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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : VOCATIONAL REGULATION

**ACT** : LEGAL PRACTICE ACT 2003 (WA)

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

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

**HEARD** : 21 AND 22 MAY 2009  
10 JUNE 2009  
EDITED REASONS DELIVERED ORALLY ON 22  
MAY 2009 AND ON 10 JUNE 2009

**DELIVERED** : 10 JUNE 2009

**FILE NO/S** : VR 209 of 2008

**BETWEEN** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE  
Applicant

AND

WILLFRIED VOGT  
Respondent

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*Catchwords:*

Vocational regulation - Legal practitioner - Unsatisfactory conduct - Unprofessional conduct - Professional misconduct - Intent to mislead Supreme Court in affidavit and oral submissions - Usual disciplinary consequence - Suspension from practice - Mitigating factors do not warrant departure from usual consequence - Suspension from practice for three months - Costs

*Legislation:*

*Interpretation Act 1984 (WA), s 37(1)(d), s 37(1)(f)*

*Legal Practice Act 2003 (WA), s 3, s 180(1), s 185(1)*

*Legal Profession Act 2008 (WA), s 438(1), s 598, s 607(1), s 607(2)(b),  
s 622(1), s 622(2), Pt 13*

*State Administrative Tribunal Act 2004 (WA), s 87(2)*

*Result:*

Practitioner found guilty of unsatisfactory conduct by unprofessional conduct

Practitioner's local practising certificate suspended from 1 August 2009 until 31 October 2009

Practitioner ordered to pay applicant's costs of \$10,000 by 1 March 2010

*Category:* B

**Representation:**

*Counsel:*

|            |   |                                     |
|------------|---|-------------------------------------|
| Applicant  | : | Mr AS Derrick with Ms PE Le Miere   |
| Respondent | : | Mr MJ McCusker QC with Ms KA Vernon |

*Solicitors:*

|            |   |                                          |
|------------|---|------------------------------------------|
| Applicant  | : | Legal Practitioners Complaints Committee |
| Respondent | : | Vogt Graham Lawyers                      |

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

Briginshaw v Briginshaw (1938) 60 CLR 336

Jamielita v Medical Board of Western Australia (Unreported, WASC, Library  
No 920584, 13 November 1992)

Kyle v Legal Practitioners Complaints Committee (1999) 21 WAR 56

Quigley (A Practitioner) v The Legal Practitioners Complaints Committee  
[2003] WASCA 228

Re A Barrister and Solicitor [1979] 40 FLR 1

Re Maraj (A Legal Practitioner) (1995) 15 WAR 12

## **REASONS FOR DECISION OF THE TRIBUNAL:**

### ***Summary of Tribunal's decision***

- 1       The Legal Practitioners Complaints Committee alleged that Mr Willfried Vogt, a legal practitioner, was guilty of unsatisfactory conduct by unprofessional conduct and it sought a finding to that effect pursuant to s 438(1) of the *Legal Profession Act 2008* (WA).
- 2       The basis of the allegations was that Mr Vogt intentionally or recklessly misled the Supreme Court of Western Australia by swearing an affidavit and subsequently making oral submissions in proceedings before the Master of the Court that were knowingly or recklessly misleading.
- 3       The Tribunal found that in swearing the affidavit and making the oral submissions the practitioner intentionally conveyed a misleading impression to the Court that his client had, without prior arrangement, paid a sum of money to the firm where the practitioner was employed, rather than to another law firm. The Tribunal therefore found that the practitioner swore the affidavit and made the oral submissions with the intention of misleading the Court.
- 4       The Tribunal noted that a legal practitioner has a paramount duty to the Court and a key aspect of that requires that a practitioner must never intentionally (or recklessly) mislead or deceive the Court in any manner. To do so is a breach of a legal practitioner's fundamental obligations as reflected by the duty owed to the Court.
- 5       Following the hearing on penalty and costs on 10 June 2009, the Tribunal gave an oral decision in which it said that the protection of the public, the protection of the reputation of the legal profession and the maintenance of proper standards in the legal profession required that the usual professional disciplinary consequence of a practitioner intending to mislead a Court should be, as a minimum, suspension from legal practice.
- 6       The Tribunal therefore found that the practitioner's conduct required, at the minimum, suspension from legal practice. The mitigating factors put before the Tribunal warranted a reduction in the term of the suspension but did not warrant a departure from that disciplinary consequence.
- 7       Although these proceedings were initially brought under s 180(1) of the *Legal Practice Act 2003* (WA), the Tribunal found it was appropriate,

pursuant to the relevant transitional provisions, to deal with the application under Pt 13 of the *Legal Profession Act 2008* (WA).

- 8           Accordingly, the Tribunal found the practitioner, Mr Willfried Vogt, guilty of unsatisfactory conduct by unprofessional conduct; it suspended the practitioner's local practising certificate for three months and ordered the practitioner to pay the Legal Practitioners Complaints Committee's costs of \$10,000.

### ***Background***

- 9           By application filed with the Tribunal on 3 December 2008, the Legal Practitioners Complaints Committee (LPCC) alleged that a legal practitioner, Mr Willfried Vogt (the practitioner), was guilty of unsatisfactory conduct by unprofessional conduct pursuant to s 185(1) of the *Legal Practice Act 2003* (WA) (LP Act) by intentionally, or alternatively, recklessly, misleading or attempting to mislead the Supreme Court of Western Australia in proceedings before the Court by:

- (a)   swearing an affidavit which, in the circumstances, was misleading and when he knew it was misleading or had reckless disregard for whether or not it was misleading; and
- (b)   providing oral submissions to the Supreme Court Master which were misleading and when he knew they were misleading or had reckless disregard for whether or not they were misleading.

- 10          At the commencement of the hearing of the application we heard submissions from each party as to whether the LP Act or the *Legal Profession Act 2008* (WA) (2008 Act) applies to the application. Written submissions were also provided. Following the hearing of the application on 21 May 2009, we reserved our decision and indicated we would deliver our decision and reasons orally the next day.

- 11          On 22 May 2009, we found the practitioner guilty of unsatisfactory conduct by unprofessional conduct. We found that the practitioner, in swearing the affidavit and making the oral submissions, intentionally conveyed to the Court the misleading impression that his client had, without prior arrangement, paid a sum of money to the practitioner's firm, rather than to another law firm. The relevant facts are set out in detail below. The proceedings were then adjourned to 10 June 2009 for a further hearing on penalty and costs.

12           The following written reasons reflect the oral reasons given by the  
Tribunal on 22 May 2009 and 10 June 2009.

***Key facts***

13           The key facts in these proceedings are not contested.

14           The legal practitioner was admitted to legal practice on 6 April 1999 and at the relevant times was employed as a solicitor with Bruce Havilah and Associates (firm). By a Client Services Agreement dated on or about 18 March 2004 (contract), PL (client) instructed the firm to act in a matter involving the taxation of a bill of costs issued by Hammond Worthington.

15           On or about 13 August 2004, in the Supreme Court, Registrar Rimmer made orders (August 2004 orders) granting an extension of time in Supreme Court proceedings during which the client was permitted to:

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

16           Hammond Worthington provided the client with a proposed bill of costs for taxation on or about 27 August 2004, but the client did not pay the filing and taxation fees as required by the August 2004 orders.

17           From about 19 October 2004 until about 16 August 2005, the practitioner had the day-to-day conduct of the matter under the supervision of his principal, Mr Bruce Havilah.

18           On or about 14 February 2005, Registrar Rimmer extended the time period during which the client could pay to Hammond Worthington the filing and taxation fees, plus costs, until 4 pm on 15 April 2005. The total amount payable was \$837.30 (amount). If the client did not pay the amount by then, the extension of time granted by the August 2004 orders would be revoked (February 2005 orders).

19           By letter dated 16 February 2005, Mr Jeffry Hewitt, a solicitor employed by the firm, wrote to the client on behalf of the firm:

- (a)   setting out the terms of the February 2005 orders;

- (b) directing the client to provide the amount to the firm well before the deadline, to permit the firm to forward the amount to Hammond Worthington; and
- (c) requesting the client to contact the practitioner with any further queries.

20        On or about 11 April 2005, the client telephoned the firm to inquire as to how the amount should be paid. She was directed by the firm's employee, Natalie, to pay the amount directly to the firm. She was further directed by Natalie to write to the firm to alert it to the receipt of the amount.

21        On 13 April 2005, the client sent a letter by facsimile addressed to Mr Havilah advising that she intended to pay the amount personally by delivering the amount in cash to the firm at 9 am on 14 April 2005 (facsimile).

22        The facsimile was received by the firm and Mr Havilah on 14 April 2005, and Mr Havilah placed the facsimile into the practitioner's in-tray on that date.

23        On 14 April 2005, at about 9.10 am, the client paid the amount in cash to the firm. Natalie arranged for the firm's accounts assistant to pay the amount into the firm's trust account.

24        The practitioner did not read the facsimile until the afternoon (probably between 4 pm and 5 pm) of 15 April 2005 and did not arrange the transfer of the amount to Hammond Worthington on behalf of the client before the deadline for payment set out in the February 2005 orders.

25        On 26 April 2005, the client wrote to Mr Havilah complaining about the practitioner's conduct.

26        On 27 April 2005, Mr Havilah wrote to the client by email to the effect that:

- (a) the firm would not make a further application to the Supreme Court on behalf of the client to extend the time in the February 2005 orders (application) unless the client paid a filing fee of \$147;
- (b) Mr Havilah intended to charge the client for the firm's professional fees involved in making the application; and

(c) Mr Havilah intended to charge the client for the professional time required to answer her complaint about the practitioner's conduct.

27 On 28 April 2005, the client paid \$147 cash to the firm and instructed it to make the application. The practitioner acted as counsel at the hearing of the application.

28 In an affidavit sworn on 28 April 2005, in support of the application, the practitioner deposed at [3] and [4] as follows:

That amount [that is, \$837.30] was required to be paid to the Practitioner, Hammond Worthington Lawyers, not to the solicitors for the [client], Bruce Havilah & Associates ...

...

The [client] made an error in relation to the intended recipient of the amount required to be paid ...

29 On 31 May 2005, at the hearing of the application before Master Sanderson, the practitioner submitted to the Master that:

... The [client] ... didn't do the right thing by telling me so that I could deal with it on the basis that it was erroneously paid into our account not either to the Supreme Court or Hammond Worthington on that date.

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

### ***Issues***

31 It is common ground that there are two issues for us to decide, namely:

- 1) whether statements in the affidavit and in the oral submissions made to Master Sanderson were misleading in that they conveyed misleading impressions; and
- 2) if so, whether the practitioner conveyed those impressions intentionally or recklessly.

## *Findings*

### **Were the statements misleading?**

32        The statements at [3] and [4] of the affidavit and the statement in the oral submissions set out above were plainly misleading because they conveyed the misleading impression that there was no prior arrangement for the client to pay the amount to the firm, when there was, to the knowledge of the practitioner at the time when he swore the affidavit and made the submissions, an arrangement to that effect in place.

33        The practitioner conceded that he had read the letter from Mr Hewitt to the client dated 16 February 2005 at around the time it was sent. The letter contained the following:

We confirm that pursuant to these orders you are required to pay to Hammond Worthington the total sum of \$837.30 by no later than 15 April 2005, the said sum being comprised of the filing fee (\$140) and the taxation fee (\$297.30) and \$400 for the costs of [Hammond Worthington]'s application filed 22 December 2004.

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

...

If you have any further queries please feel free to contact our Mr Will Vogt. [Emphasis in bold added.]

34        The highlighted words in the extract from the letter are pivotal and provide clear evidence that the practitioner was aware of the prior arrangement for the client to pay the amount to the firm and not direct to Hammond Worthington.

35        The practitioner's evidence was that he interpreted these paragraphs as meaning that if the client did not pay the amount well before the official deadline, then she was to pay the amount directly to Hammond Worthington.

36        However, the Tribunal finds that the practitioner's interpretation conveyed in his evidence was not reasonably open from the terms of the letter and was therefore not credible. The firm was acting for the client and it would have been a most unusual practice for the client to pay the amount direct to Hammond Worthington, with whom she was in dispute, rather than to her own lawyers. The practitioner's interpretation is,

therefore, not reasonably open from the usual conduct of a solicitor/client relationship and, hence, was not credible.

37           Furthermore, the Tribunal accepts the following evidence of the client:

On 21 April 2005 I spoke with Mr Vogt and he told me that I hadn't complied with the orders because the money hadn't been paid in time. I told him this was wrong because the money had been paid in time. I told him that I had spoken with the receptionist and she had told me to pay the money in cash to the firm on the morning of 14 April 2005 and that she would see that whoever was responsible for my file would be told about it and that it would all be seen to. I was very upset that he suggested I hadn't complied with the orders and that the money hadn't been paid to Hammond Worthington.

He tried telling me that I hadn't paid the money correctly[,] I should have paid it to Hammond Worthington[,] but I told him that I had paid correctly as the firm was supposed to send the money to Hammond Worthington and that I had a letter from Mr Hewitt telling me to pay the money to the firm.

I told him that Natalie told me to pay the money to the office and that I'd also sent a fax to Bruce Havilah confirming that I was paying the money. He told me that he didn't know that I had paid the money until it was too late to pay the money to Hammond Worthington.

38           This evidence was not directly challenged in cross-examination and was corroborated by a relatively contemporaneous facsimile that the client wrote to Mr Havilah on 25 April 2005 and sent to him as an attachment to her email dated 26 April 2005. The facsimile was mistakenly dated '25 April 2004'; however, we find that it was written on 25 April 2005. The facsimile contained the following:

The following is a chronology of events that are some of the basis [sic] of my complaint:

1.       Thursday 21/4/05 at approximately 16:45 I re-telephoned your firm's office Receptionist to lodge a complaint to be brought to your attention as soon as possible the following issues:

...

- I informed Mr Voigt [sic] that on the 11th April 2005 I telephoned your firm. I communicated with your Receptionist, Natalie[,] to confirm where to make the urgent payment of monies that was to be available to me within the next two days. Credit card loan payment to be

made to your firm or directly to Supreme Court Registry?

...

- I was informed that I should pay the amount to your firm directly and I could send a fax noting your firm's reference number on your last letter to identify the solicitor, which I did. I had no reason not to trust the information given[,] as your Receptionist was unsure of who was now managing my file. Mr Voigt [sic] informed me on 21/04/05 that I should not accept your firm's Receptionist's information and accused me of being difficult. ...

39        These paragraphs in the client's facsimile to Mr Havilah conveyed a detailed and relatively contemporaneous recollection of the telephone conversation with the practitioner four days earlier. Furthermore, the client had no apparent motivation at the date of the facsimile to falsify the detail of her conversation with the practitioner on 21 April 2005.

40        The practitioner gave evidence that, while the client attempted to refer to a conversation with Natalie during the telephone conversation between the client and the practitioner on 21 April 2005, he cut her off, or would have cut her off, and told her to deal with the 'main issue' and not to discuss what a '17-year-old receptionist' who was 'not authorised to give instructions about payments' had told her.

41        However, we find that the applicant has proven to our reasonable satisfaction, in accordance with the test in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 - 362, that on 21 April 2005, the client told the practitioner that Natalie advised her on 11 April 2005 to pay the amount in cash directly to the firm and send a facsimile. We make this finding based on:

- 1) the client's clear recollection in evidence and her relatively contemporaneous facsimile to the same effect;
- 2) the fact that the practitioner's file note of his conversation with the client on 21 April 2005 recorded that the client 'spoke to Natalie'; and
- 3) the fact that the practitioner's recollection of the conversation was not specific and he said that his practice was to only write down 'the salient points' of a conversation in file notes, whereas he said that he did not consider that Natalie's view or advice to the client was of any consequence.

The practitioner made a submission that:

For [the client] to pay the monies to the firm the day before the deadline, without notifying the [practitioner] was, in the circumstances, an 'error'; and the [practitioner] 'not unreasonably' viewed it as such.

42        However, the letter from Mr Hewitt to the client dated 16 February 2005 advised the client to secure the amount as soon as possible and provide the amount to the firm so that the firm could forward it to Hammond Worthington well before the official deadline. The letter did not say that the amount could not be provided to the firm in circumstances where the firm had only 31 and a half hours, that is, most of two business days (or some similar time frame), to forward it to Hammond Worthington. Further, the client notified the firm that she had the amount ready on 11 April 2005 and faxed the firm on 13 April 2005 that the amount would be provided to the firm in cash at 9 am on 14 April 2005. The client was not in error, and it was not reasonably open, in our view, to consider her conduct as being in error.

**Were the statements conveyed intentionally or recklessly?**

43        For the following reasons, we consider that the practitioner intended to mislead the Court.

44        First, the practitioner was aware of the arrangement in terms of the letter of 16 February 2005.

45        Second, on 21 April 2005, the practitioner was aware of the arrangement made between Natalie on behalf of the firm and the client.

46        Third, the practitioner could have cured to some extent the misleading statements in his affidavit by oral submissions before the Master. Instead, in his oral submissions he confirmed the misleading information.

47        Fourth, the practitioner had a very real motive to mislead the Court by suggesting that it was all the client's fault, namely, to avoid any potential professional or civil liability for the firm's and the practitioner's defaults in:

- 1)    not having an effective call up system in place to alert the client or the practitioner to the impending deadline for payment;
- 2)    not paying the amount to Hammond Worthington although it was paid in cash and was with the firm for 31

and a half hours, including most of two business days;  
and

- 3) not reviewing the client's facsimile of 13 April 2005, which sat in the practitioner's in-tray from 14 April 2005 until between 4 pm and 5 pm on 15 April 2005, in circumstances where:
  - (i) the principal of the firm was aware of the client's facsimile, but did not telephone or otherwise contact the practitioner about it;
  - (ii) the practitioner had no specific recollection of having been in court or otherwise out of the office on 15 April 2005, but did not read the facsimile in his in-tray until after the expiry of the deadline at 4 pm; and
  - (iii) if the practitioner had been in court or away from the office on 15 April 2005, he had no system in place for anyone to check and alert him to urgent faxes during a two-day period, given that he was in court and away from the office on 14 April 2005.

48 In his witness statement ([78(a)] to [78(e)]), the practitioner put forward a number of reasons why he had a belief that the client had made an 'error' in paying the amount to the firm.

49 The reasons put forward by the practitioner at [78(c)], [78(d)] and [78(e)], were that:

- 1) the client had been advised to contact the practitioner if she had any queries;
- 2) the client knew the deadline was expiring the day after she paid the amount, but did not contact the practitioner himself after payment; and
- 3) even if the practitioner had been present in the office at the time the client paid the amount, there was not sufficient time for him to adhere to the firm's cheque requisition procedures, obtain a cheque and deliver it to

Hammond Worthington, because the amount was paid into trust.

50        We do not think these explanations constitute reasons for the practitioner to have reasonably believed that the client had made an error in paying the amount to the firm on 14 April 2005 instead of direct to Hammond Worthington.

51        The reasons put forward by the practitioner in [78(a)] and [78(b)] were, in essence, that the letter from the firm to the client dated 16 February 2005 made clear to the client that the order made by the Registrar required her to pay the amount to Hammond Worthington and that the letter 'specifically advised her to provide [the amount] to the [firm] well before the official deadline so that the [firm] could forward [the amount] to Hammond Worthington, not so she could pay it to the [firm]'s trust account first'. However, for reasons set out earlier, the Tribunal does not consider that the letter of 16 February 2005 could reasonably give rise to a belief on the practitioner's part that the client had made a mistake by paying the amount to the firm in cash shortly after the commencement of business on the day prior to the day on which the period for payment would expire at 4 pm.

52        The practitioner's reasons given in his evidence were neither credible nor persuasive. We do not accept his evidence.

53        Finally, the practitioner submitted that, in any event, the Court was not, in fact, misled. However, in our view, that is not in point in relation to whether or not the practitioner is guilty of unsatisfactory conduct. Whether the Court was or was not misled is irrelevant. What is relevant and critical is that the practitioner **intended to mislead** the Court.

### ***Consequence of findings***

54        It follows from our findings that the practitioner's statements to the Court were misleading and that he intended to mislead the Court, and that the practitioner was guilty of 'unsatisfactory conduct' by 'unprofessional conduct' under the LP Act.

55        Section 3 of the LP Act defines 'unsatisfactory conduct' to mean, so far as is relevant, 'unprofessional conduct on the part of a legal practitioner, whether occurring before or after admission as a legal practitioner'. The essence of unprofessional conduct is that it refers to conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, or that, to

a substantial degree, falls 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 per Parker J, Ipp and Steytler JJ concurring; ***Quigley (A Practitioner) v The Legal Practitioners Complaints Committee*** [2003] WASCA 228 at [12] per Parker J, Malcolm CJ and Anderson JJ agreeing.

56           It is plainly obvious that making statements in an affidavit and in oral submissions intending to mislead the Supreme Court would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence. It constitutes conduct that, to a substantial degree, falls short of the standard of professional conduct observed or approved by members of the profession of good repute and competence.

57           The 2008 Act commenced operation on 1 March 2009 and, by s 598, repealed the LP Act. Section 37(1)(d) of the *Interpretation Act 1984* (WA) (Interpretation Act) provides that where a written law repeals an enactment, the repeal does not:

          unless the contrary intention appears - affect any duty, obligation, liability, or burden of proof imposed, created or incurred prior to the repeal.

58           Section 37(1)(f) of the Interpretation Act provides that where a written law repeals an enactment, the repeal does not:

          unless the contrary intention appears - affect any ... legal proceeding or remedy in respect of any right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture, and any such ... legal proceeding or remedy may be instituted, continued or enforced, and any such penalty or forfeiture may be imposed and enforced as if the written law had not been passed or made.

59           As the LPCC submitted, it follows from s 37(1)(d) and s 37(1)(f) of the Interpretation Act that the application is to be dealt with under the LP Act unless 'the contrary intention appears' in the 2008 Act.

60           Section 607(1) and s 607(2)(b) of the 2008 Act provide, in effect, that an action taken by the LPCC in relation to a person either before or after 1 March 2009, and any rights or entitlements that the person has in relation to the action, continue to have effect under the 2008 Act, subject to the 2008 Act.

61           The effect of s 622(1) and s 622(2) of the 2008 Act is that if a practitioner, prior to 1 March 2009, engaged in conduct that constituted

unsatisfactory conduct under the LP Act, Pt 13 of the 2008 Act applies to that conduct as if the conduct consisted of unsatisfactory professional conduct or professional misconduct under the 2008 Act. However, the 2008 Act does not evince an intention to exclude the operation of s 37(1)(d) and s 37(1)(f) of the Interpretation Act.

62       The result is that the application falls to be determined under the LP Act. However, as the Tribunal has found that the practitioner is guilty of unsatisfactory conduct under the LP Act, it also finds that the practitioner's conduct constitutes professional misconduct under the 2008 Act, in order to facilitate dealing with the contravention under Pt 13 of the 2008 Act. While the term 'professional misconduct' in the 2008 Act is defined in an inclusive manner only, there is sense in the LPCC's submission that 'conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence should be treated as 'professional misconduct' under the 2008 Act'. For reasons set out earlier, the practitioner is therefore guilty of professional misconduct within the meaning of the 2008 Act.

### **Conclusion**

63       One of the key aspects of a practitioner's paramount duty to the Court is that a practitioner must never intend to mislead or deceive the Court in any manner. The practitioner's conduct in swearing the affidavit and making the oral submissions with the intention of conveying the misleading impression that there was no prior arrangement under which the client was to pay the amount to the firm, was a flagrant breach of his duty to the Court. It therefore constituted unsatisfactory conduct by unprofessional conduct under the LP Act or professional misconduct by unprofessional conduct under the 2008 Act in that it was conduct that would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence.

### **Penalty**

64       The objects of disciplinary proceedings are the protection of the public, the protection of the reputation of the legal profession and the maintenance of proper standards in the legal profession. Punishment is not one of the objects of disciplinary proceedings: *Re A Barrister and Solicitor* [1979] 40 FLR 1 at 24 - 25; *Jamielita v Medical Board of Western Australia* (Unreported, WASC, Library No 920584, 13 November 1992) at 146 - 147. In order to protect the public and the reputation of the profession, the consequences for the practitioner may need to be more severe than they would be if the object of the proceeding

was one of punishment: *Re Maraj (A Legal Practitioner)* (1995) 15 WAR 12 at 25 per Malcolm CJ, Kennedy and Franklyn JJ agreeing.

65       Honesty in a practitioner's dealing with the Court is a fundamental pillar of the administration of justice in this State. It is a primary duty of a legal practitioner. Without that linchpin of honesty, the administration of justice and public confidence in it would falter. The duty is critical to the lawyer's role. The Court and the public not only expect it, but rely on it, and assume it in their dealings with legal practitioners.

66       In this case, the LPCC submitted that the inherent seriousness of the practitioner's conduct is such that, despite certain mitigatory circumstances, it is necessary to reprimand and suspend the practitioner for a specified period (not exceeding two years).

67       In contrast, the practitioner submitted that the appropriate penalty is a fine or reprimand. The practitioner submitted that the following circumstances should be taken into consideration in determining penalty:

- 1) the practitioner's age (now 33) and relative inexperience at the time of his unprofessional conduct/professional misconduct, over four years ago;
- 2) 'the one-off nature of the conduct' and the practitioner's otherwise 'unblemished reputation';
- 3) 'the allegation being one of misleading by omission, not commission';
- 4) the practitioner annexing the facsimile to his affidavit to demonstrate the client's efforts; and
- 5) the failure of Bruce Havilah to adequately supervise the practitioner or to take steps that would have obviated the need for the application to extend time.

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

69       While certain of the mitigatory circumstances identified by the practitioner are relevant and have the effect of reducing the length of

suspension which we would otherwise have imposed, they do not, in our view, warrant a departure from the usual disciplinary consequence of intending to mislead the court.

70       Significantly, in terms of mitigation, the practitioner submitted character references from barristers indicating that the practitioner is now meticulous in the preparation of affidavits, as he should be. We also consider it significant that the practitioner provides voluntary legal services on a pro bono basis.

71       In relation to the contentions relating to the practitioner's relative inexperience (he had been admitted to legal practice for six years at the time of the unprofessional conduct) and the apparent failure of the firm's principal to adequately supervise him, we consider that the duty not to intentionally mislead the court is so fundamental to legal practice and being a lawyer, that these circumstances cannot assist the practitioner.

72       In relation to the 'one-off nature of the conduct', we accept that the practitioner's conduct was not sustained and related to one matter only. However, significantly, the practitioner had the opportunity to correct the misleading impression created by his affidavit during his oral submissions made to Master Sanderson on 31 May 2005. However, he did not. Rather, he read the affidavit and exacerbated the intent to mislead the Court by his submissions.

73       We have already found that the practitioner was motivated by self-interest, namely, to avoid any potential professional or civil liability.

74       The fact that the practitioner intended to mislead the Court 'by omission, not commission' is not material; seeking to mislead the Court by omission is still very serious misconduct.

75       Finally, the fact that the practitioner annexed the facsimile is not a mitigatory circumstance, given that he attempted to mislead the Court by conveying the misleading impression that the client's intention to pay, conveyed in the facsimile, was made without any prior arrangement with the firm.

76       We cannot agree with senior counsel's contention for the practitioner that only the 'most bloody-minded' practitioner or member of the public would consider suspension to be an appropriate penalty. We consider that, in the circumstances of this case, the protection of the public, the protection of the reputation of the legal profession and the maintenance of proper standards in the legal profession require a suspension from practice

for three months. In the absence of the mitigatory circumstances to which we have had regard, in particular the practitioner's current apparent professional conduct in preparation of affidavits and his pro bono work, a suspension of six months would have been appropriate. The suspension should commence on 1 August 2009 to enable the practitioner to hand over files to his business partner or other practitioners and to make arrangements for the supervision of a junior solicitor in the interim.

### **Costs**

77           The Committee sought an order pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) that the practitioner pay its costs fixed at \$15,000 within 30 days.

78           The practitioner contended that reasonable costs for a one-day hearing would be \$7,000, comprising \$1,000 for the Committee's solicitors and \$6,000 for its counsel (one-day preparation and one-day hearing).

79           We consider that an award of \$10,000 costs should be made. This sum reflects one and a half days' preparation for counsel, one day hearing fee for counsel, \$1,000 for solicitors' costs and \$1,000 for the penalty hearing.

### **Orders**

80           The Tribunal ordered that:

1.     The practitioner is guilty of unsatisfactory conduct;
2.     The practitioner's local practising certificate, to be issued on 1 July 2009, be suspended from 1 August 2009 until 31 October 2009; and
3.     By 1 March 2010, the practitioner pay to the applicant its costs of \$10 000.00.

I certify that this and the preceding [80] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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**JUDGE J ECKERT, DEPUTY PRESIDENT**