 4); and

4) by further email sent at 2.29 pm, an email exchange between JL and DF dated 15 and 19 July 2013 in which DF alleged the 'business partnership'.

(Exhibit A pages 14-79)

37 There is no issue between the parties as to the contents of the emails or that they were sent (albeit that there were some difficulties in Mr Neil opening the attachments to emails).

The 18 August 2013 emails

38 By email dated 18 August 2013, JL forwarded to Mr Neil an email from DF sent earlier that day in response to JL's 13 August 2013 email. DF reiterated her allegation that they were in a business partnership (Exhibit A pages 84-85).

> **11.15 am**
>
> **To: Peter Neil**
>
> **Subject: Fwd: Response from DF**
>
> Hi Peter
>
> I have had a reply from DF as below. I am not sure she would have written this herself and suspect it is either [DS] or she has a very wealthy businessman friend who fancies himself as a lawyer and she has sought his advice in the past!
>
> I will, be guided by you as to the response. I am flying out tomorrow but will be checking emails regularly and am keen to try and keep some momentum with this. I suspect it will not be easy as you can see from her response. It is quite extraordinary this whole 'partnership' concocction!
>
> I have checked with her finance broker who is a friend of mine and there is no refinancing or construction funding underway. He arranged the Bankwest loan on [the Property] after Investec pulled out and he also confirms that he and the bank were not informed of any partnership between DF and myself.
>
> Warm regards
>
> [JL]

The 22 August 2013 emails

39 On 22 August 2013, the following email exchange took place:

> **4.34 pm**
>
> **To: Peter Neil**
>
> **Subject: Just following up**
>
> Hi Peter

> Just checking that you received my email with response I had from DF and making sure there are no questions or anything you want clarifying.
>
> I am unsure as to what the next step/response should be so would very much appreciate your advice and guidance. Is there any other way I can get this 'partnership' allegation sorted, for example is it something ASIC would investigate?? I did make an initial enquiry on line but got an automated response saying I should seek legal advice! It just seems extraordinary that she can suddenly conjure up a 'partnership' to justify non payment of funds owed as a deposit on a unit and a loan agreement.
>
> I flew out on Monday and will be away until early October but check my emails frequently.
>
> Many thanks
>
> [JL]
>
> **5.53 pm**
>
> **Subject: RE: Just following up**
>
> **To: [JL]**
>
> Hi,
>
> Thank you for your email
>
> I have had two days with power problems and have had the electrician out twice and have lost nearly two days work.
>
> You already know there is no partnership.
>
> I cant attend further to your matter until the weekend as I have other very urgent matters to attend to with strict deadlines to meet.
>
> ASIC will usually not do anything except tell you to go to court to sort it out yourself which is very unsatisfactory.
>
> Kind regards,
>
> Peter
>
> (Exhibit A page 80; CFSC paragraph 5, Neil Response (NR) paragraph 3)

40 A short statement that 'there is no partnership' does not constitute advice. Mr Neil's submission that he had grounds for making the statement, without providing those grounds and an explanation to JL, does not constitute advice. Mr Neil did not provide written advice to JL.

41 Clearly, Mr Neil did not provide any advice relevant to the Retainer in his email of 22 August 2013, despite JL's request for 'your advice and guidance'. Responding to JL's query about ASIC does not constitute advice or guidance. The query as to ASIC was not directly related to the Retainer.

The 27 August 2013 emails

42 On 27 August 2013, Mr Neil responded to JL's 18 August 2013 email.

> **Subject: RE: Response from DF**
>
> **To: [JL]**
>
> Hi
>
> This woman is so unreliable according to what you have told me and has already lost you a great deal of money.
>
> She seems to be anticipating losses and wants you on the face of it to share the losses by claiming you are a partner when from what you have told me you are not.
>
> According to information you are giving me she does not seem to be very truthful.
>
> When will you be back in Australia?
>
> Is there a building at present on the property?
>
> Kind regards Peter
>
> (Exhibit A pages 84-85)

43 Again, Mr Neil did not provide any advice relevant to the Retainer in his email of 27 August 2013. He did not provide JL with any guidance as to her response as requested.

The 28 August 2013 emails

44 On 28 August 2013, the following email exchange took place:

> **3.51 am**
>
> **To: Peter Neil**
>
> **Subject: Re: Next step**
>
> Hi Peter

Thank you for your email. I won't be back in Australia until the 4th Oct unfortunately. This is a badly needed break after 4+ very stressful years and I am also having to spend some time with my father in the Uk who is unwell. However I am keen to do as much as possible to keep momentum on this whilst away.

Yes DF is very untruthful it now seems and unfortunately all the funds I have are tied up in [the Property]. Hence I have a lot at stake! There is an old California style house on [the Property] but no new building has been started. Her boyfriend [GB] is renting it and his son is living there. I have no idea why given the feasibilities she put across to me she would be trying to go ahead with it. The feasibility claims there is no profit to be made and no return of my deposit of $500k or loan of $200k!

What seemed to work with [Name of Street] was a letter of demand sent by [A's] lawyer. We had aggressive emails first and then the letter of demand seemed to force her to put [Name of Street] on the market and negotiate (or else this is what [DS] advised). Am I in a strong enough position to take a similar approach with [the Property]? I don't think she is going to be reasonable as she is a bully and it is clearly in her interests to try and 'prove' a partnership and thus have me share in the losses.

This is someone who has no conscience, and thinks I am a push over and knows I am easily intimidated. I hate conflict Peter which is why I really need some help to strategise and take a determined path on recovering as much as I can. The obvious solution is to try and get her to sell [the Property] and give her some incentive to get the best possible price. Surely moving on without going bankrupt or having an expensive court case ahead of her has to be more attractive? However we are not dealing with a reasonable person here as the loss of face and delusional beliefs will be driving her.

Are you able to advise on the next step; draft an email or send a letter of demand on my behalf or whatever you think the course of action should be but I will be guided by you.

I really need your support here! Sorry if it seemed I was hassling you in my last email. I had a bad experience with the previous lawyer who did nothing for weeks and weeks, not even looking at the file he had asked me to prepare (which I diligently and expediently did) as he said 'no stone, must go unturned'! Turned out he was really too busy to deal with 'small fry' like me! I am a very patient and reasonable person I promise! So I do understand if you are tied up with more pressing matters as my case isn't urgent in the sense of deadlines to be met. Just need to know together we can work through this step by step as I need a good lawyer advising me!

Warm regards

[JL]

10.53 am

Subject: RE: Next step

To: [JL]

Hi,

I can send her a letter asking for repayment of the moneys and asking for the property to be sold at the highest possible price if that is what you wish me to do.

Just before an election generally things slow down a bit but I don't know if that is the case with development sites.

The State Government next month is increasing the grant for first home buyers who buy new homes and units to $10,000 and decreasing the grant to $3000 for first home owners who buy an existing home.

This may increase the demand for development sites and help get a better price.

How many units can be built on the development site at the moment?

Kind regards

Peter

(Exhibit A pages 87-89)

45 Again, Mr Neil did not provide any advice in his email of 28 August 2013. Mr Neil still failed to provide any advice relevant to the Retainer.

46 The subject line of JL's email was 'Next step'. Mr Neil failed to provide any guidance as to the next step or the options available to JL.

47 Mr Neil seemed more concerned with the value of the Property rather than addressing the Retainer.

The 29 August 2013 emails

48 On 29 August 2013, the following email exchange took place:

2.19 am

To: Peter Neil

Subject: Re: Next step

There is DA approval for 4 x l bed units and 2 x 2 bed units plus 2 3 x 2 homes. They are of a design to suit upper end of the market rather than first home owner. However given the market does seem to be reasonably buoyant at the moment I imagine it might sell well just as [Name of Street] did. [Name of Street] St realised a much better price than I would have expected. I don't think there is an issue with the site being desirable and selling. But there is a challenge with getting her to sell it and recovering my funds!

As much as I would like to think a path of reason avoiding litigation is possible I suspect she will be unwilling to negotiate. I anticipate she will want to run hard with the 'partnership' allegation. I would hope that if she gets legal advice, [DS] or whoever she consults would advise her to negotiate and that there is no basis to a partnership. However I cannot rely on this being the case. She is a highly manipulative and convincing person. I think I need to be prepared for the worse case scenario whilst taking steps to be reasonable and give her every chance to honour the agreements I have with her.

If you send a letter asking for repayment of the money I consider she will see this as more authoritative than me sending her something. What will the next step be if she refuses? Do you think the letter confirming the down payment of $500,000 and the loan agreement of $200,000 do have strong legal standing? Are there any other steps that you think I should be taking, e.g. a caveat?

Warm regards

[JL]

9.10 pm

Subject: RE: Next step

To: [JL]

Thanks for your email.

A real estate friend of mine [PT] with this information can give us a free appraisal of what he thinks the property is now worth with the Planning approval.

This would be useful information to know is case she tries to sell it off to a friend at below market value.

Please give me instructions to get us a free appraisal of value of the property before I write to them insisting that the property be sold.

Kind regards

Peter

(Exhibit A page 92-93)

49 Again, Mr Neil did not provide any advice relevant to the Retainer in his email of 29 August 2013. His reply failed to provide the advice requested in JL's email. JL stated that she did not think there was an issue with the site being desirable and selling. JL did not want advice as to the value of the Property. She wanted advice in terms of the Retainer. The fact that PT was prepared to give a free appraisal was not relevant. JL was hardly likely to say no to a free appraisal. However, if she was interested in the value of the Property, she could have gone to a real estate agent herself. As the next email makes clear, JL had her own source.

The 30 August 2013 email exchange

50 On 30 August 2013, the following long email exchange took place:

> **4.47 am**
>
> **Subject: Re: Next Step**
>
> **To: Peter Neil**
>
> Hi Peter
>
> Yes by all means if your friend is happy to give us an appraisal that would be helpful to get his views.
>
> I do know [M] well formerly principal of Property people in [name of suburb]. I could get her to give us an appraisal too or your friend could chat to her about what has sold in the area etc. She owns [name of real estate company] now. To my knowledge There have been few sites sold in the area and [name of street] is probably one of the few and a good comparison. That was a 640m2 site with DA for 7 x 1 bed units.
>
> Thank you and your friend very much for arranging this.
>
> I will also have a look to see if I have the plans on my computer and will send through.
>
> Warm regards
>
> [JL]

(Exhibit A pages 99-100)

> **10.03 am**
>
> **Subject: [Property] development site**

To: [PT]

Hi [PT],

I have my clients OK to do the appraisal that I talked to you about at Lunch on Wednesday

The DA approval is set out below in [JL's] email to me.

Kind regards

Peter [Neil]

(Exhibit A pages 99)

12.32 pm

Subject: RE: [Property] development site

To: Peter Neil

Hi Peter,

Please advise your client that the property is already on the market with [name of real estate company].

It isn't on any websites - but confirmed with [the real estate company] that it is on the market. (I found out via rpdata)

I will send through the appraisal, but thought it was urgent that you had this information.

Thanks

[PT]

(Exhibit A page 99)

12.55 pm

Subject: [Property] development site

To: [JL]

Hi [JL]

[PT] will still do the appraisal but thought you should urgently get this information.

King regards

Peter

(Exhibit A page 105)

12:56 pm

Subject: RE: [Property] development site

To: Peter Neil

Hi Peter,

Please find attached two documents for your client.

The document title 'Appraisal' is the appraisal that is most accurate.

The second appraisal is an automated appraisal - but the price variance is too big to be accurate.

I trust this helps your client.

Regards

[PT]

(Exhibit A pages 114-115)

1.21 pm

Subject: RE: [Property] development site

To: [PT]

The site is being sold for land value only as a development site with DA approval.

Can you give a figure that may reflect this as all the other data seems to be for house sales and not development sites.

I understand this would be worked out on the land value for each Unit

Kind regards

Peter

1:31 pm

Subject: [Property] development site

To: Peter Neil

Hi Peter,

Please supply a copy of the DA approval and I will see what I can do.

Is your client thinking of selling the blocks individually?

Thanks

[PT]

2.13 pm

FW: [Property] development site

To: [JL]

Hi [JL],

Have you a copy of the DA approval?

See [PT's] email below [sent at 12.32 pm on 30 August 2013]

Kind regards

Peter

3:34 pm

Subject: Not surprised!!

To: Peter Neil

Hi Peter

Well I am not surprised to hear it is 'quietly' on the market. She is very devious and no doubt would sell it and make off with my money!

I think it is time to call in the monies she owes and is it possible to put a caveat on [the Property]? Would this be enforceable? I also wonder if we should let her know we are aware it is on the market! I am concerned this may sell quickly if we do not act to protect funds. She will also use the equity (my funds) to pay out all her debts thus leaving nothing for me to go after!

I don't have the DA approval with me on my computer but could try and track it down via my daughter. However given it is on the market with [real estate agent] that probably gives a good indication of price. Did he give your friend an indication of price? [The real estate agent] sold [street address of property] at a very good price of $1.475m. I also heard from a real estate friend of mine who spoke with the purchaser/developer of that site that they did a deal off to the side where additional funds were paid for the architectural plans etc. Again she is devious and I had understood this wasn't lawful! But we let that one go.

Will you thank your friend [PT] profusely for finding this out as its not easy information to find unless you have access to things like RPdata.

Anyway I think you now have a good idea of the nature of the beast we are dealing with and it is imperative that I take whatever steps are needed to protect and recover what she owes me. Please advise!

Thanks so much

[JL]

(Exhibit A pages 182-183)

4.22 pm

RE: Not surprised!!

To: [JL]

Thanks for getting DA approval.

Are you sure that there will be any money left over out of the sale price once the lender has been paid out.

Have you any idea what price she would be asking with the agent?

Also what percentage of value of the property was obtained from the lender.

Have you been able to check all the expenses she is claiming as being legitimate expenses or are they greatly exaggerated?

There needs to be grounds for caveat to be lodged.

What grounds do you propose to use?

Kind regards

Peter

(Exhibit A page 182)

5.29 pm

Subject: Re: Not Surprised!!

To: Peter Neil

Hi Peter

Much of this information is in my summary and more although I realise its probably a lot to digest. See comments [to Mr Neil's email sent on 30 August 2013 at 4.22 pm] below.

Hi,

Thanks for getting DA approval.

Are you sure that there will be any money left over out of the sale price once the lender has been paid out.

Yes there will be money left from the sale price. The loan to Bankwest is $1.6m. By my reckoning $500k plus.

Have you any idea what price she would be asking with the agent?

It is worth approx $2.2m probably more given the price [street address of property] sold for. There are few if any development sites around with DA approval. [The real estate agent] specialises in this area and has a good data base of builder/developers. I could get someone to phone and ask if he has any small, boutique development sites for sale and see if he pitches [the Property] and what the asking price is.

Also what percentage of value of the property was obtained from the lender.

She has a $1.6m loan on the property based on a $2.05m valuation in 2009 with Bank west. She put no money in and used our down payment on a unit as the equity of 20% required by Bank west. She did not declare this was a deposit on a unit to my knowledge and obviously there was no suggestion of a 'partnership'. The loan is solely taken out by her. Bankwest I am sure may well be on her case to sell the site as I know she was having difficulty paying the loan each month and they were chasing her for management/reports/financials. I suspect these will not look good and as her accountant resigned over all of this, DF will be having to brief a new accountant. This might also highlight that she has been trading insolvent I suspect.

Have you been able to check all the expenses she is claiming as being legitimate expenses or are they greatly exaggerated?

I do not have access to any accounts to know if expenses are legitimate but do have some idea of what one would expect to pay for some development costs. However as I see it they are irrelevant to my claim for my monies back. It is not a case of taking off all the costs/expenses and then sharing in the loss as she suggests as per a partnership arrangement.

There needs to be grounds for caveat to be lodged.

What grounds do you propose to use?

Would the fact there is a downpayment paid of $500k for a unit on [the Property] (as per the letter) and a loan of $200k repayable on the sale of [the Property] as per the loan agreement not be sufficient grounds? As the development site is now on the market it is clear there is no intention of providing me with a unit and she has not agreed to pay back the deposit (in fact to the contrary) and the $200k loan agreement states this is payable

> (with interest) on the sale of [the Property]. If this isn't sufficient grounds then what is? Is there any other method of stopping her selling and disbursing the funds?
>
> (Exhibit A pages 182-185)

51 The Retainer required Mr Neil to provide advice, which specifically involved whether the caveat could be lodged and on which grounds. Mr Neil appears to have acted as if there was a role reversal. JL specifically stated in the email exchange 'it is imperative that I take whatever steps are needed to protect and recover what she owes me. Please advise!'

52 Again, Mr Neil did not provide any advice in his email of 30 August 2013. Mr Neil seemed unable to appreciate the urgency of the situation.

The September 2013 email exchange

53 On 5 September 2013, the following email exchange took place:

> **12.24 am**
>
> **Subject: Loan agreement**
>
> **To: Peter Neil**
>
> Hi Peter
>
> Attached is the loan agreement. I have a copy of the signed one on file. Do let me know if there is anything that needs explaining. I am keen to know if this document and the down payment document are strong enough to lodge a caveat. I think that would be a good way to go, but from my research am concerned that I do not leave myself open to a claim for compensation! Both documents clearly make a direct link and interest in the land but what are your thoughts on this?
>
> Warm regards
>
> [JL]
>
> **8.05 am**
>
> **Subject: Re: Loan agreement**
>
> **To: [JL]**
>
> Hi [JL],
>
> Thanks for the unsigned loan agreement.

> It says you can take a caveat over another property but does not say you can take a caveat over [Property].
>
> Do you have another signed agreement that says you can take a caveat over [Property]?
>
> Kind regards
>
> Peter
>
> **Subject: Re: Loan agreement**
>
> **To: Peter Neil**
>
> Hi Peter
>
> No that is the only loan agreement and the property at [address] was sold some time ago. Does the fact it says the loan is repayable on the sale of [the Property] provide a caveatable interest?
>
> [JL]
>
> **Subject: RE: Loan agreement**
>
> **To: [JL]**
>
> Hi,
>
> It may possibly but where is the signed copy as usually we need to refer to supporting documents to support the application for a caveat.
>
> Kind regards
>
> Peter
>
> (Exhibit A pages 193-194)

54 Again, Mr Neil did not provide any advice in his two emails of 5 September 2013.

The 8 September 2013 email

55 By email dated 8 September 2013, JL sent Mr Neil a copy of the signed Loan Agreement (Exhibit A page 195).

The 12 September 2013 email

56 On 12 September 2013, JL sent an email:

> **Subject: Just confirming documents received**

To: Peter Neil

Hi Peter

Just confirming that you received the signed copies of the two documents; the $500k down payment letter and the $200k loan agreement. I do hope they came through OK and that you think we can proceed with a caveat on [the Property] on the strength of one or both!

Warm regards

[JL]

(Exhibit A page 202)

57 JL clearly wanted advice as to whether a caveat could be lodged.

The 13 September 2013 email exchange

58 On 13 September 2013, the following email exchange took place:

Subject: RE: Just confirming documents received

To: [JL]

Thanks for your email.

I did not receive the complete signed document.

Can you please arrange for the whole document to be emailed to me as an attachment.

Kind regards,

Peter

Subject: Documents

Attachments: Documents.zip

To: Peter Neil

Hi Peter

[C] has put the documents into a zip file (she tells me your computer if its a PC should have no problem opening this). Can you confirm that they have come through Ok and you can open them. Many thanks. [JL]

(Exhibit A page 202-203)

The 16 September 2013 email

59 By email dated 16 September 2013, JL sent the Zip file again to Mr Neil and stated:

> **10.16 pm**
>
> **Subject: Fwd: Those signed documents!**
>
> **To: Peter Neil**
>
> I have been doing a bit of research whilst over here and it looks to me that the loan document does not give me a caveatable interest in [the Property]. However a contract to purchase does. Is the letter/document confirming down payment on a Unit at [the Property] sufficient i.e. deemed a contract in law??? I am very much hoping so as this would protect my funds and really force her to have to negotiate with me before being able to settle on [the Property]. Anyway that is my amateur reading of the situation! But obviously I am needing your advice/view of this before going ahead with a caveat. If this can be determined before my return on 4th October that would be brilliant.
>
> (Exhibit A page 211)

60 JL is again making it very clear to Mr Neil that she requires advice as to lodging a caveat.

The 7 October 2013 email

61 Three weeks later, on 7 October 2013, JL emailed Mr Neil:

> **Subject: Back in Perth**
>
> **To: Peter Neil**
>
> Hi Peter
>
> Just letting you know that I am back in Perth now and wondered how you were going with establishing if I have enough grounds for a caveat on [the Property] with the letter that confirms a down payment of $500,000 on a unit.
>
> Hope all is well with you after what I believe to have been a very wet September here in Perth!
>
> Kind regards
>
> [JL]
>
> (Exhibit A page 227)

62 Mr Neil did not immediately respond to this email.

The 16 and 17 October 2013 email exchange

63 On 16 and 17 October 2016, the following email exchange took place:

> **8.16 am**
>
> **To: [JL]**
>
> Hi [JL],
>
> I have received this email today [set out below] from [PT].
>
> What do you think?
>
> Kind regards
>
> Peter
>
> *5.02 am*
>
> *Subject: RE: [the Property]*
>
> *To: Peter Neil and JL*
>
> *Hi JL & Peter,*
>
> *At this stage I would suggest the entire property could be worth as much as $3 million (developed) based on the thorough research I have seen on real estate sites, such as rpdata, reiwa, etc*
>
> *I would suggest that it would be worthwhile getting an actual 'valuer' either independent or from a bank if you need something you can substantiate from a legal perspective.*
>
> *Appraisals as such don't carry the same weight.*
>
> *Kind Regards*
>
> *[PT]*
>
> **3.12 pm**
>
> **Subject: Re: [the Property]**
>
> **To: Peter Neil**
>
> Hi Peter

> Well it is certainly worth more and therefore has more equity in it than I thought! So that is good.
>
> I have decided to as DF if I can take a second mortgage over the property and if she does not agree to this) most likely!) I will go and take out a caveat and argue the toss in the supreme court if she challenges it. Its hard to think that with two documents clearly relating to [the Property] that I wouldn't have a strong case for the caveat being supported. Hopefully this might provide me with some protection and/or bring her to the negotiating table.
>
> I will get back to you if I need any help with this, but I think now I have done more research and formulated a plan I feel more empowered to run with this.
>
> I shall email [PT] to thank him for his help as it is certainly encouraging that prices are looking better. I appreciate you arranging this appraisal.
>
> Warm regards
>
> [JL]
>
> **6.18 pm**
>
> **17 October 2013**
>
> **Subject: RE: [the Property]**
>
> **To: [JL]**
>
> Hi,
>
> Many thanks for your email.
>
> Are you now going to urgently approach her to get a second mortgage over the property to secure the money owed to you?
>
> On the Landgate website is a publication dealing with what caveats you are allowed to lodge.
>
> Have you downloaded a copy to read?
>
> Kind regards
>
> Peter

(Exhibit A pages 228-230)

64 It is clear that at this point, JL is considering going to court. Rather than providing advice, Mr Neil suggests that JL download a caveat publication from the Landgate website.

The 1 and 5 November 2013 email exchange

11.17 am

1/11/2013

Subject: FW: Back in Perth

Hi [JL],

I had not found this email [of 7 October 2013] before as somehow it ended up in my junk mail inbox.

When can we catch up?

Kind regards

Peter Neil

Subject: Re: Back in Perth

8.18 am

November 05, 2013

To: Peter Neil

Hi Peter

I am in the process of trying to see if I can register a second mortgage over [the Property]. If not having been to Landgate it seems I can probably take out a caveat. Will see how I go and give you a shout if I need any assistance. The issue is probably that she will challenge it and I will end up in the supreme court.

Out of interest I have a letter from DF's accountant (who resigned over all this earlier this year) confirming that she has no knowledge of a 'business partnership' and in 5 years of doing the accounts for DF and all her entities there were no accounts for a business partnership with me. It feels good to have this confirmed in writing by her accountant!!

Kind regards

[JL]

6.06 pm

5 November 2013

Subject: RE: Back in Perth

To: [JL]

> Thanks for your email.
>
> If you can lodge a caveat then I suggest you do so.
>
> There is information on the Landgate website setting out who can and who can not lodge a caveat.
>
> Have you managed to read it?
>
> Kind regards,
>
> Peter Neil
>
> (Exhibit A pages 233-235)

65 Again, Mr Neil did not provide any advice in his emails of 1 and 5 November 2013. Mr Neil had not advised JL whether she could, or could not lodge a caveat.

The 25 November 2013 email

66 On or about 25 November 2013 JL instructed another law firm to advise her in relation to her dispute with DF.

The 11 December 2013 email exchange

67 On 11 December 2013, the following email exchange took place:

> **10.28 am**
>
> //au.news.yahoo.com/thewest/business/a/-/wa/20261965/scramble-for-apartment-sites/
>
> - Shared using Google Toolbar
>
> Hi [JL],
>
> I thought this article might interest you.
>
> We need to catch up again on your file as I have not heard from you for some weeks.
>
> I suggest a coffee meeting at the [Hotel] coffee shop [address] Perth CBD
>
> What day and time would suit you best?
>
> [Name of street] is at the traffic lights intersection opposite the [location name and address]
>
> Parking is easier to get if you park on the [location] and walk over the pedestrian bridge over the freeway.

> The Hotel is right next to the freeway
>
> Kind regards,
>
> Peter Neil
>
> **12.20 pm**
>
> **Subject: Re: Scramble for apartment sites - The West Australian**
>
> **To: Peter Neil**
>
> Hi Peter
>
> Thanks very much for the article. Unfortunately DF is not willing to negotiate and is hell bent on developing [the Property]. The units are now being offered for sale off the plan, listed with [a real estate agent].
>
> I cannot afford litigation to challenge her in the District Court or to defend a challenge in the Supreme Court if I take a caveat over the property. The only asset she has is [the Property] and I am concerned she may go bankrupt or sell it for a fire sale price and thus there would be no money to claim anyway.
>
> I have done a lot of research as you recommended and at this point in time I cannot afford legal fees to pursue her. I still have 18 months before the six years run out, so am going to sit and watch for the moment to see if the development does go ahead and if she is successful in funding it.
>
> As per my previous email I will give you a shout if needed, but thank you for thinking of me and sending the article.
>
> Warm regards
>
> [JL]
>
> (Exhibit A pages 236-237)

68 Again, Mr Neil did not provide any advice in his email of 11 December 2013.

Mr Neil's invoice

69 By email dated 21 December 2013, Mr Neil sent JL his tax invoice of $2,006.40 discounted to $1,495 (Exhibit A page 238-241).

70 By email dated 3 January 2014, JL emailed Mr Neil to raise a complaint about his tax invoice, in particular to complain that Mr Neil had not provided her with any legal advice in relation to the matters for which she had sought his advice. She also complained that Mr Neil

had charged her in relation to emails to PT regarding obtaining a 'free appraisal' of the Property when this was something that she had not requested. She also requested an itemised invoice (Exhibit A pages 242-243).

71 By email dated 4 January 2014, Mr Neil advised JL that he would be providing an itemised invoice. In his email, Mr Neil also refuted allegations that he had not provided JL with any legal advice (Exhibit A pages 244-245).

72 By email dated 11 January 2014, Mr Neil sent JL an itemised invoice as requested by JL (Exhibit A pages 247-249). JL responded by email on 14 January 2014 (Exhibit A pages 250-253).

The Committee's allegations and Mr Neil's response

73 The Committee alleged that:

1) Mr Neil did not at any time provide JL with the advice sought or provide the advice requested in JL's emails of 18, 22, 28, 29 and 30 August 2013, 5 and 16 September 2013 and 7 October 2013 (CSFC paragraph 40);

2) Mr Neil did not adequately or at all carry out or perform the legal work for which he was retained (CSFC paragraph 41); and

3) Mr Neil was not entitled to charge JL any legal fees in circumstances where he did not adequately or at all carry out or perform the legal work for which he was retained (CSFC paragraph 42).

74 Mr Neil stated that at all material times:

a) he considered that JL's best interests would best be served by a sale of the Property;

b) he took steps to ascertain the value of the Property, and DF's ability to pay monies to JL;

c) he considered that JL did not have a caveatable interest in the Property and was concerned that any caveat lodged might be challenged in the Supreme Court

of Western Australia, thereby exposing JL to considerable legal costs, even if she were to win;

d) he acted (as had been agreed with JL) so as to keep his legal fees as low as possible; and

e) he was conscious of JL's expressed lack of financial ability to fund litigation, as was confirmed JL's email to him of 15 December 2015 wherein, she advised:

> I cannot afford litigation to challenge her in the District Court or to defend a challenge in the Supreme Court if I take a caveat over the property. The only asset she has is [the Property] and I am concerned she may go bankrupt or sell it for a fire sale price arid thus there would be no money to claim anyway.
>
> 1 have done a lot of research as you recommended and at this point in time I cannot afford legal, fees to pursue her.

Mr Neil's advice

75 It is clear that Mr Neil failed to provide the advice required.

76 Mr Neil was not engaged to provide a valuation of the Property. He was engaged to provide legal advice in terms of the Retainer to JL. JL sought advice as to whether she could lodge a caveat and how she should respond to DF's allegations as to the 'business partnership'. JL's request for advice on a strategy to recover the $700,000 required advice as to strategy. JL engaged Mr Neil to provide a legal basis for her actions.

77 Mr Neil did not provide any advice to JL as to how and why her best interests would be served by a sale of the Property. He did not provide any advice as to why JL did not have a caveatable interest.

78 Any agreement to keep Mr Neil's fees as low as possible did not permit him to fail to provide any advice in terms of the Retainer.

79 Unless there are very specific terms of a Retainer which permits it (and there were none here), once a practitioner agrees to provide advice, he/she cannot say 'I agreed to provide the advice for $1,500 but I'm charging at $300 an hour and I've spent five hours, therefore my advice stops'.

80 The Retainer was to provide the advice required. The fact that JL wished to keep costs low did not excuse Mr Neil from providing the advice required.

81 Although the amount was not significant, in the context of legal fees overall, it was a claim for work which was not relevant to the advice required.

82 Having failed to provide the advice required, Mr Neil was not entitled to charge for it. Mr Neil's invoice notes that he received and sent multiple emails but those emails failed to provide the advice required.

Proceeding in Mr Neil's absence

83 The hearing of the matter was listed for final hearing on three occasions. The hearing was adjourned on two occasions to benefit Mr Neil. The matter was originally listed for final hearing on 10 May 2016 and again on 19-20 September 2016. It was finally heard on 13 February 2017. In effect, Mr Neil was given an extension of five months from the original hearing date.

84 Prior to that, on 3 December 2015, the matter was listed for a mediation conference to commence on 15 February 2016. On 12 February 2016, Mr Neil forwarded two reports dated 9 February 2016 from Dr Gordon to the Tribunal:

> [first Report]
>
> This is to confirm that Mr Neil was recently reviewed in my Cardiology Practice.
>
> He has a diagnosis of a leaking mitral valve and this has been followed up in my Practice and at Sir Charles Gairdner Hospital, Cardiology Unit. His leak is severe and is being kept under close surveillance.
>
> In the past he has had health issues and symptoms that we have felt have occurred principally as a reaction to high levels of stress particularly when he is faced with demanding time schedules. These symptoms have included episodes of severe chest pain which on occasions have required hospital admission to exclude heart attack. In addition he had an episode of blacking out on one occasion which may also have been a manifestation of the effects of stress on his system.
>
> I understand that he is facing further issues of stress in relation to various deadlines relating to legal issues and this raises concern that he may deteriorate with further health related issues and symptoms in response to that.

> I would be most grateful then in seeking your assistance with measures to reduce those stress related risks to Mr Neil and your consideration in relaxing any time deadlines in relation to current issues.
>
> If any further information is required please contact me at the above address.
>
> [second report]
>
> This is to confirm that Mr Neil was recently reviewed in my Cardiology Practice.
>
> He has been followed up for many years with a cardiac valve problem that is being kept under close surveillance.
>
> At the present time the situation with regards to his valve abnormality is stable.
>
> I wish to confirm that Mr Neil's cardiac valve problem should not affect his ability to practice law in his legal practice in any way.

85 It is important to note that the situation with regard to Mr Neil's valve abnormality was stable. The recommendation was that Mr Neil be given time to meet the time deadlines in the matter.

86 On 15 February 2016, that mediation conference was adjourned to 7 April 2016.

87 The mediation on 7 April 2016 was unsuccessful and the matter was listed for directions on 10 May 2016 when the following order was made:

a) the Committee was required to file a s 24 Book of Documents by 28 June 2016 and by 14 August 2016, Mr Neil was required to file any further documents;

b) witness statements were required to be filed by 28 August 2016; and

c) the matter was listed for a final hearing to commence at 10 am on 19 September 2016 for a duration of two days.

88 On 7 May 2016, Mr Neil raised some health issues. The timetable was set to accommodate Mr Neil's health issues. Mr Neil did not object to the timetable.

89 In early September 2016, the Committee requested that the matter be listed for directions. A directions hearing was listed

on 8 September 2016. Mr Neil filed an affidavit sworn 7 September 2016 which stated:

> 1. I am the Defendant in these proceedings.
>
> 2. Orders were made on 10 May 2016 by this honourable Tribunal requiring me to file and serve my witness statements by 28 August; and by that date an indexed bundle of documents be filed and served and further that the application be listed for hearing on 19 and 20 September 2016.
>
> 3. Since the orders were made on 10 May 2016 I have undergone a right hip replacement and my recovering from that operation has been slower than I expected.
>
> 4. As a result my ability to deal with procedural requirements has been hampered.
>
> 5. In addition I am conducting a legal practice with limited resources.
>
> 6. Pro bono counsel is assisting me but with limited resources himself.
>
> 7. Counsel is assisting me to prepare an indexed bundle of documents and my witness statement but is only able to spend a limited amount of time each day on that task, and my witness statement.
>
> 8. I believe that witness statements will also be needed for two other witnesses. Neither have been interviewed by counsel.
>
> 9. Annexed and marked PN1 is a true copy of my general practitioner's [Dr Westhoff's] report dated 6 September 2016.
>
> 10. After discussions with counsel I believe that I will be ready for a hearing by mid November 2016.

90 Dr Gerald Westhoff's report dated 6 September 2016 stated:

> Mr Neil has a number of significant health problems, as detailed in his recent report from his cardiologist, Dr Stephen Gordon.
>
> He again reports being required to provide written evidence to the Board.
>
> He is due to have plastic surgery on his right ear and has recently had orthopaedic surgery on his right hip in the past six weeks.
>
> In my opinion, his complying with the board's request within the requisite time frame is likely to be deleterious to his health.

> Indeed, in similar stressful situations, on two previous occasions, Mr Neil has been admitted to hospital for investigation and management of fainting and chest pains.
>
> I would appreciate it if the Board could consider extending the requisite time frame to eight weeks, rather than the current time frame to enable Mr Neil to attend to his health issues.

91 On 8 September 2016, it was pointed out to Mr Neil that in setting the hearing dates, time had been allowed for his then impending hip operation. Mr Neil's explanation was that the second hip operation had been delayed a couple of weeks. However, when Mr Neil's operation was delayed, he did not seek an extension of time.

92 The Tribunal pointed out to Mr Neil that the medical report was dated 6 September 2016. The orders had been made on 10 May 2016. Mr Neil had been required to comply with a s 24 Bundle by 14 August 2016 and the witness statements by 28 August 2016. Mr Neil did not apply for further time until after the time for compliance had expired.

93 Mr Neil's explanation for his failure to seek an extension previously was that he was trying to get a consent order and had been in contact with the Committee for five to six weeks. The Committee stated that the first notice they had from Mr Neil was an email received two weeks prior to the directions hearing on 8 September 2016. It would have been obvious to Mr Neil within at most a fortnight that he was not going to receive consent. The obligation was on Mr Neil to seek an extension of time. There was no reason why Mr Neil could not have requested a directions hearing before the Tribunal to extend time by telephone if necessary. Mr Neil was able to conduct his legal practice. Therefore he should have been able to contact the Tribunal.

94 Mr Neil was asked by the Tribunal when the matter could be set down for hearing and he stated, in effect, that he was asking for an extension of time for two months from 8 September 2016. The Tribunal asked Mr Neil whether this date would be suitable.

95 The compliance dates for the orders made on 10 May 2016 were varied to accommodate Mr Neil and the matter was set down for hearing. It was made clear to Mr Neil that it would proceed on those days.

96 At this stage, Mr Neil was informed that ground 2(b) of the Committee's application would not be pursued.

97 On 21 November, Mr Neil sent an email requesting an adjournment of the hearing listed on 28 and 29 November 2016 *sine die*. He attached to that email a letter from Dr Westhoff dated 18 November 2016 in the following terms:

> Mr Neil has a number of significant health problems, as detailed in his recent report from his cardiologist, Dr Stephen Gordon.
>
> He reports being required to attend the Board for a hearing on 28 and 29 November 2016 .
>
> In my opinion, his complying with the Board's request within this current time frame is likely to be deleterious to his health.
>
> In similar stressful situations, on two previous occasions, Mr Neil has been admitted to hospital for investigation and management of fainting and chest pains.
>
> I would appreciate it if the Board could consider extending the date for this hearing for another 12 weeks.
>
> This would enable Mr Neil to have sufficient time to make application to other State Authorities to have the need to attend the SAT hearing withdrawn, without causing him undue deleterious health [effects].

98 Mr Neil attached a letter from Dr Gordon dated 23 November 2016:

> This is to confirm that Mr Peter Neil attends my Cardiology Practice and was recently reviewed.
>
> He has a diagnosis of a severely leaking mitral valve which was exacerbated by bacterial infection of the valve several years ago. It has been kept under close surveillance through The Cardiology Department of Sir Charles Gairdner Hospital and with me.
>
> In the past he has had significant health issues and symptoms which occurred during periods of marked stress and ended up hospitalising him with symptoms of chest pain similar to a heart attack. Such symptoms have occurred on other occasions without hospitalisation particularly when he is faced with high workloads and demanding time schedules, particularly in relation to personal legal issues.
>
> I understand from him that he is facing further issues of increasing stress in relation to a legal hearing and the various deadlines relating to that hearing and this raises concern that once again his symptom status may deteriorate with further health related issues and symptoms.
>
> I would be most grateful then in seeking your assistance to look at the possibility of deferment of such a hearing to a time where he would be in

> a better position to handle the stresses associated with the event and the preparation for that event.
>
> If any further information is required please contact me at the above address.

99 On 25 November 2016, Mr Neil sent a further email to the President's associate seeking an adjournment. Mr Neil's request was denied at that time. In that email Mr Neil made complaints about Mr Merrick. This was typical of the complaints Mr Neil made about Mr Merrick and the Committee. These complaints were the subject of complaints by him to various bodies.

100 There is no substance whatsoever to those complaints. Mr Merrick was simply performing his work appropriately for the Committee and the Committee was acting appropriately in pursing the complaint against Mr Neil.

101 When the matter was called on 28 November 2016, there was no appearance by Mr Neil. As a result, the Tribunal telephoned Dr Westhoff about his letter of 18 November 2016.

102 Dr Westhoff described Dr Neil's condition as follows:

> Yes. I mean, the - so his leaking heart valve is a fairly fixed and currently not advancing condition. So it's likely as the many years go by this may become worse and he may end up needing an operation to control that leaking heart valve. So that of itself is a fairly stable problem. The letter of support I had in terms of a deleterious effect on his health is more on his mental health, rather than his physical health.
>
> One of Mr Neil's particular concerns was that dealing with the administrative issues would then place a load on his heart and previously that meant his stress levels increased and he then presented to hospital with chest pains and physical symptoms as a consequence of dealing with the stress. But the underlying heart problem itself is actually fairly stable and currently needs … [no] specific medical intervention.

103 The Tribunal explained to Dr Westhoff that the matter could not be allowed to go on indefinitely and that the Tribunal wished to fix a date when Mr Neil would not be having heart problems. Dr Westhoff stated 'they [the heart problems] are going to remain and in 12 weeks' time those heart problems themselves will remain. The only thing that may not be there is a level of agitation and concern Mr Neil has if he is better prepared to, you know, defend himself at the hearing'.

104 The following exchange took place:

> [THE TRIBUNAL]: So how many - you know, how - his stress levels as against everybody else's stress levels, are they at such a level that he should be excused indefinitely, or he - but still allowed to practice, by the way? Is that what you're saying?
>
> WESTHOFF, DR: No. Look, I guess what I'm saying is that his perceived level of stress comes with meeting the requirements. Now, I mean, obviously, to my mind it's - the board needs to make a decision as to how long it's prepared to wait on each occasion. But I guess my feeling would be that it's quite likely that Mr Neil's stress levels will not change significantly by the next hearing.
>
> …
>
> WESTHOFF, DR: Yes. Now, I think one of Mr Neil's particular plans in terms of the hearing was that he was seeking more time so that he could appeal to other legislatures to, therefore, make the SAT hearing no longer relevant. And that was - so that way he would be able to avoid having to attend the SAT and, therefore, you know, make his stress levels lower.
>
> (T:5-6; 28.11.16)

105 Although the timetable was not onerous by any stretch of the imagination, out of an abundance of caution and to give Mr Neil every chance, the matter was adjourned and listed for hearing on 13 and 14 February 2017, that is, at the time recommended by Dr Westhoff.

106 On 28 December 2016, Mr Neil made an application for further and better particulars and a stay of the proceeding and under s 47, s 48 and s 50 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), Mr Neil set out his reasons.

107 Mr Neil had been provided by that time with the Committee's s 24 Book of Documents and JL's witness statements, Mr Neil's request for particulars was both late and unnecessary. The allegations made against him were entirely clear from the application, the documentation and the witness statements.

108 Mr Neil then made various arguments about the facts of the case. All of those matters were factual matters which should properly be resolved at a hearing, not on a s 47, s 48 or s 50 application under the SAT Act.

109 The Tribunal also notes that s 47 applications should be brought sooner rather than later.

110 Mr Neil sought a stay on the following grounds:

> (1) Until the WA Bar Association has appointed a pro bono barrister to represent me at the SAT proceedings including this application to the State Administrative Tribunal. I have made an application to the WA Bar Association for a pro bono barrister and have yet to receive a reply
>
> (2) Until after the relevant State Regulatory authority plus the Public Sector Commission completes an investigation into my complaint relevant to this JL proceeding for non-compliance by Graeme Geldart with
>
> 1. the Public Sector Management Act and the Codes of Conduct and the Codes of Ethics
>
> 2. the Public Sector Commissioners Circular 2009-27 on Complaints management
>
> 3. Information for boards and tribunals about complaints handling (Ombudsman Western Australia)
>
> The Premier of WA the Hon Colin Barnett on a letter to me dated 15th December 2016 has suggested I discuss my concerns about LPBWA employees failing to act fairly in relation to the JL complaint with the Public Sector Commission which has confirmed that
>
> 1. the Public Sector Management Act and the Codes of Conduct and the Codes of Ethics
>
> 2. the Public Sector Commissioners Circular 2009-27 on Complaints management
>
> 3. Information for boards and tribunals about complaints handling (Ombudsman Western Australia) applies to LPBWA employees.
>
> Earlier this year I received pro bono advice from another senior Perth barrister with expertise regarding the Public Sector Management Act that it does apply to LPBWA employees.
>
> I am also sending a copy of this email and Application to SAT to my member of Parliament the Hon Peter Collier MLC and the Leader of the Opposition who have also received copies of my emails to the Premier concerning my complaint that I have not been treated fairly in relation to the JL complaint[.]

111 None of those grounds provided any basis for a stay of the proceedings or an injunction.

112 On 3 February 2017, Mr Neil sent an email to the Committee, copied to the President of the Tribunal's associate, requesting an adjournment. No further evidence was provided as to Mr Neil's medical condition. On the same day, Mr Neil sent a further email to the Committee, copied to the President's associate, requesting consent for the adjournment so that he could obtain pro bono legal representation.

113 On 13 February 2017, Mr Neil sent a further email to the President's associate headed 're VR 193 of 2015 re CACV of 2017 denial of stay of proceedings, denial of further and better particulars, denial of legal representation, disability and age discrimination and wrong allegations still being deliberately made against me by Merrick/LPCC'.

114 The email once again sought to argue factual matters which were not suitable for giving a determination and which would need to be determined at the hearing. It contained a large number of irrelevant matters and again sought an adjournment.

115 Again there were baseless allegations made against Mr Merrick and the Committee.

116 The email also stated that the President had prejudged the issues as he 'is virtually saying that the Committee can never make a wrong decision in relation to a complaint, that is, in this case, the JL complaint'. That allegation was entirely baseless. The Tribunal had simply been endeavouring to bring the matter to a hearing and to emphasise to Mr Neil the fact that the matters he raised would need to be determined at the hearing. The application for an adjournment was refused.

117 Mr Neil did not attend on 13 February 2017 and the matter proceeded in his absence.

118 Mr Neil was well able to send multiple emails to various parties complaining of his treatment. His energy was concentrated on avoiding the hearing rather than dealing with it. Had Mr Neil directed the same energy to complying with the timetable he would have been in a position to proceed on 13 February 2017.

119 Having regard to the history of the matter, the Tribunal was not prepared to grant an adjournment. Mr Neil was given every indulgence by the Tribunal in meeting the timetables. By

13 February 2017, JL had attended on three occasions. The Tribunal has obligations to the community, not just to Mr Neil. However, at the conclusion of the hearing, the Tribunal made an order that a copy of the transcript be sent to Mr Neil and he have 21 days from receipt of the transcript to make submissions to the Tribunal. Mr Neil did not avail himself of that opportunity.

Professional misconduct

120 The Tribunal is satisfied, on the balance of probabilities applying the ***Briginshaw*** test that Mr Neil:

- between about 13 August 2013 and 17 October 2013, engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act by engaging in conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, and which involved a substantial and consistent failure to reach or maintain a reasonable standard of competence and diligence, in that he did not provide any advice to JL in relation to a dispute with DF regarding a property development at the Property that Mr Neil had been retained to, and had agreed to, provide.

121 This is not a case where Mr Neil gave advice that was inadequate in some respects. He failed to provide any advice. Particularly given that during that period he became aware that the Property had been placed for sale with an agent and JL required advice as to whether she could lodge a caveat, JL was entitled to advice in terms of the Retainer. It was ultimately JL's right to make an informed decision based on reasonable advice provided to her. Mr Neil failed in his obligation throughout.

122 JL first met with Mr Neil on 13 August 2013. By 25 November 2013, she had gone to other lawyers for advice. Mr Neil consistently failed to provide the advice required despite the terms of the Retainer and repeated requests from JL.

123 The Tribunal is also satisfied, on the balance of probabilities applying the ***Briginshaw*** test that Mr Neil:

- between about 21 December 2013 and 9 January 2014 engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act by engaging in conduct

that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, and which involved a substantial and consistent failure to reach or maintain a reasonable standard of competence and diligence by rendering a lump sum invoice on 21 December 2013 for legal fees to JL in the sum of $1,495 and further by rendering an itemised invoice on 9 January 2014 for legal fees to the client, in substitution of the lump sum invoice, in the sum of $2,006,40 which were not fair and reasonable as Mr Neil did not carry out or perform the legal work for which he was retained at all and was not therefore entitled to charge JL at all.

124 Mr Neil sought to charge JL when he had not complied with the terms of the Retainer. The basis of a practitioner's entitlement to fees is that he/she provide the work requested. To charge a client for work in such circumstances is a substantial departure from the appropriate standard of conduct.

Orders

1. The Tribunal finds that between about 13 August 2013 and 17 October 2013, Mr Peter Christison Neil engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) by engaging in conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, and which involved a substantial and consistent failure to reach or maintain a reasonable standard of competence and diligence, in that:

   (a) Mr Peter Christison Neil he did not provide any or any adequate legal advice to JL in relation to a dispute with DF regarding a property development at the Property in which Mr Peter Christison Neil had been retained to, and had agreed to, provide legal advice.

2. The Tribunal finds that between about 21 December 2013 and 9 January 2014, Mr Peter Christison Neil engaged in professional misconduct within the meaning of s 403 and

s 438 of the *Legal Profession Act 2008* (WA) by engaging in conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, and which involved a substantial and consistent failure to reach or maintain a reasonable standard of competence and diligence in circumstances where:

(a) Mr Peter Christison Neil rendered a lump sum invoice on 21 December 2013 for legal fees to JL in the sum of $1,495 and further rendered an itemised invoice on 9 January 2014 for legal fees to JL, in substitution of the lump sum invoice, in the sum of $2,006.40 which were not fair and reasonable as Mr Peter Christison Neil did not carry out or perform the legal work for which he was retained at all and was not therefore entitled to charge JL at all.

3. The Legal Profession Complaints Committee is to file its submission on penalty and costs by 31 March 2017.

4. Mr Peter Christison Neil is to file his submissions on penalty by 14 April 2017.

5. Subject to any further order of the Tribunal, the question of penalty and costs is to be dealt with entirely on the documents.

I certify that this and the preceding [124] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUSTICE J C CURTHOYS, PRESIDENT