

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : VOCATIONAL REGULATION

**ACT** : LEGAL PROFESSION ACT 2008 (WA)

**CITATION** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE and HOLME [2012] WASAT 99

**MEMBER** : JUDGE T SHARP (DEPUTY PRESIDENT)  
MR C RAYMOND (SENIOR MEMBER)  
MS S GILLETT (MEMBER)

**HEARD** : 13 SEPTEMBER 2010 AND 18 OCTOBER 2011 -  
WRITTEN SUBMISSIONS: 7 DECEMBER 2011,  
23 DECEMBER 2011 AND 20 JANUARY 2012

**DELIVERED** : 11 MAY 2012

**FILE NO/S** : VR 34 of 2010

**BETWEEN** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE  
Applicant

AND

SIMON ALEXANDER HOLME  
Respondent

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*Catchwords:*

Vocational regulation - Legal practitioner - Professional misconduct - Unsatisfactory professional conduct - Failure to meet obligations to pay employee superannuation - Failure to meet obligations to pay employee tax withholding amounts - Failure to secure and maintain documents - Retention of interest on trust account - Disciplinary findings - Penalty

*Legislation:*

*Law Society Public Purposes Trust Act 1985 (WA)*

*Legal Contribution Trust Act 1967 (WA)*

*Legal Practice Act 2003 (WA)*

*Legal Practitioners Act 1893 (WA)*

*Legal Profession Act 2008 (WA), s 441, s 622(2)*

*State Administrative Tribunal Act 2004 (WA), s 56(1)*

*Superannuation Guarantee (Administration) Act 1992 (Cth)*

*Taxation Administration Act 1953 (Cth), Sch 1 s 16 - s 70*

*Result:*

Practitioner found guilty of professional misconduct and of unsatisfactory professional conduct

Practitioner suspended from practice and conditions placed on any future practising certificate granted to the Practitioner

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr S Vandongen SC

Respondent : Mr G Carter

*Solicitors:*

Applicant : Legal Profession Complaints Committee

Respondent : Tottle Partners

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

A Solicitor v Council of the Law Society of New South Wales  
(2004) 216 CLR 253  
International Alpaca Management Pty Ltd v Ensor (1995) 133 ALR 561  
Legal Practitioners Complaints Committee and Benari [2005] WASAT 213 (S)  
Legal Practitioners Complaints Committee and Trowell [2009] WASAT 42 (S)  
Legal Practitioners Complaints Committee v Camp [2010] WASC 188  
Legal Practitioners Complaints Committee v Lashansky [2007] WASC 211  
Legal Practitioners Complaints Committee v McKerlie [2007] WASC 119  
Royal Brunei Airlines Sdn Bhd v Tan Kok Ming [1995] 2 AC 378

**REASONS FOR DECISION OF THE TRIBUNAL:**

*Summary of Tribunal's decision*

1           A legal practitioner conceded that he had been guilty of unsatisfactory professional conduct by reason of his failure to make superannuation contributions in respect of two employees of his legal practice, failure to pay the Commissioner of Taxation the 'pay as you go' withholding amounts withheld from the wages of employees of his practice and failure to ensure that documents held by him on behalf of others were properly secured and maintained during the winding up of his legal practice.

2           However, the practitioner contested an allegation by the Legal Profession Complaints Committee that he was guilty of professional misconduct by retaining interest which his bankers paid to him on credit balances in his trust account when he knew that the bank should not have paid that interest to him.

3           The Tribunal considered that the practitioner's concession as to unsatisfactory professional conduct was properly made. The Tribunal also found that the practitioner was guilty of professional misconduct as alleged by the Committee.

4           The Tribunal accepted that at the relevant time, the practitioner was suffering from major depressive and anxiety disorders, but considered that, while this provided a partial explanation for his conduct, it did not excuse it.

5           The Tribunal determined that the appropriate professional disciplinary consequence, in the circumstances of the case, was to suspend the practitioner from legal practice for a period of two years. The Tribunal also determined that, should the practitioner apply for a practising certificate in the future, it should be made subject to a condition that he could only practise as an employed solicitor under supervision. This penalty was necessary and appropriate for the protection of the public and the maintenance of proper standards in the legal profession.

*Introduction*

6           In July 2003, Mr Simon Alexander Holme (**Practitioner**) purchased and took over the legal practice (**legal practice**) of a Mr Richard Thomas in Esperance.

7 From July 2003 to May 2008, the Practitioner was the principal of the legal practice, which operated initially under the name Richard K Thomas and subsequently under the Practitioner's name.

8 In an application dated 12 February 2010, the Legal Profession Complaints Committee (**Committee**) brought complaints against the Practitioner of professional misconduct or unsatisfactory professional conduct or both as follows:

### **Complaint A**

9 That the Practitioner engaged in professional misconduct between July 2003 or thereabouts and February 2008 by receiving and retaining for his own use and benefit interest earned on his firm's trust account when:

- 1) the provisions of the now repealed *Legal Contribution Trust Act 1967* (WA) (**Trust Act**) and arrangements entered into by the Law Society of Western Australia with the bank by which his firm's trust account was held pursuant to the *Law Society Public Purposes Trust Act 1985* (WA) (**Public Purposes Trust Act**) required the said bank to pay the interest earned on the trust account to the Legal Contribution Trust and the Law Society Public Purposes Trust;
- 2) the Practitioner:
  - (i) knew that he had received such interest and retained it for his own benefit; and
  - (ii) knew that he was not entitled to receive interest on his trust account and retain it for his own benefit.
- 3) alternatively, the Practitioner:
  - (i) recklessly disregarded that he had received such interest and retained it for his own benefit; and
  - (ii) recklessly disregarded that he was not entitled to receive interest on his trust account and retain it for his own benefit.

### Complaint B

10 That the Practitioner engaged in professional misconduct or unsatisfactory professional conduct between May 2007 and May 2008:

- 1) in failing to make or to cause to be made the required superannuation contributions in respect of two employees of his legal practice; or
- 2) further or alternatively in the premises set out in (1) above, in failing to lodge, or cause to be lodged, with the Commissioner of Taxation a superannuation guarantee statement as required by the *Superannuation Guarantee (Administration) Act 1992* (Cth) in respect of those employees.

### Complaint C

11 That the Practitioner engaged in professional misconduct or unsatisfactory professional conduct between September 2006 and June 2007 in breaching s 16 - 70 of Sch 1 of the *Taxation Administration Act 1953* (Cth) by failing to pay or cause to be paid to the Commissioner of Taxation the 'Pay as you go' withholding amounts withheld from the wages of employees of the legal practice.

### Complaint D

12 That the Practitioner engaged in professional misconduct or unsatisfactory professional conduct in about May 2008 and June 2008 by failing to ensure, by direction or supervision, that documents of his clients and documents of others, held by him in safekeeping on their behalf, were properly secured and maintained during the winding up of the legal practice.

### *Applicable legislation*

13 The conduct complained about by the Committee occurred between July 2003 and June 2008. Until 1 January 2004, the *Legal Practitioners Act 1893* (WA) (**1983 Act**) applied. Thereafter, the *Legal Practice Act 2003* (WA) (**LP Act 2003**) applied until the LP Act 2003 was repealed by the *Legal Profession Act 2008* (WA) (**LP Act**). The LP Act commenced operation on 1 March 2009, before the disciplinary proceedings were commenced. Under s 622(2) of the LP Act, the LP Act applies to conduct consisting of a contravention of the 1983 Act or the LP Act 2003 as if the

conduct consisted of a contravention of the LP Act. Accordingly, the LP Act applies to the alleged conduct complained about.

*The proceedings in the Tribunal*

14 This matter first became before the Tribunal on 16 March 2010. The Practitioner was ordered to file a response and the matter was referred to mediation.

15 The Practitioner's first substantive response was filed on 1 June 2010 (**Response**) and he filed a further response on 5 July 2010 (**Further Response**).

16 The matter was listed for a final hearing to commence on 13 September 2010.

17 At that hearing, the Committee tendered a number of witness statements and its bundle of documents (**BOD**). The hearing was then adjourned to allow the Practitioner further time to seek legal advice and representation.

18 The Practitioner filed his bundle of documents on 20 September 2011 (**Respondent's Bundle**). On 26 September 2011, the Committee filed a supplementary bundle of documents (**Supp. BOD**).

19 Following a number of further mediation conferences, the matter resumed at a hearing on 18 October 2011.

20 The Practitioner was now represented by Mr G Carter, assisted by Ms Maloney. The Committee was represented by Mr S Vandongen SC, assisted by Mr Fletcher.

21 At the commencement of the final day of the hearing, the parties informed the Tribunal that they had reached agreement with regard to the disposition of complaints B, C and D, and they handed over a minute of consent orders in the following terms:

***MINUTE OF CONSENT ORDERS AS TO GROUNDS B, C AND D***

On the application of the parties to settle the proceedings determined by ...

***The Tribunal notes:***

The Legal Profession Complaints Committee (the Committee) alleged that there is proper cause for disciplinary action against the practitioner pursuant to Section 438(1) of the *Legal Profession Act 2008*.

By a written agreement between the parties dated 18 October 2011 the parties agreed the terms upon which the proceedings could be settled.

The parties have agreed the following relevant facts:

1. In July 2003 the practitioner took over the legal practice of Richard Thomas in Esperance.
2. From July 2003 to May 2008 the practitioner was the principal of a legal practice which operated initially under the name Richard K Thomas and subsequently under the practitioner's name (*the legal practice*).

**Ground B**

3. At all relevant times, the Simon Holme Family Trust (ABN 30 374 517 322) (*the Family Trust*) was the employer within the meaning of section 12 of the *Superannuation Guarantee (Administration) Act 1992 (Cth) (SGAA)* of Karen Lavis and Petria Aileen Borgas, who were employed to carry out, or assist in, the legal practice (*the employees*).
4. The practitioner, as trustee of the Family Trust, was responsible for ensuring that the Family Trust complied with all the relevant legislative requirements or alternatively he was responsible for establishing and supervising a system to ensure that the Family Trust so complied.
5. Pursuant to the provisions of the SGAA and the *Superannuation Guarantee Charge Act 1992 (Cth) (SGCA)*, an employer's obligations to contribute to an employee's superannuation were at the relevant time as set out in paragraphs 6 to 11 below.
6. In respect of each quarter ending on the following dates an employer was obliged to contribute a specified amount to an employee's superannuation fund by at least the following dates:

Quarter ended	Last date contributions due
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30 September	28 October in the next quarter
31 December	28 January in the next quarter
31 March	28 April in the next quarter
30 June	28 July in the next quarter

7. Where an employer failed to contribute to an employee's superannuation fund in respect of any quarter by the date set out in paragraph 6 above then:
- (a) that employer had a superannuation guarantee shortfall in respect of that quarter; and
  - (b) such a superannuation guarantee shortfall was calculated in accordance with section 17 of the *SGAA*.
8. Pursuant to subsection 33(1) of the *SGAA*, an employer who had a superannuation guarantee shortfall for a quarter had to lodge a superannuation guarantee statement with the Commissioner of Taxation:
- (a) for a quarter ending on 31 March, by 28 May in the next quarter;
  - (b) for a quarter ending on 30 June, by 28 August in the next quarter;
  - (c) for a quarter ending on 30 September, by 28 November in the next quarter;
  - (d) for a quarter ending on 31 December, by 28 February in the next quarter. Where there was such a superannuation guarantee shortfall:
9. Where there was such a superannuation guarantee shortfall:
- (a) a charge in that amount was imposed on the employer pursuant to sections 5 and 6 of the *SGCA*; and
  - (b) that charge was payable by the employer pursuant to section 16 of the *SGAA*.
10. The superannuation guarantee charge payable by the employer was payable on the lodging of the superannuation guarantee statement.
11. Where the employer failed to lodge a superannuation guarantee statement as required by the *SGAA*, the Commissioner of Taxation

had to issue a default assessment of the employer's superannuation guarantee shortfall for that quarter under section 36 of the SGAA, before the employer would be liable to pay the superannuation guarantee charge in respect of the superannuation guarantee shortfall.

12. Between May 2007 and May 2008 the practitioner failed to make superannuation payments in respect of two employees as required and failed to lodge a superannuation guarantee statement with the Commissioner of Taxation as required under the relevant legislation.
13. The superannuation payments for each employee which the practitioner failed to make were as follows:

<b>Employee</b>	<b>Period</b>	<b>Shortfall</b>
Karen Lavis	May 2007 to May 2008	\$2,890.82
Petria Borgas	May 2007 to January 2008	\$1,970.00

***Ground C***

14. At all relevant times, the Family Trust employed Petria Borgas, Edward Gray, Bronwyn McLeod, Karen Lavis and Elizabeth Street to carry out, or assist in, the legal practice.
15. The practitioner, as trustee of the Family Trust, was responsible for ensuring that the Family Trust complied with all the relevant legislative requirements including section[s] 16-70 of Schedule 1 of the Taxation Administration Act 1953 (Cth) (TAA) or alternatively he was responsible for establishing and supervising a system to ensure that the Family Trust so complied.
16. Section[s] 16[-]70 of Schedule I of the TAA requires an employer who withholds 'pay as you go' (PAYG) deductions from the wages of an employee to pay the amounts withheld to the Commissioner of Taxation within the time limit set out in Section[s] 16-75 of Schedule I of the TAA.
17. Between September 2006 and June 2007 a total of \$23,866 PAYG deductions was withheld from the wages of the employees of the legal practice (as set out in schedule 1 of this Statement of Agreed Facts) and was not paid to the Commissioner of Taxation within the time limit set out in Section[s] 16-75 of Schedule 1 of the TAA or at all.

***Ground D***

18. In or about late May 2008 the practitioner commenced winding up the legal practice and he left the premises from which the legal practice had operated for the last time on or about Sunday 1 June 2008.
19. In winding up the legal practice, the practitioner was under an obligation to properly secure and maintain documents of the clients of the legal practice, and documents of others, held by him in safekeeping on their behalf.
20. The practitioner failed to properly secure and maintain the documents listed in Schedule 2 of this Statement of Agreed Facts, which documents were the property of the persons named in Schedule 2. Those documents were found on 2 June 2008 by a former employee of the legal practice in a skip bin that was in the alley at the rear of the premises.

***The Tribunal orders:***

Being satisfied by reason of the practitioner's admission that proper cause exists for disciplinary action against the practitioner, and in order to give effect to the agreed terms of settlement of the proceedings, it is on [ ] ordered pursuant to s.56(1) of the *State Administrative Tribunal Act 2004* (WA) that:

1. The practitioner engaged in unsatisfactory professional conduct:
  - a. between May 2007 and May 2008:
    - i. in failing to make or to cause to be made the required superannuation contributions in respect of two employees of the legal practice; and
    - ii. further, or alternatively, in failing to lodge, or cause to be lodged, with the Commissioner for Taxation a superannuation guarantee statement as required by the *Superannuation Guarantee (Administration) Act 1992* (Cth) in respect of those employees;
  - b. between September 2006 and June 2007 in breaching section[s] 16-70 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) by failing to pay or cause to be paid to the Commissioner of Taxation the 'pay as you go' withholding amounts withheld from the wages of five employees of the legal practice; and
  - c. between about May and June 2008 by failing to properly secure and maintain documents of his clients, and the

documents of others, held by him in safekeeping on their behalf, during the winding up of his legal practice.

2. That the penalty to be imposed with regard to the practitioner's unsatisfactory conduct be determined having reference to the decision of the Tribunal in respect of Ground A in these proceedings.

***Facts around complaint A***

22 The facts around complaint A are reasonably straightforward and are not in dispute.

23 The legal practice had two bank accounts with National Australia Bank Limited (**Bank**) in Esperance. The first was a trust account described as the Simon Holme Barrister and Solicitor Trust Account (**Trust Account**) and the second was a general account described as the Simon Alexander Holme trading as Simon Holme Barrister and Solicitor as trustee for the Simon Holme Family Trust business cheque account (**General Account**); **BOD, pages 5 and 6.**

24 The Practitioner accepts that interest earned on the Trust Account between the opening of the Trust Account on or about 24 June 2003 until the end of October 2003 was credited to and retained in the Trust Account until 15 June 2004, when it was taken out of the Trust Account by way of four paper or manual debit slips and credited to the General Account by way of four paper or manual credit slips (**Manual Transfers**); **Supp. BOD, pages 1 - 8.**

25 Interest continued to be earned on the Trust Account between November 2003 and February 2008, and was electronically transferred to the General Account (**Electronic Transfers**) at the end of each month, although the Practitioner says that he was not aware that this was occurring; **Further Response, paras 6, 10 and 11.**

26 The Practitioner agrees that between 1 July 2003 and February 2008, the interest on the Trust Account was used to maintain the operation of his practice; **Further Response, para 15.** The Practitioner also agreed in cross-examination that, without the interest on the Trust Account, his practice would have faced serious financial difficulties (T:97; 18.10.11).

27 The Practitioner accepts that the Bank was required to pay the interest on the Trust Account to the Legal Contribution Trust pursuant to the Trust Act and to the Law Society Public Purposes Trust under an

agreement between the Law Society and the Practitioner's bankers made pursuant to the Public Purposes Trust Act; **Further Response, para 5.**

- 28 It follows that the Practitioner does not dispute that:
- a) he received and retained the interest earned on the Trust Account;
  - b) he used the interest for his own purposes and benefitted from its receipt and retention; and
  - c) the receipt and retention of that interest was contrary to the obligations imposed under the Trust Act and the agreement under the Public Purposes Trust Act.

29 The issue for the Tribunal, then, is whether or not the Practitioner knew of the receipt and retention of the interest, which he denies, or alternatively, whether he recklessly disregarded the receipt and retention of the interest, which he also denies.

### ***Evidence***

30 The Committee provided to the Tribunal a witness statement from the Practitioner's secretary, Ms Petria Aileen Borgas, dated 6 September 2010 (**Borgas Witness Statement**). Ms Borgas says that she worked for the Practitioner between July 2003 and December 2004 and then from January 2006 to January 2008. She 'did the bookwork for his Trust Account'; **Borgas Witness Statement, para 3.** She said that, shortly after the Practitioner took over the legal practice, she noticed that interest was being earned on the Trust Account and that interest 'was being deposited into that account'; **Borgas Witness Statement, para 7.** She said at para 8:

I informed Simon about the interest being earned on his Trust Account and told him that that shouldn't be happening.

31 She then says that she was told to 'ring the National Australia Bank and sort it out'; **Borgas Witness Statement, para 9.** When she informed the Practitioner that she did not have the authority to instruct the Bank, she said:

Simon said he would sort it out.

32 She said that when she next checked the Trust Account's statements, no interest payments were subsequently shown.

33 It is unclear when Ms Borgas spoke to the Practitioner and she was not cross-examined at the hearing. It is likely, however, that this conversation would have taken place during her first period of employment, between July 2003 and December 2004, because the interest payments on the Trust Account balances had stopped appearing in the Trust Account statements by June 2004 and she says that it was only in early 2008 that she had her first occasion to see the statements for the Practitioner's General Account; **Borgas Witness Statement, paras 13 - 14**. She noted that they showed interest as being received into that account from the Trust Account. She says that she did not raise this with the Practitioner.

34 Ms Deborah Kennedy, an officer of the Bank at its Esperance branch, provided a witness statement dated 12 October 2011 and also gave evidence at the hearing. She said that, although it was possible that the Bank may have in error electronically credited the General Account with interest from the Trust Account, it was unlikely because of the number of those transfers. She said that, although she could not find on file the relevant written authority, a transaction could not be made on account without an authority 'with the correct signatures on it' (T:25; 18.10.11).

35 Another Bank officer, Mr Brendan Moore, also gave evidence at the hearing. He worked in the Bank's Esperance branch between 19 January 2004 and 3 December 2006, and he describes himself as the Practitioner's 'business banking manager' (T:27; 18.10.11). He said that, in order for the Manual Transfers to be processed, it would have required 'something in writing'. He said that he had never known the Bank to transfer interest from one account to another 'off its own bat' (T:29; 18.10.11). He did, however, accept that it was always possible that both the Manual Transfers and the Electronic Transfers could have occurred through 'processing errors' on the part of the Bank (T:61; 18.10.11).

36 The Practitioner's evidence at the hearing was that he simply could not recall who gave the instructions to the Bank (T:82; 18.10.11) and that, to the extent that he examined the statements from the General Account at all, he said that he just did not notice that interest was being credited to the General Account, even though, in retrospect, it 'stood out a bit' (T:77; 18.10.11).

37 The Practitioner says (**Respondent's Bundle page 13, para 77**) that he regularly saw the annual profit and loss statements for the legal

practice. At the hearing, he was shown the profit and loss statements for the legal practice for the years respectively to 30 June 2004, 30 June 2005 and 30 June 2006 (T:77 and T:78; 18.10.11). Those profit and loss statements (**BOD pages 76 - 78**) show that the legal practice had substantially only two sources of income for those years, namely, professional fees and 'interest'. The Practitioner said that the legal practice had no investments, annuities or shares that were earning money or any other source of 'interest' (T:76; 18.10.11) and then, when it was put to him that '[the interest] stands out a bit, doesn't it, Mr Holme?', he replied 'It does when I look it now, but at the time ... the penny didn't drop' (T:77; 18.10.11).

38 The Practitioner said that he took a close interest in the financial affairs of the legal practice. It is reasonable, therefore, to assume that he inspected the statements from the Bank in respect of the General Account. Those statements show regular credits of interest from another, numbered, account, which is, in fact, the Trust Account.

39 Finally, the Tribunal heard evidence from Mr Philip Geoffrey Hunt, a psychologist who provided the Tribunal with his clinical assessment of the Practitioner in December 2007, his opinion as to the Practitioner's likely mental state in 2003 and 2004 and his opinion as to the Practitioner's 'likely ability to deal with important occupational matters requiring his attention in 2003/2004'.

40 It is unnecessary to provide details of Mr Hunt's evidence because the Committee readily concedes that the Practitioner at all relevant times was suffering from an anxiety disorder and a major depressive disorder, at least 'in the moderate range'.

***The Tribunal's findings as to the Practitioner's conduct***

41 The Tribunal has considered the parties' proposed findings insofar as they relate to the Practitioner's conduct in respect of complaints B, C and D. The Tribunal is satisfied by reason of the Practitioner's admission that the Practitioner engaged in unsatisfactory professional conduct:

- a) between May 2007 and May 2008:
  - i) in failing to make, or cause to be made, the required superannuation contributions in respect of two employees of the legal practice; and

- ii) further, alternatively, in failing to lodge, or cause to be lodged, with the Commissioner for Taxation a superannuation guarantee statement as required by the *Superannuation Guarantee (Administration) Act 1992* (Cth) in respect of those employees;
- b) between September 2006 and June 2007 in breaching s 16 - s 70 of Sch 1 of the *Taxation Administration Act 1953* (Cth) by failing to pay, or causing to be paid, to the Commissioner of Taxation the 'Pay as you go' withholding amounts withheld from the wages of five employees of the legal practice; and
- c) between about May 2008 and June 2008, by failing to properly secure and maintain documents of his clients, and the documents of others, held by him in safekeeping on their behalf, during the winding up of the legal practice.

42 In respect of the Practitioner's conduct relating to complaint A, the Tribunal cannot form a conclusive view as to whether or not the Practitioner expressly authorised the Manual Transfers or the Electronic Transfers or both. It may be that the Practitioner did so, but it is also possible that this was done by a member of his staff without his knowledge, or that this was done by the Bank without any authorisation.

43 However, the Tribunal finds that the Practitioner either knew that he was receiving interest on the Trust Account or, alternatively, he recklessly disregarded the fact that the interest was being paid to the legal practice and, in either case, he retained it for his own use, thus enriching himself with funds which he knew were being paid to him in breach of the Trust Act and the Public Purposes Trust Act.

44 As to whether this conduct can be regarded as dishonest, Lord Nicholls observed in *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming* [1995] 2 AC 378 at 389:

... an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.

45 His Lordship continued (at 390):

Acting in reckless disregard of others' rights or possible rights can be a telltale sign of dishonesty.

46 In *International Alpaca Management Pty Ltd v Ensor* (1995) 133 ALR 561 at 597, it was said:

It is true that Royal Brunei was not a sale of goods case, but in our view, these observations are capable of general application in civil matters where 'good faith' or 'honesty' is an issue.

47 The Tribunal has accepted that the Practitioner was suffering from the serious mental health issues referred to earlier in these reasons. Had the complaint been about a single or occasional oversight, we could accept that it is conceivable that he may not have noticed the errors or may have noticed the errors and simply forgot to contact the Bank. However, this complaint is about events which occurred regularly every month for over four years and the Tribunal simply cannot believe that the Practitioner's conduct can be explained in this way.

48 The Practitioner's judgment in dealing with this matter could have been influenced by his health issues. Mr Hunt's evidence suggests that the Practitioner may have been demonstrating an inclination to avoid a difficulty by ignoring it, which may well be the case. However, if the Practitioner was ignoring the situation, then it can be inferred that he was aware of the situation. Accordingly, his health issues, while they might provide a partial explanation, cannot justify his actions.

49 The Practitioner also points to 'systemic failures', namely, the failure of the Bank to observe its statutory duties with regard to the interest on the Trust Account and the failure of the Legal Practice Board's inspector and the auditors to observe the accumulation of that interest. While these failures are unfortunate, they can, at least to some extent, be explained. However, it is unnecessary to consider that issue further, because the failures cannot excuse or justify the Practitioner's conduct.

50 The Practitioner's conduct, including dishonest conduct, was such that the Tribunal finds that the Practitioner is guilty of professional misconduct.

### ***Appropriate disciplinary outcome***

51 We propose to deal with the four complaints together for the purpose of imposing a penalty.

52           However, our remarks which follow concentrate on the finding of professional misconduct, as it is more serious than the three findings of unsatisfactory professional conduct. This should not be seen as minimising the seriousness of the conduct which led to the findings of unsatisfactory professional conduct and, in assessing the appropriate penalty, our decision is based on the cumulative effect of our findings in relation to all of the complaints.

53           The principles to be applied when considering an appropriate penalty to be imposed on legal practitioners upon a finding of professional misconduct or unsatisfactory professional conduct are summarised in *Legal Practitioners Complaints Committee v Camp* [2010] WASC 188 at [79] as follows (citations omitted):

It is timely to acknowledge that the objects of professional disciplinary proceedings are to secure the protection of the public; to maintain a high reputation of the legal profession; and to enforce the maintenance of proper standards by members of the profession ... Punishment is not one of the objects of disciplinary proceedings. ... The penalty must demonstrate without doubt the standards to be observed by practitioners ...

54           The Committee seeks an order that a report be submitted to the Supreme Court recommending that the Practitioner be struck off the Roll of practitioners.

55           Where an order for removal from the Roll of practitioners is contemplated, the ultimate question is whether the material demonstrates that the Practitioner is not a fit and proper person to remain a legal practitioner; *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253 at [15] (*A Solicitor*).

56           Fitness to practice is to be decided as at the time of the hearing, not as at the time that the relevant conduct was engaged in; *A Solicitor* at [21].

57           Honesty and integrity are essential prerequisites to a practitioner's right to practise law; *Legal Practitioners Complaints Committee v McKerlie* [2007] WASC 119 at [8].

58           A practitioner's failure to understand that the impropriety of his or her conduct may be a factor of great importance in determining whether he or she should be permitted to stay on the Roll of Practitioners; *Legal Practitioners Complaints Committee v Lashansky* [2007] WASC 211 at [35].

59 The Practitioner, on the other hand, in resisting the Committee's contention for removal of the Practitioner from the Roll, says that it is appropriate that the principles applicable to sentencing apply by analogy to disciplinary decisions of the Tribunal. The Practitioner's authority for this is in a decision of the Tribunal in *Legal Practitioners Complaints Committee and Trowell* [2009] WASAT 42 (S) (*Trowell*) at [19]. On that basis, the Practitioner argues that the existence of any mental disorder or impairment (whether or not the condition can be properly labelled a serious mental illness) either at the time of the offence or at the time of 'sentencing' or both may be relevant in that the Practitioner's 'moral culpability should be significantly reduced in considering an appropriate penalty, because his impaired mental functioning impaired his ability to exercise reasonable diligence and appropriate judgment, impaired his ability to think clearly, remember and action issues requiring his attention, obscured any intent and otherwise contributed causally to the alleged conduct'.

60 The comments of the Tribunal in *Trowell* referred to above were, of course, made in the context of an argument by the practitioner in that case that 'whilst the role of the [Committee] is to protect the public and maintain the standards of the profession, and that this is the primary purpose of the imposition of a penalty in disciplinary proceedings, that does not mean that the Tribunal may ignore the punitive effects on the individual': *Trowell* at [16].

61 The Tribunal in *Trowell* went on to say, at [20]:

As a practical matter, courts and tribunals dealing with the appropriate penalty in disciplinary proceedings often have regard to factors such as the gravity of the charge, the effect of the misconduct on the client, the practitioner's previous good character, her or his level of co-operation with the regulating authority and the effect of the penalty (and an order for costs) in the circumstances. We are prepared to consider the practitioner's submissions of 'facts in mitigation' on this basis.

62 It concluded, at [21], that the Tribunal is 'required to consider all the material circumstances supporting and relating to the charges; that is, both the "aggravating" as well as the "mitigating" circumstances'.

63 We agree that it is clearly open to the Tribunal to take into account the Practitioner's circumstances when assessing the appropriate disciplinary outcome.

64 The Tribunal does not consider that this is an appropriate case to make and transmit a report to the Supreme Court recommending that the

Practitioner be struck off the Roll of practitioners. The Practitioner was making decisions or failing to make decisions in a situation where he was suffering from serious health issues and was probably overwhelmed by what transpired to be a much more difficult challenge than he was expecting, namely, the acquisition and operation of the legal practice. He was also under extreme financial pressure.

65 The Tribunal considers that the appropriate disciplinary outcome in this case is to make an order that a local practising certificate not be granted to the Practitioner for a period of two years. Should the Practitioner then wish to apply for a local practising certificate, the certificate should include a condition that the Practitioner not be permitted to practise except as an employed solicitor under the supervision of a legal practitioner who has not less than five years post-admission experience. This should be sufficient to protect the public and to ensure the maintenance of proper professional standards.

### *Costs*

66 Notwithstanding the general position set out in s 87(1) of the SAT Act, where disciplinary actions have been commenced in the public interest by a vocational regulatory body and the vocational regulatory body has been successful in the prosecution of those proceedings, ordinarily the affected person will be ordered to contribute to the costs of the proceedings which are incurred by the vocational regulatory body; *Legal Practitioners Complaints Committee and Benari* [2005] WASAT 213 (S) at [25] (*Benari*).

67 The contribution the affected person should be required to make lies in the discretion of the Tribunal, having regard to all of the circumstances of the case. Special matters may be taken into account to determine what is a fair and reasonable costs order; *Benari* at [26] - [29].

68 The Practitioner has submitted to the Tribunal that he is not currently employed and is an undischarged bankrupt. His partner's salary is the sole source of income of the Practitioner and his family.

69 The Committee is seeking costs of \$21,505.45, and points out that:

- a) not all fees charged by counsel are sought by the Committee;

- b) counsel's fees have been charged to the Committee at a reduced or discounted rate relative to what counsel would otherwise charge; and
- c) the Tribunal's fees are at cost.

70 The Tribunal considers that it is appropriate for the Practitioner to contribute to the Committee's costs, but also considers that to award the full amount claimed by the Committee would cause unnecessary hardship to the Practitioner and his family.

71 Accordingly, the Tribunal finds that the Practitioner should be ordered to pay a sum of \$10,000, being a substantial contribution to the costs incurred by the Committee.

### ***Orders***

72 The Tribunal therefore makes the following final orders in these proceedings:

1. Being satisfied by reason of the Practitioner's admission that proper cause exists for disciplinary action against him, and in order to give effect to the agreed terms of settlement of the proceedings, it is ordered, pursuant to s 56(1) of the *State Administrative Tribunal Act 2004* (WA), that the Practitioner engaged in unsatisfactory professional conduct:
  - (a) between May 2007 and May 2008:
    - (i) in failing to make or to cause to be made the required superannuation contributions in respect of two employees of the legal practice; and
    - (ii) further, or alternatively, in failing to lodge, or cause to be lodged, with the Commissioner for Taxation a superannuation guarantee statement as required by the *Superannuation Guarantee (Administration) Act 1992* (Cth) in respect of those employees;

- (b) between September 2006 and June 2007 in breaching sections 16 - 70 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) by failing to pay or cause to be paid to the Commissioner of Taxation the 'pay as you go' withholding amounts withheld from the wages of five employees of the legal practice; and
  - (c) between about May and June 2008 by failing to properly secure and maintain documents of his clients, and the documents of others, held by him in safekeeping on their behalf, during the winding up of his legal practice.
- 2. There is a finding that the Practitioner, between July 2003 or thereabouts and February 2008, engaged in professional misconduct by receiving and retaining for his own use and benefit interest earned on his firm's trust account.
- 3. In respect of the findings of unsatisfactory professional conduct and professional misconduct against the Practitioner:
  - (a) he is not to be granted a local practising certificate for a period of two years from and including 11 May 2012; and
  - (b) the following condition is to be imposed upon the practising certificate of the Practitioner, should he wish to apply for a local practising certificate after the expiry of the period referred to at 3(a):

The Practitioner is not permitted to practise law except as an employed solicitor under the supervision of a legal practitioner who has not less than five years post-admission experience.

The Practitioner has liberty to apply for the removal or variation of that condition after a period of five years from and including 11 May 2012.

4. The Practitioner is to pay the Legal Profession Complaints Committee's costs fixed at \$10,000, to be paid within 30 days of the date of these orders.

I certify that this and the preceding [72] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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**JUDGE T SHARP, DEPUTY PRESIDENT**