

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and WROUGHTON [2013] WASAT
191

MEMBER : JUDGE T SHARP (DEPUTY PRESIDENT)
MS V O'TOOLE (SENIOR SESSIONAL MEMBER)
MR H DEMBO (SENIOR SESSIONAL MEMBER)

HEARD : 9 AUGUST 2013

DELIVERED : 27 NOVEMBER 2013

FILE NO/S : VR 110 of 2012

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

KAREN ALETHEA MULLALLY WROUGHTON
Respondent

Catchwords:

Legal practitioner - Unsatisfactory professional conduct - Conduct falling short of the standard of competence and diligence expected of a reasonably competent Australian practitioner - Instituting court proceedings without any or adequate evidence to support the claim - Failing to provide any or adequate advice - Failing to respond in a timely manner to requests from another practitioner

Legislation:

Legal Practice Act 2003 (WA)

Legal Profession Act 2008 (WA), s 402, s 403, s 438(1), s 622(2)

Legal Profession Conduct Rules 2010 (WA)

Result:

A finding of unsatisfactory professional conduct

Summary of Tribunal's decision:

The Legal Profession Complaints Committee brought an allegation to the Tribunal that Karen Alethea Mullally Wroughton engaged in professional misconduct. The conduct complained about related to her representation of her client in proceedings in the District Court for breach of contract and negligence against a surgeon. The Committee alleged that the practitioner's conduct involved a substantial and a consistent failure to reach or maintain a reasonable standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner.

The Committee subsequently amended its application to allege that the practitioner was guilty of unsatisfactory professional conduct rather than professional misconduct.

The Tribunal considered the allegations and the grounds for them. It concluded that the Committee's allegations against the practitioner had been made out and that the practitioner was guilty of unsatisfactory professional conduct.

Category: B

Representation:

Counsel:

Applicant : Ms KF Banks-Smith
Respondent : In person

Solicitors:

Applicant : Legal Profession Complaints Committee
Respondent : N/A

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

NSW Bar Association v Meakes [2006] NSWCA 340

Studer v Boettcher [2000] NSWCA 263

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 In an application dated 13 July 2012, the applicant (**Committee**) brought a complaint of professional misconduct against the respondent (**Practitioner**). The conduct complained about occurred between 1 June 2007 and 14 May 2009. It related to the Practitioner's representation of Mr Phillip Edward Coster (**Coster**) in District Court action No 1070 of 2007 (**District Court proceedings**). The District Court proceedings were in relation to Coster's claim for breach of contract and negligence against a surgeon referred to by the parties, and consequently in these reasons, as **the Defendant**. The Committee alleges that the Practitioner's conduct involved a substantial and consistent failure to reach or maintain a reasonable standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner.

Applicable legislation

2 The provisions of the *Legal Practice Act 2003* (WA) (**2003 Act**) were in force until 1 March 2009, when the *Legal Profession Act 2008* (WA) (**Legal Profession Act**) commenced operation. Under s 622(2) of the Legal Profession Act, the Legal Profession Act applies to conduct consisting of a contravention of the 2003 Act as if the conduct consisted of a contravention of the Legal Profession Act.

3 Accordingly, the Legal Profession Act applies to the alleged conduct the subject of the Committee's application.

4 The term 'unsatisfactory professional conduct' is defined in s 402 of the Legal Profession Act as follows:

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

5 The more serious form of unprofessional conduct, 'professional misconduct' is defined in s 403 to include 'unsatisfactory professional conduct ... where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'.

Background

6 The facts in this matter as set out below have been taken from the
Committee's application and are largely uncontested.

7 At all relevant times the Practitioner was an Australian legal
practitioner, as defined in the Legal Profession Act.

8 On 16 May 2003, the Defendant performed a surgical operation to
repair a left inguinal hernia that Coster had suffered in the course of his
employment as a spray painter.

9 Some three months later, Coster began to experience pain at or
around the site of the initial surgery. Further surgery was performed by
the Defendant on 11 September 2003 and again on 26 February 2004 to
try to relieve Coster's ongoing post operative pain.

10 That surgery did not achieve the desired outcome. Coster then
ceased his former employment.

11 Coster engaged Mr Patrick Mullally (**Mullally**), who was at the
relevant time a registered industrial agent employed by an entity named
Workclaims Australia, to make a claim on his behalf for worker's
compensation.

12 In a letter dated 30 August 2004, Mr Christopher Lawson-Smith, a
general surgeon, provided a report to Coster's general practitioner. This
concerned Coster's ongoing post-operative pain and contained an opinion
as to its cause for the purposes of Coster's worker's compensation claim
(**the Lawson-Smith report**).

13 The Lawson-Smith report stated that:

- a) pain due to nerve injury is common whether mesh
hernioplasty or suture repair is undertaken; and
- b) the author suspected that the ilioinguinal nerve had
become incorporated in scar tissue associated with the
repair.

14 The Lawson-Smith report did not address the issue of whether there
was any negligence on the part of the Defendant.

15 In November 2004, Coster's worker's compensation claim settled
and, in early 2005, Mullally discussed with Coster a potential action in
negligence against the Defendant.

16 On 24 February 2006 a meeting was held between Coster, Mullally
and the Practitioner. This is the only time that the Practitioner and Coster
met each other. At the meeting, the Practitioner discussed with Coster the
possibility of lodging a complaint with the Office of Health Review
regarding health services provided by the Joondalup Health Campus
through the Defendant and of commencing an action in negligence against
the Defendant.

17 On 5 September 2006, the Practitioner on behalf of Coster (and
subsequently Coster himself), submitted a complaint to the Office of
Health Review. On 6 November 2006, the Office of Health Review
advised Coster that it would not accept his complaint because it was more
than 12 months since the events the subject of the complaint occurred.

18 On 1 June 2007, the Practitioner on behalf of Coster commenced the
District Court proceedings and on 24 October 2007, the Practitioner filed
and served Coster's statement of claim. The statement of claim alleged
that, due to the negligence of the Defendant while performing surgery to
prepare Coster's left inguinal hernia, Coster's ilioinguinal nerve became
incorporated in scar tissue, resulting in damage to the nerve and the client
experiencing ongoing post-operative pain (**Coster's claim**).

19 On 27 November 2007, the Defendant's solicitors, Clayton Utz, filed
the Defendant's defence, together with a request for further and better
particulars of the statement of claim.

20 In a letter dated 2 January 2008 to the Practitioner, Clayton Utz
offered to settle the proceedings on the basis that the proceedings be
dismissed and that each party bear its own costs.

21 In a letter dated 4 April 2008 to Clayton Utz, the Practitioner
provided the further and better particulars requested.

22 In a letter dated 24 June 2008 to the Practitioner, Clayton Utz:

- a) provided a copy of a report dated 3 June 2008 from a
general surgeon, Mr Chris Couch (**the Couch report**);

- b) noted that, despite Coster's claim, Coster had undergone further surgery for the repair of his right inguinal hernia by the Defendant on 27 May 2004;
- c) made a further offer to settle the action by dismissal of the proceedings with each party bearing its own costs; and
- d) expressed the view that they expected to be served with the expert evidence to be relied upon in the District Court proceedings in the very near future.

23 In a letter dated 20 July 2008 to Clayton Utz, the Practitioner rejected Clayton Utz's view that the Couch report exonerated the Defendant and confirmed that Coster intended to proceed. Then, in a further letter to Clayton Utz dated 4 August 2008, the Practitioner informed them that she would 'revert to [Clayton Utz] later in the week with a list of expert evidence to be relied upon'.

24 On 3 November 2008 a registrar of the District Court ordered that on or before 17 November 2008 the Practitioner should list the matter for trial. On 18 November 2008, the Practitioner listed the matter for trial. A pre-trial conference was listed for 18 December 2008.

25 In a letter to the Practitioner dated 26 November 2008, Clayton Utz noted that, despite repeated assurances that she would do so, the Practitioner had still not disclosed any expert evidence relating to either liability or quantum of damages. Clayton Utz again requested that the Practitioner disclose the expert evidence upon which Coster would rely.

26 In response, on 27 November 2008, the Practitioner sent a copy of the Lawson-Smith report to Clayton Utz, along with internet articles by Professor Lowenfels and Dr Ndiaye relating to nerve damage during repairs of inguinal hernias. The Practitioner described them as '... reports upon which [Coster] relies to establish liability'.

27 On or around 3 December 2008, the Practitioner briefed Mr Ronald Bower of Corser & Corser (**Bower**) to attend the pre-trial conference on 18 December 2008. The matter did not settle and the conference was adjourned to 16 February 2009. Shortly after the conference, Bower wrote to Mullally and Workclaims Australia with a report on the outcome of the conference. In that report, Bower noted that the Lawson-Smith report was not sufficient evidence to support Coster's claim. He recommended that Coster should see a surgeon with a view to

obtaining a report on liability. He said that such report should be provided to Clayton Utz by 2 February 2009.

28 The Practitioner then requested a report from Mr Graeme Clarke, a surgeon, about the alleged negligence of the Defendant and the cause of Coster's post-operative pain. In a letter dated 28 April 2009, Mr Clarke provided a report to the Practitioner (**the Clarke report**). The Clarke report did not support Coster's claim.

29 The Practitioner had no further involvement in Coster's matter.

The allegations by the Committee against the Practitioner

30 The Committee alleges that the Practitioner's conduct in the course of representing Coster involved a substantial and consistent failure to reach or maintain a reasonable standard of competence and diligence in that she:

- a) instituted and continued the District Court proceedings without any or any adequate evidence to support Coster's claim;
- b) purported to rely on articles downloaded from the internet as expert medical evidence to support Coster's claim;
- c) failed to provide any or any adequate advice to Coster or to Mullally in a timely manner or at all:
 - i) as to the merits and possible cost consequences to Coster of commencing the District Court proceedings in the light of the medical evidence in the possession of Coster or the Practitioner at that time;
 - ii) of the need to obtain expert medical evidence to support Coster's claim; and
 - iii) as to the effect of the medical advice contained in the Couch report on Coster's claim;
- d) failed to respond in a timely manner or at all to requests from Clayton Utz:
 - i) for disclosure of the expert evidence upon which Coster intended to rely;

- ii) to supply copies of Coster's medical records from the Joondalup Health Campus;
 - iii) to supply further and better particulars of negligence; and
 - iv) to have the action removed from the inactive list and the matter listed for trial; and
- e) failed adequately or at all to report or to keep Coster adequately informed about the District Court proceedings.

The findings sought by the Committee

31 The Committee in its application sought a finding by the Tribunal that the Practitioner engaged in professional misconduct pursuant to s 438(1) of the Legal Profession Act.

32 However, at the hearing, the Committee stated through counsel, Ms KF Banks-Smith, that it would be content to accept an order or finding that the Practitioner engaged in unsatisfactory professional conduct pursuant to s 438(1) of the LP Act. Later in the proceedings, the Committee sought and was given leave to amend the application to that effect (T:56, 9.8.13).

33 Counsel for the Committee also advised the Practitioner and the Tribunal that it did not intend to press its allegation that the Practitioner failed to respond in a timely manner or at all to requests from Clayton Utz to supply further and better particulars of negligence (paragraph 55(d)(iii) of the Committee's application) (T:36-7, 9.8.13).

The hearing

34 The hearing of this matter took place on 9 August 2013. The Practitioner was not represented and attended by telephone. The Committee was represented by counsel.

Practitioner's objection to the Committee's documents

35 Prior to the Committee addressing the Tribunal on its case, the Committee advised the Tribunal that the Practitioner had on the previous day contacted the Committee. She had advised the Committee that she objected to the Committee tendering any documents not originating from her file. The Tribunal invited the Practitioner to address this issue. The

Practitioner repeated her objection but gave no reason for it. The Tribunal accordingly overruled it.

36 The Practitioner then sought an order that she be given access to or copies of the files of Messrs Bower and Mullally. However, despite prompting from the Tribunal, the Practitioner did not apply for, nor did she seek an adjournment of the proceedings. She told the Tribunal that she did want to see those files, but that she also wished the hearing to proceed immediately. Accordingly, she was content not to have access to those documents prior to the hearing.

37 Because the Practitioner did not demonstrate any forensic purpose to be achieved in the production of such files, the Tribunal considered that the granting of such an order would serve no purpose. Accordingly, the Tribunal declined to make that order.

38 The Practitioner then informed the Tribunal that she would not be giving evidence nor would she be calling any witnesses. However, she stated that once the Committee had presented its case, she then wanted the opportunity to make written submissions. The Tribunal gave leave for the Practitioner to do so.

Evidence before the Tribunal

39 Over further objection from the Practitioner, the Committee tendered a book of documents dated 1 May 2013 (**Exhibit A**), and a supplementary book of documents dated 24 May 2013 (**Exhibit B**). The Committee also tendered a witness statement from Coster dated 14 May 2013 (**Coster's witness statement**).

40 Before those documents were admitted in evidence, the Practitioner explained that her objection to the Committee tendering documents was limited to documents not originating from her file. She stated that she disputed the authenticity of any document 'signed by someone else other than myself' (T:33, 9.8.13). The Tribunal ruled that the books would be admitted. The Practitioner provided no evidence to lead the Tribunal to conclude that these documents are anything other than genuine and what they purport to be. The Tribunal considered that the documents should all be accepted as if they were proven and formally authenticated.

41 The Committee then proceeded. It highlighted a number of 'key documents' from Exhibit A and Exhibit B. The 'key documents' referred to by the Committee are described below. The document number specified in each case is the number given to the particular document in

the index of each book. The page numbers referred to are the page numbers of the relevant book.

Documents included in Exhibit A

1. Document No 1, page 1 - 5.
This is the agreement concerning Coster's worker's compensation claim.
2. Document No 3, page 7.
This is a letter from Mullally to Coster dated 3 March 2005 relating to potential claims against the Defendant. It advises that Mullally will be investigating all aspects of the matter.
3. Document No 6, page 10.
This is a letter from Mullally to Coster. It advises Coster that the Practitioner is to be appointed to carry out the legal services to prosecute Coster's claim. It provides that Workclaims Australia will charge an upfront fee of \$5,000 to enable legal work to prosecute the claim.
4. Document No 7, page 11 and Document No 8, page 12.
These are respectively Workclaim Australia's invoice for \$5,000 and an advice that an appointment had been made for Coster to see the Practitioner.
5. Document No 12, page 17 - 20.
This is a letter from the Practitioner to the Office of Health Review. The Practitioner states inter alia 'I act for [Coster] ...'. The Practitioner also says, at page 19, that 'Our client considers that [the Defendant] was negligent ...' and on page 20, first paragraph, '... [the Defendant] carried out the operation negligently, ...'.
6. Document 12 (m), page 32 - 33.
This is the Lawson-Smith report. This document refers to pain due to nerve injury which is 'common'. It makes no mention of any negligence nor breach of duty by the Defendant nor was it in the form of an expert report.
7. Document No 16, page 49.

This is a letter from Mullally in February 2007 advising Coster that the Practitioner will shortly be back from maternity leave and will report to him.

8. Document No 17, page 50.

This is letter from Mullally to the Practitioner in April 2007 requesting on Coster's behalf that she give consideration to commencing District Court proceedings.

9. Document 18, page 51.

This is the writ of summons issued 1 June 2007 with Coster as plaintiff and the Defendant as defendant, prepared and issued by the Practitioner.

10. Document No 20, page 56.

This is a letter from the Practitioner to Coster dated 20 July 2007. This advises Coster that the Practitioner has issued a writ and says that cases of this nature will be 'hard fought'. She notes that Coster cannot afford to take the case to a full hearing and that her instructions are to get this matter to a pre-trial conference where 'hopefully it can be settled'.

11. Document No 23, page 59 - 66.

This is the statement of claim filed 24 October 2007. Notably, it is issued without any expert evidence to support the allegations of negligence.

12. Document No 25, page 68.

This is a letter dated 31 October 2007 to the Practitioner from Clayton Utz, solicitors acting for the Defendant, which requested copies of medical records relating to various procedures performed on Coster.

13. Document No 26, page 69 - 76.

This is a copy of the Defendant's defence, in which he denies liability and negligence.

14. Document No 27, page 77 - 78.

This is a request for further and better particulars filed 28 November 2007.

15. Document No 28, page 79.

This is a letter from Mullally to Coster dated 31 December 2007 updating Coster on the progress of the matter.

16. Document No 29, page 80 - 81.

This is a letter from Clayton Utz to the Practitioner dated 2 January 2008. The body of this letter is set out in full below.

Phillip Coster v [the Defendant]

District Court No. 1070 of 2007

We refer to previous correspondence.

The Defendant denies all allegations of negligence made by the Plaintiff as set out in the Defence served upon you on 28 November 2007.

We are of the opinion that [Coster's] claim is wholly without merit. If the matter is continued, it will be defended and we are confident that [Coster's] claim will fail in its entirety.

At this early stage of the proceeding the costs incurred to date are not significant. Consequently, our clients are prepared to allow [Coster] to discontinue his action with no order as to costs provided that acceptance of this offer is forthcoming before 31st January 2008.

Should [Coster] not accept this offer and subsequently wish to discontinue this action or fail to establish liability at trial, the Defendant will seek a costs order against [Coster] and will take steps to enforce that order if necessary.

This offer is made in a genuine attempt to resolve this matter without incurring any further costs. It is not our intention to repeat the offer at any subsequent stage of the proceedings if it is rejected by [Coster].

We trust that you will discuss this offer with your client and explain to him the financial consequences which could follow if this offer is rejected.

We look forward to hearing from you within the period allowed for acceptance.

Please do not hesitate to telephone if you wish to discuss this matter further.

...

17. Document No 30, page 82.

This is a letter in reply to document no 29 from the Practitioner in which she says:

... I refer to previous correspondence and apologise for the delay. My client intends to continue with this claim. I will provide you with discovery and copies of documents previously requested by the end of this week. ...

18. Document No 31 and 32, pages 83 and 84.

There are letters from Clayton Utz to the Practitioner following up their requests for particulars and records from Joondalup Health Campus.

19. Document No 38, page 115 - 116.

This is a letter to the Practitioner from Clayton Utz dated 24 June 2008. It provides:

...

Phillip Coster v [the Defendant]

We have investigated this matter further and remain very firmly of the opinion that [Coster's] claim is without merit.

We enclose the report of Mr Chris Couch, General Surgeon, dated 3 June 2008. You will note that Mr Couch accepts no criticism whatsoever at the standard of care provided by [the Defendant] to [Coster].

[Coster's] case in respect of consent must fail given that, notwithstanding the complications experienced by [Coster] after the surgical repair of his left inguinal hernia on 16 May 2003, he still consented to [the Defendant] undertaking repair of the right inguinal hernia on 27 May 2004. At the time of the repair of the right inguinal hernia, [Coster] had first hand knowledge that there were risks associated with the procedure because some of those complications had eventuated following the repair of the left inguinal hernia. However, [Coster] still elected to proceed to surgical repair of the right inguinal hernia. In the circumstances, we fail to see how [Coster] has any prospects of convincing the Court that, if he had been aware of the complications associated with the original left inguinal hernia procedure, he would not have proceeded. Such an argument contradicts [Coster's] subsequent decision to proceed to surgical repair of the right hernia.

In a final attempt to bring this matter to a resolution without any further costs being incurred on behalf of the Defendant, we are instructed to allow [Coster] a further 14 days from the date of this letter to discontinue his action with no order as to costs. Should [Coster] not accept this offer and subsequently wish to

discontinue this action or fail to establish liability at the trial, the Defendant will seek a costs order against [Coster] and we shall take steps to enforce that order if necessary.

This offer is made in a further genuine attempt to resolve this matter without incurring any further costs and we trust that you will discuss this offer and the financial consequences of rejection with your client.

We trust that if the offer is to be rejected you will be in a position to serve the expert evidence to be relied on (sic) behalf of [Coster] and to proceed, within the very near future, to a pre-trial conference.

We look forward to hearing from you as soon as possible.

...

20. Document No 39, page 121.

In this letter dated 20 July 2008 to Clayton Utz, the Practitioner rejects the assertion that the report of Dr Couch clears the Defendant and she states that Coster intends to proceed.

21. Document No 40, page 122.

This is a letter dated 4 August 2008 from the Practitioner to Clayton Utz promising to revert later that week with a list of expert evidence to be relied on.

22. Document 44, page 126.

This is a letter dated 25 September 2008 from Clayton Utz to Ms Wroughton. The body of this letter says:

...

Phillip Coster v [the Defendant]

We refer to our previous correspondence.

You have still not returned the Minute of Consent orders forwarded to you originally under cover of our letter dated 30 July 2008 and, at your request, subsequently on 17 September 2008.

As previously indicated, we are of the opinion that this matter should not be allowed to delay indefinitely. As you have failed to return the Minute of Consent Orders we have had no alternative but to issue a Chamber Summons seeking the orders that we have

foreshadowed. We enclose a copy of the Chamber Summons we have prepared for your attention.

We would be grateful if you could respond to the issues that we have raised in our previous correspondences and advise whether you are now in a position to serve the expert evidence [Coster] intends to rely on.

We would be grateful for the courtesy of a response at your earliest convenience.

Hopefully, you will now be in a position to return the Minute endorsed with your consent so that attendance at Court will not be necessary thus avoiding further unnecessary costs.

...

This met with no response from the Practitioner which resulted in the Chamber Summons being issued, (Document 45, page 127), seeking orders inter alia that [Coster] enters the matter for trial within 14 days.

23. Document 47, page 129.

This is a letter dated 30 October 2008 from the Practitioner to Clayton Utz promising to provide the list of expert evidence within 7 days.

24. Document 49, page 131.

This is a letter dated 18 November 2008 from Clayton Utz to the Practitioner highlighting that she still had not entered the matter for trial and that they had still not received the 'liability expert evidence'.

25. Document 50, page 132.

This is the Entry For Trial dated 18 November 2008 signed by the Practitioner as solicitor for Coster. It certifies that Coster has complied with the relevant rules with regard to expert evidence ordered and that the matter is in all respects ready for trial.

26. Document 51, page 133.

This is a letter from Clayton Utz on 26 November 2008 to the Practitioner, asserting that she had still not provided her expert evidence.

27. Document 52, page 134 - 136.

In this letter from the Practitioner to Clayton Utz dated 27 November 2008, the Practitioner sends to Clayton Utz '... the following reports upon which the plaintiff relies to establish liability ...'. These were respectively the Dr Lawson-Smith report and two extracts which appear to be printouts from the internet. This was responded to in a letter from Clayton Utz dated 1 December 2008 (Document 53, page 137). The body of this response is reproduced below.

...

P Coster v [the Defendant]

District Court No. 1070 of 2007

We refer to your correspondence dated 27 November 2008 and the enclosed documents described as reports upon which [Coster] will rely to establish liability.

None of the documents is an independent expert report addressing the issues of breach of duty or causation. We do not see how any of the documents disclosed will assist [Coster] in establishing the pleaded allegations.

Please confirm that the documents disclosed under the cover of your correspondence dated 27 November 2008 are the only evidence that you intend to rely upon.

Please can you advise whether you will be calling Dr Lawson-Smith or the authors of the two articles to give oral expert evidence if this matter proceeds to trial. We would be grateful if you would advise whether Dr Lawson-Smith has agreed to act as an expert in this matter as it is not clear that he is aware that he has been put forward as an expert for [Coster] in these proceedings.

We are firmly of the opinion that [Coster] has no sustainable action and that he should seriously consider seeking to discontinue his action against the Defendant.

We fail to see how [Coster] expects to be able to overcome the difficulties presented by the entirely supportive report of Mr Chris Couch, General Surgeon.

We would be grateful for a response from you prior to the forthcoming pre-trial conference.

...

28. Document 58, page 147.

This is a letter dated 5 February 2009 from Clayton Utz to the Practitioner. The body of this letter is reproduced in full.

...

Coster v [the Defendant], District Court Action No.1070 2007

We refer to our previous correspondence and to the Pre Trial Conference on 18 December 2008 at which [Coster] was represented by Mr Ron Bower.

The PTC was adjourned until 16 February 2009 on the understanding that Mr Bower would discuss with you the need for [Coster] to obtain proper expert evidence and for that evidence to be served in advance of the adjourned PTC if [Coster] intended to continue with these proceedings. Mr Bower recognised the difficulties [Coster] would face in proceeding with this matter if [Coster] was unable to obtain and serve expert evidence in support of the allegations made.

As you are aware, we are firmly of the opinion that [Coster] has no reasonable prospects of establishing the pleaded claim. We have served the expert evidence of Mr Couch, General Surgeon, on which the Defendant will rely. Mr Couch is entirely supportive of the management of [Coster] by [the Defendant].

If [Coster] intends to proceed, please serve the expert evidence he will rely on without any further delay.

If [Coster] is not in the position to serve any expert evidence, please advise whether he will agree to having his action dismissed.

We would be grateful if you would respond to this correspondence within the very near future. If this matter is not to proceed, we would like to avoid any unnecessary costs preparing for, and attending, the PTC.

...

29. Document 60, page 149.

This is a letter from Clayton Utz to Bower, a copy of which was provided to the Practitioner (page 150). It expresses disappointment that no expert evidence has been obtained and confirming that the previous 'walk away offer' is withdrawn.

30. Document 62, page 151.

This is a letter, undated, from the Practitioner addressed to Mr Graham Clarke, General Surgeon seeking a report with respect to Coster.

31. Documents 63, page 153 and Document 66, page 156.

These are letters from Clayton Utz to the Practitioner concerning expert evidence and confirming the Registrar's orders at the pre-trial conference relating to the service of expert evidence.

32. Document 69, page 160 - 174.

This is the Clarke report addressed to the Practitioner. It is a lengthy report that relevantly states at page 162:

'... To this end I would state at the outset that there is nothing in the information that you've given me that suggests that [the Defendant's] surgery was inadequate in any way. The procedure that he undertook was that which most surgeons would have performed in 2003. ... I do not see that [Coster] has a valid claim against [the Defendant].

33. Document 71(a), page 177 - 180.

This is the Deed of Settlement ultimately signed by Coster.

34. Document 74, page 185 - 191.

This is Coster's complaint to the Committee.

35. Document 75, page 206 - 209 and Document 77, page 213 - 216.

These are letters to the Committee from the Practitioner dated 28 October 2009 relating to Coster's complaint.

36. Document 86, page 243 - 245.

This is Coster's response to the Practitioner's letter to the Committee in which he says that no 'offers of settlement' were made available to him and he was unaware of them. He says that because the offers were not disclosed to him, he was unable to make informed decisions. Coster confirms again that the Practitioner did not make him aware of [the] Couch report and he specifically denies instructing the Practitioner to continue with the action.

37. Document 87, page 246 - 247.

This is another letter from the Practitioner to the Committee dated 4 March 2011 where the Practitioner refuses to ask Mullally for copies of any letters of instruction. She stated that she used her Law Society diary to record important details of conversations which she alleged she was currently retrieving from storage.

Exhibit B - Supplementary Book of Documents

38. Document 4, page 11.

This is a letter from Bower to Clayton Utz in which he states '... that we continue to be retained to provide Counsel ...'. This letter is dated 13 February 2009.

39. Document 9, page 17.

This is Clayton Utz's letter to Bower enclosing a copy of the letter addressed to the Practitioner.

40. Document 10, page 19.

This is a facsimile dated 4 May 2009 from Bower to Clayton Utz. Bower tells Clayton Utz that he and his instructing solicitor, the Practitioner, will recommend to Coster that he discontinue the action.

Statement of Phillip Edward Coster

42 The Committee also relied on Coster's witness statement, which was admitted into evidence as Exhibit C. The Committee highlighted a number of paragraphs from that statement in summary that:

- he remembered meeting with Mullally; paragraph 12;
- he was told to see Mr Lawson-Smith for a report about his post-operative pain; paragraph 15;
- his worker's compensation claim was settled around November 2004; paragraph 19;
- he paid Mullally \$2,000 for a thorough investigation of all aspects and to determine if there was a good cause of action against the Defendant (Exhibit A, page 7); paragraph 24;
- Mullally wrote to him (Exhibit A, page 10) saying inter alia that if the Defendant did not warn him of the chance of nerve damage he would have a claim for negligence against the

Defendant. Further, he stated that 'our solicitor', (the Practitioner) would be appointed to prosecute such claim and that Mullally's employer - Workclaims Australia - would charge Coster an upfront fee of \$5,000 and that if the matter was not settled he would not incur any further fees; paragraph 29;

- Coster paid \$5,000 to Mullally on the understanding that this was for the Practitioner to represent him in negligence proceedings; paragraph 30;
- in February 2006 he and his wife met with Mullally and the Practitioner who was introduced to him as his solicitor; paragraph 32;
- he could not afford to proceed past the pre-trial conference; paragraph 36;
- the Practitioner indicated that his chances of success were good in making a damages claim against the Defendant; paragraph 37;
- the Practitioner was going to be his solicitor but that Mullally was going to be their 'go-between'; paragraphs 39 - 43;
- this was his first experience with having a solicitor; paragraph 44;
- he does not recall discussing the statement of claim with the Practitioner; paragraph 55;
- he has never before seen the defence file by the Defendant's solicitor nor does he recall discussing it with Mullally or the Practitioner; paragraph 57;
- he was never shown any offers of settlement. He did not receive advice from the Practitioner or Mullally about the offers, neither did he receive Mr Couch's report nor was it ever discussed with him by the Practitioner or Mullally; paragraphs 58 - 63;
- he met with Bower who was briefed on his behalf by the Practitioner. The Practitioner was not present; paragraph 65;

- he attended at the pre-trial conference with his wife and Bower and Bower's clerk. On 18 December 2008, neither the Practitioner nor Mullally were present; paragraph 69;
- he was told he needed another doctor's report. That was his last contact with Bower. His understanding at that time was that the Practitioner was still acting for him; paragraph 72 - 75;
- he saw Mr Clarke, paid Mullally \$2,200 for the report and recalls Mullally telling him that Mr Clarke's report was damaging in that he would have to stop proceedings; paragraph 86. He later signed the relevant documents to discontinue the proceedings and the Deed of Settlement was also signed;
- neither the Practitioner nor Mullally gave him any advice on these documents; paragraph 88 to the end of his statement.

The Practitioner's response

43 As the Practitioner foreshadowed at the outset of the hearing, she neither gave evidence nor called any witnesses. In particular, Coster's statement was received into evidence without objection and the Practitioner did not seek to call Coster for either examination or cross-examination.

44 Further, the Practitioner did not produce any file notes or other documents and relied entirely on her written closing submissions.

Conclusions on the evidence

45 The Tribunal accepts the evidence of Coster as truthful and complete. It is clear that the Practitioner at not time had any evidence to support the claim by Coster of negligence on the part of the Defendant. Despite this, even as early as September 2006, when the Practitioner wrote to the Office of Health Review (Exhibit A, document 12, page 17-20), the Practitioner makes an unqualified and unsubstantiated allegation of negligence on the part of the Defendant. Other than her own private internet research, she had the benefit of only the Lawson-Smith report, which document makes no mention of any negligence nor any breach of duty on the part of the Defendant. On the information provided, the Practitioner had simply nothing to support a view that she could succeed in a claim against the Defendant, nor is there any evidence of advice to her client to this effect.

46 Despite this, the Practitioner instituted the District Court proceedings and in November 2008 signed the Entry For Trial (Exhibit A, document 50, page 132). The certification by the Practitioner that Coster had complied with the relevant rules with regard to expert evidence ordered and that the matter was in all respects ready for trial were simply untrue.

47 Throughout the course of the matter, the Practitioner consistently failed to advise her client of the possible weaknesses in his case and the merits of the Defendant's defence. The Practitioner's assertion in her closing submissions that she was providing advice to Mullally 'to provide to the client' is not supported by the evidence and in any event does not excuse her failure to properly advise her client. Indeed, her occasional references in her closing submissions to discussions with or advice to Mullally as 'the agent for Mr Coster' only goes to further demonstrate her lack of understanding about her relationship with Coster.

48 From the terms of Coster's complaint to the Committee (Exhibit A, document 74, page 185 - 191), it is apparent that Coster's clear view is that the Practitioner was representing him, even though he had only met with her once. There can be no doubt that this was in fact the case. If the Practitioner is instead asserting that she was acting for and advising Coster through Mullally, we do not accept that assertion

49 When Clayton Utz wrote to the Practitioner on 2 January 2008 (Exhibit A, document 29, page 80 - 81), there was no evidence that Coster was advised of the contents of that letter, or of the Offer of Settlement which was included in that letter. Instead, the Practitioner responded to that letter (Exhibit A, document 30, page 82), by informing Clayton Utz that her client intended to continue with the claim. Coster's evidence is that he did not give any instructions to the Practitioner to that effect.

50 When Clayton Utz wrote to the Practitioner on 24 June 2008 (Exhibit A, document 38, page 115 - 116), they raised a legal issue, namely that the action had no prospect of success. This letter, it will be recalled, included a copy of the Couch report, which contained the opinion that all steps taken by the Defendant in Coster's clinical management were logical and reasonable and that in the opinion of Mr Couch there was no evidence that the standard of surgical care provided by the Defendant fell below an acceptable level.

51 The letter from the Practitioner to Clayton Utz dated 20 July 2008 (Exhibit A, document 39, page 121) contains a rejection of the assertions

made in the Couch report. However, there is no evidence to suggest that the Practitioner took her client's instructions and showed her client the Couch report before making that assertion.

52 The Practitioner wrote to Clayton Utz on 30 October 2008 (Exhibit A, document 47, page 129), confirming that she would provide a list of expert evidence. However, the Tribunal has not been persuaded that such evidence in fact existed.

53 When the Practitioner wrote to the Committee in response to the complaint on 28 October 2009, (Exhibit A, document 75, page 206 - 209), she made a number of other assertions which are clearly incorrect. She says that the Defendant did not make any offer of settlement at the first pre-trial conference and that '... the opposition were steadfast in not offering a settlement'.

54 The Practitioner also alleges that Coster, even after seeing the Couch report, instructed her to proceed. She has produced no evidence that this is the case and that statement is contradicted and denied by Coster. He says that the Practitioner did not make him aware of the Couch report and he denies instructing the Practitioner to continue with the action.

55 Finally, in a further letter from the Practitioner to the Committee dated 4 March 2011 (Exhibit A, document 87, page 246 - 247), the Practitioner states that she never provided Coster with legal advice. It is here that she attempts to draw some distinction between legal advice and the provision of legal services.

Findings

56 In the Tribunal's view, even though Coster instructed the Practitioner through a third party, namely Mullally, there is no question that the Practitioner was at all relevant times acting as Coster's lawyer. This is irrespective of whatever remuneration arrangements were in place. The Practitioner signed the certificate of readiness for trial, was on record as his solicitor and wrote letters on his behalf.

57 For the most part, the contact between the Practitioner and Coster was through Mullally. Accordingly, the result was that Coster was poorly advised by the Practitioner about these proceedings. In particular, we find that the Practitioner did not advise her client that, on the evidence available, there was simply nothing to support a view that he could succeed in a claim against the Defendant. Further, we find that, despite the fact that the necessity for expert evidence was frequently pointed out

by the Defendant's solicitor almost from the inception of the matter, the Practitioner did not advise Coster of the requirement for appropriate expert evidence concerning negligence of a medical practitioner. The Practitioner in fact demonstrated a total lack of knowledge of the elements of the tort of negligence and the issues involved in a case alleging professional negligence. Legal practitioners are not usually expert medical practitioners and they cannot opine on issues of whether an act or omission of a medical practitioner is a negligent act or omission. Both the Court and the practitioner concerned must be guided by experts in that field

58 Even if in fact the Practitioner believed that Mullally was 'the go-between' (the Practitioner's closing submissions at para 14), this does not absolve the Practitioner of her obligations to her client. Accordingly, on any analysis, there is no evidence to contradict the Committee's contention that the Practitioner failed to keep her client adequately informed.

59 The Practitioner also failed to inform Coster of the Defendant's offers of settlement. Clearly, and incorrectly, the Practitioner does not consider an offer to discontinue the proceedings, with no costs to either party, to be an offer of settlement. In her words, the two offers made by Clayton Utz 'were not offers in the sense that there was any monetary value attached to the offer'. Nonetheless, offers of settlement were made but Coster was not given an opportunity to consider them. As was pointed out by the New South Wales Court of Appeal in *Studer v Boettcher* [2000] NSWCA 263 at [74] and at [75]:

Although it is in the public interest for disputes to be compromised whenever practical, a lawyer is not entitled to coerce a client into a compromise which is objectively in the client's best interests, at least when the client alone must bear the consequences of the decision. The client, not the lawyer, is entitled to decide whether to compromise or to litigate.

Broadly, and not exhaustively, a legal practitioner should assist a client to make an informed and free choice between compromise and litigation, and, for that purpose, to assess what is in his or her own best interests. The respective advantages and disadvantages of the courses which are open should be explained. The lawyer is entitled, and if requested by the client obliged, to give his or her opinion and to explain the basis of that opinion in terms which the client can understand. The lawyer is also entitled to seek to persuade, but not to coerce, the client to accept and act on that opinion in the client's interests. The advice given and any attempted persuasion undertaken by the lawyer must be devoid of self-interest. Further, when the client alone must bear the consequences, he or she is entitled to make the final decision.

60 Coster was not given these opportunities of early settlement, because
the Practitioner failed to pass those offers on to Coster for his
consideration.

61 The Tribunal therefore finds that the Practitioner instituted and
continued the District Court proceedings without any evidence other than
her own research to support the claim and that she failed to provide
adequate advice to Coster about the merits of his claim, including the need
to obtain expert medical evidence in the light of the contents of the Couch
report.

62 We turn now to the other allegations of the Committee.

63 Insofar as the Practitioner's submissions relating to delays relating to
further particulars are concerned, the Tribunal has already observed that
the Committee does not pursue this allegation.

64 In regard to the Practitioner's delays relating to the provision of
expert evidence, this was requested by the Defendant's solicitors on
24 June 2008 and only responded to on 27 November 2008.
Notwithstanding the reminders on 25 September 2008 and 18 and
26 November 2008, that is a period of five months. The eventual
'response' did not in any event provide expert evidence (Exhibit A,
page 134).

65 In regard to the Practitioner's delay in supplying medical records,
these were requested by the Defendant's solicitors on 31 October 2007,
27 February 2008 and 11 March 2008 and eventually produced on
20 March 2008, a delay of over four and a half months.

66 In regard to having the matter entered for trial, the request was made
by the Defendant's solicitors on 30 July 2008 and 25 September 2008; a
Chamber Summons was issued on 16 October 2008 and an order was
made on 3 November 2008 and eventually complied with on
18 November 2008. Thus there was a delay of some three and a half
months.

67 In our view these delays could not be regarded as reasonable.

68 The Practitioner's assertion in her closing submissions that the
Committee's failure to identify which professional conduct rule had been
breached by the Practitioner is somehow fatal to the Committee's case, is
clearly incorrect. Quite aside from the fact that the *Legal Profession
Conduct Rules 2010* (WA), to which the Practitioner refers, were not in

force at the relevant time, there is no requirement under the Legal Profession Act which limits a finding of professional misconduct or unsatisfactory professional conduct to cases where professional conduct rules have been breached.

69 Finally, we must comment on the Practitioner's decision not to give evidence at the hearing. The Committee referred the Tribunal to the New South Wales case of *NSW Bar Association v Meakes* [2006] NSWCA 340, where Tobias JA said:

In my opinion, the Tribunal also erred in declining to criticise the respondent's decision not to give sworn evidence at the hearing. It is true that in professional disciplinary proceedings the onus of proving misconduct lies with the party bringing the charges and, it should be noted, a practitioner is not required to give evidence. However, as this Court observed in *Coe v NSW Bar Association* [2000] NSWCA 13, there is an expectation that legal practitioners will mount the witness box to provide some explanation as to their conduct, rather than simply relying upon evidence from the Bar table. In *Coe*, Meagher JA (at [21]), with the agreement of Priestley JA, repeated with approval the following observations made by the Tribunal in that case and which are apposite to the present case:

In the circumstances where a prima facie [case] against a legal practitioner has been presented and where the practitioner wishes the Tribunal to accept an explanation as to how the conduct came about it is inappropriate and irregular for the legal practitioner to attempt to do so through submission from the Bar table. If he wishes the Tribunal to accept some explanation as to how the conduct came to take place then in our view he has an obligation to meet the situation by explanation on oath.

Yet these were the very matters which were wholly within the knowledge of the respondent and which he did not offer to answer in the witness box. On the contrary, he chose the safety of the well of the Tribunal. Notwithstanding the advice of his then senior counsel, the respondent's refusal to enter the witness box and provide evidence with respect to the matters referred to should have been the subject of harsh criticism by the Tribunal. Moreover, if that evidence had otherwise been relevant to the issue, his refusal to provide it would have significantly detracted from the weight to be attached to the tendered character references. In these circumstances, the only inference one can draw from the respondent's refusal to give sworn testimony in this matter was that his evidence would not have assisted his case in resisting a finding of professional misconduct.

70 The Tribunal respectfully agrees with these statements. If the Practitioner is to be believed in any matter that she asserts, either in her response to the application or in her submissions, she should have given

evidence to that effect. She did not, and must therefore be criticised for her failure to give any explanatory evidence to the Tribunal.

71 We mentioned earlier in these reasons that the Committee had decided not to press for a finding against the Practitioner of professional misconduct, instead seeking a finding that the Practitioner is guilty of unsatisfactory professional conduct.

72 In our view, this concession on the part of the Committee was correctly made. The Tribunal's conclusion is that the Practitioner's conduct in the matter under review fell short of the standard of competence and diligence expected of her, but not substantially so. Also, there is nothing to suggest that the Practitioner has consistently failed to reach that standard.

73 We therefore find that the Practitioner is guilty of unsatisfactory professional conduct.

74 At the hearing, the Committee informed the Tribunal that in the event that the Tribunal makes such a finding, then the Committee would seek orders that the Practitioner is reprimanded and that a condition is imposed on the Practitioner's practising certificate that she may not practise as an Australian legal practitioner other than as an employee or under the supervision of an Australian legal practitioner approved by the Legal Practice Board (T:13,9.8.13).

75 We will hear from the Committee as to whether this continues to be the Committee's position. We will then order that the Practitioner files her responsive submissions on the appropriate penalty.

Orders

1. There is a finding that Karen Alethea Mullally Wroughton is guilty of unsatisfactory professional conduct contrary to the *Legal Profession Act 2008 (WA)* by failing to reach a reasonable standard of competence and diligence in that she:
 - (a) instituted and continued an action in the District Court on behalf of Mr Phillip Edward Coster without any evidence to support her client's claim;
 - (b) failed to provide adequate advice to Mr Coster:

- (i) as to the merits and possible cost consequences to Mr Coster of commencing those proceedings in the light of the medical evidence in the possession of Mr Coster or the practitioner at that time;
 - (ii) of the need to obtain expert medical evidence to support Mr Coster's claim; and
 - (c) failed to respond in a timely manner to requests from other solicitors:
 - (i) for disclosure of the expert evidence upon which Mr Coster intended to rely;
 - (ii) to supply copies of Mr Coster's medical records from the Joondalup Health Campus; and
 - (iii) to have the matter listed for trial; and
 - (d) failed to keep Mr Coster adequately informed about the proceedings in the District Court.
2. The Legal Profession Complaints Committee is to file and serve any submissions on penalty within 28 days of publication of these reasons.
 3. Ms Karen Alethea Mullally Wroughton is to file and serve any submissions on penalty within 28 days of the service of the Legal Profession Complaints Committee's submissions or within 56 days of publication of these reasons, whichever is sooner.
 4. Subject to any further order of the Tribunal, the question of penalty is to be dealt with on the papers.

I certify that this and the preceding [75] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE T SHARP, DEPUTY PRESIDENT