
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : VOGT -v- LEGAL PRACTITIONERS
COMPLAINTS COMMITTEE [2009] WASCA 202

CORAM : OWEN JA
WHEELER JA
NEWNES JA

HEARD : 17 SEPTEMBER 2009

DELIVERED : 17 NOVEMBER 2009

FILE NO/S : CACV 68 of 2009

BETWEEN : WILLFRIED VOGT
Appellant

AND

LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Respondent

ON APPEAL FROM:

Jurisdiction : STATE ADMINISTRATIVE TRIBUNAL OF
WESTERN AUSTRALIA

Coram : JUDGE J ECKERT (DEPUTY PRESIDENT)
MR D R PARRY (SENIOR MEMBER)
MR J MANSVELD (MEMBER)

Citation : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE and VOGT [2009] WASAT 125

File No : VR 209 of 2008

Catchwords:

Legal practitioners - Professional misconduct - Finding by State Administrative Tribunal that appellant had knowingly misled court - Penalty of suspension for three months - Whether Tribunal erred in its finding - Whether misdirected itself that suspension mandatory - Whether penalty excessive - Appropriate penalty where practitioner knowingly misleads court - Revision of ex tempore reasons - Permissible amendments

Legislation:

Legal Practice Act 2003 (WA), s 180(1)

Legal Profession Act 2008 (WA), s 621(1)

State Administrative Tribunal Act 2004 (WA), s 105(13)

Result:

Leave to appeal refused

Category: B

Representation:

Counsel:

Appellant	:	Mr M J McCusker QC & Ms K A Vernon
Respondent	:	Mr A S Derrick & Ms P E Le Miere

Solicitors:

Appellant	:	Metaxas & Hager
Respondent	:	Legal Practitioners Complaints Committee

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

Bar-Mordecai v Rotman [2000] NSWCA 123

Bromley v Bromley [1965] P 111

Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115; (1999)
21 WAR 56

Lam v Beesley (1992) 7 WAR 88

Law Society of New South Wales v McElvenny [2002] NSWADT 166

Legal Practitioners Complaints Committee and Fleming [2006] WASAT 352

Legal Practitioners Complaints Committee and Morton [2006] WASAT 172

The Council of the Queensland Law Society Inc v Wright [2001] QCA 58

1 **JUDGMENT OF THE COURT:** This is an appeal from a decision of the State Administrative Tribunal of 22 May 2009, in which the Tribunal found the appellant guilty of unsatisfactory conduct by unprofessional conduct and ordered that his local practising certificate be suspended for three months. The appellant contends that the Tribunal erred in concluding that he was guilty of unprofessional conduct and, alternatively, that the penalty of suspension of his practising certificate was excessive in the circumstances. It was common ground that this appeal is not limited to a question of law but that the appellant may, with leave, appeal on any ground: s 105(13), *State Administrative Tribunal Act 2004* (WA) (the SAT Act).

The relevant facts

2 The appellant was admitted to practice on 6 April 1999. At the time of the relevant events in 2004 he was employed as a solicitor by Bruce Havilah & Associates (the firm).

3 On or about 18 March 2004, Ms PL (the client) instructed the firm to act for her in an application to tax the costs of her former solicitors, Hammond Worthington. What steps were taken in response to those instructions prior to 13 August 2004 is not apparent from the appeal papers. Relevantly, however, on or about 13 August 2004, Registrar Rimmer granted an extension of time within which the client could:

- (a) request itemised accounts from Hammond Worthington; and
- (b) on payment to Hammond Worthington of the required filing and taxation fees, request that the itemised accounts be taxed by a taxing officer of the Supreme Court.

4 Hammond Worthington provided the client with the itemised accounts for taxation on or about 27 August 2004, but the client did not pay the filing and taxation fees.

5 The appellant assumed the day to day conduct of the matter in October 2004, under the supervision of a principal of the firm, Mr Bruce Havilah.

6 On 22 December 2004, Hammond Worthington applied to strike out the client's application for a further extension of time. That application came before Registrar Rimmer on 14 February 2005. Mr Hewitt, a solicitor employed by the firm, attended the hearing on behalf of the client, the appellant having a pre-existing commitment in another court.

The Registrar ordered that unless the client paid the filing and taxation fees by 4.00 pm on 15 April 2005 the extension of time to request taxation of the bill of costs be revoked. The Registrar also ordered the client to pay Hammond Worthington's costs of the application, fixed at \$400, by 4.00 pm on 15 April 2005. It appears that the client attended for part of the hearing, having arrived after it had started.

- 7 Mr Hewitt wrote to the client on 16 February 2005 confirming the outcome of the hearing and confirming that she was liable to pay to Hammond Worthington the total sum of \$837.30 by no later than 15 April 2005. That amount was made up of a filing fee of \$140, a taxation fee of \$297.30 and \$400 for the costs of the application of 22 December 2004. The letter went on to say:

We confirm our Mr Hewitt's advice to you after the hearing to secure this money as soon as possible and provide it to our office, so that we can forward it to Hammond Worthington well before the official deadline. ...

If you have any further queries please feel free to contact our Mr Will Vogt.

- 8 On or about 11 April 2005, the client telephoned the firm to enquire how the amount should be paid. She was informed by the firm's receptionist, identified as Natalie, that someone would call her back. Having heard nothing, the client telephoned the firm on 13 April 2005 and again spoke to Natalie. The client said she had the money and would be bringing it in. Natalie told her to bring it in cash as that would make it easier if it had to be paid out urgently. Natalie also told her to write to the firm to alert it to fact that the money was coming.

- 9 On 13 April 2005, the client wrote to the firm by facsimile. The facsimile was addressed to Mr Havilah but it had the firm's file reference on it. In the facsimile, the client acknowledged receipt of the letter of 16 February 2005. She said (relevantly):

I will bring the amount of \$837.30 in cash and pay it to Natalie your receptionist early Thursday morning (09:00) 14 April 2005.

- 10 The facsimile was received by the firm on 14 April 2005 and Mr Havilah placed it in the appellant's in-tray on that day. At about 9.10 am on 14 April 2005 the client paid the amount in cash to the firm. An employee from the firm's accounts department paid the money into the firm's trust account.

11 On 14 April 2005, the appellant was engaged in a hearing at the Midland Magistrates Court. The hearing lasted all day and the appellant did not see the facsimile until some time after 4.00 pm on the following day, 15 April 2005. At that point he was unaware of the client's telephone conversation with Natalie. The appellant made enquiries about the payment and found that the money had been paid into the firm's trust account. He telephoned the solicitor concerned at Hammond Worthington and informed him that he would arrange immediately for a trust cheque to be drawn and couriered to Hammond Worthington. The solicitor did not indicate whether late payment would be accepted. In fact it was not accepted.

12 On 21 April 2005, the appellant spoke to the client by telephone. Before the Tribunal there was a conflict between the appellant and the client as to that conversation. The client said that she informed the appellant of her telephone conversation with Natalie about the payment of the money. The appellant, on the other hand, said that the client had referred to having spoken to Natalie but she did not tell him what Natalie had said to her. He said that when she mentioned having spoken to Natalie he had cut her off as he considered that what had been discussed between the client and Natalie was irrelevant. It will be necessary to come back to this issue shortly.

13 On 25 April 2005, the client wrote by facsimile to Mr Havilah complaining about the appellant's conduct of the matter. In the facsimile, the client, among other things, set out a chronology of the events which led to her complaint. In that chronology, the client said that on 21 April 2005 she had spoken to the appellant by telephone and informed him that she had been told by Natalie that the amount should be paid to the firm direct. The client said the appellant had told her she should not accept information from the firm's receptionist and accused her of being difficult.

14 Mr Havilah wrote to the client by email on 27 April 2005. He informed her that the firm was not prepared to make a further application on her behalf to extend the time allowed in the orders of February 2005 unless she paid the filing fee on the application, in the sum of \$147. Mr Havilah said that he intended to charge her for making any such application and for the time required to answer her complaint about the appellant's conduct.

15 On 28 April 2005, the client paid \$147 in cash to the firm and instructed the firm to make the application, which it duly did. In support of the application, the appellant swore an affidavit dated 28 April 2005.

Relevantly for present purposes, the appellant deposed in pars 3 and 4 as follows:

3. On 15 April 2005 I was handed a facsimile letter from [the client] dated 13 April 2005. Annexed hereto and marked with the letters 'WV1' is a copy of the facsimile letter dated 13 April 2005. The amount of \$837.30 as stated in the facsimile letter of 13 April 2005 was paid into my firm's trust account on 14 April 2005. That amount was required to be paid to the Practitioner, Hammond Worthington Lawyers, not to the solicitors for the [client], Bruce Havilah & Associates. The [client] did not inform me that she had paid the amount into my firm's trust account. The time in which the payment was made to our trust account did not allow me to transfer the amount so that compliance of Registrar Rimmer's Orders could be complied with [sic].
4. Although I verily believe that every effort was made by the [client] to pay the amount of \$837.30 in accordance with the orders made by Registrar Rimmer on 14 February 2005 the [client] made an error in relation to the intended recipient of the amount required to be paid and no notice of the payment was brought to my attention until late afternoon on 15 April 2005.

16 The client's application was heard by Master Sanderson on 31 May 2005. The appellant appeared on behalf of the client. In the course of argument before the Master, the appellant said as follows:

MR VOGT: It's probably easier if I explain it this way. On 13 April 2005 the [client] provided my firm with a facsimile stating that she intended to pay cash to my firm's account the amount required, \$837.30. The following day she would do that.

THE MASTER: Yes.

MR VOGT: I didn't get that facsimile letter until 15 April 2005 because I was in a trial the day prior. It was received in my in-tray I think on the 14th. I didn't read it until later on 15 April 2005 which is the date to comply. I say in this affidavit that the [client] did not tell me that the moneys were in my trust account so that I could deal with it. In this affidavit I state that I verily believe that the [client] intended to comply with that order, but simply didn't do the right thing by telling me so that I could deal with it on the basis it was erroneously paid into our account, not either to the Supreme Court or Hammond Worthington on that date.

17 On 1 June 2005, Master Sanderson dismissed the application and ordered the client to pay Hammond Worthington's costs of the application.

The statutory provisions

18 Before turning to the proceedings before the Tribunal, it is necessary to mention briefly the statutory framework under which the complaint against the appellant fell to be determined. At the time the conduct in question occurred the relevant statute was the *Legal Practice Act 2003* (WA). On 1 March 2009 that Act was repealed and replaced by the *Legal Profession Act 2008* (WA). Pursuant to s 621(1) of the *Legal Profession Act*, the Tribunal may deal with a complaint which was made prior to 1 March 2009 under the *Legal Practice Act* if the complaint has not been finally dealt with. In this case, the respondent's application to the Tribunal was made on 3 December 2008 under s 180(1) of the *Legal Practice Act* and had not been finally dealt with.

19 The complaint before the Tribunal alleged that the appellant had engaged in 'unsatisfactory conduct' within the meaning of the *Legal Practice Act* and (as the complaint was amended) 'unsatisfactory professional conduct' or 'professional misconduct' under the *Legal Profession Act*. The Tribunal found that the appellant was guilty of 'unsatisfactory conduct'. The Tribunal also went on to find that the appellant's conduct constituted 'professional misconduct' under the *Legal Profession Act*.

20 There was an issue between the parties as to whether the relevant sanctions were those contained in the *Legal Practice Act* or the *Legal Profession Act*, but it was accepted that nothing turned on that for the purposes of the appeal and it is therefore unnecessary to consider it.

The proceedings before the Tribunal

21 The Legal Practitioners Complaints Committee alleged that the affidavit sworn by the appellant on 28 April 2005 was misleading and that at the time he swore the affidavit the appellant knew it was misleading or was reckless as to whether or not it was misleading. It also alleged that the submissions made orally by the appellant on 31 May 2005 were misleading and at the time the appellant made those submissions he knew they were misleading, or was reckless as to whether or not they were misleading.

22 The hearing before the Tribunal took place on 21 May 2009. Both the client and the appellant gave evidence. The client's evidence (relevantly) was that in their telephone conversation of 21 April 2005 she had told the appellant about the arrangement she had made with Natalie. The client said she told the appellant that Natalie had said to bring the

money to the office and to send a facsimile confirming that she was doing that.

23 The appellant gave evidence (relevantly) that he had understood the letter of 16 February 2005 (which he had read at about the time it was sent) to mean that if the client could not pay the amount well before the deadline then she should pay it direct to Hammond Worthington. The appellant said that in his telephone conversation with the client on 21 April 2005 she did not inform him of the arrangement she had made with Natalie. In cross-examination, the appellant was referred to his file note of the conversation, in which appear the words 'She spoke to Natalie'. The appellant said that when the client mentioned speaking to Natalie he would have cut her off and told her to move on to the real issues. He said he would have done so because he was not interested in what she had said to the firm's receptionist.

24 The appellant said that when he swore the affidavit and made the submissions he believed the client had done the wrong thing in not informing him that she had paid the money to the firm, and that she had made a mistake in paying the money into the firm's trust account instead of to the court or Hammond Worthington.

25 On 22 May 2009, the Tribunal delivered its decision. It found that in swearing the affidavit and making the oral submissions the appellant had conveyed a misleading impression to the court that the client had, without prior arrangement, paid a sum of money to the firm rather than to Hammond Worthington. It found that the statements in the affidavit and in oral submissions that the client had been in error in paying the money to the firm were misleading.

26 Turning to the question of intention, the Tribunal did not accept the appellant's evidence as to his interpretation of the letter of 16 February 2005. The Tribunal found that the appellant's interpretation was not reasonably open and was not credible. The letter meant, and the appellant understood it to mean, that the client was to pay the money to the firm.

27 Nor did the Tribunal accept the appellant's evidence as to the telephone conversation on 21 April 2005. The Tribunal accepted the client's evidence that in that telephone conversation she had informed the appellant of the arrangement with Natalie. The Tribunal noted that the client's evidence was not directly challenged in cross-examination and it was corroborated by the facsimile which the client sent to Mr Havilah on 25 April 2005. In addition, the appellant's file note of his conversation

with the client on 21 April 2005 recorded that the client 'spoke to Natalie'. The appellant had given evidence that it was his practice to write down in file notes only the salient points of a conversation.

28 The Tribunal found that in making the misleading statements in the affidavit and submissions the appellant intended to mislead the court. It reached that view because, first, the appellant was aware of the terms of the letter of 16 February 2005; secondly, on 21 April 2005 he became aware of the arrangement between the client and Natalie; thirdly, the appellant could have cured to some extent the misleading statements in his affidavit by oral submissions before the Master but instead confirmed the misleading affidavit; and, fourthly, the appellant had a very real motive to mislead the court by suggesting that it was the client's fault the deadline had been missed, namely, to avoid any professional or civil liability for the firm's and the appellant's defaults.

29 On the question of penalty, the Tribunal did not accept that the appellant's relative inexperience and the apparent lack of supervision of his work were mitigating factors. It considered that the duty not intentionally to mislead the court was fundamental. And while the Tribunal accepted that the conduct was of a 'one-off nature', it noted that the appellant had had an opportunity to correct the impression during his oral submissions but instead had read the affidavit and by his submissions had exacerbated the misleading nature of the affidavit. The Tribunal did not consider that the annexure of the client's facsimile of 13 April 2005 was a mitigating circumstance in light of the oral submissions that were made.

30 The question of penalty was considered at a subsequent hearing on 10 June 2009. In oral reasons given by the Tribunal that day, it said:

It is our view that the standing of the legal profession and protection of the public are so important that to mislead a court mandates a term of suspension of the practise certificate. It is essential to the confidence that practitioners have in each other and that the public has in the profession. Having said that a period of suspension of a practise certificate is mandated, we were presented with a large range of mitigating factors in favour of [the appellant]. Whilst those mitigating factors do not wipe out the mandative suspension, they do affect the term of suspension (ts 26).

31 Later in its oral reasons, the Tribunal rejected a submission put on behalf of the appellant that neither the public nor the legal profession would expect a practitioner to be suspended for this sort of conduct. The Tribunal said:

To the contrary, we think that suspension would be expected by the profession and by the public. As we said we view it as very serious conduct and with only one appropriate penalty available to us, that is suspension. Whether or not the court was actually misled is in our view irrelevant.

We therefore impose a suspension for a period of three months from 1 July this year (ts 27).

32 Following submissions that the appellant would require some time to transfer the matters he was handling to another practitioner, the Tribunal ordered that the suspension take effect from 1 August 2009. (The parties subsequently agreed that the suspension should not take effect until this appeal has been determined, if it is unsuccessful.) It appears that the written order of the Tribunal was authenticated, pursuant to s 74 of the SAT Act, on or before 16 June 2009 [BAB 53].

33 In its written reasons, delivered on 26 June 2009, the Tribunal appeared to put the matter somewhat differently. There it said:

We consider that the protection of the public, the protection of the reputation of the legal profession and the maintenance of proper standards in the legal profession require that the usual professional disciplinary consequences of intending to mislead a court should be, as a minimum, suspension from legal practice.

...

We cannot agree with senior counsel's contention for the [appellant] that only the 'most bloody-minded' practitioner or member of the public would consider suspension to be an appropriate penalty. We consider that, in the circumstances of this case, the protection of the public, the protection of the reputation of the legal profession and the maintenance of proper standards in the legal profession require a suspension from practice for three months. In the absence of the mitigatory circumstances to which we have had regard, in particular the [appellant's] current apparent professional conduct in preparation of affidavits and his pro bono work, a suspension of six months would have been appropriate [68], [76].

34 It will be necessary to come back to the differences between the oral and the written reasons for decision.

The grounds of appeal

35 It is unnecessary to set out the grounds of appeal in full. The appellant asserts, in substance, that the Tribunal made an error of mixed fact and law in finding the appellant guilty of unprofessional conduct in that:

1. it erred in finding that the appellant's affidavit of 28 April 2005 and the oral submissions he made on 31 May 2005 were misleading; and
2. it erred in finding that the appellant made the affidavit and submissions with the intention of misleading the court.

36 The appellant relies on an alternative ground that:

3. the Tribunal made an error of mixed fact and law in ordering that the appellant be suspended from practice, in that:
 - (a) it misdirected itself that a finding of intentionally misleading the court 'mandated' an order for suspension; and
 - (b) the penalty was manifestly excessive in the circumstances.

Appellant's submissions

37 It was submitted that the Tribunal had erred in finding that the appellant had conveyed the misleading impression that there was no prior arrangement for the client to pay the money to the firm. In so finding, the Tribunal had failed to give consideration to the fact that the appellant had annexed the client's facsimile of 13 April 2005 to his affidavit. The facsimile disclosed that the client had advised the firm she was paying the money to the firm on 14 April 2005. It was therefore apparent from the facsimile that there was a prior arrangement for the client to pay the money to the firm and that the failure to pay the money to Hammond Worthington in time was the fault of the firm. The disclosure of the letter of 16 February 2005 would have added nothing. It was not relevant to the reason why the money had not been paid to Hammond Worthington in time.

38 Senior counsel for the appellant argued that there was no evidence of any intention on the part of the appellant to mislead the court. The appellant had understood the letter of 16 February 2005 to instruct the client to pay the money to the firm in sufficient time to enable the firm to pay it to Hammond Worthington. The appellant considered that the client was in error because she had not paid it in sufficient time and therefore she should have paid it direct to Hammond Worthington.

39 It was submitted that the finding that the appellant had a motive to mislead the court was a patent error. There was no evidence that the appellant had such a motive. The motive found by the Tribunal was

speculative, was not put to the appellant, and was inconsistent with the evidence which the appellant put before the court. Nothing in the affidavit or the submissions could possibly be construed as an attempt to exculpate the appellant or the firm. The client was aware of the letter of 16 February 2005 so the absence of reference to it in the affidavit was of no relevance to any possible professional consequences or civil claim by the client.

40 On the question of penalty, it was submitted that, on the basis of its oral reasons for decision, the Tribunal had proceeded on the erroneous basis that to mislead a court mandates a term of suspension. There was in fact no basis upon which the Tribunal could have concluded that only suspension would serve the objective of protection of the public, having regard to the appellant's inexperience at the time; the fact that the events were now four years old; the appellant's otherwise unblemished record; the fact that the appellant was now practising on his own account; the character evidence on behalf of the appellant; and the fact that suspension would deprive the public of the appellant's considerable pro bono work as well as depriving existing clients of his representation.

41 Although comparable decisions involving misleading conduct were cited to the Tribunal, no mention was made of them in the Tribunal's reasons. It was submitted that the cases demonstrated that suspension is not 'mandatory' in cases involving misleading conduct.

Respondent's submissions

42 It was submitted that the Tribunal had not erred in deciding that the affidavit and submissions conveyed a misleading impression. The statements made by the appellant conveyed the impression that just before the deadline the client had decided of her own volition to pay the money to the firm and that there was no prior arrangement in place for her to do so. The absence of reference to the arrangement in the letter of 16 February 2005 and with Natalie on 13 April 2005, enabled the appellant to describe the payment of the money to the firm as 'erroneous'. In his oral submissions, the appellant effectively confirmed and repeated the statements made in the affidavit.

43 It was submitted that the Tribunal was entitled to draw the inference that the appellant had intended to mislead the court. The Tribunal correctly found that he had a very real motive to do so, namely to avoid professional or civil liability. The circumstances in which the misleading affidavit and misleading submissions were made were alone sufficient to support the inference that the appellant had some motive for conveying a

misleading impression that the client had paid the money without any prior arrangement. The question of motive was canvassed with the appellant during cross-examination when it was put to him that he refrained from contacting the client after discovering the money had not been paid by the deadline because he realised that he and the firm had made an error. The appellant denied that that had ever entered his mind. The question of motive was also canvassed in the closing submissions of counsel for the appellant and the appellant was aware that motive was a live issue.

44 In any event, even if the Tribunal was in error in finding the appellant had a motive to mislead the court, the error did not result in any injustice to the appellant. Even in the absence of motive, the Tribunal was justified in drawing the inference that the appellant intended to mislead the court. The appellant was aware from the letter of 16 February 2005 and, from his telephone conversation with the appellant on 21 April 2005, that prior arrangements had been made for the payment of the money to the firm, so that the conduct of the client in paying it to the firm was not erroneous but in accordance with the arrangements. The appellant's asserted understanding of the effect of the letter of 16 February 2005 was not credible. Once that interpretation was rejected, the only inference that could be drawn was that the appellant intended to convey a misleading impression to the court that the client had erroneously paid the money to the firm without there being any prior arrangement to do so.

45 The respondent accepted that if in its oral reasons the Tribunal had directed itself that suspension was required in any case involving the intentional misleading of the court, then it was in error. It was submitted that that is not what the Tribunal meant but that its intended meaning is reflected in its written reasons.

46 It was submitted that the penalty was within the range of a sound exercise of discretion, having regard to the seriousness of the appellant's conduct. It was not relevant whether or not the court had in fact been misled. The appellant conveyed a misleading impression which had the potential to mislead the court and he intended that it would mislead. Nor is it apparent whether or not the misleading conduct in fact had any effect on the Master's decision.

47 The cases referred to by the appellant concerning misleading conduct were said to be not comparable.

Disposition of the appeal

48 The first two grounds of appeal can conveniently be considered together. In our view, they must fail. The finding that the affidavit and submissions were misleading was one that was clearly open to the Tribunal. The import of both the affidavit and submissions was that the client had made an error in paying the money to the firm. In the absence of any reference to the letter of 16 February 2005 and the arrangement with Natalie of 13 April 2005, the clear impression, in our view, was that at the last minute the client had taken it upon herself to pay the money to the firm rather than to Hammond Worthington, and that, on 14 April 2005, without notice to the appellant, she had done so. The annexure to the appellant's affidavit of the client's facsimile of 13 April 2005 did not detract from that, as the facsimile did not refer to the letter of 16 February 2005 or the arrangement with Natalie and was not inconsistent with the import of the affidavit and submissions.

49 In short, contrary to the references in both the affidavit and submissions to the client's 'error', there was no error by the client. The client had paid the money to the firm in accordance with the instruction in the letter of 16 February 2005 (save that she had not, as requested, paid it well before the deadline) and the arrangement with Natalie of 13 April 2005.

50 The question then is whether the Tribunal was entitled to find that the appellant intentionally misled the court.

51 It was clearly open to the Tribunal to reject the appellant's evidence as to his understanding of the letter of 16 February 2005. On a fair reading of the letter, it is very difficult to see how anyone could arrive at that understanding of it. The Tribunal had the benefit of hearing the appellant's evidence on the point and did not believe it. Nothing that has been said on behalf of the appellant on this appeal would justify intervention on the ground that such a finding was not open to the Tribunal.

52 Similarly, it was open to the Tribunal to accept the client's evidence in preference to the appellant's evidence in respect of the telephone conversation of 21 April 2005. The Tribunal heard their evidence and, as the Tribunal noted, the client's evidence was supported by her facsimile of 26 April 2005 to Mr Havilah in which she refers to having informed the appellant in that telephone conversation of the arrangement with Natalie. That facsimile was sent at a time when, on the evidence, the client was unaware that there was any issue about the content of the conversation.

53 It was never part of the appellant's case that he had overlooked the letter of 16 February 2005 or the relevant part of the telephone conversation of 21 April 2005. His case was that he understood the letter to instruct the client to pay the money to the firm only if it was paid well before the deadline, and that the relevant part of the telephone conversation did not take place. Once that was rejected it was clearly open to the Tribunal to conclude that the appellant intended to mislead the court, in the absence of some other explanation. There was no other explanation.

54 However, in our view the Tribunal's finding as to motive was not necessary to its conclusion and we consider the Tribunal erred in making that finding. It is not difficult to think of possible motives the appellant might have had, including motives other than those identified by the Tribunal, but the evidence did not permit any positive finding to be made as to the appellant's motive. We do not, however, consider that this error is a basis upon which the Tribunal's decision should be disturbed. The finding that the appellant had a motive to mislead the court was not an essential step in the reasoning process that led to the conclusion that his conduct was intentional.

55 It is necessary, then, to turn to the third ground of appeal. Two attacks are made on the penalty of suspension. The first turns on what is said to be a disparity between the oral reasons of the Tribunal and its later written reasons, and the second is that the penalty is manifestly excessive.

56 It is, of course, quite proper for the Tribunal to revise *ex tempore* reasons after the order to which they relate has been made authenticated, so long as the substance of the reasons is not altered. Such revisions may be made to correct mistakes of transcription, errors of grammar or infelicities of style, or where by reason of an error the reasons plainly misstate what the decision-maker meant to say, and also to clarify the reasons as expressed orally: **Lam v Beesley** (1992) 7 WAR 88, 93 - 94; **Bar-Mordecai v Rotman** [2000] NSWCA 123 [194] - [195]. See also **Bromley v Bromley** [1965] P 111, 116. Where in a particular case the line is to be drawn between permissible alterations and changes of substance may not always be clear-cut, however.

57 In our opinion, in this case the change between the oral reasons and the later written reasons is one of substance and goes beyond what is permissible in the editing of reasons. It appears from the oral reasons that the Tribunal considered that where a practitioner intentionally misleads a court, a penalty of suspension is mandatory and the only question is the

length of the period of suspension. Suspension in such a case was said to be 'essential to the confidence that practitioners have in each other and that the public has in the profession'. Having reached that view, the Tribunal turned to the mitigating factors on the basis that they were relevant to the period of suspension. Having considered those factors, the Tribunal considered that a penalty of three months suspension was appropriate.

58 We do not think that that process of reasoning is consistent with the view reflected in the subsequent written reasons that 'the *usual* professional disciplinary consequences of intending to mislead a court should be, as a minimum, suspension from practice' (emphasis added), and that in the circumstances of this case the protection of the public and the maintenance of proper standards required a penalty of suspension. In its written reasons, the Tribunal concluded that the period of suspension should be three months, being reduced by the mitigating factors from what would otherwise have been a period of six months.

59 As the order of the Tribunal was made and authenticated on the basis of the oral reasons, in our view it is the oral reasons to which regard must be had on the issue of penalty.

60 It was not in issue on the appeal that if the Tribunal acted upon the basis that a penalty of suspension was the only penalty open to it then it was in error. We are satisfied that the Tribunal did err by directing itself that suspension was mandatory in a case where a practitioner is found intentionally to have misled a court. The discretion of the Tribunal is not limited in that way. Whether a penalty of suspension is appropriate must always depend upon the facts of the particular case. There can be no hard and fast rules, even in cases where a practitioner is found intentionally to have misled a court. We consider, however, that on the facts of this case the penalty imposed by the Tribunal was an appropriate penalty and we would not, therefore, disturb it.

61 For a practitioner, in the course of his or her practice, intentionally to mislead anyone is a serious breach of the practitioner's professional duty. But the finding in the present case that the appellant intentionally misled the court is of particular significance. It goes to the very heart of a practitioner's duty as an officer of the court and therefore to the proper administration of justice. We would respectfully adopt what was said in that respect by the Queensland Court of Appeal in ***The Council of the Queensland Law Society Inc v Wright*** [2001] QCA 58, a case involving a solicitor who (among other things) intentionally misled a court in relation

to an affidavit relied upon to resist a summary judgment application and as to the availability of a witness. The court said:

A practitioner's duty to the court arises out of the practitioner's special relationship with the court; it overrides the duties owed by a practitioner to clients or others ... The lawyer's duty to the court includes candour, honesty and fairness. ... The effective administration of the justice system and public confidence in it substantially depends on the honesty and reliability of practitioners' submissions to the court. This duty of candour and fairness is quintessential to the lawyer's role as officer of the court; the court and the public expect and rely upon it, no matter how new or inexperienced the practitioner. Breaches such as this are hard to detect and once established to the requisite standard are deserving of condign punishment, not only as a deterrent but also to reassure the public that such conduct on the part of lawyers will not be tolerated [67]. (footnotes omitted)

62 A number of factors were put in mitigation to this court, as they were to the Tribunal. It was submitted that the practitioner was relatively inexperienced at the time of the conduct, having then been admitted for only some six years; the conduct was of a one-off nature and was now some four years old; the appellant had an unblemished record both before and after the conduct; the appellant had been inadequately supervised and had left the firm in 2007 to start his own legal practice, which had procedures in place designed to ensure that deadlines did not pass unnoticed; there was character evidence that in the four years since the conduct the appellant had demonstrated a meticulous understanding of the duties of a practitioner in the preparation of documents so there was no reason to infer any likely repetition of the conduct; and that suspension would deprive the public of the appellant's substantial pro bono work as well depriving his own clients of his services.

63 It was submitted on behalf of the appellant that a penalty involving suspension from practice was excessive and several decisions were cited by counsel for the appellant in support of that submission. We would note at the outset that we were referred to only one case in this jurisdiction (*Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56) where a practitioner has been found intentionally to have misled a court or tribunal. Our own researches have not revealed any others.

64 In *Kyle*, the practitioner opened the case at trial on the basis that one of his clients had signed a deed when he knew that that was not the case. The Tribunal found that the practitioner acted in the expectation that the true position would be revealed in the course of the trial, so that he did not

act with the object of ultimately deceiving the court. The practitioner was reprimanded.

65 In an unreported matter to which reference was made, Legal Practitioners Complaints Committee and Havilah, file number VR 208/2008, the practitioner was found by the Tribunal to have sworn a misleading affidavit in the Magistrates Court, in that the affidavit did not contain all the material matters, but was found to have done so from a want of care. He was fined \$6,000.

66 In a case to which the appellant referred the Tribunal, *Law Society of New South Wales v McElvenny* [2002] NSWADT 166, the practitioner admitted swearing a false affidavit but there was no finding that he intended to mislead the court. He was fined \$3,750.

67 In *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352, during settlement negotiations over the entitlement to the assets of an estate, the practitioner misled the other party as to the existence of a properly executed will by failing to disclose that what he described as the 'will' had not been signed in accordance with the requirements of the *Wills Act 1970* (WA). He was fined \$7,500.

68 In *Legal Practitioners Complaints Committee and Morton* [2006] WASAT 172, the practitioner had failed to pursue an action diligently with the result that it was struck out for want of prosecution, and then failed to advise the client to seek independent advice. For that conduct, fines of \$8,000 and \$6,000 respectively were imposed on the practitioner.

69 Those decisions each involved circumstances some distance removed from this case and are not, in my view, of any real assistance. In particular, only *Kyle* involved the element of intentionally misleading a court and the facts in *Kyle* were quite different.

70 As we have observed, it is a matter of the utmost seriousness for a practitioner intentionally to mislead a court. The effective administration of the justice system and public confidence in the system depends upon the absolute and unconditional discharge by practitioners of their duty of honesty and candour to the court. It is a duty so fundamental that factors such as relative inexperience and lack of supervision do not weigh so heavily in mitigation as they might in other situations. A deliberate departure from the duty must attract a substantial penalty. We consider that in the circumstances of this case the penalty of three months suspension imposed by the Tribunal was appropriate. We would dismiss this ground of appeal.

Conclusion

71 No grounds have been shown for interfering with the decision of the Tribunal. We would refuse leave to appeal.