[2010] WASAT 133

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and LEASK [2010] WASAT 133
MEMBER	**:**	JUDGE J ECKERT (DEPUTY PRESIDENT) MR C RAYMOND (SENIOR MEMBER) DR A MCCUTCHEON (SENIOR SESSIONAL MEMBER)
HEARD	**:**	16 MARCH 2010
DELIVERED	**:**	24 SEPTEMBER 2010
FILE NO/S	**:**	VR 129 of 2009
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND DAVID LEASK Respondent

Catchwords:

Legal practitioners - Professional misconduct - Inordinate delay in conduct of proceeding - Repeated deliberate misleading of client - Appropriate penalty

Legislation:

Interpretation Act 1984 (WA), s 37(1), s 37(2)
Legal Practice Act 2003 (WA), s 198(1)

Legal Profession Act 2008 (WA), s 402, s 438(1), s 621(3)

Result:

Practitioner guilty of professional misconduct

Category: B

Representation:

Counsel:

Applicant	:	Nr M Herron and Ms P Le Miere
Respondent	:	Mr P Laskaris

Solicitors:

Applicant	:	N/A
Respondent	:	N/A

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

Hudson v Slade (1862) 3 F & F 174
Legal Profession Complaints Committee and A Practitioner [2010] WASC 13
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12
Ziems and Prothonotary of the Supreme Court of New South Wales [1957] 97 CLR 279

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The State Administrative Tribunal dealt with a referral from the Legal Profession Complaints Committee alleging that David Charles Leask, a legal practitioner, is guilty of professional misconduct in relation to three separate allegations.

2 The first allegation was that in the course of legal practice between 27 February 2003 and 16 June 2008, or thereabouts, the practitioner failed to carry out work for a client which he had agreed to do. The second allegation was that the practitioner knowingly misled the client as to the progress of the matter, with the intention of deceiving and misleading the client or in reckless disregard as to whether the client would be misled and deceived or not. The third allegation, in respect of a different client, was that in the course of legal practice between 17 November 2006 and 2 September 2008, or thereabouts, the practitioner failed to carry out work for the client which he had agreed to do.

3 The practitioner admitted the allegations against him and that in relation to allegation two, his conduct constituted professional misconduct. In relation to allegations one and three, the practitioner contended that the conduct should be characterised as constituting unsatisfactory professional conduct.

4 It was submitted on behalf of the practitioner that having regard to his personal and financial circumstances, the appropriate penalty should be an order suspending the practitioner, or otherwise specifying conditions upon which the practitioner might continue in practice. After considering the admitted facts and uncontested information provided, the Tribunal concluded that the conduct relating to each of the allegations constituted professional misconduct. Based on expert medical evidence provided by a forensic psychiatrist, which demonstrated that the practitioner was unable to avoid this type of conduct reoccurring without first undertaking a course of cognitive therapy of three to five months in duration, and then undertaking maintenance sessions for an unspecified period of time, the Tribunal concluded that the practitioner constituted a risk to the public and in all the circumstances was not a fit and proper person to engage in legal practice.

5 The Tribunal accordingly made findings of professional misconduct, as alleged, and determined that a report be submitted to the Supreme Court (Full Bench) with a recommendation that the practitioner

be struck off the roll of practitioners. The practitioner was also ordered to pay the applicant's costs.

The application

6 The Legal Profession Complaints Committee (Complaints Committee) seeks an order that the Tribunal make a finding that a legal practitioner, Mr David Charles Leask (practitioner), is guilty of professional misconduct pursuant to s 438(1) of the *Legal Profession Act 2008* (WA) (2008 Act) and consequential orders.

7 The Complaints Committee alleges three instances of professional misconduct, being that:

1) in the course of legal practice between 27 February 2003 and 16 June 2008 or thereabouts, the practitioner failed to carry out work for his client, Mr B, which he had agreed to do (allegation one);

2) the practitioner knowingly misled Mr B as to the progress of his matter with the intention of deceiving and misleading Mr B, or in reckless disregard as to whether or not he would be misled and deceived (allegation two); and

3) in the course of legal practice between 17 November 2006 and 2 September 2008, or thereabouts, the practitioner failed to carry out work for his client, Ms K, which he had agreed to do (allegation three).

8 The conduct the subject of these on proceedings, occurred prior to the commencement of the 2008 Act and repeal on 1 March 2009 of the *Legal Practice Act 2003* (WA) (2003 Act). The application to this Tribunal under the 2008 Act is permitted by s 621(3) of the 2008 Act. The practitioner asserts no rights or entitlements affecting the conduct of the proceedings preserved by s 37(1) and s 37(2) of the *Interpretation Act 1984* (WA) but the effect thereof is that the Tribunal must be satisfied that the conduct complained of constitutes unsatisfactory conduct under the 2003 Act and that any penalty is within the range permitted by that legislation.

The issues for determination

9 The parties have filed a statement of agreed facts in which the practitioner admits the allegations made against him. Counsel for the practitioner acknowledges that the admitted conduct in relation to allegation two constitutes professional misconduct, but otherwise the characterisation of the admitted conduct in relation to allegations one and three remains in issue.

10 The only other issue is the appropriate penalty to be applied. The Complaints Committee contends that the Tribunal should make and transmit a report to the Supreme Court (Full Bench) recommending that the practitioner be struck off the role of practitioners. The practitioner submits that the Tribunal should make an order suspending the practitioner, or otherwise specifying conditions upon which the practitioner might continue in practice.

The material facts

11 The parties filed a statement of agreed facts which was admitted into evidence as Exhibit 2.

12 In addition, personal information regarding the practitioner was included in the practitioner's written submissions on penalty. The Tribunal accepted into evidence the parties' respective books of documents, including a supplementary book from the practitioner providing details of his financial position and copies of orders made by the Tribunal in two previous complaint matters involving the practitioner. Reference will be made to this information as necessary.

13 The practitioner also provided a written report from a consultant forensic psychiatrist, Dr Bryan Tanney, which was supplemented by oral evidence.

14 The practitioner is 55 years of age. He was born in, and lived in, England until 1990 when he emigrated to Australia with his wife and his children. He was admitted to practice in Western Australia on 4 March 1992.

15 The practitioner entered into articles with a small suburban firm. His articles were transferred to a large central law firm where he remained until December 1995. The practitioner was then a senior associate with the firm and there was some discussion about partnership, although the practitioner was not offered a partnership. The practitioner had, in any event, made the decision to join a smaller firm practising in Fremantle

where he remained until October 1998. He then set up his own sole practice under the style Leask & Co in Fremantle. Character references included in the practitioner's book of documents convey that the practitioner is generally hard working, competent and dedicated to his clients. He has a reputation for charging moderate fees and for undertaking pro bono work. He is held in high regard by his peers.

Allegation one: the failure between 27 February 2003 and 16 June 2008 to carry out work for a client; and

Allegation two: knowingly misleading the client

16 The practitioner commenced acting for his client, Mr B, in September 1997 while an employed solicitor with the Fremantle firm. The client wished to claim for personal injuries he sustained while travelling to work on 4 June 1997. The client followed the practitioner when the practitioner left his employed position and opened his own law firm. In November 1999, the practitioner advised Mr B to commence proceedings in the District Court against the insurance company concerned. On 11 November 1999, or thereabouts, the client paid $300 to the practitioner, to be held in trust for filing fees to issue a writ of summons in the District Court.

17 Some time went by during which the practitioner procured additional medical evidence, continued negotiations with the insurer and advised the client on the prospects of success of the contemplated proceedings against the insurer. On 7 November 2001, or thereabouts, the client instructed the practitioner to commence proceedings and to take all necessary steps to progress that action.

18 A writ of summons was issued out of the District Court on 19 February 2003 and served by registered post on 20 February 2003. The writ was received by the insurer on 24 February 2003. No appearance was entered on behalf of the insurer but the applicant took no steps towards either applying for judgment or otherwise to progress the matter.

19 Between 2000 and 2003, Mr B spoke to the practitioner by telephone on numerous occasions to enquire as to the status of the proceedings. The practitioner admits that on eight specified occasions he made representations to Mr B about the progress of the proceedings which he knew to be false, or at least misleading, and which he made with the intention of deceiving and misleading the client as to the progress of the proceedings.

20 The first representation was made in about September 2003 to the effect that the proceedings would progress to a hearing in about three to four weeks. The matter was not ready for a hearing.

21 In circumstances which are not fully explained, the only further action which the practitioner took was on 10 October 2005 when he wrote to a medical practitioner to commission a medical report on behalf of the client, and on 25 October 2005 when the practitioner paid a sum of money to the medical practitioner for the medical report.

22 Notwithstanding that no steps had been taken to apply for judgment, the practitioner continued his deception by stating to the client on 10 February 2006 that he anticipated an outcome in about two weeks' time. On 17 October 2006, the practitioner stated that the proceedings would be heard before Christmas. On 6 February 2007, the practitioner stated that the proceedings had been adjourned and that further evidence was required concerning the client's work history. On about 18 April 2007, the practitioner informed the client that the proceedings would be resolved in three or four weeks and that the client would receive his compensation in time to contribute to his superannuation fund before 30 June 2007. In about July 2007, the practitioner advised that he would be in court for the client the next day and (later) that 'it went reasonably well today, it's reserved and you should get the decision in a couple of weeks time …' During September and December 2007, the practitioner gave false explanations for the lack of a decision from the court. During this period of inaction and at irregular intervals, always immediately following a complaint from the client about lack of progress, the practitioner made payments to the client totalling $10,500. The circumstances in which most of these payments were made are set out in transcripts of telephone discussions between the client and the practitioner (practitioner's book of documents, page 6 and following). The frustration and despair on the part of the client is excruciatingly evident from these discussions.

23 No suggestion was made on behalf of the Complaints Committee that the payments were made as an inducement to not make a complaint to the Complaints Committee or that there was anything dishonest in the making of the payments (T: 15, 16). Dr Tanney, in the course of his evidence, disclosed that he had ascertained that the practitioner had made payments to other clients in the past. It was something which he did in his practice (presumably to tide clients over). (T: 48) In relation to the particular payments made to Mr B, Dr Tanney's view, based on the telephone transcripts, was that the practitioner was 'getting browbeaten' … 'he just

didn't know what to do, and he was trying to keep this - he was trying to keep this man at a distance. This was one of the ways to do it.'

24 Dr Tanney's further evidence and its consequences are dealt with more fully below. However, based on Dr Tanney's evidence as a whole concerning the practitioner's personality characteristics, we accept that these payments were made as part of an avoidance mechanism to keep the client satisfied for a time and therefore to delay further uncomfortable contact. The explanations given to the client were that payment was being made to 'ease the financial pain' and to 'keep you going' and to 'tide you over' pending delivery of a judgment by the court.

Allegation three: the failure between 17 November 2006 and 2 September 2008 to carry out work for a client

25 On or about 8 February 2006, the practitioner issued a writ of summons, endorsed with a statement of claim, out of the District Court of Western Australia seeking damages for personal injuries suffered by his client, Ms K. A defence was filed on 23 March 2006 and in the ensuing months up to 30 October 2006, the practitioner corresponded with the defendant's solicitors and Ms K, and otherwise attended to the proceedings. By a minute of consent orders dated 30 October 2006, the practitioner sought an extension of the entry for trial milestone until 17 November 2006.

26 On 17 November 2006, the District Court Registrar notified the practitioner that the minute of consent orders could not be accepted by the court because the proceedings were inactive and the minute was returned to the practitioner. From that date the practitioner did not at any time inform his client, Ms K, that the proceedings were inactive and seek her instructions, or otherwise take any steps to progress the proceedings by applying to have the matter put back in the active list. Further, the practitioner failed to respond to correspondence from the defendant's solicitors, dated 8 January 2007, 6 February 2007, 6 June 2008, and 21 July 2008. Ultimately, on 20 August 2008 the defendant's solicitors served an application to dismiss the proceedings for want of prosecution. The practitioner appeared at the hearing of the application on 2 September 2008. The application was dismissed and the entry for trial milestone was extended by seven further days.

27 Between 20 August 2008 and 5 September 2008, the practitioner failed to inform his client, Ms K, about the application to seek her instructions in respect of the application, or inform her of the outcome of the application to dismiss, to explain the significance of the application

and the reason for it, or to inform her she ought to obtain independent legal advice about it.

28 On or about 6 September 2008, Ms K telephoned the practitioner to enquire as to the status of the proceedings generally, and was advised that the application to dismiss for want of prosecution had been made but had been dismissed. Thereafter, the matter was entered for trial and was subsequently settled at a pre-trial conference. The defendant's solicitors had lodged an appeal against the decision of the Registrar dismissing the application for the proceedings to be dismissed for want of prosecution. There is no suggestion that the lodging of the appeal had any impact on the monetary sum for which the matter was settled.

Practitioner's disciplinary history

29 The admitted facts encompass conduct of the practitioner subsequent to 2 September 2008 but that conduct is not the subject of any particular allegation.

30 The admitted facts in relation to allegation one reflect that the practitioner received specific instructions to commence the District Court action. It is implicit in those instructions that the practitioner would take all necessary steps to progress the proceedings competently and diligently. In relation to allegation three, there are no admitted facts reflecting express instructions to issue the writ of summons. It is admitted that in August 2002, the practitioner was retained to advise in regard to a proposed action. Given that the practitioner issued a writ of summons, endorsed with a statement of claim on 8 February 2006, there being no suggestion to the contrary, it can be inferred that the practitioner had instructions to do so and to thereafter prosecute the proceedings competently and diligently. Indeed, counsel for the practitioner, in his written submissions on penalty, expressly stated that the practitioner did not contest allegations one to three and 'has pleaded "guilty" to the allegations'. The matter has been conducted and subsequently considered by us on that basis.

31 The practitioner has previously been the subject of disciplinary proceedings in this Tribunal. During 2006, two separate applications were referred to the Tribunal by the then Legal Practitioners Complaints Committee involving the legal practitioner and they were dealt with under matter numbers VR 105 of 2006 and VR 106 of 2006. Both matters were referred to mediation, at which an agreement was reached concerning the allegations made, the facts relevant to those allegations, and the appropriate dispensation by way of penalty. All of

that information is set out in the two separate orders that were issued to reflect the settlement on 9 August 2006.

32 In matter VR 105 of 2006, the agreed facts reflect that the practitioner did not respond to written requests from a legal officer assisting the Complaints Committee in relation to a complaint that had been made. Those requests were contained in letters dated 25 May 2004, 29 June 2004, and 8 October 2004. The only response from the practitioner was that on a date in August 2004, the practitioner wrote saying that he had been unable to provide a response due to court commitments and that he would do so early the following week. He did not do so. A summons under s 198(1) of the 2003 Act was sent to the practitioner by letter dated 13 October 2004, requiring production of the client's file. A further summons was served on 19 November 2004 by personal service and the practitioner then produced the file.

33 On those facts, the practitioner admitted that he was guilty of unsatisfactory conduct by way of unprofessional conduct and he consented to an order to pay a fine of $1,500 and for an order to pay the Complaints Committee's costs.

34 In relation to VR 106 of 2006, the agreed facts reflect that from 2 August 2001 the practitioner made a number of representations to a client which were not correct. The first statement on 2 August 2001 was that the practitioner had sent a notice of an intention to claim damages to two parties when he had not sent a notice to any party. During the period from 28 August 2001 to 25 July 2002, the practitioner responded to telephone calls from his clients in the matter, advising that he was waiting to hear from a barrister whom he had briefed, when he had not briefed a barrister. On 28 February 2002, the practitioner advised his clients that he would apply for judgment in a few weeks when he knew that he would not be in a position to do so. On 25 July 2002, the practitioner advised his clients that a statement of claim had been completed when he well knew that not to be so. On the agreed facts, the practitioner admitted that he was guilty of undue delay in the practice of law and of unprofessional conduct and he consented to orders for the payment of a fine of $7,000 and for the payment of the Complaints Committee's costs.

Dr Tanney's evidence in mitigation

35 Dr Tanney's report, dated 9 March 2010, is based on two consultations with the practitioner, each of 1.25 hours' duration. The report reflects that the practitioner was cooperative throughout, providing thoughtful and considered responses that on numerous occasions were

self-deprecating. Dr Tanney stated that he regarded the information provided as reliable in the construction of his opinion. When questioned by the Tribunal concerning whether the information provided by the practitioner was an insightful, honest view of himself, Dr Tanney stated:

> It was so consistent and it was framed in the context of self-effacing. It was just, 'that's the way it is' and he didn't see it as - it didn't make him a bad person and he wasn't doing it to sort of excuse away what had happened at all. He's very, very hard on himself. Most perfectionists are. I think that's what I saw happening.

36 Dr Tanney's report sets out personal information concerning the practitioner, most of which it is not necessary to repeat. Dr Tanney noted that the practitioner acknowledged some work assessments criticising his time management and not keeping on top of briefs whilst he was working with the large commercial law firm in the central business district of Perth, and that a few clients felt their work was not managed efficiently.

37 Dr Tanney's report then addresses the practitioner's views of himself and Dr Tanney's observations relating thereto as follows:

> David described himself realistically, honestly, but with regular self-devaluing. With little generosity of spirit, he seldom described himself in positive terms, instead defining himself as '*not […]* 'and '*aware of my shortcomings*'. *H*e described his positive qualities as '*compassionate, empathetic, tolerant, patient, easy-going, people trust me, circle of friends but never charismatic*'. Of more concern, he also described himself as '*emotionally very stunted*', '*find it hard to love*', and listed '*commitment disappointment and betrayal*' in his avoidance of relating to others. He acknowledged avoidance as a primary mechanism '*to avoid conflict*'. His inner psychic life is orderly and introspective but lacking in emotional insight. His phlegmatic behaviour at interview reinforced his self-description. He regularly intellectualised his replies and on several occasions offered lists. I specifically explored his framework of personal values around guilt, shame, truth, lying and procrastination. He addressed each of these with life examples and consistently endorsed the relativistic or situational moral position that is most widely held in the current culture.

38 In relation to the practitioner's relationship with his client, Mr B, Dr Tanney recorded:

> David described the [sic] Mr [B] as '*robust in his communication*' and that '*the fellow radiated*' '*anger*'. He described the voice as '*whiny, a high-pitched, angry*'. David said that the matter '*got into my head*'. Several times he used the term '*uncomfortable*' to describe his response during the conversations. David said quote: '*he was in my ear, I didn't want to listen*' and '*would say anything to get him off the phone*'. He

provided several examples of avoiding the client or creating diversions as a means of forestalling further communication. David never initiated a call to the client. He was very aware that the unresolved matter was inappropriate and said that it would '*bubble up*' in his thoughts. He on several occasions applied a '*valid, logical thought process*' to his responses and realized that he '*should have transferred the brief*'. He described feeling '*blocked*' in resolving the matter. He regarded his behaviour and responses as '*a mistake*' and '*an inadequacy*'.

39 Dr Tanney then set out his opinion as follows:

OPINION

1. There is a valid psychological explanation for David's behaviour related to these complaints. Major mental disorder is not involved. Although there were psychosocial stressors related to finances and his personal relationship both initially and ongoing during the temporal course of this matter, these also were not of sufficient intensity. I do not believe that this behaviour represented an aberration from his usual psychological inner processes, such as might occur in a white male between 45 and 55 [midlife crisis].

II. David's strongest personality dimension is in the 'avoidant - obsessive' spectrum. It is not of the intensity to qualify as a personality disorder. I would characterize these aspects of his personality as of moderate strength [3 - 3.5] on a 1 - 5 scale with 5 being just short of interfering in a distressing way with everyday function, the accepted definition of a disordered personality. This personality structure is very characteristic of high achieving professional workers. As a personality dimension, it is a lifelong trait …

III. The client, [Mr B] in the complaint relating to Allegations I & II, for whatever reason, presented a stimulus of strong emotion, controversy, and discomfort. In particular, the critical emotion of anger was identified. To avoid all emotional conflict and any ensuing emotional distress, David mobilized long-standing personality defences. In his own words, he was '*blocked*'. He was regularly able to intellectually process this difficulty, but just as regularly unable to act appropriately to resolve it. This was directly because of the emotional turmoil that he was ill equipped by his personality to handle. As David told me with respect to the first girlfriend he had, '*I just didn't know what to do*'.

IV. A further characteristic of this personality type explains his ongoing inability to resolve the matter. Viewing his behaviour as inadequate and a mistake, he reawakened the very strong emotional responses of both guilt and shame that regularly pervade the self-concept of such people and paralyse the intellectually reasonable solutions that they can create.

V. Further, this personality type is prone to catastrophic reactions and 'black and white' or 'all or none' thinking patterns. A mistake can never be rectified, and never forgotten.

VI. David is not strongly motivated to explore these psychological mechanisms at an emotionally insightful level. Again, such avoidance is typical of this personality type. However, the strong cognitive problem-solving that is the strength of such personalities has allowed him to learn how to recognize and avoid such situations in the future. Because of this strength, I regard it as very unlikely that David would ever again allow such a situation as led to the [Mr B] complaint to begin or to evolve to the extent that it did.

VII. The possibility of requiring some cognitive-based psychological counselling for David can be considered as a remedial matter. David has the capability and the competencies to explore the deficits of his personality style. It is my belief that an exploratory course of such counselling might be of benefit in shaping further career and life decisions at this time. It is not unusual for such exploration to evoke strong emotional responses and a concurrent program of antidepressant therapy would be a consideration if the counselling proceeded to such a level of intensity. Since this is a lifelong personality dimension, major alterations are not to be expected nor would they likely be accepted as an objective of such counselling activity.

SUMMARY

A. Mr. Leask's behaviour in regard to these complaints can, with good validity, be explained in the context of a lifelong personality trait [avoidant - obsessive].

B. It is very unlikely that such behaviour will be repeated, because a recognized strength of this personality trait is excellent cognitive problem-solving.

C. A program of exploratory psychological counselling as a remedial measure could be considered, but is unlikely to accomplish significant alterations in a lifelong personality pattern. It may have other benefits that may indirectly lessen the remote likelihood of a repetition of such behaviour.

40 In his oral evidence, Dr Tanney resiled from his opinion set out in paragraph VI (and B of his summary) that it was unlikely the practitioner would ever again allow such a situation as led to the complaint by Mr B to begin, or to evolve to the extent that it did.

41 Dr Tanney explained in his oral evidence that it is part of the practitioner's character to procrastinate. There is nothing unusual in that and most professional persons have to employ techniques to prioritise work. In the case of the practitioner, difficulty arises because of inherent vulnerabilities which trigger his avoidance tendency. Dr Tanney had not spent enough time with the practitioner to identify all the triggers for that vulnerability to manifest itself. In the case of the client, Mr B, the initial trigger was apparently that the practitioner 'submitted something that had the wrong name on it and that was the beginning of the whole thing. It was just one application that had a wrong name' (T: 37). Once the vulnerability had been triggered, the practitioner conducted himself as he did to avoid the situation. The practitioner knew what he had to do to carry out a relatively mundane task, and one which he could normally undertake without any difficulty, but he could not do it. It became a mental block. Dr Tanney described this vulnerability as a 'really big one and it is that when you confront him with an emotional situation by his own admission he can't address it' (T: 39). Although the difficulty with Mr B's matter commenced because of a simple error in the documentation, the practitioner was unable to deal with it. In addition, the anger which he detected in his dealing with the client exposed the practitioner's vulnerability 'the vulnerability dealt with dealing with someone who he was able to characterise almost immediately as someone who was angry and demanding and pushed his buttons' (T: 30).

42 Dr Tanney explained the options identified in paragraphs VI and VII of his report. He did not favour the course set out in paragraph VII which he described as the emotionally reparative option which would involve long sessions with a psychotherapist for a period of about two years. He stated of this process:

> There's a reasonable possibility in the course of about two years Mr Leask would make significant changes in the way he lives his life. Included in that would more than likely be the way that he practises his profession. That would be a second - a sort of contingent. He would change his life because of things he'd learned, and then that would allow him to change the way he does his profession and, most clearly, to not do some of the things that we have heard today have got him into trouble. I'm not sure that's a fair expectation to have. I think that most people today would take the other perspective, which is that here is a man who is clearly bright and competent, doesn't have any reason why he can't understand what has happened to him and if he can why he wouldn't want to change his behaviour that, if pointed out to him, this behaviour would be remarkably susceptible to change. (T: 30)

43 Dr Tanney went on to explain that the 'other perspective' referred to involved training the practitioner to identify where the problems come from, which is understood to mean, the events which trigger his vulnerability. Dr Tanney stated that the way to do that is to set up a series of signals or steps that, in certain situations, sometimes with guidance and support, would enable the practitioner to take appropriate action such as by transferring or handing off certain things. This process he referred to as relapse prevention (T: 30). This, he stated, involved a course of cognitive therapy or cognitive problem solving therapy of probably three to five months in duration and then reinforcing sessions or maintenance sessions for an unspecified period of time thereafter as well as self-monitoring and monitoring by others who would report back to the therapist (T: 34).

44 Dr Tanney had not been aware at the time of interview of the 2006 disciplinary convictions of the practitioner. The penalty then imposed had no deterrent effect because the practitioner had not been given any support to identify his vulnerability and the tools to avoid its consequences (T: 31 - 33).

45 Under cross-examination it was put to Dr Tanney that the cognitive problem-solving approach that he was advocating seemed to be a resiling from the forthright opinion expressed in paragraph VI that because of the practitioner's strong cognitive problem-solving ability, it is unlikely that the practitioner would ever again allow such a situation as led to the [Mr B] complaint to begin or to evolve to the extent that it did. Dr Tanney agreed (T: 50). Further, Dr Tanney stated:

> I wouldn't at all leave him to his own devices.
>
> … I think that inherent in this all the way is that he is not able to deal with it at an emotionally insightful level that the issues - his strong, cognitive problem solving can be built on it [sic]. (T: 51)

46 Dr Tanney proceeded to re-emphasise that it would be possible to create a monitoring situation to ensure that the procrastination would not continue in the practitioner's professional life. He stated that it would be necessary for the practitioner to learn the new rules, practise them under supervision and to be monitored on an intermittent basis.

Characterisation of the admitted conduct

47 Section 402 of the 2008 Act defines unsatisfactory professional conduct as follows:

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

48 Professional misconduct is defined by s 403 of the 2008 Act in the following terms:

> (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.

49 We reject the practitioner's submission that the conduct underlying allegations one and three constitutes unsatisfactory professional conduct rather than professional misconduct. The delay in the case of Mr B was quite extraordinary, with no steps being taken to further Mr B's claim for almost five and a half years. In respect of allegation three, the practitioner failed to advance Ms K's claim for almost two years. We consider that in respect of both allegations one and three, the practitioner's conduct involves a substantial failure to maintain a reasonable standard of competence and diligence. In addition, for the reasons set out further below, we consider that allegations one and three, considered together with the conduct relating to allegation two, which the practitioner acknowledges constitutes professional misconduct and the inability of the practitioner at the present time to remove the risk of similar conduct occurring in the future, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

50 The conduct which establishes each of the above allegations is also conduct which constitutes unsatisfactory conduct under the 2003 Act. Section 3 of the 2003 Act defines unsatisfactory conduct to include, relevantly, unprofessional conduct on the part of a legal practitioner,

neglect or delay and conduct occurring in connection with legal practice that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner. Allegations one and three constitute neglect and undue delay, in the course of legal practice and conduct which falls short of the standard of competence and diligence described. The conduct establishing allegation two constitutes unprofessional conduct, given the fiduciary relationship between legal practitioner and client and the honesty and integrity required of a legal practitioner.

The appropriate penalty

51 Counsel for the practitioner developed an argument that having regard to the personal and financial circumstances of the practitioner, the Tribunal should not consider making a report to the Supreme Court (Full Bench) recommending the removal of the practitioner from the roll. We cannot accept that argument.

52 Counsel for the practitioner based the argument on the approach of the majority of the High Court in ***Ziems and Prothonotary of the Supreme Court of New South Wales*** [1957] 97 CLR 279 (***Ziems***). In that case, the approach of the court was to ensure that the entire position concerning the circumstances leading to the conviction of the practitioner in that case was examined, and the statement by Fullagar J at 287 to the effect that the possible disastrous consequences of disbarment to the individual concerned are not overstated by Cockburn CJ in ***Hudson v Slade*** (1862) 3 F & F 174 at 184 (***Hudson***). Firstly, in the ***Ziems***' decision there was no consideration of the personal circumstances or the financial situation of the practitioner. It was simply the whole of the circumstances leading to the conviction of the practitioner in that case that was considered. This was in contradistinction to the decision of the New South Wales Court of Appeal which refused to look beyond the mere fact that the practitioner had been convicted of a serious criminal offence. Further, the reference to the statement by Cockburn CJ in ***Hudson*** must be understood in context. After referring to the passage which was quoted by counsel, which emphasises that there is no jurisdiction more serious than that by which 'a man may be deprived of his degree and status as a barrister' (Cockburn CJ at 411), the Honourable Chief Justice continued:

> And its gravity and importance are only equalled by its high and salutary effects in preventing the profession of the bar from being disgraced by members of it who are guilty of conduct unworthy of it and contrary to that which all its member ought to maintain.

53 The courts and this Tribunal have consistently applied the principle that the object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession rather than punishment of the practitioner, and that, therefore, the consequences for the practitioner may need to be more severe than they would be if the only object of the proceedings was one of punishment: ***Re Maraj (a Legal Practitioner)*** (1995) 15 WAR 12.

54 There are circumstances, particularly when a monetary fine is being contemplated, when the financial and personal circumstances of a practitioner will be relevant. In those circumstances, the Tribunal will be able to express its reasons for imposing whatever is the appropriate fine, having regard to the personal circumstances of the practitioner, in such a way that the effectiveness of the element of deterrence can be maintained. There will be circumstances in which the practitioner's personal circumstances can be taken into account provided that an appropriate penalty can be imposed which achieves the above central object of protecting the public and the maintenance of proper standards in the legal profession. This is not such a case.

55 It is clear from Dr Tanney's report and oral evidence that the practitioner has an 'avoidant - obsessive' personality which leaves him vulnerable when, as yet largely unidentified triggers cause him to suffer mental blocks. It is a part of his personality to procrastinate. Further, the practitioner needs assistance to identify those triggers and to participate in a relapse prevention program. While that would ordinarily involve cognitive therapy or cognitive problem-solving for three to five months, there would then also need to be reinforcing sessions or maintenance sessions, as well as self-monitoring and monitoring by other people who would report to the therapist.

56 Without these steps having already been satisfactorily and substantially completed, the practitioner represents a risk to the public. Dr Tanney cannot at this stage identify all of the triggers which might activate the practitioner's vulnerability. In the case of Mr B, it was, at least initially, his reaction to something as insignificant as the filing of a document with an incorrect heading.

57 It is with considerable empathy for the practitioner that we reach the conclusion that the only appropriate course is to transmit a report to the Supreme Court (Full Bench) recommending his removal from the role of practitioners, that being a course which was equally available under the 2003 Act. The references provided by the practitioner, and the further

background provided by Dr Tanney of the practitioner's approach to practice, leave us in no doubt that Mr Leask is an inherently good person who has generally been a credit to the legal profession.

58 The circumstances of this case have some parallels with the ***Legal Profession Complaints Committee and A Practitioner*** [2010] WASC 13 in which the practitioner's conduct was associated with mental illness. The statement by the Chief Justice at [26] and [27] is equally applicable to this case:

> … However, as the dominant objective of the court in cases such as this is the protection of the public and the maintenance of proper standards of legal practice, considerations personal to the practitioner cannot deflect the court from the only reasonable conclusion open on the facts which she has admitted, and that is that her name must be removed from the Roll of Practitioners.
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> …
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> Those conditions [the psychiatric conditions] create a degree of risk to the public, in the event that the practitioner was permitted to remain in practice, which is unacceptable. However, should those conditions and the symptoms associated with those conditions subside, it is not beyond the realm of possibility that the practitioner might be readmitted (***Re Stokes*** [2008] WASC 269). That prospect might provide some incentive to the practitioner to undertake the treatment regime which has been proposed for her. Only time will tell whether the practitioner's condition will improve to the point where readmission could be contemplated.

Orders

59 The Complaints Committee sought an order for costs in the amount of $5,000. Having regard to the nature of the case and the manner in which it was conducted, it is determined that the costs claimed are reasonable and that an order should issue, as sought, which accords with the Tribunal's usual practice in vocational matters. Costs will be fixed accordingly. The practitioner did not oppose the grant of costs as sought.

60 For the above reasons, the Tribunal orders that:

1. the practitioner is guilty of professional misconduct in that in the course of legal practice between 27 February 2003 and 16 June 2008 or thereabouts, the practitioner failed to carry out work for his client, Mr B, which he had agreed to do;

2. the practitioner is guilty of professional misconduct in that the practitioner knowingly misled Mr B as to the progress of his matter with the intention of deceiving and misleading Mr B, or in reckless disregard as to whether he would be misled and deceived or not;

3. the practitioner is guilty of professional misconduct in that in the course of legal practice between 17 November 2006 and 2 September 2008, or thereabouts, he failed to carry out work for his client, Ms K, which he had agreed to do;

4. a report be transmitted to the Supreme Court (Full Bench) with a recommendation that the practitioner be struck off the roll of practitioners. These reasons for decision comprise that report. The Tribunal will also forward the exhibits from these proceedings with its report together with the written submissions of the parties; and

5. by 30 October 2010 the practitioner pay the applicant its costs fixed at $5,000.

I certify that this and the preceding [60] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUDGE J ECKERT, DEPUTY PRESIDENT