[2011] WASAT 118 (S)

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and VANDERFEEN [2011] WASAT 118 (S)
MEMBER	**:**	JUSTICE J A CHANEY (PRESIDENT) JUDGE T SHARP (DEPUTY PRESIDENT) MS S GILLETT (MEMBER)
HEARD	**:**	27 APRIL 2011 AND 15 SEPTEMBER 2011
DELIVERED	**:**	4 AUGUST 2011
SUPPLEMENTARY DECISION	**:**	16 SEPTEMBER 2011
FILE NO/S	**:**	VR 182 of 2010
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND SALLY MARJORIE VANDERFEEN Respondent

Catchwords:

Legal practitioner - Professional misconduct - Penalty - Whether fit and proper

Legislation:

Legal Practice Act 2003 (WA), s 187
Legal Profession Act 2008 (WA), s 12, s 144

Result:

Practitioner fined $20,000 and ordered to pay applicant's costs

Category: B

Representation:

Counsel:

Applicant	:	Ms P Cahill SC and Ms P Le Miere
Respondent	:	Mr GR Donaldson SC

Solicitors:

Applicant	:	Law Complaints Officer
Respondent	:	Self-represented

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

A Solicitor v Council of the Law Society of New South Wales [2003] 216 CLR 253
Coe v New South Wales Bar Association [2000] NSWCA 13
In Re Davis [1947] 75 CLR 409
Legal Professional Complaints Committee and Vanderfeen [2011] WASAT 118
O'Reilly v Law Society of New South Wales [1988] 24 NSWLR 204
Re Maraj (a legal Practitioner) (1995) 15 WAR 12
Stanoevski v Council of Law Society of New South Wales [2008] NSWCA 93
Vogt v Legal Practitioners Complaints Committee [2009] WASCA 202

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 Following delivery of reasons for decision in which the respondent was found guilty of professional misconduct, the Tribunal was called upon to determine the question of penalty. The position adopted by the Legal Profession Complaints Committee was that the finding that the practitioner had misled the Family Court, coupled with the other findings against the practitioner, should be the subject of a report to the Supreme Court with a recommendation that the practitioner's name be struck from the roll of legal practitioners.

2 The Tribunal considered the applicable principles in relation to disciplinary penalties, and the particular circumstances of this case. It did not accept that the practitioner was not a fit and proper person to remain a legal practitioner, and therefore declined to make a report to the Supreme Court. Because, in this case, an order suspending the practitioner from practice would be of no practical effect, the Tribunal imposed a fine of $20,000, and ordered the practitioner to pay the applicant's costs of the proceeding.

The findings against the practitioner

3 On 4 August 2011, the Tribunal published reasons for decision in relation to allegations of professional misconduct by a legal practitioner, Ms Sally Marjorie Vanderfeen - see ***Legal Professional Complaints Committee and Vanderfeen*** [2011] WASAT 118 (Reasons). The specific findings were then recorded in orders of the Tribunal which read:

> 1. There is a finding that the practitioner Sally Marjorie Vanderfeen ('the practitioner') between about 7 December 2004 and 31 January 2005 engaged in professional misconduct by:
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> (a) Filing a minute of consent orders in the Family Court of Western Australia for the transfer of a property situated at [property address], Ardross ('the property') from the registered proprietor of the property to the practitioner's client:
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> (i) in circumstances where the practitioner knew that a third party claimed, or may claim, rights as a third party purchaser of the property, including a right to a transfer of the property to the third party;

(ii) without notifying, or attempting to notify, the third party of the practitioner's intention to file the minute of consent orders or the fact that the minute had been filed;

(iii) without notifying, or attempting to notify, the Family Court of Western Australia of the fact that a third party claimed, or may claim, rights as a third party purchaser of the property;

(b) Intentionally, alternatively, recklessly misleading the Family Court of Western Australia:

(i) as to the reasons why the registered proprietor of the property and the practitioner's client sought to have orders made urgently by the Court in terms of the minute of consent orders;

(ii) that there was no third party who ought be heard by the Court before orders were made in terms of the minute of consent orders;

(c) Failing to notify, or attempt to notify, the third party who had, to the practitioner's knowledge, reserved his rights as a third party purchaser of the property, that orders had been made by the Family Court of Western Australia in terms of the minute of consent orders for the transfer of the property from the registered proprietor to the practitioner's client;

(d) Subsequent to orders being made by the Family Court of Western Australia in terms of the minute of consent orders, failing to notify, or attempt to notify, the Court that a third party had reserved his rights as a third party purchaser of the property, in circumstances where the practitioner knew that the third party had expressly so reserved those rights;

(e) Attempting to have the property transferred from the registered proprietor of the property to her client for the purpose of defeating any right by the third party to have the property transferred to the third party;

(f) all of the conduct referred to in (a) - (e).

4 Following delivery of the decision, the parties lodged submissions in relation to penalty, and the question of penalty was dealt with at a hearing on 15 September 2011.

The Complaints Committee's submissions

5 The Complaints Committee submits that the Tribunal should order that a report be transmitted to the Supreme Court (Full Bench) with a recommendation that the practitioner be struck off the roll of practitioners, and also sought an order that the practitioner pay the Complaints Committee's costs. It makes that submission on the basis that the Tribunal found that the practitioner intentionally, or alternatively recklessly, misled the Court in two respects when filing a minute of consent orders, and that conduct was aggravated by her failure to notify the Court of the interest of a third party in the property the subject of the orders, that she formed an intention to defeat the third party's claims to the property, and she failed to notify the third party's solicitors of the fact that consent orders had been made, despite their repeated attempts to contact her. The Complaints Committee submits that the findings should lead the Tribunal to conclude that the practitioner is not a fit and proper person to remain a legal practitioner.

6 The practitioner, whilst accepting the seriousness of the findings against her, submits that, in all the circumstances of the case, a report to the Supreme Court is not called for in order to meet the proper objectives to be served by the imposition of a disciplinary penalty. In particular, the practitioner submits that the findings do not, when considered against her otherwise impeccable professional career, lead to the conclusion that she is not fit to remain on the roll of practitioners.

When should a recommendation for removal from the role be made?

7 In ***Re Maraj (a legal Practitioner)*** (1995) 15 WAR 12 at 25, Malcolm CJ (with whom the other members of the court agreed) explained the object of disciplinary proceedings and the approach to be taken in relation to removal from the roll in the following way:

> Their Honours also cited the well known passage in *Re Barrister and Solicitor* (1979) 40 FLR 1 at 24-25, per Blackburn CJ, Connor and Davies JJ, in which it was explained that the object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession, rather than punishment. It is clear from the relevant passage and the authorities which have been repeatedly followed in this Court that when the question is whether a practitioner should be struck off the roll and the only question is whether the practitioner is a fit and proper person to remain a member of the legal profession: see *Re Davis* (1947) 75 CLR 409 at 416, per Latham CJ; *Ziems v Prothonotary of Supreme Court (NSW)* (1957) 97 CLR 279.

8 The question for present purposes is therefore whether the practitioner is a fit and proper person to remain a member of the legal profession - see also ***A Solicitor v Council of the Law Society of New South Wales*** [2003] 216 CLR 253 at [15], where it was said that not all cases of professional misconduct justify or require suspension or striking off from the roll.

Is there a 'starting point' in determining penalty?

9 In ***Vogt v Legal Practitioners Complaints Committee*** [2009] WASCA 202 (***Vogt***) at [70] the Court of Appeal said:

> As we have observed, it is a matter of the utmost seriousness for a practitioner intentionally to mislead a court. The effective administration of the justice system and public confidence in the system depends upon the absolute and unconditional discharge by practitioners of their duty of honesty and candour to the court. It is a duty so fundamental that factors such as relative inexperience and lack of supervision do not weigh so heavily in mitigation as they might in other situations. A deliberate departure from the duty must attract a substantial penalty.

10 In ***Vogt***, the Court concluded that the Tribunal at first instance had misdirected itself by proceeding on the basis that a period of suspension was mandatory where there had been a finding that a practitioner had misled the Court. The Court said, at [60]:

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

11 It follows that, as counsel for the applicant accepted, the discretion of the Tribunal is never fettered by the nature of the findings. Each case must be determined having regard to all of relevant circumstances.

12 It can be accepted that a finding that a solicitor has misled a Court raises serious questions as to the solicitor's fitness to practice. In ***O'Reilly v Law Society of New South Wales*** [1988] 24 NSWLR 204 (***O'Reilly***) at 230, Clarke JA described such a finding as providing 'compelling evidence' of unfitness to practice.

13 Notwithstanding that acknowledgement of the seriousness of a finding of misleading a Court, it is necessary to examine all of the relevant considerations arising in a particular case to determine whether the practitioner is fit and proper to continue to engage in the practice of law. We accept that a single event of intentionally misleading a Court may be sufficient to justify a report to the Supreme Court - see for example ***Coe v New South Wales Bar Association*** [2000] NSWCA 13 and ***O'Reilly***. That does not, of course, mean that every finding of that nature will have the same result.

Respondent's fitness to practice

14 As was pointed out in the joint judgment of the Court in ***A Solicitor v Law Society of New South Wales***, fitness is to be decided at the time of the hearing (at [21]).

15 The conduct the subject of the adverse findings occurred between 7 December 2004 and 31 January 2005, now almost seven years ago. Ms Vanderfeen was admitted to practice in this State in 1982. She worked for 10 years initially as a solicitor, and finally as a partner in a city law firm. From 1992 to 2002, she worked as a solicitor with another large city law firm. From March 2002 to August 2006, she was an associate at the firm Paterson and Dowding, the position she held at the time of the conduct the subject of the findings.

16 From September 2006 to 3 August 2008, Ms Vanderfeen was a Registrar of the Family Court. From August 2008 to February 2010 she was an acting Magistrate at the Family Court, before returning to her position as Registrar, a position she continues to occupy. She has not been the subject of any other disciplinary action in the 22 years of her practice up until (or since) she commenced in her present position.

17 For the purposes of the penalty hearing, the respondent provided the Tribunal with a bundle of 26 references. Some of those were from Ms Vanderfeen's professional colleagues who had provided references which were tendered during the course of the hearing, and which are referred to in [95] of the Reasons. In each case, those referees affirmed their earlier supportive comments, notwithstanding having read the Reasons. The additional references came from Judges, Magistrates or Registrars of the Family Court, very senior legal practitioners working in the family law area, in one case a more junior practitioner for whom Ms Vanderfeen had been a mentor while at Paterson and Dowding, and an officer of the Family Law Practitioners Association. All referees had read the Reasons before providing their references.

18 The references strongly support a conclusion that Ms Vanderfeen was a highly respected family law practitioner, whose integrity was never in question amongst those with whom she worked, or who were adversaries to her in practice. They also attest to a high regard in which she is held as an officer of the Family Court, both by her colleagues and by practitioners appearing before her. Whilst all referees accepted the findings of the Tribunal, some expressed surprise at the findings, and a number considered the conduct to be quite out of character based on their own experience of dealings with the respondent.

19 She was described by the Chief Judge of the Family Court of Western Australia as having been, the time he knew her in practice, a 'competent and trustworthy opponent'. He said she was liked and respected by members of the legal profession. His Honour said that, since becoming a Registrar of the Court in September 2006, she had carried out her duties with diligence and skill and he had never found her to be anything other than reliable and trustworthy. She had disclosed the complaint the subject of these proceedings when applying for appointment as a Registrar in 2006. Notwithstanding that, she was appointed to serve a temporary period as a Magistrate in the Family Court. (It would appear that, at that time, the Complaints Committee had indicated that it did not propose to pursue the complaint). She would have been called upon to serve as an acting Magistrate again but for the fact that proceedings in relation to the present complaint had been brought before the Tribunal. We will return to the significance of that matter below.

20 Other judicial officers who provided letters of support to Ms Vanderfeen, many of whom had been in practice with her before being appointed to the Bench, stated that they had no reason to doubt her competence or honesty, that she dealt with others 'with the utmost integrity', that she is 'a dedicated and very hard worker' with 'sound and helpful judgment', that there had never been 'cause to be concerned about her honesty or her professional integrity', and that she 'continues to have [His Honour's] professional support and faith in her integrity'. The other letters of support from Family Court Magistrates and Registrars, and senior members of the profession practicing in Family Law, were all to a similar effect.

21 The Complaints Committee submits that the references submitted by the practitioner are of limited assistance. They do not, it is submitted, grapple with the proposition drawn from ***O'Reilly***, that there was at the time the conduct occurred, compelling evidence of unfitness to practice. In our view, that criticism is misplaced. The question for determination is

the practitioner's character. The referees acknowledge the Tribunal's findings. They attest however to their experience and observations as to Ms Vanderfeen's integrity over a long period of practice. They are clearly relevant to the question before the Tribunal.

22 It is also submitted that the acknowledgement by the Chief Judge of the Family Court that, but for the proceedings in this Tribunal, Ms Vanderfeen would have been called upon to serve as an acting magistrate again, suggests that the Court considers that the fact that these matters were pending rendered her unfit to be appointed as a magistrate, and that she is thus unfit to be a legal practitioner. We do not accept that submission. It is quite understandable that a cautious approach would be taken to an appointment as an acting magistrate while the current proceedings remained unresolved. That does not imply a pre-emptive determination on the question of fitness to practice made by the government or the Court. The allegations were obviously serious, and it is unsurprising that those with responsibility for any acting magisterial appointments would await the Tribunal's determination on both the conduct and penalty.

23 The Complaints Committee, relying on ***In Re Davis*** [1947] 75 CLR 409 at 420, submits that fitness to practice requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges. The references which have been provided suggest strongly that, notwithstanding their knowledge of the finding of misconduct in this matter, Ms Vanderfeen does retain the personal confidence of fellow practitioners and judges, and it might be inferred, clients.

24 The Complaints Committee argues that, where acts of professional misconduct in the past establish that a practitioner was, at the time of those acts, not a fit and proper person to remain on the roll, a 'presumption of continuity arises' so that the Tribunal would be justified in concluding the practitioner is still unfit. That presumption would apply, it is submitted, unless the practitioner could produce evidence that gave reason for believing that the situation had changed. The Complaints Committee further submits that a failure of the practitioner to demonstrate insight into their conduct, contrition or remorse, will independently of the application of the presumption, support the inference that the practitioner remains unfit to practice. In making those submissions, the Complaints Committee relies on ***Stanoevski v Council of Law Society of New South Wales*** [2008] NSWCA 93 (***Stanoevski***) at [65] - [67] where it was said:

> There may be some subject matters concerning which the strength of an inference arising from a presumption of continuity attenuated with time until it totally disappeared. However, the subject matter to which the presumption of continuity is applied in the present case is the character of a person. It is not at all uncommon for aspects of the character of a person to persist over decades, frequently for someone's entire life. In my view, a tribunal of fact would be justified in using the extremely serious acts of professional misconduct in which the Appellant engaged in the period 1991 to 1993 as a basis for inferring that she was then unfit to practise, and that it was likely, notwithstanding that 15 years had passed, that she was still unfit to practise, unless the Appellant could produce evidence that gave reason for believing the situation had changed.
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> In fact, the reasoning of the Appeal Panel was not totally dependent upon applying a presumption of continuity to the demonstrated unfitness of the Appellant in the period 1991-1993. A very important strand in the reasoning of the Appeal Panel related to the evidence that she had given (or failed to give) in various hearings before the Tribunal and the Appeal Panel, including the hearing before the Appeal Panel from which the present appeal is brought. Their assessment of her evidence before them was (at [154]):
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> 'The Appellant has shown no real understanding of her own misconduct, nor has she shown genuine contrition, and her evidence before this Appeal Panel does not lead to a finding that she was openly frank and candid.'
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> The Appeal Panel concluded (at [162]):
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> 'The attitude adopted by the Appellant in the course of her evidence before this Appeal Panel was not conducive to a finding that, on the balance of probabilities, she had candidly come to terms with her wrongdoing; recognized the enormity of her conduct, and could, accordingly, undertake never to engage in similar conduct. She appeared to the Appeal Panel to have insufficient insight to recognize and frankly acknowledge her gross professional misconduct. Accordingly, it is not possible for the Appeal Panel to be satisfied that faced with a situation requiring her to make frank admission of error, oversight or ignorance, she is capable of the necessary candour. Thus, there continues, in the opinion of the Appeal Panel, an unacceptable risk to the public'
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> Even though there was this most important strand to the reasoning of the Appeal Panel, to the extent to which its reasoning depended upon the Appellant having failed to convince it that she was a fit and proper person, there was no error of law.

25 The observations above should be read in the context of the findings in respect of which the inference of unfitness to practise arose. The findings were summarised at [12] - [15] of the decision as follows:

> The first instance hearing of the Tribunal occurred in December 2002, with judgment being given on 17 April 2003. The first group of acts of professional misconduct that the Tribunal found related to the handling by the Appellant of a simple application for probate. She delayed, in a way found not to amount to professional misconduct. She replied to letters from the Law Society concerning a complaint about the handling of the estate on 29 January 1993, 12 March 1993, and 29 March 1993, in a way that the Tribunal found was misleading. The Tribunal found that her dealings with the Law Society concerning the estate were professional misconduct.
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> Another group of findings of professional misconduct related to instructions received concerning a property settlement relating to the divorce of Mr and Mrs Buldioski. They had agreed on the property division they wanted made, and the Appellant's task was to implement that agreement. She forged the signatures of Mr and Mrs Buldioski on four separate copies of consent orders, and purported to attest (in her own name) those signatures. Those orders were filed with the Family Court. In correspondence with the Law Society she made positive assertions that the documents were signed before her, and were not forgeries. Those assertions were held to be misleading, or attempting to mislead, the Law Society. Such letters were written to the Law Society on 22 June 1992, 20 October 1992, and 23 November 1992. Lodging the purported order with the Family Court was held to be misleading, or attempting to mislead, the Family Court. The misleading of, or attempting to mislead, the Law Society, and the misleading of, or attempting to mislead, the Family Court were all held to be professional misconduct.
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> A third group of complaints related to divorce proceedings involving a Mrs Fowler. Three affidavits, dated 27 January 1993, 4 February 1993, and 13 April 1993, purportedly sworn by Mrs Fowler, were attested by the Appellant, notwithstanding that Mrs Fowler had not signed the documents in front of her. The Appellant lodged those documents with the Family Court. The false attestation, and the lodging of the documents with the Family Court, were both held to be professional misconduct.
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> On the basis of these various acts of professional misconduct, the Tribunal ordered that her name be removed from the roll.

26 The nature of the findings in ***Stanoevski***, involving conduct over a period of years, and of an extremely serious kind, readily suggest serious deficits in character. The observations in [64] - [67] which are set out above should be read in that context, and in the context that the practitioner had already been struck off the roll and was applying to have her name restored.

27 The references put before the Tribunal strongly support a conclusion that the conduct the subject of the findings was entirely out of character

for Ms Vanderfeen. We are satisfied that Ms Vanderfeen's actions, motivated as they were by a misguided desire to secure her client's interests, was a single lapse in her otherwise high professional standards rather than a flaw in her character which renders her unfit for legal practice. Thus, we do not consider it appropriate to act upon a 'presumption of continuity' of an ongoing character deficit. Any such presumption is displaced by the materials presented by the practitioner in mitigation of penalty.

28 The Complaints Committee submits that Ms Vanderfeen has failed to demonstrate contrition or remorse. It notes, correctly, that it was required to prosecute the charges to final determination in the face of a denial by the practitioner that she had intentionally or recklessly misled the Court. Thus, the Complaints Committee contends, the practitioner's continuing unfitness to remain on the roll must be inferred.

29 In response, counsel for the respondent submits that 'there is no serious issue that Ms Vanderfeen is contrite in respect of these matters'.

30 Ms Vanderfeen acknowledged that her conduct was a 'serious error of judgment', and that she was uncomfortable with her avoidance of the third party's solicitors during the relevant period. She maintained, however, that she did not intend to mislead the Court, and that her reason for avoiding contact with the third party solicitors was because she wished to leave dealings with them to the husband. She did acknowledge that, in retrospect, she should have notified the Court of the third party's interests, and should have notified the third party's solicitors of the lodgement of the proposed consent orders, or of the fact that consent orders had been made. In essence, therefore, she accepted that her conduct was wrong, but did not accept its characterisation as professional misconduct. She continued to deny the motivation which the Tribunal ultimately concluded she had for conducting herself in the way that she did.

31 The continued denial by Ms Vanderfeen of her motivation for her conduct is a matter of concern. On balance, however, we do not consider that, given her acceptance that her conduct was wrong, that continued denial should lead to a conclusion that she is not fit and proper to remain on the roll of practitioners.

32 As we have found (Reasons [54]), Ms Vandersteen's conduct was most likely motivated by her desire to avoid the threats to the successful settlement of her client's matrimonial affairs. She now acknowledges that she went about that objective in a way which involved serious breaches of

her professional duties, including recklessly misleading the Court. She rightly acknowledges that the breaches were serious. The materials before the Tribunal strongly support the conclusion that this matter should be seen as a serious aberration, deserving of a significant penalty, but not as demonstrating an underlying unfitness to practice. We do not therefore consider this to be a case which calls for a report to the Supreme Court.

The appropriate penalty

33 Having determined that it is not appropriate that a report be transmitted to the Supreme Court, the question arises as to what is the appropriate penalty. It is necessary that a penalty be imposed which demonstrates to the public the seriousness with which this conduct is treated so as to instil confidence in the public that the high standards of the profession are maintained, and that transgressions from those standards are dealt with seriously, and that such conduct is not tolerated.

34 Because of Ms Vanderfeen's present position, the consequences of an order suspending Ms Vanderfeen from legal practice are at least uncertain. In her current position as a Registrar of the Family Court, she is not required to hold a practice certificate. She is not, and has not been since 2006, engaged in legal practice in the sense contemplated by s 12 of the *Legal Profession Act 2008* (WA) (LP Act). Suspension from legal practice, which otherwise might have been seriously considered, would, therefore, be a penalty of no practical effect.

35 In those circumstances, we are of the view that it is appropriate that there should be a fine imposed in relation to the findings. At [94] of the reasons, we expressed the view that it is appropriate to see the conduct contained in findings (a) to (e) as elements of the same misguided objective. We considered that it is appropriate to impose a global fine in relation to all aspects of the conduct constituted by the findings. The maximum fine provided for under s 441 of the LP Act is $25,000. The same maximum fine was prescribed by s 187 of the Legal Practice Act 2003 (WA), which was the Act in force at the time that the conduct occurred. As we have found, the findings against the practitioner are serious. But for her present position, we would have been inclined to impose a suspension on the respondent's practice. In those circumstances, we consider a fine to the higher end of the range to be appropriate. Accordingly, we would order that the practitioner pay a fine of $20,000.

Costs

36 In accordance with the usual practice of the Tribunal where a complaint brought by a vocational body is successful, it is appropriate in this case that Ms Vanderfeen be ordered to pay the Complaints Committee's costs of the proceedings. No submissions were made by the respondent in opposition to such an order.

37 The Complaints Committee has provided a schedule of costs made up essentially of counsel fees and disbursements. The Complaints Committee does not seek to recover the costs of its legal officers in prosecuting the matter. In our view the amount claimed for counsel fees, which have been discounted by 20%, together with the disbursements claimed, are reasonable. There should be an order that the practitioner pay the Complaints Committee's costs in the sum of $18,412.70.

Orders

1. The practitioner is ordered to pay a fine to the Legal Practice Board in the sum of $20,000.

2. The practitioner is ordered to pay the Legal Profession Complaints Committee's costs fixed at $18,412.70.

I certify that this and the preceding [37] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUSTICE J A CHANEY, PRESIDENT