[2017] WASAT 48 (S)

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and NEIL [2017] WASAT 48 (S)
MEMBER	**:**	JUSTICE J C CURTHOYS (PRESIDENT) MR M SPILLANE (SENIOR MEMBER) MS R MOORE (MEMBER)
HEARD	**:**	DETERMINED ON THE DOCUMENTS
DELIVERED	**:**	2 MAY 2017
FILE NO/S	**:**	VR 193 of 2015
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND PETER CHRISTISON NEIL Respondent

Catchwords:

Professional misconduct - Breach of *Legal Profession Conduct Rules 2010* (WA) - Protection of public - Disciplinary sanctions - Fine imposed pursuant to s 441(a) of *Legal Profession Act 2008* (WA) - Legal practitioner to undertake specified period of practice under specified supervision pursuant to s 441(f) of the *Legal Profession Act 2008* (WA)

Legislation:

Legal Profession Act 2008 (WA), s 438(1), s 438(2), s 439, s 441, s 441(a), s 441(d), Pt 13

Legal Profession Conduct Rules 2010 (WA), r 6(1)(c), r 7(e), r 7(g)
State Administrative Tribunal Act 2004 (WA), s 87, s 87(1), s 87(2)

Result:

Practitioner fined $5,000
Legal Practice certificate subject to condition for period of 12 months
Practitioner pay Legal Profession Complaints Committee's costs

Summary of Tribunal's decision:

The practitioner was found to have engaged in professional misconduct pursuant to s 438(1) of the *Legal Profession Act 2008* (WA).

In determining the appropriate disciplinary sanctions for such conduct, the Tribunal imposed a fine on the practitioner as well as a condition on his practice certificate whereby he may only practice as an employed practitioner under supervision for a period of 12 months from the date of the Tribunal's order.

The practitioner failed to show any insight into his misconduct or any remorse.

The practitioner was also ordered to pay the costs of the Legal Profession Complaints Committee.

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):

A Solicitor v Council of the Law Society of NSW [2004] HCA 1; (2004) 216 CLR 253
Bar Association (NSW) v Evatt (1968) 117 CLR 177
Chamberlain v Law Society of the Australian Capital Territory (1993) 118 ALR 54
Council of the Law Society (NSW) v A Solicitor [2002] NSWCA 62
Craig v The Medical Board of South Australia [2001] SASC 169
Law Society of New South Wales v Foreman (1994) 34 NSWLR 408
Law Society of New South Wales v Walsh [1997] NSWCA 185
Legal Profession Complaints Committee and A Legal Practitioner [2013] WASAT 37 (S)
Legal Profession Complaints Committee and Amsden [2014] WASAT 57 (S)
Legal Profession Complaints Committee and in de Braekt [2012] WASAT 58 (S); (2012) 80 SR (WA) 194
Legal Profession Complaints Committee and in de Braekt [2013] WASAT 124
Legal Profession Complaints Committee and Khosa [2015] WASAT 107(S)
Legal Profession Complaints Committee and Leask [2010] WASAT 133
Legal Profession Complaints Committee and Neil [2017] WASAT 48
Legal Profession Complaints Committee v Detata [2012] WASCA 2014
Legal Profession Complaints Committee v Lashansky [2007] WASC 211
Legal Profession Complaints Committee v Love [2014] WASC 389
Legal Profession Complaints Committee v Masten [2011] WASC 71
Legal Profession Complaints Committee v O'Halloran [2013] WASC 430
Legal Profession Complaints Committee v Segler [2014] WASC 159
New South Wales Bar Association v Evatt (1968) 117 CLR 177
New South Wales Bar Association v Hamman [1999] NSWCA 404
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Quinn v Law Institute of Victoria [2007] VSCA 122
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12
Smith v New South Wales Bar Association [2014] WASAT 112 (S); [1992] HCA 36; (1992) 176 CLR 256
Stirling v Legal Services Commissioner [2013] VSCA 374
Veterinary Practitioners Board of NSW v Johnson [2010] NSWADT 308
Western Australian Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA 32

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 17 November 2015, the Legal Profession Complaints Committee (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) (LP Act).

The relevant procedural history

2 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 - see ***Legal Profession Complaints Committee and Neil*** [2017] WASAT 48 (***Neil***).

3 Pursuant to order 3 of the Tribunal orders made on 17 March 2017 in ***Neil***, the Committee filed its submission on penalty and costs on 31 March 2017. Mr Neil did not comply with order 4 of the Tribunal made on 17 March 2017 which required him to file submissions by 14 April 2017. Mr Neil ultimately filed submissions on 18 April 2017.

The practitioner's conduct

4 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.

5 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.

6 In ***Neil***, the Tribunal set out its findings on practitioner's conduct as follows:

> 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 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.

The orders sought by the Committee

7 In submissions filed on 31 March 2017, the Committee sought the following orders as to penalty and costs:

(a) In relation to the findings of two counts of professional misconduct the practitioner:

i. pay a fine in the sum of $12,000 pursuant to sections 438(2)(b) and 441(a) of the Act; and

ii. effective from 30 days from the date of this order, for a period of two (2) years, the practitioner's local practising certificate be subject to the condition that he only practice law as an employed solicitor in the employment of and supervised by a practitioner with a minimum of ten years' experience, approved in writing by the Legal Practice Board of Western Australia. At the conclusion of two years should the practitioner wish to engage in practice other than as an employed solicitor, he give the Legal Practice Board forty two days' notice of his

intention to do so pursuant to section 439(c) of the Act; and

iii. be reprimanded pursuant to section 439(d) of the Act.

(b) The practitioner pay the Committee's costs pursuant to section 87(2) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) in the sum of $10,218.90.

(c) The amounts specified in orders (a)(i) and (b) are to be paid to the Legal Practice Board within 30 days, or as otherwise agreed between the practitioner and the Legal Practice Board.

8 In his submissions filed on 18 April 2017, Mr Neil made no submissions as to appropriate orders as to penalty and costs.

Legal framework and principles

9 The purposes of Part 13 of the LP Act are, relevantly:

(a) to provide for the discipline of the legal profession in this jurisdiction, in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally; and

(b) to promote and enforce the professional standards, competence and honesty of the legal profession.

10 Section 438(2) of the LP Act provides:

If, after it has completed a hearing in relation to a referral under this Part in respect of an Australian legal practitioner, the State Administrative Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may -

(a) make and transmit a report on the finding to the Supreme Court (full bench); or

(b) make any one or more of the orders specified in section 439, 440 and 441.

11 Section 439 of the LP Act provides:

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

(a) an order that the practitioner's local practising certificate be suspended for a specified period or cancelled;

(b) an order that a local practising certificate not be granted to the practitioner before the end of a specified period;

(c) an order that -

(i) specified conditions be imposed on the practitioner's practising certificate granted or to be granted under this Act; and

(ii) the conditions be imposed for a specified time; and

(iii) specifies the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed;

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

12 Section 441 of the LP Act provides:

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

(a) an order that the practitioner pay a fine to the Board of a specified amount not exceeding $25 000;

(b) an order that the practitioner undertake and complete a specified course of further legal education;

(c) a compensation order;

(d) an order that the complainant pay the amount of legal costs in dispute or that the amount of legal costs be reduced by a specified amount (not exceeding the amount in dispute);

(e) an order that the practitioner provide specified legal services to the complainant either free of charge or at a specified cost;

(f) an order that the practitioner undertake a specified period of practice under specified supervision;

(g) an order that the practitioner do or refrain from doing something in connection with the practice of law;

(h) an order that the practitioner's practice, or the financial affairs of the practitioner or of the practitioner's practice, be conducted for a specified period in a specified way or subject to specified conditions;

(i) an order that the practitioner's practice be subject to periodic inspection for a specified period;

(j) an order that the practitioner undergo counselling or medical treatment or act in accordance with medical advice given to the practitioner;

(k) an order that the practitioner use the services of an accountant or other financial specialist in connection with the practitioner's practice;

(l) an order that the practitioner seek advice in relation to the management of the practitioner's practice from a specified person;

(m) an order that the practitioner not apply for a local practising certificate before the end of a specified period.

Disciplinary sanctions - general principles

13 The jurisdiction of the Tribunal is protective rather than punitive, and such protection runs to both the public and the profession (***Re Maraj (a Legal Practitioner)*** (1995) 15 WAR 12 (***Re Maraj***) at 25); ***Legal Profession Complaints Committee v Love*** [2014] WASC 389 (***Love***) at [19]; ***Law Society of New South Wales v Foreman*** (1994) 34 NSWLR 408 (***Foreman***) at 440G-441A-B; ***Legal Profession Complaints Committee and in de Braekt*** [2013] WASAT 124 at [24]-[26]; ***New South Wales Bar Association v Hamman*** [1999] NSWCA 404 (***Hamman***) at [21] and at [77]).

14 The appropriate sanction is to be considered at the time of the making of the sanction and not by reference to the date of the unprofessional acts (***Legal Profession Complaints Committee and A Legal Practitioner*** [2013] WASAT 37 (S) (***A Legal Practitioner (S)***) at [23]; ***Legal Profession Complaints Committee v Segler*** [2014] WASC 159 at [7]; ***A Solicitor v Council of the Law Society of NSW*** [2004] HCA 1; (2004) 216 CLR 253 (***A Solicitor [2004] NSW***) at [15]; ***Love*** at [16]).

15 It is the practitioner's conduct that attracts any sanction (***A Legal Practitioner (S)*** at [24]; ***Smith v New South Wales Bar Association*** [2014] WASAT 112 (S); [1992] HCA 36; (1992) 176 CLR 256 at 267-268 and 271-272; ***A Solicitor [2004] NSW***).

16 As the Tribunal explained in ***A Legal Practitioner (S)*** at [24]:

> [I]n determining the appropriate penalty, care needs to be taken that the penalty reflects the matters with which the practitioner is charged and not other conduct including the defence of the action by the practitioner which is ultimately held to be unsuccessful: *Smith v New South Wales Bar*

Association [1992] HCA 36; (1992) 176 CLR 256 (*Smith*) at 267 - 268 and 271 - 272[.]

Twelve matters for consideration

17 In determining an appropriate sanction, twelve matters may require consideration. Those matters are interrelated and are not mutually exclusive. The list of matters is not exhaustive. The twelve matters are:

1) Any need to protect the public against further misconduct by the practitioner (***Legal Profession Complaints Committee and Amsden*** [2014] WASAT 57 (S) (***Amsden (S)***) at [8]; ***Foreman*** at 440C; ***Hamman*** at [77]).

2) The need to protect the public through general deterrence of other practitioners from similar conduct (***Veterinary Practitioners Board of NSW v Johnson*** [2010] NSWADT 308 (***Johnson***) at [103]; ***Hamman*** at [77]).

3) The need to protect the public and maintain public confidence in the profession by reinforcing high professional standards and denouncing transgressions and thereby articulating the high standards expected of the profession (***Amsden (S)***) at [8]; ***Foreman*** at 444F; and ***Hamman*** at [77] and at [79]), such that, even where there may be no need to deter a practitioner from repeating the conduct, the conduct is of such a nature that the Tribunal should give an emphatic indication of its disapproval (***Craig v The Medical Board of South Australia*** [2001] SASC 169 at [64]; ***Johnson*** at [103]).

4) In the case of conduct involving misleading conduct, including dishonesty, whether the public and fellow practitioners can place reliance on the word of the practitioner (***Johnson*** at [109]; ***Foreman*** at 445B - 445G).

5) Whether the practitioner has breached any:

   a) Act;

   b) Regulations;

c) Guidelines or Code of Conduct, issued by the relevant professional body; and

d) whether the practitioner has done so knowingly.

6) Whether the practitioner's conduct demonstrated incompetence, and if so, to what level.

7) Whether or not the incident was isolated such that the Tribunal can be satisfied of his or her worthiness or reliability for the future (***Foreman*** at 442E - 442G; ***New South Wales Bar Association v Evatt*** (1968) 117 CLR 177 at 183; ***Council of the Law Society (NSW) v A Solicitor*** [2002] NSWCA 62 (***A Solicitor [2002] NSW***) at [80]; ***Chamberlain v Law Society of the Australian Capital Territory*** (1993) 118 ALR 54 at 62 and 63).

8) The practitioner's disciplinary history (***Legal Profession Complaints Committee v O'Halloran*** [2013] WASC 430 at [93]);

9) Whether or not the practitioner understands the error of his ways, including an assessment of any remorse and insight (or a lack thereof) shown by the practitioner, since a practitioner who fails to understand the significance and consequences of misconduct is a risk to the community (***Law Society of New South Wales v Walsh*** [1997] NSWCA 185 per Beazley JJA (***Walsh***); ***Legal Profession Complaints Committee v Lashansky*** [2007] WASC 211 at [31] - [52] and (second) at [35]; ***Amsden (S)*** at [8]; ***Foreman*** at 444E; ***Love*** at [9]).

10) The desirability of making available to the public any special skills possessed by the practitioner.

11) The practitioner's personal circumstances at the time of the conduct and at the time of imposing the sanction. However, the weight given to personal circumstances cannot override the fundamental obligation of the Tribunal to provide appropriate protection of the public interest in the honesty and integrity of legal practitioners and in the maintenance of proper standards of legal practice (***Love*** at [59]); ***Paridis v Settlement Agents***

Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361 (***Paridis***) at [30(5)]).

12) The Tribunal may consider any other matters relevant to the practitioner's fitness to practise and other matters which may be regarded as aggravating the conduct or mitigating its seriousness (***A Legal Practitioner (S)*** at [25]). In general, mitigating factors such as no previous misconduct or service to the profession are of considerably less significance than in the criminal process because the jurisdiction is protective not punitive (***Walsh***).

General matters relating to sanctions

18 Where there is a choice of sanctions, the Tribunal will choose that sanction which maximises the protection of the public (***Quinn v Law Institute of Victoria*** [2007] VSCA 122 at [31]).

19 The dominant purpose of the disciplinary regulation of the legal profession is the protection of the public by the maintenance of proper standards within the profession. Hence, the impact which an appropriate penalty would have upon a practitioner guilty of misconduct, and personal hardship to a practitioner, are necessarily secondary considerations (see ***Legal Profession Complaints Committee v Detata*** [2012] WASCA 2014 at [47]; ***Legal Profession Complaints Committee v Masten*** [2011] WASC 71 at [29]; and ***Legal Profession Complaints Committee and Leask*** [2010] WASAT 133 at [54]).

20 There are circumstances in which a 'global' approach to sanction, rather than the imposition of separate sanction for each unprofessional act, may be more appropriate in vocational disciplinary proceedings namely, where the facts of the case are so inextricably woven as to make it difficult to meet a clear standard of prescription (***A Legal Practitioner (S)*** at [5]; ***Stirling v Legal Services Commissioner*** [2013] VSCA 374 at [72]-[75]).

21 All of the above matters are to be considered in the context of the Tribunal's findings as to penalty, that is, how serious was the conduct and the practitioner's explanation for the conduct (***Paridis*** at [30(1)]-[30(2)]).

Factor 1 Is there a need to protect the public against further misconduct by Mr Neil?

22 The Tribunal notes that it has adopted parts of the Committee's submissions in these reasons.

23 This was not a case where Mr Neil gave advice to the client that was inadequate in some respects. Rather, he failed to provide her with any advice relevant to the retainer and 'failed in his obligation throughout [the retainer]' (***Neil*** at [75] and [121]), and, accordingly, was not entitled to charge her at all (***Neil*** at [82] and [124]).

24 It is trite to note that a practitioner has fundamental ethical obligations to:

a) perform the work required on behalf of the client diligently and competently: r 6(l)(c) and r 7(e) of the *Legal Profession Conduct Rules 2010* (WA) (Conduct Rules); and

b) not accept an engagement unless they are in a position to carry out and complete that engagement diligently: r 7(g) of Conduct Rules.

25 Once a practitioner accepts a retainer they are bound by the obligations that arise from that retainer.

26 Mr Neil took the client's limited means as a basis for not doing anything that effectively advanced her interests.

27 The fact that Mr Neil exhibited such a fundamental misunderstanding of his obligations under the retainer, despite his long years in the profession, shows that there is a need to protect the public from further misconduct by him.

Factor 2 Is there a need to protect the public through general deterrence of other practitioners?

28 An important object of the disciplinary function is to maintain and protect the reputation of the profession: ***Re Maraj*** at 24-25. Accordingly, account must also be taken by the Tribunal of the effect which its orders will have on the understanding, in the profession and the public of the standard of behaviour required of practitioners: ***Foreman*** at 444F.

29 There is a clear public interest in imposing a penalty that deters other practitioners from breaching fundamental duties such as r 6(l)(c), 7(e) and r 7(g) of the Conduct Rules. A failure to provide any advice in accordance with a retainer (coupled with the circumstances set out in the ***Neil*** at [50]-[65] and [121], particularly where the practitioner was aware that the property had been placed for sale with an agent and the client required advice as to whether she could lodge a caveat, and where the practitioner later tendered an account) is an anathema to the high professional standards expected of a legal practitioner by the public and any penalty must reflect the need to maintain those standards, particularly, as in this case, involving a lay client with relatively limited means.

30 It may well be appropriate in some circumstances to have a client undertake certain types of information gathering so as to limit the costs for the client. However, that does not extend to a practitioner abdicating their responsibility to provide legal advice in the terms of their retainer. Referring the client to the Landgate website did not constitute legal advice. As the Tribunal noted in its reasons, Mr Neil reversed the roles of himself and his client.

31 Practitioners need to be aware of the obligations that arise from accepting a retainer. If they feel that they will not be able to fulfil the requirements of the retainer because of the client's limited means then they should refuse to accept the retainer. Limited means are not to be equated with second rate service.

Factor 3 Is there a need to protect the public by reinforcing high professional standards and denouncing transgressions?

32 Factor 3 is dealt within the discussions of factors 1 and 2 above.

Factor 4 Dishonesty

33 The Tribunal has not found Mr Neil to have been dishonest.

Factor 5 Breach of an Act, Regulations, Guidelines or Code of Conduct

34 Mr Neil breached r 6(l)(c), r 7(e) and (g) of the Conduct Rules.

Factor 6 Incompetence

35 In ***Neil*** at [76] and [77], the Tribunal found that Mr Neil was engaged to provide legal advice in terms of the retainer to the client, namely whether she should lodge a caveat, how she should respond to

DF's allegations as to the 'business partnership', and a strategy to recover the $700,000, and that Mr Neil failed to provide any advice to the client as to how and why her best interests would be served by the sale of the Property and failed to provide any advice as to why the client did not have a caveatable interest.

36 The Tribunal in ***Neil*** at [22] noted that in his response, Mr Neil acknowledged that the client required the advice as set out at [21] in ***Neil***. The Tribunal's finding that Mr Neil failed to provide the client with any advice relevant to the retainer (including but not limited to at the Meeting: ***Neil*** at [32]) and consideration of the contents of his email replies to the client, in particular his query 'What grounds [for a caveat] do you propose to use?' in his email sent at 4.22 pm on 30 August 2013 (Exhibit A page 82; described by the Tribunal: as a 'role reversal': ***Neil*** at [51]) and in his emails sent at 6.18 pm on 17 October 2013 (Exhibit A page 228) and on 5 November 2013 (Exhibit A page 233) suggesting the client download a caveat publication from the Landgate website, demonstrates incompetence on Mr Neil's part.

37 At all times in his response and his emails to the Tribunal, Mr Neil maintained that he provided legal advice and charged the client for that 'advice', in circumstances where the Tribunal has found he did not provide any advice.

38 Mr Neil has exhibited incompetence both in his failure to comply with the terms of the retainer and in his inability to comprehend that he had failed in his obligations under the retainer. His incompetence is further amplified by his inability to comprehend that, in the circumstances, he was not entitled to charge the client.

39 The basis for charging a client is not a mathematical exercise of simply multiplying the time recorded by the hourly rate. The basis for charging requires that the retainer be substantially complied with before a charge can be levied.

40 The level of incompetence exhibited by Mr Neil indicates a need for supervision if he is to be allowed to continue to practice.

Factor 7 Was the incident isolated?

41 Mr Neil's conduct continued throughout the course of his acting for the client from mid-August 2013 to January 2014.

Factor 8 Mr Neil's disciplinary history

42 Mr Neil does not have any disciplinary history.

Factor 9 Whether or not Mr Neil understands the error of his ways, including an assessment of any remorse and insight (or a lack thereof) shown by Mr Neil

43 Mr Neil has failed to exhibit any remorse or insight.

44 Indeed, far from exhibiting any remorse, Mr Neil has attacked the Committee's conduct of this matter. His 'submissions' in relation to penalty and costs continued his baseless attacks on the staff of the Committee.

45 Much of the rest of Mr Neil's submissions were directed to disputing the findings of the Tribunal in ***Neil***.

46 The fact that Mr Neil made the 'submissions' in that form, further demonstrates a worrying inability to comprehend his legal obligations. The place to challenge findings as to conduct is not in submissions as to penalty and costs.

47 Sincere expressions of remorse demonstrate the insight that is necessary for the Tribunal to find that a practitioner has learnt from his/her mistakes. A failure to do so suggests that the practitioner represents a continuing risk to the public.

48 Mr Neil exhibited a lack of insight into his conduct, from the time of his email to the client on 4 January 2014 (Exhibit A pages 244-245; ***Neil*** at [71]) up to and including his email to the President's Associate on the morning of the final hearing on 13 February 2017 (***Neil*** at [113]-[116]) and in his submissions.

49 Mr Neil has not yet demonstrated remorse, as that necessitates acceptance of wrong-doing: ***Legal Profession Complaints Committee and Khosa*** [2015] WASAT 107(S) at [35].

50 A failure to understand the error of one's ways is relevant to penalty (***Bar Association (NSW) v Evatt*** (1968) 117 CLR 177).

Factor 10 Are there any special skills possessed of Mr Neil?

51 Mr Neil does not possess any special skills.

Factor 11 Mr Neil's personal circumstances

52 Mr Neil has not raised any personal circumstances that are relevant to penalty.

53 The Tribunal notes that Mr Neil has raised issues as to his health throughout the proceedings but as explained in ***Neil*** the hearing was listed to accommodate those health concerns.

Factor 12 Are there any other matters related to Mr Neil's fitness to practise?

54 There are no other matters relevant to Mr Neil's fitness to practice.

References

55 In *Lawyers' Professional Responsibility* (6th ed, 2017) Professor G E Dal Pont wrote at pages 777-778:

> For testimonials to assume any weight, they must be based on a detailed understanding of the conduct that occurred, and informed by a full appreciation of the lawyer's methods, not by opinions based upon a view from days past (*Re Melvey* (1966) 85 WN (Ft 1) (NSW) 289 at 298 (CA). Cf *Prothonotary of the Supreme Court of New South Wales v P* [2003] NSWCA 320 at [14], per Young CJ in Eq (who remarked that '[i]t was pleasing to see that in contrast with many cases of this type each of the character referees appears to have been made fully aware, of all the relevant facts and circumstances of the opponent's offence'). Testimonials that disregard known facts, or downplay the seriousness of the misconduct, indicate a diminished capacity to give convincing evidence of good character (*Re Bridgman* [1934] St R Qd 1 at 7 per Blair CJ; *Re Nelson* (1991) 106 ACTR 1 at 24 per Higgins and Foster JJ) and so attract little weight. Nor is evidence from a non-legally qualified deponent of great value, for 'it is one thing to speak well of a man whom the deponent has met in social or business circles; it is another to speak of him as to his professional dealings' (*Re Melvey* (1966) 85 WN (Ft 1) (NSW) 289 at 298 (CA)). Third parties' opinions cannot, in any event, be substituted for the opinion of the tribunal or court (*Re Bridgman* [1934] St R Qd 1 at 7 per Blair CJ).
>
> Evidence of the lawyer's good reputation and integrity carries greatest weight where the breach is a minor and isolated one, here presenting a compelling case that the lawyer's character as revealed by the breach is entirely out of character (*Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 444 per Mahoney JA). …
>
> The position is otherwise where the breach is more serious, and especially where it involves repeated dishonesty (*Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 448-449 per Mahoney JA. The cases

> most commonly concerned fraudulent trust account misappropriations: see, for example, *Re a Practitioner* (1984) 36 SASR 590 at 592 per King CJ, at 593 per Jacobs J; *Re Nelson* (1991) 106 ACTR 1 at 24 per Higgins and Foster JJ) here, character evidence carries far less weight because a serious breach, and breaches that are repeated, are difficult to explain as other than indicative of a lack of integrity[.]

56 The Tribunal adopts Professor Dal Pont's writing as a correct statement of the law relating to testimonials/references.

57 Mr Neil provided a reference from an accountant. The reference did not state that the referee was aware of the finding against Mr Neil. In addition, it related to events in 2008. The Tribunal has therefore given no weight to that reference in reaching its decision.

58 Mr Neil provided a further reference from another accountant. It appears that the second accountant may have read the decision in ***Neil***. It appears that he may have had more recent contact with Mr Neil. However on the evidence before it as outlined above, the Tribunal is unable to agree with this referee's conclusion that Mr Neil has learnt from the experience.

59 A further reference was provided by a valuer. It is not apparent that the referee has read the decision in ***Neil*** and again for the same reason as above, the Tribunal has given no weight to that reference in reaching its decision.

60 A reference was also provided by a former client in a family law matter. Again, it is not apparent that the referee has read the decision in ***Neil*** and the Tribunal has therefore again, given no weight to that reference in reaching its decision.

Failure to grant an adjournment on 13 February 2017

61 Mr Neil submitted that he should have been granted an adjournment on 13 February 2017.

62 On 13 February 2017, the first day listed for hearing, Mr Neil sent a long email to the President's Associate requesting an adjournment. The majority of that email dealt with why the Committee's case was flawed.

63 Mr Neil also stated that he was not in the best of health because of previous operations. His email stated:

> I am also feeling very unwell today and have made an appointment this morning to see my doctor as well as get a referral to my long time cardiologist Dr Stephen Gordon.

64 Mr Neil failed to provide any details as to why he was feeling unwell.

65 Dr Westhoff's report dated 16 March 2017, over a month after the hearing, stated that Mr Neil had attended the surgery at midday on 13 February 2017. Dr Westhoff stated that Mr Neil 'reported that he had symptoms consistent with laryngitis in the morning of that day'. Dr Westhoff does not refer to his conducting any examination of Mr Neil. There is no reason why Mr Neil could not have provided details of his alleged ill health to the Tribunal in his email of 13 February 2017.

66 Dr Westhoff also noted that Mr Neil had not been granted a pro bono lawyer for the hearing and that a pro bono lawyer would ameliorate Mr Neil's stress.

67 A party is not entitled to representation by a legal practitioner. There is no evidence that the stress occasioned by this was sufficient to warrant an adjournment. Any hearing is stressful for the parties.

68 Mr Neil submitted a report from his cardiologist, Dr Gordon, dated 2 March 2017. This report basically repeated information Dr Gordon previously provided to the Tribunal on Mr Neil's health condition. Dr Gordon also requested more time on Mr Neil's behalf. Dr Gordon does not appear to have been aware of the steps taken by the Tribunal to accommodate Mr Neil by allowing him further time on a number of occasions. Mr Neil had ample time to compose and send a very long email to the President's Associate and to the Committee. Mr Neil's actions are inconsistent with a need for more time.

69 The Tribunal was not satisfied on the evidence before it on 13 February 2017, that another adjournment would have been appropriate. A further adjournment would likely have led to yet another request for an adjournment at any future hearing date.

70 Mr Neil provided a further two medical certificates from Dr Westhoff and Dr Gordan. Neither certificate was provided at the hearing. In fact, the medical certificates are dated well after the hearing date.

Mr Neil's further submission

71 On 21 April 2017, without leave, Mr Neil filed a further submission alleging 'ongoing age and disability discrimination'.

72 There is simply no basis for those allegations. The Tribunal has done everything possible to accommodate Mr Neil's health issues.

73 The findings against Mr Neil were based on the evidence before the Tribunal. Mr Neil's age was irrelevant to those findings.

Penalty

74 Mr Neil's conduct, although serious, is not of sufficient seriousness to warrant a suspension or striking off.

75 The Tribunal is satisfied that a fine (s 441(a) of the LP Act) and a condition that Mr Neil undergo a specified period of practice under specified supervision (s 441(d) of the LP Act) would be sufficient to remedy Mr Neil's professional misconduct so as to protect the public.

Costs

76 The Committee sought an order for the payment by the practitioner of counsel's fees and other disbursements incurred in the proceeding in the amount of $10,218.90. The Committee did not seek a costs order in relation to its solicitor's fees.

77 Although s 87(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) contemplates that, generally, parties bear their own costs in proceedings before the Tribunal, s 87(2) of the SAT Act confers a discretion on the Tribunal to make an order for the payment by a party of all or any of the costs of another party.

78 In ***Western Australian Planning Commission v Questdale Holdings Pty Ltd*** [2016] WASCA 32, Murphy JA (Martin CJ and Corboy J agreeing) stated:

> 46 The effect of s 87(1) of the SAT Act is, relevantly, that each party in proceedings before the Tribunal is to bear its own costs, unless the Tribunal otherwise orders.
>
> …
>
> 51 Section 87(2) is to be construed in the context that the legal rationale for an order for costs is not to punish the person against whom the order is made, but to compensate or reimburse the person

> in whose favour it is made. That rationale is evident in s 87(3) of the SAT Act. Accordingly, even in a statutory context where the presumptive position is that no costs will be ordered, generally speaking, the question is whether, in the particular circumstances of the case, it is fair and reasonable that a party should be reimbursed for the costs it incurred. The onus is on the party seeking an order in its favour.

79 The Tribunal's approach and practice in relation to costs in vocational disciplinary proceedings costs was summarised in ***Legal Profession Complaints Committee and in de Braekt*** [2012] WASAT 58 (S); (2012) 80 SR (WA) 194 (***in de Braekt***) at [51] as follows:

> Although s 87(1) of the SAT Act contemplates that, generally, parties bear their own costs in proceedings before the Tribunal, s 87(2) of the SAT Act confers a discretion on the Tribunal to make an order for the payment by a party of all or any of the costs of another party. The Tribunal's established practice in relation to the exercise of its discretion as to costs under s 87(2) of the SAT Act in vocational disciplinary proceedings is that a successful application by a vocational regulatory body, such as the Committee, will usually result in an order for costs being made in favour of the vocational regulatory body: *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S); (2005) 39 SR (WA) 47 (*Roberman*) at [30] referred to with approval in *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 at [35]. The policy basis behind this practice is that vocational regulatory bodies 'perform a function which promotes the public interest, and usually with limited resources' and '[t]he financial burden of bringing disciplinary action if the body had no capacity to recover some or all of its costs may be such as to provide a disincentive to bring disciplinary action, or when brought, to ensure that the allegations against the practitioner concerned are properly and thoroughly presented': *Roberman* at [30].

80 Despite what the Tribunal stated in ***in de Braekt***, every case must be considered individually on its merits bearing in mind s 87 of the SAT Act. There is no presumption that a disciplinary body will be awarded costs if successful.

81 The Committee was successful on both allegations. The costs were incurred as a result of Mr Neil's lack of insight. Mr Neil should pay the Committee's reasonable costs.

82 The Committee presented a detailed schedule of disbursements and copies of accounts. The time incurred by counsel for the Committee was reasonable and necessary to properly prepare and present the case, which was listed for a day but was twice adjourned by reason of Mr Neil's failure

to prepare. Assessed overall, counsel's fees sought by the Committee are reasonable and an order should be made for the payment by Mr Neil of the Committee's costs in the amount sought.

Orders

1. In relation to the findings of two counts of professional misconduct the practitioner:

   (i) pay a fine in the sum of $5,000 to the Legal Practice Board by 4 pm on Monday 15 May 2017, pursuant to s 438(2)(b) and s 441(a) of the *Legal Profession Act 2008* (WA); and

   (ii) effective from 30 days from the date of this order, for a period of one (1) year, the practitioner's local practising certificate be subject to the condition that he only practice law as an employed solicitor in the employment of and supervised by a practitioner with a minimum of ten years' experience, approved in writing by the Legal Practice Board of Western Australia. At the conclusion of one year should the practitioner wish to engage in practice other than as an employed solicitor, he give the Legal Practice Board forty two days' notice of his intention to do so pursuant to s439(c) of the *Legal Profession Act 2008* (WA).

2. The practitioner pay the Legal Profession Complaints Committee's costs pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) in the sum of $10,218.90 by 4 pm on Monday 15 May 2017.

I certify that this and the preceding [82] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUSTICE J C CURTHOYS, PRESIDENT