[2006] WASAT 108

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PRACTITIONERS ACT 1893 (WA)
CITATION	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and WILLIAMS [2006] WASAT 108
MEMBER	**:**	JUDGE J CHANEY (DEPUTY PRESIDENT) MR C RAYMOND (SENIOR MEMBER) MS M CONNOR (MEMBER)
HEARD	**:**	10 APRIL 2006
DELIVERED	**:**	5 MAY 2006
FILE NO/S	**:**	VR 12 of 2004 VR 351 of 2005
BETWEEN	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND PAUL THOMAS WILLIAMS Respondent

Catchwords:

Professions - Solicitor - Disciplinary proceedings - Alleged unprofessional conduct - Whether affidavit false - Statement in affidavit that debt due and payable - Non-compliance with statutory requirement to notify of right to taxation of solicitor's bill - What constitutes a bill - Whether debt due and payable - Whether conflict of interest - Solicitor pursuing bankruptcy proceedings against client while acting for client in court proceedings - Whether correspondence with Complaints Committee misleading

Legislation:

Companies (Victoria) Code, s 364
Corporations Act 2001 (Cth), s 459D, s 459E, s 459E(1), s 459E(3)
Costs Act 1867 (Qld), s 22
Legal Practitioners Act 1893 (WA), s 25(1)(c), s 65, s 65(4), s 66, s 66B
Legal Profession Act 1987 (NSW), s 192, s 192(1)
Property Law Act 1969 (WA), s 20
Solicitors Act 1843 (UK), s 37
Supreme Court Act 1958 (Vic), s 81
Supreme Court Act 1986 (Vic), s 61(1)

Result:

Complaints of making false affidavit and misleading Complaints Committee dismissed
Complaint of creating conflict of interest established

Category: B

Representation:

Counsel:

Applicant	:	Mr AS Derrick and Ms CFM Coombs
Respondent	:	Mr DR Clyne

Solicitors:

Applicant	:	Legal Practitioners Complaints Committee
Respondent	:	Williams and Co

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

Briginshaw v Briginshaw (1938) 60 CLR 336
Burrell v Connell (1998) 84 FCR 383
Coburn v Colledge (1897) 1 QB 702
Currie v Robinson [1968] QWN 25
Kyle v Legal Practitioners Complaints Committee (1999) 21 WAR 56
Malleson, Stewart, Stawell and Nankivell v Williams [1930] VLR 410

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170
Quigley (A Practitioner) v The Legal Practitioners Complaints Committee [2003] WASCA 228
Re Devy; Ex parte BBC Hardware Pty Ltd (1996) 67 FCR 355
Re Elgar Heights Pty Ltd (1985) VR 657
Re King, Ex parte Gallagher Ryan and Maloney (1994) 54 FCR 493
Re Walsh Halligan Douglas Bill of Costs (1990) 1 Qd R 288
Udovenko v Mitchell (1997) 79 FCR 48

Case(s) also cited:

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The Legal Practitioners Complaints Committee (the Complaints Committee) made allegations of unprofessional conduct by a solicitor, Mr Paul Thomas Williams. All three allegations arose out of circumstances surrounding the efforts of Mr Williams to recover his costs and disbursements in relation to Supreme Court proceedings in which Mr Williams' firm, Williams & Co, acted for a Mr Jefto Radovanovic and Murchison Queen Pty Ltd (Murchison Queen), who were defendants in the Supreme Court action. Although Williams & Co acted for both defendants, it was only Murchison Queen that was liable under a costs agreement for payment of the fees in relation to the action.

2 Following completion of the trial in the Supreme Court, Mr Williams had incurred substantial legal costs to the counsel who had been briefed for the trial, and two legal consultants who had assisted in the preparation of the matter for hearing. Apparently because of concerns as to payment of his fees, Mr Williams negotiated an assignment of a debt owed personally by Mr Radovanovic and his wife to another solicitor in relation to different proceedings in which the other solicitor had acted some years earlier. Mr Williams' reasons for doing so was to enable himself to put pressure on Mr Radovanovic to cause Murchison Queen to meet its liability to Williams & Co.

3 Neither Murchison Queen nor Mr Radovanovic paid the solicitors fees. Mr Williams threatened bankruptcy proceedings against Mr and Mrs Radovanovic based on their debt to the previous solicitor, and threatened to wind up Murchison Queen in relation to fees and disbursements owed to Mr Williams. Following delivery of the Supreme Court decision in May 2002, in which Mr Williams' clients were successful, the plaintiff in that action instituted an appeal. Mr Williams acted for Mr Radovanovic and Murchison Queen in relation to the appeal which was ultimately heard in November 2002. Throughout the period that he acted in the appeal, Mr Williams continuously threatened bankruptcy and liquidation proceedings, and eventually issued a bankruptcy notice against Mr and Mrs Radovanovic in October 2002, whilst still acting for Mr Radovanovic in the appeal.

4 Not long after the Supreme Court trial had been completed, Mr Williams served a creditors statutory demand under s 459E of the *Corporations Act 2001* (Cth). As required by that section, Mr Williams made an affidavit on 5 February 2002 in which he deposed to the belief

that an amount, being the total of the fees of counsel and the legal consultants engaged, was "due and payable by the debtor to the creditor". The first allegation by the Complaints Committee is that that affidavit was false, in that, by reason of a failure by Mr Williams to comply with s 65 of the *Legal Practitioners Act 1893* (WA) (which was the applicable legislation in February 2002), the amount claimed was not due and payable by Murchison Queen to Mr Williams at the time the affidavit was sworn.

5 The Tribunal examined the law in relation to when a debt to a solicitor becomes "due and payable" in the light of the provision of s 65 of the *Legal Practitioners Act 1893*. It concluded that, if Mr Williams' affidavit was in error, the error was not so obvious that deposing as he did in the affidavit could be said to be unprofessional conduct.

6 The second allegation brought against Mr Williams was that, between February 2002 and ceasing to act for Mr Radovanovic in December 2002, Mr Williams created an unacceptable conflict between his own interests, and the interests of his client, Mr Radovanovic, by taking an assignment of a debt by Mr Radovanovic to a third party for the purpose of exerting pressure on his client while at the same time continuing to act for him. The Tribunal concluded that Mr Williams did place himself in a position of serious conflict at the relevant time, at least from the point where the appeal was instituted, and then acted for Mr Radovanovic in the appeal, apparently motivated principally by his own interest in recovering fees. Although the Tribunal concluded that Mr Williams' conduct did not, in fact, adversely impact upon Mr Radovanovic's interests, he did act unprofessionally in placing himself in a position where the conflict could manifest itself in a way adverse to his client, and by undertaking representation of this client with a principal objective of protecting the solicitor's own interests.

7 Following a complaint to the Complaints Committee by Mr Radovanovic, the Complaints Committee engaged in correspondence with Mr Williams concerning the complaint. At an early stage in that correspondence, the Complaints Committee sought information about the circumstances surrounding the assignment of Mr Radovanovic's debt to Mr Williams. Mr Williams queried the basis upon which the Complaints Committee sought information on that matter, given that Mr Radovanovic's original complaint related to the question of conflict of interest. The correspondence between the Complaints Committee and Mr Williams showed reluctance on Mr Williams' part to disclose the full details of his arrangements with the other solicitor. The third matter of

complaint by the Complaints Committee to the Tribunal was that, on two separate occasions, letters written by Mr Williams were misleading and thus amounted to unprofessional conduct. Although the Tribunal expressed concern at Mr Williams' reticence to provide full and frank disclosure promptly to the Complaints Committee, it concluded that, after proper examination of all the correspondence and the materials available at the hearing, the two communications could not be said to be misleading, and the allegations to that effect should be dismissed.

Introduction

8 The Legal Practitioners Complaints Committee (the Complaints Committee) makes three allegations against a legal practitioner, Paul Thomas Williams.

9 The first was that he was guilty of unprofessional conduct in 2002 in swearing an affidavit knowing it was false, alternatively with reckless indifference as to whether it was false, and in using that affidavit for the purpose of seeking to recover costs from his clients – VR 351 of 2005.

10 The second is an allegation that Mr Williams was guilty of unprofessional conduct between February 2002 and 11 December 2002 in creating an unacceptable conflict between his own interests and those of his client, a Mr Radovanovic – VR 12A of 2004.

11 The third is that Mr Williams was guilty of unsatisfactory conduct by unprofessional conduct in misleading, or attempting to mislead the Complaints Committee in response to enquires of the Committee resulting from a complaint by Mr Radovanovic – VR 12B of 2004.

VR 351 of 2005

12 The allegations by the Complaints Committee were dealt with entirely on the basis of agreed documents and admitted facts. Neither party adduced any oral evidence. The history which emerges from the documents is as follows.

13 In approximately July 2000, Mr Williams accepted instructions to act for Mr Radovanovic and Murchison Queen Pty Ltd (Murchison Queen) in a Supreme Court action which had been commenced against each of them as defendants earlier that year.

14 On 1 August 2000, a costs agreement was executed by Williams & Co and Mr Radovanovic. It identified the client for the purposes of the costs agreement as Murchison Queen.

15 The terms and conditions of the costs agreement contain the following provisions:

> "3.1 You will also be liable to pay to us all costs incurred in connection with any of your instructions or matters in which we are acting, including counsel's and expert's fees (whether or not these costs have first been paid by us), Court and other filing fees, witness fees, travel expenses, investigation expenses and all extraordinary postage and other incidental expenses.
>
> …
>
> 8.1 You authorise us to engage independent counsel to advice *[sic]* and appear in Court on your behalf, when we consider it necessary. You authorise us to negotiate and agree Counsel's fees, for which you will be liable. You also authorise us to engage such experts as we consider necessary and to negotiate and agree experts' fees for which you will be liable.
>
> 8.2 The fees and charges of Counsel and any expert must be paid by you to us immediately on request by us, notwithstanding that we may not have first paid those fees or charges."

16 On 17 October 2000, a letter was sent to Mr Williams by Michael Workman, a solicitor who had previously acted for Mr and Mrs Radovanovic in 1996 and 1997. Mr Workman had obtained a judgment against Mr and Mrs Radovanovic for $15 041.53 on 22 August 2000, and his letter was intended to avoid the necessity of Mr Workman taking enforcement proceedings on the judgment if possible. It is not clear from the evidence whether there was any response to that letter.

17 The Supreme Court action proceeded, and was eventually listed for trial in January 2002. Counsel was briefed to appear at trial, and in late December 2001, Mr Williams engaged legal consultants, Liscia & Tavelli, to undertake final preparatory work for the hearing. The trial was completed over three days between 16 and 18 January 2002.

18 On 15 January 2002, Liscia & Tavelli rendered a tax invoice to Mr Williams. It was an itemised account for services provided between 24 December 2001 and 14 January 2002. The invoice was directed to

Williams & Co, and, in accordance with s 65 of the *Legal Practitioners Act 1893* (WA) (the LP Act) bore the endorsement "within 30 days of receiving an itemized *[sic]* account, you may require me by notice in writing to submit the account to the taxing officer of the Supreme Court of Western Australia for review of the amount of costs charged to you, the subject of this account".

19 On 21 January 2002, Williams & Co sent a letter to Mr Radovanovic enclosing the tax invoice from Liscia & Tavelli, and a receipt for a Supreme Court filing fee in the sum of $210. The letter advised that Mr Williams expected counsel's final account to be received within the next seven days, and made some observations to the effect that Mr Williams considered Liscia & Tavelli's account to be "reasonable and necessary". It also foreshadowed that an account for his firm's work would be rendered at the end of January 2002. Mr Williams sought written confirmation of previous discussions with Mr Radovanovic to the effect that the latter had made provision for payment of approximately $25 000 for legal fees and disbursements. The letter concluded:

> "As discussed, the timing of the various payments differs, for example, Counsel's fee will be payable immediately upon receipt of invoice, Liscia & Tavelli Legal Consultants invoice is payable by 4 February 2002, and this firm's pending monthly invoice will be payable by approximately 15 February 2002."

20 On 22 January 2002, Mr Williams sent to Mr Radovanovic a further facsimile in which he enclosed counsel's tax invoice in the sum of $8250. That tax invoice directed to Williams & Co did not bear the endorsements specified under s 65 of the LP Act. The facsimile concluded:

> "Please immediately:
>
> 1. forward the requested written confirmation regarding your having made provision for the further payment of approximately $25,000 of legal fees and disbursements;
>
> 2. telephone the writer to discuss this firm's recent facsimiles to you.
>
> Please address the above as a matter of utmost priority."

21 On 5 February 2002, Mr Williams sent a further facsimile to Mr Radovanovic. The facsimile enclosed a creditors statutory demand addressed to Murchison Queen for a total of $22 801.80 (being the sum of

the accounts from Liscia & Tavelli and counsel) plus interest. The demand was issued pursuant to s 459E of the *Corporations Act 2001* (Cth) (the Corporation Act) which requires that, unless the debt demanded is a judgment, the demand must be accompanied by an affidavit that verifies that the debt is due and payable by the company. The appropriate affidavit apparently accompanied the demand.

22 Two of the affidavits, sworn by Mr Williams, stated "I believe that the amount of $22,801.80 ('the Debt'), being the Debt specified in the accompanying demand is due and payable by the Debtor to the Creditor".

23 It is the Complaints Committee's case that, as at 5 February 2002, when the affidavit was sworn, there was no debt due and payable by Murchison Queen to Williams & Co, and the affidavit was thus false. It is that allegation which forms the subject matter of the allegation in matter VR 351 of 2005.

24 In its application to the Tribunal, the Complaints Committee alleged that there was no debt due and payable because the practitioner did not render to the company a bill of costs in accordance with s 65 of the LP Act in relation to either the fees of Liscia & Tavelli or counsel, and because the practitioner did not pay the accounts prior to making the affidavit. The latter proposition was based upon a general proposition that agents' fees and counsels' fees are disbursements which do not become due and payable as disbursements until the practitioner pays them on behalf of the client. It was conceded at the hearing, however, that that general rule is subject to the terms of any costs agreement between the practitioner and a client, and that the costs agreement in this case expressly provided that disbursements were payable by the client to the practitioner notwithstanding that the practitioner had not paid the disbursements himself. The Complaints Committee's contention that the affidavit was false for that reason was not pursued.

Was the debt due and payable?

25 Section 65 of the LP Act appears as follows:

> "65. Signed bill of costs to be served before suit
>
> (1) No practitioner shall sue for the recovery of any services, fee, charges or disbursements until a bill for the same, being either a bill containing detailed items or for a lump sum, has been served upon the party charged therewith.

> (2) At any time within 30 days from the service of a lump sum bill referred to in subsection (1) the party charged may require the practitioner to serve upon him in lieu of the lump sum bill a bill containing detailed items, and upon that requirement being made the lump sum bill shall be of no effect except that proceedings for recovery already instituted in accordance with subsection (1) may be continued unless stayed by the court in which those proceedings were instituted or under section 66B."

26 Subsection (3) then sets out the form of notice required to be shown on a bill of costs advising a client of the right to seek taxation of an itemised bill of costs, or itemisation of a lump sum bill of costs, within certain specified times of receipt of the account. Section 66 gives a party charged with an itemised bill of costs the right to apply for taxation of the bill by the taxing officer of the Supreme Court. Section 66B provides:

> "Where under section 66 a bill of costs in taxed, the taxing officer of the Supreme Court may order that any proceedings for the recovery of the costs be stayed until such time as the taxing officer may direct and the order shall have effect accordingly."

27 The Complaints Committee's contention is that a debt will not be "due and payable" within the meaning of s 459E(1) and (3) of the Corporations Act unless it is presently payable in the sense that it is immediately recoverable or enforceable. It contends that by reasons of the proscription on suing for recovery of charges in the absence of a compliant bill of costs, the fees payable to Liscia & Tavelli and to counsel were not "due and payable", within the meaning of the section.

28 The Complaints Committee relied upon the decision of Ormiston J in ***Re Elgar Heights Pty Ltd*** (1985) VR 657. That case involved consideration of a statutory demand on s 364 of the *Companies (Victoria) Code* in relation to a demand by solicitors. Section 364 of the *Companies (Victoria) Code* provided for demands in relation to debts "in a sum exceeding $1000 then due". Section 81 of the *Supreme Court Act 1958* (Vic) provided that a solicitor "shall not commence or maintain any action or suit for the recovery of" any charges until the expiration of one month after the delivery of a signed bill of costs. The solicitors had not served a bill in compliance with s 81 at the time of making demand for payment

from the company. Ormiston J concluded (at 673) that, as no proper bill was delivered, it followed that no fees were "then due" to the solicitors at the time of the service of the statutory demand. That conclusion was reached after a thorough and detailed analysis of authority on the question of when a debt becomes "due" for the purposes of the section.

29 A similar question arose in the Federal Court in ***Re Devy; Ex parte BBC Hardware Pty Ltd*** (1996) 67 FCR 355, which involved consideration of s 22 of the *Costs Act 1867* (Qld) which precluded a solicitor from commencing proceedings for a recovery of fees before sending a bill in proper form to the client. Hill J referred to the decision of Lord Esher MR in ***Coburn v Colledge*** (1897) 1 QB 702 where his lordship said, in relation to s 37 of the *Solicitor's Act 1843* (UK):

> "Similarly, I think s 37 of the *Solicitors Act* deals, not with the right of the solicitor, but with the procedure to enforce that right. It does not provide that no solicitor shall have any cause of action in respect of his costs or any right to be paid till the expiration of a month from his delivering a signed bill of costs, but merely that he shall not commence or maintain any action for the recovery of fees, charges, or disbursements until then. It assumes that he has a right to be paid the fees, charges, and disbursements, but provides he shall not bring an action to enforce that right until certain preliminary requirements have been satisfied. If the solicitor has any other mode of enforcing his right than by action, the section does not seem to interfere with it. For instance, if he has money of the client in his hands not entrusted to him for any specific purpose, there is nothing in the section to prevent his retaining the amount due to him out of that money. If that be the true construction of the section, it does not touch the cause of action, but only the remedy for enforcing it."

30 Hill J concluded, however, that although the claim by the solicitor who had not rendered a compliant bill was a liquidated claim, he did not accept the proposition that, while no action can be maintained to recover the debt for fees unless and until a bill has been rendered, the debt itself was payable immediately. By analogy with debts the enforcement of which is statute barred, Hill J concluded that, for the purpose of identifying an act of bankruptcy, the inability to enforce the debt at the time of the statutory demand led to the conclusion that a failure to meet a demand for payment of the debt did not amount to an act of bankruptcy.

31 The same conclusion was reached by the full court of the Federal Court in ***Udovenko v Mitchell*** (1997) 79 FCR 48. The full court reversed a decision of the judge at first instance not to set aside a statutory demand based on a local court judgment obtained by a solicitor, notwithstanding that the solicitor had not complied with the requirements as to the service of a bill of costs in relation to the debt upon which the local court judgment was founded. Carr J with whom the other members of the court agreed, referred to the decision of Hill J in ***Re Devy*** as "fortifying" the conclusion that he had reached.

32 In ***Re King, Ex parte Gallagher Ryan and Maloney*** (1994) 54 FCR 493, Northrop J was called upon to consider the merits of a creditor's partition where solicitors had obtained a judgment for legal costs but had failed to comply with s 61(1) of the *Supreme Court Act 1986* (Vic) by failing to provide a proper account of costs. The decision was given ex tempora, and it is apparent that Northrop J was not referred to ***Re Elgar Heights Pty Ltd*** in argument. His Honour concluded that "in the absence of reference to authority, it seems that non compliance with section 61 merely makes a claim for costs unenforceable. Non compliance does not go to the validity of the claim" (at 495).

33 In ***Burrell v Connell*** (1998) 84 FCR 383, Sackville J considered whether he should go behind a judgment obtained by a solicitor where there had been non-compliance with s 192 of the *Legal Profession Act 1987* (NSW). In that case, a solicitor had commenced an action less than 30 days after the solicitor had given the debtor the relevant invoices. Notwithstanding non-compliance with the statutory provision, the solicitor had obtained judgment in the local court for these costs. Sackville J was prepared to go behind the judgment to examine whether there was an underlying indebtedness. He was prepared to do so for a number of reasons, one of which was the acknowledged non-compliance with the requirement of the *Legal Profession Act 1987* not to commence proceedings within the 30 days of serving a bill of costs. Sackville J referred to ***Re Devy*** as authority to the proposition that provisions such as s 192(1) of the *Legal Profession Act 1987* do not take away a solicitor's rights to payments of fees, but they do prevent the solicitor recovering fees or disbursements for professional services. On an examination of the facts of the case, however, His Honour concluded that independently of the judgment, there was a liability for legal costs at the date of the relevant act of bankruptcy, because by that date, there had been compliance with the requirements of the relevant regulations in relation to the provision of invoices by a solicitor to a client. Although ***Burrell v Connell*** was relied upon by the respondent in this case as supporting the proposition that a

debt existed even if there were failure to comply with s 65, the case is properly read as supporting the line of authority relied upon by the Complaints Committee for the proposition that, in the absence of compliance with s 65 of the *Legal Practitioners Act 1893*, a debt to a solicitor is not "due and payable".

34 The practitioner contends that, in relation to the debt which formed the subject of the statutory demand, and the affidavit in support, s 65 had been complied with, or at least it was not obvious that it had not been complied with. There is no definition in the LP Act of a "bill". Counsel for the applicant argued that the practitioner's facsimile of 21 January 2002 enclosing Liscia & Tavelli's invoice, and the facsimile of 22 January 2000 enclosing a copy of counsel's invoice can properly be considered a bill. Although, as counsel for the Complaints Committee observed, there is no express demand for payment in either facsimile, the clear statement in the earlier facsimile as to when the different invoices were payable is an implicit request for payment by the solicitor. The practitioner argues that each of the accounts of Liscia & Tavelli and counsel were sufficiently itemised to enable the client to make an assessment as to whether the account was reasonable and whether taxation should be requested, and the invoice from Liscia & Tavelli contained the requisite notice under s 65. The invoice sent by Williams & Co to Murchison Queen dated 30 January 2002, which did not form part of the debt the subject of the statutory notice, contained the required notice under s 65. It did not, however, contain items for disbursements in relation to counsel's or the legal consultant's fees.

35 In ***Re Walsh Halligan Douglas Bill of Costs*** (1990) 1 Qd R 288, Dowsett J considered the question as to what might be considered a bill for the purposes of s 22 of the *Costs Act 1867* (Qld). His Honour referred to observations in ***Currie v Robinson*** [1968] QWN 25 where Douglas J approved observations of Mann J in ***Malleson, Stewart, Stawell and Nankivell v Williams*** [1930] VLR 410 where it was said:

> "These authorities show that the Courts have repeatedly held that a bill of costs must contain such details as will enable the client to make up his mind on the subject of taxation, and will enable those advising him to advise him effectively as to whether taxation is desirable or not."

36 The information provided by Mr Williams to his client did contain sufficient detail to assess, or take advice in relation to, the desirability of taxation. It did not, however, comply strictly with s 65 in that the notice

as to the right of taxation contained in Liscia & Tavelli's tax invoice was not a notice to the person charged, but rather a notice to Williams & Co which was the party charged by the invoice.

37 The preponderance of authority is to the effect that solicitors' costs are not "due and payable" for the purposes of s 459D of the Corporations Act until there is compliance with s 65. In our view, however, that proposition is not so obvious that a failure by a solicitor to appreciate it amounts to unprofessional conduct. The parties to these proceedings rightly accepted that the test for unprofessional conduct is conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, or that, to a substantial degree, fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence – ***Kyle v Legal Practitioners Complaints Committee*** (1999) 21 WAR 56 at 71-72 and ***Quigley (A Practitioner) v The Legal Practitioners Complaints Committee*** [2003] WASCA 228 at [12].

38 Mr Williams' costs agreement with Murchison Queen stipulated that fees and charges of counsel or any expert must be paid immediately on request notwithstanding that those fees had not previously been paid. That provision in the costs agreement does not override the requirement of s 65(4) but gives context to the way in which the invoices for very substantial liabilities undertaken by the practitioner were handled. The agreement provides a foundation for the belief expressed by Mr Williams, in the affidavit of 5 February 2002, as the existence of Murchison Queen's indebtedness as at that date. There is no suggestion in these proceedings that the charges made by the consultants or by counsel were anything other than reasonable and reasonably incurred.

39 The Complaints Committee's case in relation to this reference is that Mr Williams knew that his affidavit was false, or alternatively made the affidavit with reckless indifference as to its truth or falsity, or that the falsity was so obvious that he ought to have known that it was false. In our view, none of those assertions is made out. In Mr Williams' facsimile of 21 January 2002 to Mr Radovanovic, he advised when the counsel's fees and the legal consultant's fees were to be payable, with the last of those being payable on 4 February 2002. The affidavit sworn was consistent with that advice to the client, and it is reasonable to infer that Mr Williams believed that what he was saying was accurate. If he were alive to the proposition that the client's liability to him would only arise after he sent an invoice for the disbursements containing the necessary

notice under s 65, there is no reason to think he would not have sent such a document with his facsimile of 21 January 2002.

40 It follows that, in our view, the allegation the subject of VR 351 of 2005 that Mr Williams intentionally or recklessly made a false affidavit is not made out and should be dismissed.

VR 12A of 2004

41 The second allegation made against the practitioner is that he was guilty of unprofessional conduct between February 2002 and 11 December 2002 in creating an unacceptable conflict between his own interests and those of his client, Mr Radovanovic. The facts which emerge from the documents relevant to this reference are as follows.

42 As has already been observed, on 5 February 2002, Mr Williams sent a facsimile to Mr Radovanovic enclosing the statutory demand and supporting affidavit. In that facsimile, Mr Williams said "your explanations and the corresponding delay regarding non payment of legal fees and disbursements, are unacceptable". In the subsequent facsimile on 12 February 2002, Mr Williams referred to numerous requests and demands for payment which had been unmet, representations by Mr Radovanovic concerning payment which had been unmet, and a failure by Mr Radovanovic to confirm arrangements for payment of the outstanding fees and disbursements. The letter stated "further, the writer no longer accepts your explanations regarding your alleged inability to either pay or cause this firm's outstanding legal fees and disbursements to be paid". The letter advised of steps to "be directed towards you personally" and if necessary that Mr Williams would proceed with bankruptcy proceedings and take steps for the firm to cease acting on Mr Radovanovic's (and presumably Murchison Queen's) behalf.

43 On 18 February 2002, Mr Williams again wrote threatening to proceed in the way outlined in the facsimile of 12 February 2002, and advised that the firm was in the process of taking an assignment of a debt owed by Mr Radovanovic, and proposed the issue of the creditor's petition. Between about 18 February 2002 and 6 March 2002, Mr Williams negotiated with Michael Workman, a solicitor who held a judgment against Mr and Mrs Radovanovic in respect of unpaid legal fees, for the assignment to Mr Williams of the debt owed by Mr and Mrs Radovanovic to Mr Workman. The details of those negotiations are relevant to matter VR 12B of 2004, and will be dealt with in full in that context. For present purposes, however, it is sufficient to say that a deed of assignment of debt was executed by Mr Williams and Mr Workman

and was returned in executed form by Mr Workman to Mr Williams on 6 March 2002. The amount of the assignment was $11 541.53.

44 The completion of the assignment enabled Mr Williams to be in a position to carry out the threat contained in his facsimile of 12 February 2002 to take action against Mr Radovanovic personally. Prior to the assignment, the debt to Williams & Co was owed only by Murchison Queen which was the only party to the costs agreement with Williams & Co.

45 On 7 March 2002, Mr Williams sent a facsimile to Mr and Mrs Radovanovic enclosing notice of the assignment for the purposes of s 20 of the *Property Law Act 1969* (WA). The facsimile called for payment of the debt by 13 March 2002 failing which a creditor's petition for bankruptcy was to be issued against both Mr and Mrs Radovanovic. The facsimile also called for payment of the amount set out in the statutory demand that had previously been served on Murchison Queen, and threatened to appoint a liquidator on failure to comply with that notice by 13 March 2002.

46 It is apparent that by the end of February 2002, the relationship between Mr Williams and his client had completely broken down. Williams & Co had incurred quite substantial fees on behalf of Murchison Queen and Mr Radovanovic. Mr Williams was entitled to pursue recovery action against Murchison Queen whether by suit or by the issue of a statutory demand against the company. There is nothing in the materials before the Tribunal which suggests that the failure by Murchison Queen to meet its liabilities was in any way justified. Had Mr Williams' retainer been completed, there is no question that he was at liberty to act contrary to his client's interest in the sense of pursuing payment by the client of his proper fees and disbursements. The taking of the assignment of the debt owed by Mr Radovanovic personally was a commercial step taken in an effort to make recovery action more effective. It was likened by Mr Clyne, who appeared for the practitioner, to the taking of security or a third party guarantee in the sense that those are commercial steps that might be taken quite properly by a lawyer seeking to secure recovery of his or her fees. Had Mr Williams ceased to act for Mr Radovanovic and Murchison Queen as soon as their relationship broke down, we do not consider that the taking of the assignment in order to improve Mr Williams' commercial position in relation to recovery of his fees could be said to create an unacceptable conflict of interest. The problem is, however, Mr Williams did not cease to act.

47 On 3 May 2002, the Supreme Court decision was delivered. Mr Williams' clients were successful, and were awarded four fifths of the costs of the action. It is not clear from the papers whether that costs order ultimately proved to be of any value, but we assume it was not.

48 Shortly after the decision was delivered, the unsuccessful plaintiff lodged a notice of appeal on 7 May 2002. Williams & Co acted on the appeal for Murchison Queen and Mr Radovanovic. On 10 June 2002, 20 June 2002, 26 June and 1 July 2002, Williams & Co, or a service company acting on its behalf, threatened to issue the bankruptcy notice against Mr and Mrs Radovanovic. In August 2002, Williams & Co lodged a notice of motion with the local court seeking substitution of Mr Williams, as assignee of the judgment obtained by Mr Workman, as plaintiff in the action and seeking liberty to issue execution against Mr and Mrs Radovanovic. That motion was successful.

49 On 3 September 2002, Mr Williams wrote to Mr and Mrs Radovanovic advising that the appeal had been listed for 12 September 2002 and suggesting that Mr and Mrs Radovanovic note that:

> "1. despite your persistent non payment of this firm's invoices, this firm will remain as the solicitors on record on behalf of you and Murchison Queen Pty Ltd, for the purposes of the above appeal;
>
> 2. this firm has briefed Mr Cywicki of Counsel to appear on behalf of you and Murchison Queen Pty Ltd at the hearing of the above appeal. In this regard, we anticipate the hearing of the above appeal to take approximately half a day and Mr Cywicki's fee will be approximately $3,000.00;
>
> 3. If (as anticipated) the appeal is dismissed, the Orders of His Honour Justice Hasluck made 3 May 2002 will be upheld and enforced. In this regard, we confirm that:
>
> 3.1 by 12 September 2002, the writer anticipates issuing a Bankruptcy Notice against both of you;
>
> 3.2 if the above appeal is dismissed and the above Orders enforced, your interest in the Eagle Hawk Mine will be acknowledged; and therefore

> 3.3 the writer will take all steps to ensure that the Eagle Hawk Mine is included as part of your bankruptcy estate, and hopefully sold by your Bankruptcy Trustee."

50 It appears that, by September 2002, in making decisions about the conduct of the appeal, Mr Williams was primarily motivated by his own interests in recovering his costs. That conclusion is supported by a letter sent by Mr Williams to the Complaints Committee on 8 September 2003. In that letter Mr Williams said:

> "By May 2002, the writer believed there was no realistic prospect of recovering any of this firm's outstanding legal fees and disbursements, without the costs payable pursuant to the tax costs orders made against the unsuccessful plaintiff in the Supreme Court Proceedings. As a result, the writer was effectively forced to run a Full Court appeal to defend the successful trial outcome and costs orders and thereby forced to bear the further expense of instructing counsel for the appeal to protect the costs orders gained at first instance."

51 By reason of the court lists, the matter did not proceed as originally scheduled. In the practitioner's amended answer to the allegations in this reference, it is asserted that in a conversation between the practitioner and the client in late October concerning arrangements for the new appeal date, the practitioner informed the client of increased costs necessary to prosecute the appeal and reminded Mr Radovanovic of the amounts outstanding and his repeated promises to pay. The answer asserts that "the client became flippant and, abandoning all previous promises to pay, then told the practitioner that for all outstanding monies he could wait until payment was made by the other side". The papers established that on 29 October 2002, Mr Williams did lodge a bankruptcy notice against Mr and Mrs Radovanovic. The practitioner remained on the record in relation to the appeal to the Full Court, and by reason of counsel becoming unavailable on the hearing date, Mr Williams appeared before the Full Court on 22 November 2002 when the appeal was dealt with.

52 On 11 December 2002, Williams & Co removed itself from the record in the appeal proceedings as solicitor for Mr Radovanovic. The firm remained on the record as solicitors for Murchison Queen until a notice of change of solicitors was filed on behalf of the company on 13 February 2003. The following day, 14 February 2003, the appeal was

dismissed, and thus the judgment in favour of Mr Radovanovic and Murchison Queen stood.

53 The bankruptcy proceedings instituted by Mr Williams were eventually withdrawn in June 2003.

54 As we have already observed, the relationship between Williams & Co and Mr Radovanovic and Murchison Queen had effectively broken down from February 2002 onwards. It is apparent from Mr Williams' own admission that he continued to act for those entities in the appeal proceedings principally in order to protect his own interests in upholding his client's judgment to improve Williams & Co's prospect of recovery of its fees. It is immaterial that Williams & Co's interest was substantially aligned with the client's interest. Mr Williams chose to conduct proceedings in a context where the necessary relationship of trust and confidence between solicitor and client was absent. Mr Williams' ability to give objective and disinterested advice to his client was severely affected by the course which he chose to take. In continuing to act after the relationship had broken down, Mr Williams ignored a fundamental requirement of the relationship between solicitor and client. In our view, the pursuit of bankruptcy proceedings against Mr Radovanovic while continuing to act for him in the litigation did create an unacceptable and serious conflict of interest. The creation and continuation of that conflict is conduct which falls short of the standard of professional conduct observed or approved by members of the profession of good repute and competence.

VR 12B of 2004

55 The third allegation against Mr Williams is that he was guilty of unprofessional conduct in misleading or attempting to mislead the Complaints Committee in response to enquiries of the Complaints Committee resulting from the complaint by Mr Radovanovic.

56 There are two occasions in which it is alleged that letters written by Mr Williams were misleading. Both concerned details which the Complaints Committee was seeking as to the precise nature and terms of the arrangement between Mr Williams and Mr Workman for the assignment of Mr and Mrs Radovanovic's debt.

57 To understand the allegations, it is necessary to review the correspondence which passed between Mr Williams and Mr Workman in February 2002.

58 Some time before 18 February 2002, Mr Williams apparently had a telephone discussion with Mr Workman regarding the judgment in favour of Mr Workman. On 18 February 2002, Mr Williams wrote by facsimile to Mr Workman confirming a previous telephone discussion and matters discussed including that:

> "The writer wishes to acquire the Judgment Debt from you on the following terms, namely:
>
> 5.1 the Judgment Debt be assigned to the writer for nominal consideration;
>
> 5.2 upon recovery, the writer will reimburse to you the remaining balance of the principal sum of the Judgment Debt;"

59 The letter sought confirmation of "agreement to the above" by return facsimile.

60 There was apparently a further telephone discussion between Mr Workman and Mr Williams on 20 February 2002 because the following day Mr Workman sent a letter to Mr Williams referring to a brief discussion on 20 February 2002. Mr Workman advised that he had sought advice of counsel concerning any ethical or other constraints upon his participation in the proposed arrangement. The advice Mr Workman had received was that there were no ethical constraints nor any constraints in relation to the release of information or documents to Mr Williams. Accordingly, Mr Williams sent a draft deed of assignment to Mr Workman under cover of a facsimile dated 25 February 2002 in which Mr Williams said "as previously discussed and agreed, the writer intends to enforce the debt (once assigned) and upon recovery pay to you the remaining principal sum of the debt, which we estimate to be $11,541.53". The following day, Mr Workman wrote to Mr Williams suggesting some amendments to the draft deed and stating " I note and confirm the agreement (set out in paragraph 3 of your facsimile) that upon recovery from Mr and Mrs Radovanovic you will pay the amount of the debt to me".

61 On 27 February 2002, Mr Williams sent a further draft deed. On 6 March 2002, Mr Workman sent an executed copy of the deed of assignment to Mr Williams and asked to be kept advised "from time to time, as to payments received in reduction of the Debt".

62 The deed of assignment of debt provided that the assignment was made in consideration of the payment by the assignee to the assignor of the sum of $10. There was no mention of any obligation on the part of Mr Williams to pay any further sum to Mr Workman, and in particular, no provision was made for any reimbursement to Mr Workman of the principal sum of the debt in the event of recovery of it by Mr Williams.

63 Mr Radovanovic made a complaint to the Complaints Committee by letter dated 20 November 2002, apparently received by the Complaints Committee on 22 November 2002. Interestingly, the complaint was received by the Complaints Committee the very day that Mr Williams appeared as counsel for Mr Radovanovic and Murchison Queen before the full court of the Supreme Court. The complaint attached a number of documents, and although the complaint was not stated with precision, it appears to revolve around Mr Williams "buying a debt from another lawyer and issuing us with a bankruptcy notice while still acting for us".

64 On 29 November 2002, a legal officer from the Complaints Committee wrote to Mr Williams advising him of the complaint, and stating that "Mr Radovanovic's complaint is that you have continued to act for Mr Radovanovic while placing yourself in a conflict of interest situation by having a debt owed by Mr Radovanovic to Mr Workman assigned to you. Further, you have issued bankruptcy proceedings against Mr Radovanovic while continuing to act for him in his Supreme Court proceedings.

65 The letter sought Mr Williams' comments and submissions and stated "when doing so, please provide details of your agreement with Mr Workman leading to the assignment of debt. I note from the deed of assignment of debt provided by Mr Radovanovic, that the consideration for the assignment was $10. Does the deed reflect the entire agreement?".

66 Mr Williams responded to that letter by facsimile on 3 December 2002. He asked that, in order to properly formulate a response, he be provided with a copy of Mr Radovanovic's complaint, and enquired as to "the basis for your enquiry regarding the Assignment of Debt from Mr Workman to the writer".

67 On 10 December 2002, the legal officer responded, advising that "the basis for my enquiry is that it was a subject of the complaint. Please note that in any event the Committee can enquire into matters without complaint pursuant to section 25(1)(c) of the *Legal Practitioners Act*". On 17 December 2002, Mr Williams wrote to the Complaints Committee,

acknowledged receipt of the letter of 10 December 2002, and advised that he was endeavouring to complete a substantive response. The facsimile then noted that Mr Radovanovic's complaints relate to:

> "1. the issuing of the Bankruptcy Notice against Mr and Mrs Radovanovic, whilst (allegedly) acting for them;
>
> 2. writing 'constant threatening letters';
>
> 3. allegedly failing to 'recognise the sum of $6,000 already paid towards the debt'."

68 Mr Williams wrote again to the Complaints Committee on 19 December 2002 indicating that Mr Williams had been unable to locate all of the annexures to Mr Radovanovic's complaint, but proposed to make a "further response regarding the alleged conflict of interest" as soon as possible after the missing annexures are located. The legal officers followed the matter up by letter dated 16 January 2003 to which Mr Williams responded on 10 February 2003. That response denied any conflict of interest on the basis that Mr Williams contended that by continuing on the record he had in fact protected Mr Radovanovic's interests and contended that a duty of loyalty was not breached by attempts to recover unpaid fees and disbursements.

69 By letter dated 5 March 2003, the Complaints Committee wrote again to Mr Williams saying "you do not in your previous correspondence provide details of your agreement with Mr Workman regarding the assignment of debt, as requested in my letter to you of 29 November 2002. Please provide any documentation you have relating to the agreement. Please also advise whether the $10 referred to in the deed of assignment as being consideration for the assignment was the total consideration".

70 The following day, Mr Williams wrote to the Complaints Committee in response. He stated:

> "The copy documentation forming Mr Radovanovic's alleged complaint (previously forwarded by you) contains the relevant Deed of Assignment of Debt and related correspondence.
>
> The writer's review of Mr Radovanovic's complaint does not disclose any issues relating to the formation of the agreement to assign the debt, or the consideration for same. Those areas of inquiry appear to have been first raised by you (and not

> Mr Radovanovic). The writer therefore respectfully requests your advice regarding the basis upon which those areas of inquiry are raised, and your entitlement to do so."

71 It is that letter which is the first of the two letters said to be misleading. The Complaints Committee asserts that it is misleading because it implies that Mr Williams held no other documents relating to the agreement other than those already in the Complaints Committee's possession. It is common ground that, as at 6 March 2003, the Complaints Committee was not in possession of the copies of the correspondence passing between Mr Williams and Mr Workman between 18 February 2002 and 6 March 2002 which is referred to above.

72 On 7 March 2003, the legal officer again wrote to Mr Williams referring to s 25(1)(c) of the LP Act in relation to the query as to the basis for the Complaints Committee's enquiries. The letter concluded "I look forward to an answer to my queries".

73 Mr Williams responded to that letter on 18 March 2003 advising that he had forwarded a proposed response to counsel for settling and would provide that as soon as counsel's advice permitted. He did not provide a further response however before 30 April 2003, when the legal officer again followed the matter up by letter. Subsequently, Mr Williams advised that counsel from whom he had sought advice had recommended taking further advice from senior counsel, and that Mr Williams was seeking that advice. There was further delay in providing a substantive response, and after further prompting from the Complaints Committee in July 2003, Mr Williams eventually provided a substantive response on 8 September 2003, apparently with the benefit of senior counsel's advice.

74 In relation to the question of consideration for the assignment of debt, Mr Williams stated:

> "1. With reference to the Deed of Assignment of Debt (copies of which have previously been provided) dated February 2002, the terms of the Deed are expressed to be an entire agreement. In the event that the assigned debt was paid, it had been the writer's intention to make a voluntary payment to Mr Workman in the amount of at least the principal sum of the assigned deed ie $11,541.53. I do not regard that intention on my part (which is not mentioned in the Deed) as being a part of the consideration for, or as a collateral component of the

Deed. It was something that the writer, whilst not bound to do, thought an appropriate gesture, if the debt was in fact ever met;

2. The writer had volunteered that proposal to Mr Workman who had said that it was not necessary and Mr Workman did not ever seek a payment of any consideration beyond the $10 as specified in the Deed;

3. The writer had suggested the voluntary payment to Mr Workman on the basis that the writer saw a personal obligation to assist Mr Workman (at the same time as the writer was attempting to recover monies owing to this firm). The writer had sought the assignment of the debt (which was the subject of an unsatisfied judgment) in an effort to make Mr Radovanovic address the significant debt he owed (and still owes) to this firm. The writer was preoccupied with the fact of the assignment of a debt, not the quantum of same."

75 It is that passage in the letter which is said to constitute the second aspect of the allegation of misleading the Complaints Committee. The letter is said to be misleading in that:

"1. Workman had required, in consideration of the assignment, the practitioner's agreement that upon recovery of any monies owed pursuant to the debt from Radovanovic that the practitioner would pay the amount of the debt to Workman; and

2. Workman had not, prior to the execution of the Deed of Assignment by Workman and the practitioner, told the practitioner that it was not necessary for the practitioner to pay to him at least the principal sum of the assigned debt."

76 The Complaints Committee's contention is based upon the contents of the exchange of correspondence between Mr Williams and Mr Workman between 18 February 2002 and 6 March 2002.

77 In his answer to the reference, Mr Williams says as to the letter of 6 March 2003 that that letter was an interim response not intended to convey all or indeed any relevant information.

78 It is clear that Mr Williams' letter of 6 March 2003 seeks further advice as to basis for the Complaints Committee's enquiries concerning the formation of the agreement to assign the debt. That enquiry would not have been necessary if the previous sentence concerning the documentation was intended to be a final answer to the Complaints Committee's enquiries as to the circumstances of the formation of the agreement and the documents surrounding it. The legal officer's response of 7 March 2003, which concludes with the words "I look forward to an answer to my queries" suggests that Mr Williams' letter was not construed as a final statement of his response to the questions that had been put to him.

79 We accept that Mr Williams' correspondence with the Complaints Committee between November 2002 and March 2003 demonstrates a desire on Mr Williams' part to avoid answering the specific questions put to him. He took far too long in providing a substantive response, and his tardiness in that regard reflects poorly on him. It is no answer to blame pressures of work and the availability of counsel for untoward delay in responding to enquiries from the Complaints Committee. There is an obligation on practitioners to give full and frank disclosure promptly upon enquiry being made by the Complaints Committee. The allegation made to the Tribunal against Mr Williams is, however, not one of delay in responding, or delay in providing full and frank disclosure, but is an allegation of misleading. The facsimile of 6 March 2003 tended to avoid the issue, but, in failing to address the issue, it did not mislead, because it was not a substantive response to the questions posed.

80 In relation to the facsimile of 8 September 2003, Mr Williams contends in his answer that statements contained in par 1 and par 2 are an accurate statement of the facts, and not, as the Complaints Committee contends misleading. That assertion appears inconsistent with the plain terms of the correspondence between Mr Workman and Mr Williams recording the assignment transaction. It is that correspondence upon which the Complaints Committee relies to establish the falsity of the statements in the facsimile of 8 September 2003.

81 Mr Workman was not called by either party to give evidence at the hearing. In late December 2005 the Complaints Committee did, however, seek information from Mr Workman as to his recollection of events. By letter dated 11 January 2006, Mr Workman wrote to the Complaints Committee a letter detailing his recollection of events. That letter formed part of the agreed bundle tendered at the hearing. Mr Workman's first record of a discussion with Mr Williams was a file note dated

13 February 2002. The file note contains a notation "collect principal sum". In his letter, Mr Workman said that he believed that that may be a reference to a statement by Mr Williams to the effect that payments received by Mr Williams (subsequent to any assignment) would then be paid by Mr Williams to him. Mr Workman noted par 5.2 of the facsimile of 18 February 2002 but made no comment about it in his letter. As to the comment in Mr Williams' letter of 25 February 2002 as to his intention to pay the remaining principal sum to Mr Workman upon recovery, Mr Workman said that he believed that to be a reference to discussions during the telephone conversation of 13 February 2002.

82 In regard to his own letter of 26 February 2002, where he noted and confirmed the agreement that upon recovery Mr Williams would pay the amount of the debt to him, Mr Workman said:

> "I was aware that the precise and formal terms of the draft Deed of Assignment of Debt did not require Mr Williams to make any payment or re-imbursement to me if he was able to recover the Judgment Debt (once assigned). I regarded the 'agreement' to repay or re-imburse me any part of the Judgment Debt (if recovered) as an informal and non binding arrangement between us."

83 Similarly, Mr Workman said that his request in his letter of 6 March 2002 to be kept advised as to payments was "a reference to what I regarded as the informal/non binding intention on the part of Mr Williams to make payment to me of the Judgment Debt if recovered by him".

84 In response to specific questions asked by the Complaints Committee, Mr Workman stated:

> "(a) it is my understanding that the formal contractual position as set out in the Deed of Assignment of Debt is that Mr Williams (as Assignee) could retain any amount of the assigned Judgment that may have subsequently been received by him from the Debtors;
>
> (b) accordingly, I believe that the formal contractual position was that Mr Williams had no binding obligation to pay me any amount received by him;
>
> (c) however, Mr Williams had effectively stated that it was his intention that if received payment of the balance of

the Judgment Debt then he would 're-imburse' me such payment. I regarded this as an informal/non binding arrangement;

(d) I was happy to rely on the integrity of Mr Williams to advise me as to any payments received and to make any payments to me;

(e) I anticipated that if Mr Williams made any payment to me pursuant to the informal/non binding arrangement, he would retain, from any payments received by him, his reasonable costs and disbursements incurred (although I have no present recollection of this being discussed)."

85 Mr Workman concluded his letter by adding that he had not discussed the contents of his response with Mr Williams or any solicitor or counsel instructed by him.

86 The account of the arrangements given by Mr Williams to the Complaints Committee in his facsimile of 8 September 2003 aligns closely with the account of events given by Mr Workman in his letter to the Complaints Committee of 11 January 2006. In order to conclude that Mr Williams' facsimile of 8 September 2003 was misleading, it would be necessary to reject the account of events given by Mr Workman. The Tribunal was invited by counsel for the Complaints Committee to conclude that Mr Workman's recollection of events, as outlined in the letter of 11 January 2006, should not be accepted as accurate in light of the terms of the correspondence exchanged between Mr Workman and Mr Williams in February and March 2002. That submission highlights the difficulty of dealing with matters of this nature purely on the basis of documents. There is no suggestion that Mr Workman has not responded conscientiously to the enquiry of the Complaints Committee in writing his letter of 11 January 2006. There is no suggestion that Mr Workman's version of events has been put forward in the light of discussions with Mr Williams or any representative of Mr Williams, and Mr Workman expressly states that it was not. There is no suggestion that Mr Workman was provided with a copy of Mr Williams' facsimile of 8 September 2003. Bearing in mind the need for a tribunal, in a matter such as this, to feel an actual persuasion of the occurrence or existence of the relevant facts (see ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 at 361-362, and ***Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*** (1992) 67 ALJR 170 at 170-172). The Tribunal is not satisfied that it should reject the account of

events given by each of Mr Workman and Mr Williams by reason of the terms of the correspondence between them.

87 It follows that the Complaints Committee has not established that the facsimile of 8 September 2003 was misleading, and thus that the allegation in matter VR 12B of 2004 is not made out.

Conclusion

88 For the foregoing reasons, the complaints of unprofessional conduct contained in matters VR 351 of 2005 and VR 12B of 2004 should be dismissed. The complaint of unprofessional conduct by reason of the creation of a conflict of interest as alleged in matter VR 12A of 2004 is made out, and the Tribunal will hear the parties as to the appropriate penalty to be imposed in relation to that finding.

Orders

VR 12 of 2004

1. There is a finding of unprofessional conduct by the practitioner in creating an unacceptable conflict between his own interests and those of his client.
2. The practitioner is fined $2000 to be paid to the Legal Practice Board within 28 days.
3. The practitioner is reprimanded.
4. The practitioner is to pay to the Legal Practice Board, the Legal Practitioners Complaints Committees costs fixed at $5000, within 28 days.
5. The application is otherwise dismissed.

VR 351 of 2005

1. The application is dismissed.

I certify that this and the preceding [88] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUDGE J CHANEY, DEPUTY PRESIDENT