

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : VOCATIONAL REGULATION

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

**CITATION** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE and CAINE [2010] WASAT 178

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

**HEARD** : 8 SEPTEMBER 2010  
WRITTEN SUBMISSIONS  
24 SEPTEMBER 2010  
11 OCTOBER 2010

**DELIVERED** : 8 DECEMBER 2010

**FILE NO/S** : VR 201 of 2009

**BETWEEN** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE  
Applicant

AND

CORRIN LINDSAY CAINE  
Respondent

---

*Catchwords:*

Legal practitioner - Disciplinary proceedings under *Legal Profession Act 2008 (WA)* - Where issues of professional conduct other than competence and diligence - Continuing application of common law concept of unprofessional conduct - Unsatisfactory professional conduct - Counsel likely to be a witness -

---

Witness giving false evidence to counsel's knowledge - Attempt to mislead the Complaints Committee - Counsel suggesting that a witness confer with other witnesses

*Legislation:*

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

*Law Society of Western Australia Professional Conduct Rules*

*Legal Practice Act 1893 (WA)*

*Legal Practice Act 2003 (WA)*

*Legal Profession Act 2008 (WA), s 428(2), s 622, Pt 13, s 401, s 402, s 403, s 404, s 406(2), Pt 13, s 621, s 607*

*Medical Practice Act 2008 (WA), s 76*

*Western Australian Bar Association Conduct Rules*

*Result:*

The respondent is guilty of unsatisfactory professional conduct

*Category:* B

**Representation:**

*Counsel:*

Applicant : Ms P Cahill SC and Ms P Le Miere  
Respondent : Mr I Viner QC and Mr R Butcher

*Solicitors:*

Applicant : Legal Profession Complaints Committee  
Respondent : Butcher Paull & Calder

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

Briginshaw v Briginshaw (1938) 60 CLR 336

Chapman v Rogers [1983] 1 Qd R 542

Day v Perisher Blue Pty Ltd [2005] NSWCA 110

Holborow v MacDonald Rudder [2002] WASC 265

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

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170  
Powell v In De Braekt [2007] WASC 4

**REASONS FOR DECISION OF THE TRIBUNAL:**

*Summary of Tribunal's decision*

1           Between 1995 until 2002, the respondent, a legal practitioner, acted for two clients in relation to the affairs of a unit trust whose object was the establishment of a commune. The clients were unit holders and held shares in the corporate trustee. There were disputes between the shareholders about control of the trustee and the clients were parties to a series of actions in the Supreme Court brought by, and brought against, other shareholders.

2           The respondent's conduct during the course of this litigation and his responses following the making of a complaint against him were the subject of an application brought by the Legal Profession Complaints Committee in the Tribunal. It was alleged that the practitioner had engaged in unsatisfactory professional conduct or professional misconduct or both, based on five grounds. These were in summary:

- (1) acting as counsel in proceedings when he knew he was likely to be a material witness;
- (2) alternatively, failing to intervene when his client gave evidence which he knew to be incorrect;
- (3) attempting to mislead the Legal Profession Complaints Committee;
- (4) alternatively providing a witness statement which he knew to contain a false statement; and
- (5) suggesting to a witness that he confer with other witnesses with a view to his evidence being consistent with theirs.

3           We found the practitioner guilty of unsatisfactory professional conduct on the following grounds:

- (1) failing to intervene when his client gave evidence which he knew to be incorrect; and
- (2) suggesting to a witness that he confer with other witnesses with a view to his evidence being consistent with theirs.

*Reasons*

4 Pursuant to the provisions of Pt 13 of the *Legal Profession Act 2008* (WA) (**LP Act**) the applicant instituted professional disciplinary proceedings before the Tribunal against the respondent (practitioner). A complaint against the practitioner was initially made in 2002 by Mr Price, who claims to have been a former client of the practitioner in the circumstances described below. The matter was investigated by the Complaints Committee. Upon the completion of its investigation, the Complaints Committee determined to refer the matter to the Tribunal. By its application lodged 9 November 2009, amended 19 July 2010, the Complaints Committee alleges that the practitioner engaged in unsatisfactory professional conduct or professional misconduct or both. The grounds of the application, as set out below, are somewhat different from the basis of Mr Price's complaint. Such a course of action is provided for by s 428(2) of the LP Act.

5 The practitioner by his reply denies he was guilty of any such conduct.

*Grounds of Application*

6 The grounds of the application are that the practitioner engaged in unsatisfactory professional conduct or professional misconduct or both by:

(1) Between 1998 and 2001 accepting instructions to act, and then so acting, as counsel in Supreme Court of Western Australia, proceedings CIV 2251 of 1998 (**the 1998 units action**) when the practitioner had reason to believe he was likely to be a relevant witness of fact in the proceedings. (**The counsel as witness ground**).

(1)(a) Alternatively to ground 1, continuing to act as Counsel for his client after he became aware that she had made an incorrect statement when giving evidence in the 1998 units action without obtaining his client's consent to inform the Court of the incorrect statement and informing the Court of the incorrect statement. (**The proceeding on false evidence ground**).

(2) Intentionally, alternatively, recklessly attempting to mislead the applicant in letters dated 23 July 2002 and

21 August 2003 from the practitioner to the applicant responding to complaints that had been made about the practitioner's conduct. (**The misleading answers ground**).

- (3) Alternatively to ground 2, providing in about August 2004 a witness statement to solicitors acting for the defendants in Supreme Court of Western Australia proceedings CIV 1124 of 2002 (**the 2002 units action**) which statement the practitioner knew to be false in a material particular or, alternatively, which the practitioner made recklessly, not caring whether it was true or false in a material particular. (**The false witness statement ground**).
- (4) By a letter dated 15 September 1997 suggesting, in effect, to a witness of fact proposed to be called by the practitioner on behalf of his client to give evidence at the trial of Supreme Court of Western Australia proceedings CIV 2114 of 1995 (**the 1995 shares action**), that the witness confer with other proposed witnesses of fact with the objective to render the evidence the witness proposed to give at trial on critical issues of fact consistent with the evidence proposed to be given by the other witnesses. (**The improper advice ground**).

7 Before turning to the facts and contentions alleged in support of each of the grounds and to the practitioner's reply in respect of them, it is necessary first, to consider the application of the LP Act to this complaint and the applicable standard of proof; and second, in order that the pleaded facts and contentions of the parties may be understood, to outline the complex background facts of the matter.

***Unsatisfactory professional conduct and professional misconduct under the LP Act***

8 The LP Act commenced 1 March 2009 and repealed the *Legal Practice Act 2003* (WA) (**LP Act 2003**). The application, 'in the matter of the *Legal Profession Act 2008*', was made subsequent to this, on 9 November 2009. The application alleges the practitioner engaged in 'unsatisfactory professional conduct' or 'professional misconduct', being terms used and defined in the LP Act. The practitioner has not suggested that the LP Act does not apply, although at one point in his written closing

submissions reference is made to the common law test of unprofessional conduct.

9           The conduct of the practitioner complained of took place between 1997 and 2004 at a time when the *Legal Practitioners Act 1893* (WA) (**1893 Act**) and the LP Act 2003 (which came into force on 1 January 2004 and repealed the 1893 Act) were in force. Moreover, the initial complaint by Mr Price was made on 22 January 2002 and initially investigated by the Complaints Committee during the currency of the 1893 Act.

10           This situation is covered by the LP Act. By s 622, Part 13 of the LP Act (which provides for complaints and discipline) applies in relation to the conduct of legal practitioners whether the conduct occurred before or after the commencement day; and to conduct consisting of a contravention of the 1893 Act or the LP Act 2003 before the commencement of s 622, as if the conduct consisted of a contravention of the LP Act. The effect of that provision is that unprofessional conduct in the form proscribed under the earlier Acts is capable of constituting, and to the extent established must be categorised as, unsatisfactory professional conduct or professional misconduct under the LP Act.

11           Further, by s 621, a complaint made to the Complaints Committee or an inquiry commenced by it under the earlier legislation that has not been finally dealt with before the commencement day, may be dealt with under the LP Act. Insofar as the application was made after the commencement date and pursuant to the LP Act, we do not understand s 607 of the LP Act (and s 37(1)(d) and s 37(1)(f) of the *Interpretation Act 1984* (WA)) to have any scope for operation. To the extent it does, it provides that the application, and any rights or entitlements the practitioner has in relation to it (arising under the former legislation), continue to have effect under and subject to the Act. It is not suggested that any such rights or entitlements exist.

12           The term 'unsatisfactory professional conduct' is defined in s 402 of the LP Act to include conduct that 'falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner'. The term 'professional misconduct' is defined in s 403 to include 'unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'; and 'conduct whether occurring in connection with the practice of the law or occurring

otherwise ... that would, if established, justify a finding that the legal practitioner is not a fit and proper person to engage in legal practice'.

13 It is apparent that professional misconduct is of a more serious nature than unsatisfactory professional conduct and extends to conduct outside professional practice. In the manner in which the terms are defined, we do not think that particular conduct of a practitioner can properly be determined as both unsatisfactory professional conduct and professional misconduct. We proceed on that basis.

14 Section 404 of the LP Act gives instances of conduct capable of constituting unsatisfactory professional conduct or professional misconduct. These include such matters as a contravention of the Act, charging excessive costs, conduct for which there is a conviction for a serious offence or involving dishonesty and a failure to comply with an order of the Complaints Committee.

15 The common law concept of 'unprofessional conduct' (sometimes expressed as 'professional misconduct', sometimes signifying more serious misconduct) is 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. See *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56 (*Kyle*) for a recent restatement and application of this notion in Western Australia, which is not to be treated as codified or exhaustive.

16 It will be observed that this concept, like the statutory definitions, is in two parts. The first part (as s 403) concerns conduct of a more serious nature and is not confined to professional conduct, that is, conduct in the practice of the law. With respect to the category of less serious conduct, at least where the conduct in question concerns a lack of competence or diligence, the statutory definition of unsatisfactory professional conduct would seem to encompass conduct which would not necessarily be regarded as unprofessional conduct within the common law notion. Conduct which 'falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner' (for example, negligence as such) might not be regarded as falling short **to a substantial degree** of 'the standard of professional conduct observed or approved by members of the profession of good repute and competence'.

17           Legal profession rules, such as the Law Society of Western Australia *Professional Conduct Rules* which are now put on a statutory footing, provide a guide as to what is regarded in Western Australia as proper professional behaviour. These rules, without being exhaustive of what constitutes unprofessional conduct or pre-empting a finding of such, provide instances of conduct in various aspects of legal practice the breach of which may constitute unprofessional conduct. Their relationship with the common law concept of unprofessional conduct is that the Rules in effect record the position 'of members of good repute and competence.' To the extent these rules are concerned with proper professional behaviour rather than with unprofessional conduct as such, conduct constituting a breach of the rules might appropriately be described as either unsatisfactory professional conduct or professional misconduct.

18           The matters the subject of the application allege a failure to comply with professional standards of conduct associated with honesty, propriety and integrity, rather than standards of competence and diligence as such.

19           It cannot have been intended by the legislature that only conduct involving 'competence' (to do with skill, capacity and ability) and 'diligence' (to do with application to the task) should (in addition to conduct establishing unfitness to practice) fall for consideration and that other instances of unprofessional conduct (for example dishonesty or impropriety) which exist at common law should no longer constitute conduct covered under the LP Act. (Professional standards include but are not limited to consumer protection). So much follows as a matter of common sense and from the operation of s 622 as described above. Moreover, s 401 includes as the purposes of Part 13 'to promote and enforce the professional standards, competence and honesty of the legal profession'. (See also the matters discussed in the following paragraphs).

20           It might be possible to argue that a 'diligent' and 'competent' practitioner will know and comply with the relevant professional standards, so that all instances of unprofessional conduct may be conflated into a failure of diligence or competence ('professional incompetence'), or (under s 403) as constituting unfitness to practice. Put another way, that under the Act the focus of an enquiry into a complaint is not directly on the conduct itself, but rather the lack of professional competence and diligence which the conduct reveals.

21           However, there are a number of matters which suggest that the references to competence and diligence were not intended to cover all

instances of unprofessional conduct, or are incapable as a matter of language of doing so, and that the common law notion of unprofessional conduct, based upon the standards of members of the profession, is intended to continue but, depending on the seriousness of the matter, to be classified under the Act as either 'unsatisfactory professional conduct' or 'professional misconduct'. That is, using those terms as they are commonly understood, but with the qualification that regard is to be had to the instances which the legislature by s 402, s 403 and s 404 treats as within those terms. In practice, the more serious form of unprofessional conduct (that which is regarded as disgraceful or dishonourable) will likely fall under the more serious statutory form (professional misconduct). Correspondingly, the less serious form of unprofessional conduct (that which to a substantial degree falls short of the standards of the profession) will likely fall under the less serious statutory form; but recognising (as mentioned above) that the concept of unsatisfactory professional conduct lowers the common law threshold at least in the case of competence and diligence.

22 First, had the legislature intended that the relevant provisions be understood as reducing all unprofessional conduct to either incompetence or lack of diligence (or unfitness to practice), it is likely that it would have expressed itself in these terms, perhaps by defining 'competence' and 'diligence'.

23 Second, it is significant that the definitions of 'professional misconduct' (s 403) and 'unsatisfactory professional conduct' (s 402) are expressed as inclusory only.

24 Third, a practitioner's failure to exercise 'competence' and 'diligence' are instances of unprofessional conduct at common law. That is, in this context, 'competence' and 'diligence' are commonly regarded as distinct from other instances of unprofessional conduct involving improper or unethical conduct (for example related to honesty or integrity in professional practice), including in relation to a lawyer's duties to the Court. Consistently with this distinction, s 404 gives instances of conduct capable of constituting unsatisfactory professional conduct or professional misconduct unrelated to competence and diligence (but which may fall short of unfitness to practice). Again, (although the point might be argued both ways) under the LP Act 2003, the definition of 'unsatisfactory conduct' includes reference to standards of competence and diligence (in identical terms to that in the definition of unsatisfactory professional conduct in the LP Act) and in addition 'unprofessional

conduct' and 'illegal conduct'. (Note s 76 of the *Medical Practice Act 2008* (WA)).

25 Fourth, whilst it may be appropriate to have regard to standards of competence and diligence (as the terms are commonly understood) by reference to the expectations of members of the public (as the definition provides), it would not seem appropriate to do so where the issue is whether some other professional failure (for example in relation to the lawyer's duties to the court or to other practitioners) is in issue and where judgment according to the standards of the profession would seem more apposite.

26 Under the new statutory regime, the Tribunal will be required to make findings as to: the nature of the charge made and the evidence in support, the relevant professional conduct rules or practice governing the matter, the extent to which there has been a departure from those rules or that practice, and whether in all of the circumstances including as necessary by reference to the common law concept of unprofessional conduct, the practitioner's conduct may be said to constitute unsatisfactory professional conduct or professional misconduct.

27 We mention one other preliminary matter. At the time of the conduct in question the practitioner held a local practising certificate. The practitioner retired from practice in, and has not held a practising certificate since, June 2004. However, by s 406(2), Part 13 of the LP Act applies to former Australian legal practitioners in relation to conduct occurring whilst they were Australian legal practitioners; that is, who then held a local practising certificate.

### ***The standard of proof***

28 In his written opening submissions Mr Viner QC, counsel for the practitioner, maintains that that the established 'standard' before the Tribunal is that of *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*).

29 To the extent this is a reference to the standard of proof, it is not an entirely accurate way of expressing the position. The standard of proof which the Complaints Committee must meet in proving its case is the civil standard - that is, proof on the balance of probabilities. But in determining whether on the evidence this standard has been satisfied, the Tribunal will recognise that 'the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are

considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal'. (See Dixon J in *Briginshaw* at 362). Each of these 'considerations' applies in disciplinary proceedings against a legal practitioner. As the High Court has more recently expressed the position, the significance of *Briginshaw* is that the seriousness of the matter and of its consequences does not affect the standard of proof but goes to the strength of the evidence necessary to establish a fact required to meet that standard. So much reflects a conventional perception that (relevantly) members of the legal profession do not ordinarily engage in improper conduct generally and in circumstances where to do so is likely to render them liable to disciplinary orders: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

30           The need for reasonably clear and cogent proof in disciplinary proceedings having regard to the seriousness of the matter and its consequences assumes some importance in this case where the events relied upon by the Complaints Committee extend back to 1995. To the extent proof is established by the documents, the delay between event and hearing may be of little consequence. However, when the issue is dependent upon the practitioner's recall of events of so long ago, including of his state of mind in relation to those events, allowance must be made for the inevitable effect of such delay upon both his ability to recall those matters and the accuracy of his recall.

### *The background facts*

31           The Complaints Committee has provided a Statement of Facts and Contentions (set out below) in support of each of the five grounds of its application and the practitioner has provided an amended reply responding to this. In order to understand the statement and the reply it is necessary to outline the events which gave rise to the three legal actions and the initial complaint in the course of which it is alleged the practitioner's conduct took place. As an aside we should express our concern that notwithstanding the volume of material tendered (the Complaints Committee's Book of Documents alone exceeds 400 pages) and an earlier direction from the Tribunal that the parties produce an agreed statement of facts, we were informed at the hearing that the parties were not able to agree any facts.

32           The following background facts, which (materially) are not in dispute, are taken from the reasons for judgment in the 1995 shares action

and in the 1998 units action, the practitioner's witness statement and otherwise from the tendered documents.

33 In late 1988 Mr Hayes, with the advice and assistance of Mr Price, established the Denmark Unit Trust. Mr Hayes and Mr Price each held 10 units in the trust and were directors of and each held two of the four issued shares in the corporate trustee. The trust was established to further the objectives of Mr Hayes and Mr Price to establish a commune in Denmark in which they, and others invited to do, so might reside.

34 In about mid-1990 an agreement (**the 1990 agreement**) was made between Mr Hayes, Mr Price and others interested in the commune being Mr and Mrs Powers and Mr Ryan. The Powers and Mr Ryan agreed to contribute funds to the trust to enable the purchase of additional land (or to purchase such land and contribute this to the trust). This was on the understanding that:

- (1) 10 ordinary units would be issued to the Powers (jointly) and 10 ordinary units would be issued to Mr Ryan.
- (2) (as found by the Court in the 1995 shares action) Mr Hayes and Mr Price would each transfer one of their shares in the trustee company to respectively Mr Ryan and the Powers (jointly); and
- (3) Mr Powers and Mr Ryan would be appointed directors.

35 This agreement was implemented, except as to the transfer of shares.

36 In 1991 a further agreement (**the 1991 agreement**) was made between these parties in contemplation of Mr Price becoming bankrupt. This agreement was that Mr Price would exchange his 10 ordinary units in the trust for 13,125 special units (which retained their nominal value of \$1 each and did not carry voting rights) and the Powers, Mr Hayes and Mr Ryan undertook that when Mr Price was discharged from bankruptcy he would be reinstated as a director of the company and his special units would be converted back to 10 ordinary units. The agreement was recorded in minutes of the company and the trust, backdated to August 1991, by which the company accepted the offer by Mr Price to have his 10 units repurchased in exchange for the special units. The terms of the 1991 agreement were subsequently recorded in a Deed of Declaration of Trust (**Deed**) made by the Powers and dated 16 April 1996. The Deed was prepared by the practitioner on the instructions of Mr Price on behalf of the Powers. The 1991 agreement was executed to the extent

that the company repurchased Mr Price's 10 units and issued the special units.

37 On 2 July 1991, Mr Price became bankrupt and his rights in the special units and two shares and (arguably) his interests in the 1990 agreement and the 1991 agreement thereby vested in his trustee in bankruptcy. At this time also he ceased as a director of the trustee.

38 In April 1992, Mr Ryan died leaving the residue of his estate and his units to the trust. This left the Powers and Mr Hayes each holding 10 ordinary units in the trust and Mr Powers and Mr Hayes as the directors. The making and substantial value of Mr Ryan's gift (his properties in Cottesloe were subsequently sold for about \$2.4 million) appears unfortunately to have led to disagreement and litigation between the commune members.

39 From about October 1995 the practitioner commenced to act for the Powers in relation to this disagreement and litigation, including as solicitor and counsel in the 1995 shares action, the 1998 units action and (initially) the 2002 units action.

40 There were disputes between Mr Hayes and Mr Powers in relation to the management of the trust. In October 1995 Mr Hayes brought proceedings seeking orders for the distribution of the assets of the trust. The practitioner acted for the Powers in opposing the application, which was dismissed.

41 In November 1995, the Powers and the executor of Mr Ryan's estate instituted the 1995 shares action. These were proceedings against Mr Hayes and Mr Price, seeking the transfer to the Powers and the executor of one share each in the trustee company in accordance with the terms of the 1990 agreement. The object of obtaining these shares was that, together with Mr Price, they would then be in a position to outvote Mr Hayes and break the deadlock in the management of the trust. Mr Price, who assisted the Powers in these proceedings, consented to such orders. (Mr Price in his subsequent complaint said that in the course of this assistance he provided confidential information about his dealings with the trust to the practitioner.) Mr Hayes defended the action on the basis that there was no agreement that he would transfer a share to Mr Ryan. The practitioner prepared witness statements for the Powers, Mr Bazeley and for Mr Price. The practitioner forwarded a draft of Mr Price's witness statement to him with advice to discuss it with the Powers. (This conduct is the subject of the improper advice ground).

42 In about November or December 1995, or alternatively March or April 1996 (the former date was ultimately adopted by the Powers in the 1998 units action) there was a further oral agreement (**the related oral agreement**) between the Powers and Mr Price, the terms of which were again disputed. The Powers claimed that Mr Price had agreed to indemnify the Powers for and pay one half of the costs (to be) incurred by them in the 1995 shares action. Mr Price contended that the agreement in this respect was that upon his becoming reinstated as a unit holder and director he would support all such legal costs being paid from trust funds. Relevant to this dispute was a later letter dated 14 February 1997 from Mr Price to the Powers supporting their claim against Mr Hayes and indicating that the Powers and Mr Price would share all costs and legal fees incurred in relation to the 1995 shares action. The issue was the source of these funds. Further, the Powers claimed that the agreement included that Mr Bazeley, another person interested in the commune, was to become a shareholder and unit holder in the trust. The significance of that was, as Mr Price understood, that if implemented, the Powers and Mr Bazeley would then be in a position to outvote Mr Price in the affairs of the trust. Mr Price contended that the agreement was only that Mr Bazeley had a common purpose in the preservation and expansion of the objects of the trust. These issues were litigated and determined in the 1998 units action (below).

43 In May 1998, Templeman J delivered his reasons for judgment in the 1995 shares action. He held, in favour of the Powers, that it was an implied term of the 1990 agreement that there would be an equality of shareholding between the parties. He therefore made declarations that Mr Hayes held one share in trust for the executor of the Ryan estate and (this matter not being in contention) Mr Price held one share in trust for the Powers. Pursuant to these orders, on 21 August 1998, Mr Price executed a transfer of one share to the Powers. Mr Hayes executed a transfer of one share to Mr Ryan's executor (who signed a transfer in favour of the corporate trustee). The transfers were not registered. The Powers and Mr Price, having succeeded against Mr Hayes, were by now disputing control of the trust between themselves.

44 At a meeting on 18 June 1998 in the presence of the practitioner, Mrs Powers called on Mr Price to agree to the issue of units to Mr Bazeley and his appointment as a director. Mr Price refused. The Powers for their part refused to re-appoint Mr Price as a director of the trustee and to arrange for the trustee to re-issue the ordinary units to him. This disagreement led to the 1998 units action being proceedings by the Powers against Mr Hayes and Mr Price for the removal of Mr Hayes

as a director and the appointment of Mrs Powers as a director and more relevantly, a counterclaim by Mr Price against the Powers for the enforcement of the 1991 agreement.

45 On 23 June 1998 the practitioner wrote to the Powers in relation to his costs. He reminded them that his fees had been secured against monies owed to them by the trust. He also said: 'there is your agreement with David Price that he will share the costs'. (The terms of the agreement as to sharing costs became important to the outcome of the 1998 units action. The question of the practitioner's knowledge of this agreement is important to several grounds of the application).

46 In November 1998 the Powers issued the writ in the 1998 units action through the practitioner. The practitioner prepared witness statements for both Mr and Mrs Powers, dealing with, amongst other things, their version of the costs sharing agreement. Upon receipt of the writ, Mr Price's solicitors wrote to the practitioner on 9 December 1998 objecting to him acting for the Powers in the 1998 units action on the basis that the practitioner had previously acted for Mr Price in relation to the affairs of the trust. The practitioner in his letter of 15 December 1998 disputed that Mr Price was ever his client or that he had knowledge of Mr Price's position in relation to the trust beyond the evidence Mr Price had given in the 1995 shares action. The practitioner pointed out that Mr Price had no (direct) responsibility to him for the practitioner's costs of that action. The practitioner said that although there was an agreement between the Powers and Mr Price to share his costs, the practitioner had not been a party to that agreement.

47 No application to restrain the practitioner from acting for the Powers in the 1998 units action was then made, although in about August 1999 an application was brought to restrain the practitioner acting for the trustee in the 1998 units action. This was on the basis that, because of Mr Price's claims in the 1998 units action, there was a conflict of interests between the trustee and the Powers and the same solicitor should not represent both. That application was not pursued.

48 Further, in about December 1998, Mr Price brought an application to restrain the practitioner from acting for the Powers in further proceedings taken in the 1995 shares action against Mr Hayes to recover the costs of that action. In support of this application Mr Price filed affidavits dated 17 December 1998 and 9 April 1999. These affidavits made reference to the practitioner's conflict in acting for the Powers against Mr Price in the 1998 units action. They also deposed in considerable detail to the

discussions between the parties, in the presence of the practitioner, in October 1995 and confirmed in May 1996, concerning sharing the costs of the 1995 shares action by in effect a distribution from the trust. Affidavits opposing this application and dealing with Mr Price's affidavits were filed by the practitioner dated 15 January 1999 and by Mrs Powers dated 5 May 1999. These affidavits, relevantly, disputed the making and terms of the agreement in relation to sharing costs. That restraint application was again not pursued.

49 In July 1999 there was a compromise of the dispute between the Powers and Mr Hayes arising from the 1995 shares action. Mr Hayes agreed to give up his interests in the trust in consideration of payment to him of a share of the trust funds. In substance this involved him transferring his 10 ordinary units to the Powers or their nominee (in fact to Mr Bazeley) and his transferring his one remaining share in the trustee to Mr Bazeley in consideration of a payment to Mr Hayes of one half of the capital gain on the sale of Mr Ryan's Cottesloe properties plus \$100,000.

50 On learning of the compromise agreement, Mr Price obtained an injunction against the distribution of these trust funds to Mr Hayes pending the determination of the 1998 units action. This injunction was subsequently modified but leaving \$600,000 of trust funds representing Mr Price's interest in the trust in the event he was successful in the 1998 units action. At this time Mr Price's solicitors, by letter dated 21 July 1999, advised the practitioner that if the restraint proceedings could no longer be heard in the 1995 shares action the same application would be pursued in the 1998 units action.

51 In August 2001 the 1998 units action was heard before White J. On his counterclaim Mr Price sought orders that the Powers implement the 1991 agreement, reflected in the Deed, by procuring the trustee to exchange his special units for 10 ordinary units and reinstate him as director. The Powers refused on the grounds that:

- (1) The parties had made the 1990 agreement and executed the relevant minutes after Mr Price was declared bankrupt so that the ownership of his ordinary units vested in the trustee in bankruptcy and Mr Price was not in a position to deal with them.
- (2) Mr Price had repudiated his obligations under the related oral agreement so that the Powers were not obliged to perform their (dependent) obligation to procure the

trustee to issue the units and to agree to Mr Price resuming his directorship. This alleged repudiation was constituted by Mr Price:

- (a) refusing to pay half the Powers' legal costs of the 1995 shares action;
- (b) refusing to support the application of Mr Bazeley to units and his nomination as a director;
- (c) declaring his intention to wind up the trust.

52           White J delivered his reasons for judgment in October 2001. On the first issue, he held that the 1991 agreement was made prior to 2 July 1991 (that is, before Mr Price's bankruptcy). In any event he found that Mr Price had purchased from the bankruptcy trustee his interest in the units.

53           As regards the Powers' grounds for refusing to perform the 1991 agreement based upon Mr Price's alleged breach of the related oral agreement, White J held there was no basis for such claim. First, Mr Price's agreement in relation to costs was, as he had contended, that these would come from his interest in the trust rather than be met by him personally. (Importantly in relation to the counsel as witness ground and the proceeding on false evidence ground, this finding was based in part on Mrs Powers' evidence under cross-examination). Secondly, there was no legal agreement concerning Mr Bazeley and even if there had been, it did not form part of the 1991 agreement so its alleged breach could not provide a basis for the Powers refusing to perform the 1991 agreement. Thirdly, Mr Price's declaration as to not proceeding with the trust followed the Powers' refusal to cooperate to issue him units and make him a director, so he was not in a position to proceed with the trust. White J therefore held that the Powers were bound by the 1991 agreement and made the appropriate orders including for the conversion of Mr Price's special units to ordinary units.

54           Following the reasons of White J and the orders made in the 1998 units action, a meeting was held between the Powers, Mr Price and Mr Bazeley to convert Mr Price's special units into ordinary units. Mr Bazeley, by now a unit holder and shareholder under the compromise agreement with the Powers, voted against the motion, which was defeated. This led to further litigation.

55 In January 2002, Mr Price initiated the 2002 units action, against the Powers, Mr Hayes and Mr Bazeley seeking orders including for the reconversion of his special units, the cancellation of the units and share held by Mr Bazeley, the winding up of the trust and distribution of its profits. (It was in these proceedings that the practitioner, who shortly after the proceedings commenced and following a suggestion from the Complaints Committee ceased acting for the Powers, filed a witness statement which is the subject of the false witness statement ground).

56 On 22 January 2002, Mr Price made his complaint to the Complaints Committee. This was based on the practitioner having a conflict of interest in acting for the Powers in the 1998 units action, in that in the previous several years Mr Price had provided the practitioner with confidential information concerning his involvement in the affairs of the trust. There followed correspondence between the Complaints Committee and the practitioner in relation to the complaint, which is the subject of the misleading answers ground.

***The Legal Profession Complaints Committee's facts and contentions***

57 The Complaints Committee identifies five grounds in support of its claim that the practitioner was guilty of unsatisfactory professional conduct or professional misconduct. It provided a statement of facts and contentions in support of each ground. (We refer to these in context as 'pleadings'). The practitioner filed a reply admitting or denying the facts alleged and providing additional facts and contentions in answer.

58 The Complaints Committee did not pursue Mr Price's central complaint that the practitioner had acted for the Powers against him, a client or former client, in the 1998 units action.

***The counsel as witness ground***

59 In relation to the first ground, the Complaints Committee relies upon the following facts and contentions.

- (1) Between 1998 and 2001, the practitioner accepted instructions to act as counsel on behalf of the Powers and the trustee company in proceedings commenced against Mr Price (the 1998 units action).
- (2) In the 1998 units action the Powers, relevantly and in substance, contended that they did not have to perform the 1991 agreement because:

- (a) it was not made in February 1991 as Mr Price asserted but was made in August 1991 subsequent to Mr Price being declared bankrupt;
  - (b) there was an additional related oral agreement made in respect of the 1991 agreement;
  - (c) it was a term of the related oral agreement that Mr Price agreed to the issue of shares in the trust to a Mr Bazeley and to his appointment as a director of the company. [This part of the related oral agreement was not relied upon by the Complaints Committee in this ground].
  - (d) it was a further term of the related oral agreement that Mr Price agreed to indemnify the Powers and pay them half of the legal costs they had incurred in the 1995 shares action.
- (3) The practitioner accepted instructions to appear, and then appeared, as counsel on behalf of the Powers and the trustee company at the trial of the 1998 units action.
- (4) Mrs Powers gave evidence at the trial of the 1998 units action to the effect that:
- (a) Mr Price had confirmed aspects of the alleged related oral agreement in the presence of the practitioner;
  - (b) the practitioner was present when Mr Price agreed to reimburse half the Powers' costs of the 1995 shares action;

In these reasons referred to as 'Mrs Powers evidence as to sharing costs');

- (c) she had acted on the advice of the practitioner and her accountant in recording in the books of the company the relinquishment of Mr Price's original units in the trust. (In these Reasons referred to as **'Mrs Powers evidence as to advice on the company records'**).

- (5) It is to be inferred from the fact that the practitioner acted as counsel for the Powers at the trial of the 1998 units action that he knew or ought to have known before the trial that Mrs Powers proposed to give evidence in the terms referred to in the preceding paragraph.

60 The practitioner admits these facts, save to deny he acted for the trustee (which does not appear to be material to the Complaints Committee's case), that he does not admit what Mrs Powers said in evidence (because he does not now remember), and that he denies the inference sought to be drawn. He further denies:

- (1) Mr Price confirmed any aspect of the alleged related oral agreement in his presence;
- (2) he was present if and when Mr Price agreed to reimburse half of the Powers' costs of the 1995 shares action;
- (3) he advised Mrs Powers to record anything in the books of the company if in fact she ever did so;
- (4) he had any reason to believe that he was likely to be a relevant witness of fact in the 1998 units action.

61 It is important to appreciate the narrow basis upon which the Complaints Committee has supported its claim that the practitioner had reason to believe he was likely to be a relevant witness of fact. This is that the practitioner knew or ought to have known before the trial that Mrs Powers proposed to give the evidence she did on one or both of the two specific matters identified, namely evidence as to sharing costs and evidence as to advice on the company records. The basis for this knowledge, actual or imputed, is said to be an inference drawn from the practitioner acting for the Powers in the action. It is implied from this contention that to the extent the practitioner knew or ought to have known of such proposed evidence, he ought to have appreciated that he was likely to be a witness to affirm or otherwise her evidence as to his involvement in relation to them.

62 The pleaded case is not, as was sometime suggested by the Complaints Committee's submissions and cross-examination, that irrespective of the evidence Mrs Powers proposed to give or gave in relation to the matter, the practitioner ought to have appreciated from his involvement in preparing the case that he was likely to be a witness as to the making and terms of the related oral agreement.

63 It was necessary for the Complaints Committee to have identified with some particularity the basis upon which it claims the practitioner knew or ought to have known he was likely to give such evidence and the nature of the evidence which it maintains the practitioner might have been called upon to give in the action. However, having done so, it is necessarily confined to that basis. It follows on our reading of the Complaints Committee's pleadings, and as was raised during the hearing with its senior counsel, Ms Cahill SC, if we are satisfied on the evidence that the practitioner did not know or could not reasonably have foreseen, that Mrs Powers proposed to give the evidence she gave on these specific matters, the Complaints Committee's case would not be made out.

64 The general principle is that a legal practitioner should not accept instructions to act as counsel in a case in which he has reason to believe that he is likely to be a witness. Ms Cahill referred to r 13.1 of the Law Society of Western Australia Professional Conduct Rules to this effect. Both parties referred to *Chapman v Rogers* [1983] 1 Qd R 542 at [544-545] where it was said that, unless unavoidable (for instance in complex commercial cases), it was unwise for a firm of solicitors to act for a person in proceedings where a solicitor from the firm was likely to be a witness in those proceedings.

65 Mr Viner's research also turned up *Powell v In De Braekt* [2007] WASC 4 (*Powell*) and *Holborow v MacDonald Rudder* [2002] WASC 265 (*Holborow*). He cited these authorities for the proposition that the court will not always intervene to restrain a solicitor because of an actual or suspected conflict of interest. He submits moreover, that a higher likelihood of transgression is required for a finding of misconduct in disciplinary proceedings than for a restraint in civil proceedings. *Powell* stands for the proposition that whether there is a likelihood of the practitioner being called upon to give evidence is to be tested from the standpoint of a fair-minded and reasonably informed observer; and that there may be exceptional circumstances which preclude a practitioner being restrained from acting even where there is such a reasonable likelihood.

66 With respect to *Holborow*, we do not think that, as Mr Viner submitted, the decision requires an 'unequivocal situation' before the jurisdiction may be invoked to restrain a practitioner where the grounds are that she or he is likely to be a witness. We think that qualification was made in the context of the exceptional grounds which were relied upon in that case and where the restraint proceedings were brought by the practitioner's former clients' former solicitors. In the immediately

preceding passages of the judgment, the court cites first the principle that a practitioner who is likely to be a witness in a case should not act; and second the principle that where it is shown that there is a risk that a practitioner will disregard his overriding duty to the court this will usually require a restraint. In each case there is no reference to a requirement for 'unequivocal' proof.

67 Further, we do not accept the submission, made without supporting authority, that a higher threshold is required for disciplinary than for restraint proceedings. Although the basis for each jurisdiction is the potential for conflict between the practitioner's duty to the court and duty to the client and the principles from each jurisdiction may inform the other, there will inevitably be different considerations. For example, disciplinary proceedings generally take place after the conduct in question, when the facts including the course of the trial are mostly known. The concern is not, as commonly the case in restraint proceedings, with evaluating the risk of conflict and the possible disadvantage for the client in removing the practitioner without the benefit of such facts. We think that in disciplinary proceedings the position of a practitioner is sufficiently protected by the strength of evidence and the actual persuasion required by *Briginshaw*.

68 We do however accept the practitioner's submission to this extent. In the case of a possible conflict of duty based upon a practitioner's prior representation of a client, it will usually be necessary to identify with some precision the confidential information said to have been imparted by the client and which is at risk. Similarly, in a case based upon the likelihood of the practitioner being a witness in the proceedings, it will be necessary to identify with some precision the evidence which it is contended the practitioner was likely to have been called upon to give and of circumstances known to the practitioner as to the nature and value of that evidence.

69 As set out above, the Complaints Committee identified two aspects of Mrs Powers' evidence which on its case the practitioner, because he acted for the Powers in the preparation of their case, ought to have known she proposed to give, such that he was likely to be a relevant witness of fact (impliedly) to affirm or otherwise that evidence.

### **Mrs Powers' evidence as to sharing costs**

70 As to the evidence given by Mrs Powers concerning 'aspects of the related oral agreement' said to have been confirmed by Mr Price in the presence of the practitioner (above), Ms Cahill confirmed in answer to

questions from the Tribunal that the 'aspects' are confined to the agreement on costs sharing. To the extent the Complaints Committee maintains the distinction in its plea between Mrs Powers 'confirming' and 'agreeing' the issue of costs (and this was not a distinction made by the trial judge when deciding the matter - below), its case is in effect that Mrs Powers gave evidence to the effect that the practitioner was present when Mr Price agreed or confirmed his agreement 'to reimburse half the Powers costs of the 1995 shares action'.

71 As to this matter, the issue between the parties in the 1998 units action was not that Mr Price had agreed to meet his share of the costs (he had said he would do so in a letter to the Powers dated 14 February 1997), but rather whether, as the Powers claimed in the proceedings, and in their witness statements standing as their evidence in chief, this was to be a personal liability; or as Mr Price contended, his share of the costs, as theirs, was to come from their respective interests in the trust funds.

72 Mrs Powers said in her witness statement dated August 2001, prepared by the practitioner, that in late 1995 the Powers and Mr Price were together at the trust property. On one occasion at a forest on or nearby to the property where they had met to scatter the ashes of Mr Ryan's body, they confirmed arrangements discussed in the previous eight weeks (at the trust property). This included that 'Price would indemnify us for and pay one half of the legal costs incurred by us in the [1995 shares action]'. Although the date of this occasion is not specified she said that the writ in that action was issued shortly thereafter.

73 Notwithstanding this evidence, under cross-examination Mrs Powers said that in the course of a conversation between the practitioner and her concerning the costs of the 1995 shares action, she had turned to Mr Price and said that the Powers could not afford these costs. She said Mr Price had responded: 'Yes you can. It will come out of the trust and I will share that cost with you'. She confirmed this was said in the presence of the practitioner.

74 White J incorporated this evidence of Mrs Powers under cross-examination in his reasons. He found on this basis [at 53] that the agreement between the parties was that if they gained control of the company and the trust (by the 1995 shares action), the legal costs would be borne by the trust so that each beneficiary (including Mr Price) would in effect contribute a like amount. 'Mrs Powers certainly understood that to be the agreement with Mr Price'. White J [at 12] construed Mr Price's letter dated 14 February 1997 on this basis.

75 The practitioner stated in his evidence before us (by his witness statement and affirmed in cross-examination) in relation to this aspect of Mrs Powers' evidence that 'I did not know before the cross-examination [of Mrs Powers] that such was her belief or that she would give that evidence'. He said that in her witness statement 'she made no suggestion that I was present at the time' and that 'in the preparation of the statement at no time did Mrs Powers say or indicate to me that she believed that I was present'. The practitioner said that he knew from his instructions from Mr Powers that his evidence was that he (the practitioner) was not present when the agreement concerning costs was reached. When Mrs Powers gave this part of her evidence under cross-examination the practitioner determined that 'he would let the trial take its course with Mr Powers' evidence, expecting that he would contradict his wife with its consequences for her credibility and that, therefore, it was not necessary for me to say anything to the Court or to remove myself as counsel'. That was an improper position to take for reasons explained below. For present purposes however, the issue is whether in the light of the practitioner's evidence it is open to find that he knew or ought to have known that Mrs Powers proposed to give the evidence she gave under cross-examination in these terms such that (as the Complaints Committee contends) he had reason to believe he was likely to be a witness and therefore ought not to have acted.

76 In testing the practitioner's evidence in this respect, Ms Cahill referred to the affidavit of Mr Price sworn 9 April 1999 (**Mr Price's affidavit**) in support of his application in the (continuing) 1995 shares action to restrain the practitioner from acting. Mr Price there deposed over some pages to conversations in October 1995 and May 1996 between the Powers and him in the presence of the practitioner, and involving the practitioner, about sharing costs, in terms similar to that of Mrs Powers given under cross-examination. Ms Cahill put to the practitioner that in preparing Mrs Powers' witness statement, the practitioner must have considered Mr Price's assertions and that in consequence that Mrs Powers would be examined on the subject. (It might have been helpful if Mr Price's affidavit had been pleaded in support of this ground. However, although the practitioner by the opening submissions noted in the application the lack of any pleaded facts supporting this ground, no challenge was made to its use).

77 The practitioner's reply to these questions was that Mr Price's affidavit was not present in his mind at the time he was preparing for the 1998 units action. His evidence was that he did not review, or could not remember having reviewed, Mr Price's affidavit in preparation for the

1998 units action. He said that the restraint proceedings had lapsed. In re-examination he added that the affidavits for the restraint proceedings were on the 1995 shares action file and not on the 1998 units action file. The practitioner also said that to the best of his recollection, in his evidence in the 1998 units action Mr Price had not made similar claims either in his witness statement or under cross-examination. (This best recollection was elevated to a statement of fact in the practitioner's closing submissions). As a matter of probabilities, that assertion seems unlikely given Mr Price's earlier affidavits, his pleaded case, the trial Judge's finding of Mr Price's understanding of the costs agreement [at 12] and the indirect evidence before us (the part of the transcript in the 1998 units action showing an exchange between counsel) that Mr Price had given evidence in the proceedings of conversations with the practitioner. However, neither the practitioner in support of his assertion, nor the Complaints Committee in challenging it, was able to produce the relevant parts of the transcript showing Mr Price's evidence. At the same point in his cross-examination, the practitioner also denied that he knew that Mrs Powers was likely to be cross-examined about the costs sharing agreement having been made in his presence.

78 We regard the practitioner's evidence that he did not in fact review or could not recall reviewing Mr Price's affidavit filed in the restraint proceedings in preparation for the 1998 units action as implausible. The affidavit dealt with an important issue between the parties in the latter action, namely the making and terms of their agreement for sharing costs, and directly addressing the issue whether Mr Price's share was to come from his own funds or from his interest in the trust. The Powers' pleaded case was that it was Mr Price's refusal to honour their version of this promise (that he was personally responsible for his share) which entitled them to refuse to re-appoint him a director and procure the trustee to re-issue the units. It was inevitable that Mr Price would base his version of the agreement (that his share would come from the trust funds) on what he had deposed to at considerable length in his earlier affidavit. It would have been negligent for the practitioner to have prepared for the cross-examination of Mr Price without having made himself familiar with this affidavit. He would also have been remiss not to have taken his clients through the affidavits to prepare them for cross-examination on the conflict between their testimony and that of Mr Price, and in relation to Mrs Powers, to ensure she was prepared for cross-examination on her earlier affidavit filed in the restraint proceedings. It follows that we also regard as implausible the practitioner's claim that he did not anticipate that

Mrs Powers would be cross-examined on Mr Price's assertion as to the making of the costs agreement.

79           Moreover, the affidavits, including that of the practitioner himself, were filed in proceedings to restrain the practitioner from acting because it was contended he had a conflict of interest; that is, because he owed duties of loyalty and confidentiality to Mr Price which would be compromised by his acting for the Powers in the 1998 units action and in the continuing proceedings in the 1995 shares action. That was hardly a matter which the practitioner would have overlooked or not adverted to, including because the papers were filed in a related file. As noted above, a second restraint application was made and supported by a further affidavit of Mr Price in the 1998 units action, and the service copies presumably filed by the practitioner in his 1998 units action file. As late as July 1998, Mr Price was threatening restraint proceedings in the 1998 units action. (We recognise that the practitioner was not cross-examined on these last matters).

80           In the event, we do not think it necessary to make a formal finding on the truthfulness of the practitioner's evidence on this point, having regard to the manner in which the Complaints Committee formulated its case. This was that the practitioner ought to have known that Mrs Powers would give evidence that in the practitioner's presence Mr Price had agreed or confirmed agreement to reimburse half the costs of the 1995 shares action. That is, the Complaints Committee has in effect assumed the correctness of Mr Price's version of events recited in his affidavit, at least in relation to the practitioner being present, and founded this ground of complaint on that premise. However, not only was Mrs Powers evidence under cross-examination contrary to the narrative of events in her witness statement (as recounted above), it was also contradicted by her earlier affidavit sworn 5 May 1999 in answer to Mr Price's affidavit in the restraint proceedings. She there said that the conversations in the presence of the practitioner about costs being recovered from the trust, which Mr Price had sworn to, 'did not happen' and that the practitioner's advice had been that the Powers were themselves personally liable for the costs of the 1995 shares action. She also swore that in about March 1996, Mr Price had agreed to contribute to the costs (presumably a reference to the conversations in the forest, subsequently said to have been in October or November 1995) and that her understanding of his letter dated 14 February 1997 was that Mr Price agreed to be personally liable for his share of the costs. (See paras 14 - 16, para 17, para 22, para 26 and para 29).

81 For completeness, we mention that had the practitioner believed Mr Price's version of events and that in consequence Mrs Powers would ultimately give evidence that the agreement had been made or confirmed in the practitioner's presence, then grave questions would arise concerning first the practitioner's affidavit sworn 15 January 1999 in which he in substance rejects Mr Price's version of events; and second in that he put forward witnesses, the Powers, whose evidence he knew to be false in relation to their version of the making and terms of the costs agreement.

82 It follows that in our view, the practitioner knew or ought to have known from Mr Price's affidavit that Mrs Powers would be cross-examined about the agreement as to sharing costs having been made or discussed in the practitioner's presence and otherwise as outlined in Mr Price's affidavit. This arguably made the practitioner a potential witness. However, this is materially different from the contention that the practitioner knew or ought to have known that Mrs Powers proposed to give the evidence she did as to sharing costs. That is, that Mrs Powers proposed in effect to give a different version of the agreement as to costs from that contained in her witness statement and, at least in relation to the practitioner's presence, to adopt Mr Price's version of how the agreement was made or confirmed. The practitioner was entitled to presume that Mrs Powers would maintain her version of events based on her earlier affidavit and witness statement, rather than give two inconsistent versions of the agreement. We think that was so, whether or not he had reviewed Mr Price's earlier affidavits in the restraint proceedings.

83 The manner in which we find that Complaints Committee's case must fail was not put in these terms in the practitioner's oral and written submissions. Further, no reliance has been placed by either party on Mrs Power's affidavit in the restraint proceedings. Ms Cahill mentioned in oral submissions only that the affidavits in the restraint proceedings 'contain evidence which is relevant to this application'. Nevertheless, we think the nature of this defence is apparent from a close reading of the grounds of the application and having regard to the entirety of the evidence. Moreover, on one reading of the Complaints Committee's closing submissions (see paras 3 - 5) it appears to have been anticipated.

### **Mrs Powers' evidence as to advice on the company records**

84 In Mr Viner's closing submissions a challenge is made to this part of the ground. This is on the basis that the application contends that the practitioner was a likely witness only in relation to the evidence as to sharing costs; not as to the company records. Insofar as the

Complaints Committee's contention is based on Mrs Powers' evidence as to the relinquishment of Mr Price's units, we think the pleading clearly covers this. However, to the extent the evidence related to the treatment of shares in the company's records, we regard this as outside the Complaints Committee's case.

85 The threshold issue is whether in fact Mrs Powers gave the evidence alleged by the Complaints Committee in its application. White J found that the records of the company disclosed that Mr Price's holding of 10 ordinary units had been removed following the 1991 agreement. His Honour pointed out that if Mrs Powers' case that the 1991 agreement was made after Mr Price's bankruptcy was correct, the units ought to have been shown as belonging to the trustee in bankruptcy. His Honour found there was no satisfactory explanation from Mrs Powers as to why they had been removed and no such entry recorded: 'she claimed to have been acting at all times on the advice of her accountant and lawyer'.

86 A review of the transcript of Mrs Powers' evidence put into evidence by the Complaints Committee does not support its claim that she gave evidence as to receiving advice from the practitioner in recording in the books of the company the relinquishment of Mr Price's original units in the trust.

87 Ms Cahill referred first to the transcript of Mrs Powers' cross-examination as to how Mr Price's shares in the company were transferred out of his name. Mrs Powers gave evidence about questioning her accountant and the practitioner about registering the shares. At another point, asked about the transfer of the shares, Mrs Powers answered: 'I truly don't know. We left everything to do with the company with Mr Pawlak, having been advised by the law what the situation was and this is what he came up with'. (Mr Pawlak was an accountant engaged by the Powers on behalf of the trust). At another time, asked about signing the company returns which omitted reference to Mr Price holding a share, Mrs Powers said she had signed these because 'we have accepted Mr Pawlak's and Mr Caine's advice'.

88 Clearly these sections of her evidence, dealing with shares rather than units, and expressed in vague terms (it may have been Mr Pawlak who advised on the law), fall short of establishing the Complaints Committee's case that Mrs Powers' evidence in substance was that 'she had acted on the advice of the practitioner and her accountant in recording in the books of the company the relinquishment of Mr Price's original units in the trust'.

89 We should mention for completeness the practitioner's evidence on the matter. In both his witness statement and under cross-examination, the practitioner denied he gave the advice concerning the company records upon which the Complaints Committee relied. Pressed under cross-examination the practitioner conceded only that he gave some general advice that the company records needed to be put in order. We see no basis why that evidence ought not be accepted.

90 Ms Cahill submitted that the fact that the practitioner was solicitor and counsel in preparing the Powers' case ought to have alerted him to the possibility that Mrs Powers would be examined on the subject of the company's and the trust's records. Further, that Mrs Powers might have, on the practitioner's case, deposed to not having received advice from him, so as to make it likely that he would be a witness to confirm or otherwise that story. Again, however, that is not how the Complaints Committee has pleaded its case; namely that he ought to have anticipated that she proposed to give the evidence which she did. Even if the practitioner might have anticipated she would be examined on the records, it does not follow that he was to anticipate that she proposed (on the practitioner's case) in effect to invent evidence that the practitioner gave advice to her in the terms alleged.

91 Our finding on this point is sufficient to defeat the complaint on this, and the following ground, based upon Mrs Powers evidence as to advice on the company records. The proceeding on false evidence ground (which is discussed next) therefore only concerns Mrs Powers evidence as to sharing costs.

### **The proceeding on false evidence ground**

92 The Complaints Committee pleads:

(1) In the alternative to the contention (above) that the practitioner knew or ought to have known that Mrs Powers proposed to give the evidence identified [relevantly Mrs Powers evidence as to sharing costs], the practitioner knew his client, Mrs Powers, gave incorrect evidence in the proceedings and in breach of his professional obligations:

(a) took no or no sufficient steps to gain instructions to inform the Court that the evidence set out above was incorrect; or

(b) as the instructions were not given to cease to act for Mrs Powers.

93 Although these matters are denied in the practitioner's reply, in his witness statement the practitioner admits that Mrs Powers (on the practitioner's case) gave incorrect evidence in relation to the agreement to share costs. In his evidence the practitioner was at pains to describe Mrs Powers' evidence as mistaken rather than untruthful.

94 It will be recalled that the relevant evidence given under cross-examination was that Mrs Powers had said that in the course of a conversation between herself and the practitioner concerning the costs of the 1995 shares action, she had turned to Mr Price and said that the Powers could not afford these costs. She said Mr Price had responded 'Yes you can. It will come out of the trust and I will share that cost with you'. She confirmed this was said in the presence of the practitioner. It is the last evidence which the Complaints Committee has relied upon as the basis of its complaint.

95 On the practitioner's case before us, Mrs Powers' evidence was false (whether deliberately or not is not material) on his instructions generally and in relation to his being present at the time, to his own knowledge. Nevertheless, based on what he understood Mr Powers would say, namely that the practitioner had not been present at the relevant conversation, the practitioner said in his witness statement that he determined that 'he would let the trial take its course with Mr Powers' evidence, expecting that he would contradict his wife with its consequences for her credibility and that, therefore, it was not necessary for me to say anything to the Court or to remove myself as counsel'. The practitioner sought to support this decision in his reply and in written submissions, essentially on the basis advanced in his witness statement and on the additional matters we address below.

96 We think that in the circumstances the practitioner's decision, even with the benefit of the submissions elaborating on the exercise of his 'independent judgment', was indefensible.

97 During a hearing in which he was counsel, a witness and client whom he had called to give evidence made a statement under cross-examination which on his instructions and to his own knowledge was false. From that moment and thereafter, the Court was misled with respect to this evidence. With respect to the practitioner being present during the conversation, this was not a trivial detail. An assertion that a

lawyer was present when a promise was made by an opposing party gives that assertion added weight; and more so, when the lawyer is present in court.

98           The fact that (ironically) this part of Mrs Powers' evidence supported Mr Price's version of events and was relied upon by the trial judge in preference to the version in her witness statement is not presently material. From the practitioner's point of view, the trial judge was misled. This was not a situation where the practitioner might have believed that his client had merely departed from her witness statement, perhaps with the benefit of further reflection. On his evidence to us, the practitioner knew the aspect of her evidence concerning his being present was false.

99           The principles are well established. In *Kyle* Ipp J said [at 12]:

It is a basic precept of the legal profession that lawyers owe a duty of honesty and candour to the Court. It is the general duty of lawyers not to mislead the court by stating facts which are untrue, or mislead the judge as to the true facts, or conceal from the Court facts which ought to be drawn to the judge's attention, or knowingly permit a client to deceive the Court: *Rondel v Worsley* [1969] 1 AC 191; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, *Tombling v Universal Bulb Company Ltd*, *Vernon v Bosley (No. 2)*, *Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No 2)* (1997) 18 WAR 190 at 193

100           The importance of the rule was expressed by Parker J [at 66]:

At heart, the justification for this duty, and the reason for its fundamental importance in the due administration of justice, is that an unswerving and unwavering observance of it by counsel is essential to maintain and justify the confidence which every court rightly and necessarily puts in all counsel who appear before it.

101           The decision of the practitioner to do nothing following Mrs Powers' evidence of the conversation meant that the practitioner in effect 'knowingly permitted his client to deceive the Court'. The proper course for the practitioner to have taken at this stage was at the first opportunity, if necessary during the cross-examination with the leave of the Court, to have sought a conference with his client, raised the matter of the incorrect evidence with her, and sought her instructions to inform the Court and the opposing party that she had erred in this aspect of her evidence. If she declined to do so, the practitioner's duty was to consider whether he ought not to withdraw from the case.

102           The decision in *Kyle* also exposes the error in the practitioner's reasoning that he might proceed without taking action because his client's

false statement would be 'contradicted' by Mr Powers and (presumably) the misleading of the court would then cease. Ipp J said [at 20]:

There was some discussion concerning the fact that the appellant only intended to create a false impression for a short period, that is until Mr Beyer was asked in evidence in chief how the deed came to be signed. The point is, however, that once a practitioner has breached his duty by knowingly misleading the Court for a perceived tactical advantage, it matters not (for the purposes of determining whether professional misconduct has been committed) for what period of time the court was misled. Professional misconduct has then been established. Of course, if the court was misled only for a relatively short period of time this may be relevant to the punishment that follows: but it is immaterial to whether the practitioner is guilty of misconduct.

103 The facts in *Kyle* were different from the present insofar as it was counsel in that case who actively misled the court by moving an amendment and opening the case on a basis which he knew to be false. The principle however remains applicable. In the practitioner's closing submissions Mr Viner sought to distinguish *Kyle* on the basis that Ipp J required for the application of the principle that the practitioner 'knowingly' mislead the Court and that 'an intention to deceive or act dishonestly is a necessary element of misleading the Court'. However, that part of the judgment in which these expressions are used, was made to contrast the case where 'a practitioner innocently misleads a court that is, without knowledge that the court is being misled'. That these passages were not intended to mean that in order to offend the practitioner must proactively make the false statement (as in *Kyle*) rather than standing by and taking no action upon it being made (as here) is made clear later in the judgment:

If after making a factual allegation in a pleading that is before the court (and thereby leading the court to believe that the allegation in question is part of his or her case), a lawyer discovers that the allegation is false, the lawyer will mislead the court if he or she fails to disclose the true position: cf *Vernon v Bosley (No 2)* [1997] 3 WLR 683 at 698.

104 Clearly the same principle operates with respect to evidence given in Court.

105 There are other difficulties with the decision which the practitioner took. First, as White J's reasons disclose, the (admittedly confusing) evidence under cross-examination which Mr Powers gave, appeared at one point, to support his wife's evidence that one discussion at least concerning Mr Price's obligation to contribute to costs had taken place in the practitioner's presence. Still the practitioner did not act. Second, even

if Mr Powers had given unequivocal evidence contradicting his wife, the practitioner was not entitled to assume that the trial judge would accept that evidence over that of Mrs Powers; much less (as the practitioner appears to say in his witness statement in relation to her advice on the company records) to assume the judge would reject her evidence on the basis that the practitioner was not called to support it.

106 Mr Viner's opening submissions also point out that there was no observation or admonition by the trial judge suggesting that the position of the practitioner, acting as counsel, was compromised or conflicted or that he should not continue; nor was there any challenge by opposing counsel to the practitioner continuing to act as counsel. As to that, to the extent it is regarded as established (and it is not, the whole transcript for the 1998 units action not being available), neither the trial judge nor the opposing counsel were in the position we are to judge, with the benefit of all of the relevant material, the propriety of the practitioner's conduct.

107 At the end of his cross-examination, the Tribunal asked the practitioner whether, with the benefit of hindsight, without the pressures and distractions of the trial, he now considered that the appropriate course was to have sought instructions from Mrs Powers to disclose to the Court that this aspect of her evidence was not, as the practitioner believed, true. To his credit the practitioner, in these circumstances, acknowledged that such was perhaps the appropriate course. That concession does not affect the immediate issue of misconduct, although it may be relevant to penalty. It is when a practitioner is under the pressures of a trial that he must be most astute to meet his obligations as an officer of the Court.

108 In our view, in the circumstances, it was not proper for the practitioner to elect to do nothing and hope that his witness's false testimony would be contradicted so as not ultimately lead to error on the part of the judge. The practitioner's duty was to have raised the matter with his client at the first opportunity and sought its correction. To this extent this part of the Complaints Committee's application is made out. However, this was not a case where the practitioner knew in advance of the false statement and maintained it before the court (as in *Kyle*). Rather, on our findings, this was a case where without prior warning (in relation to his clients' proposed evidence), the practitioner was confronted with the witness making an incorrect statement during cross-examination. The practitioner, we accept, believed the error would be contradicted by Mr Powers. He was, as he said in evidence, in a difficult position. The practitioner made a decision in that respect which may be described as an

error of judgment. That does not of course preclude it being unprofessional conduct.

109 In all of the circumstances, we think the practitioner's conduct to a substantial degree fell short of the standard of the profession, such as to constitute unprofessional conduct as expressed in *Kyle*. For the purposes of the LP Act, we regard the conduct in the circumstances as constituting unsatisfactory professional conduct rather than the more serious professional misconduct.

### **The misleading answers ground**

110 The Complaints Committee's contentions in relation to this and the following ground (the false witness statement ground) are as follows:

- (1) The practitioner was asked by the Complaints Committee in mid-2002 to provide a response to a complaint made by Mr Price in relation to certain of the practitioner's conduct in the course of acting in the 1998 units action.
- (2) By letter dated 23 July 2002 to the Complaints Committee the practitioner represented to the Complaints Committee that he had no personal knowledge of the related oral agreement and therefore had no relevant evidence to give in the 1998 units action.
- (3) The practitioner was asked by the Complaints Committee in August 2003 to provide a response to a complaint made by Mr Price in respect of the contents of an affidavit sworn by the practitioner on 15 January 1999 in the 1995 shares action, this being the practitioner's affidavit opposing Mr Price's application to restrain him from acting further in that action.
- (4) By letter dated 21 August 2003 to the Complaints Committee the practitioner represented to the Complaints Committee that he had no personal knowledge of the related oral agreement and therefore had no relevant evidence to give in the 1998 units action.
- (5) In about August 2004 the practitioner provided a witness statement (the witness statement) to solicitors then representing the Powers in the 2002 units action.

- (6) In the witness statement the practitioner made the following statement:

Since about 1996, my instructions from the Powers were that there was an agreement between the Powers, Price and Bazeley that Bazeley would be admitted to the trust in recognition of all the work he had done on the farm since 1992.

- (7) The effect of the practitioner's statement in the preceding paragraph was:

- (a) that the practitioner had since about 1996 known of the related oral agreement or, at least, some aspects of that agreement;
- (b) directly inconsistent with the representations set out above by the practitioner to the Complaints Committee that the practitioner had no personal knowledge of the related oral agreement and therefore had no relevant evidence to give in the 1998 units action made.

- (8) In the context of the practitioner's statement in the witness statement, the practitioner intentionally, alternatively, recklessly misled the Complaints Committee in his letters to the Complaints Committee dated 23 July 2002 and 21 August 2003 that he had no personal knowledge of the related oral agreement.

- (9) Alternatively to the preceding paragraphs, in the context of the representations made by the practitioner to the Complaints Committee in his letters to the applicant dated 23 July 2002 and 21 August 2003, the practitioner provided a witness statement to the solicitors then representing the Powers in the 2002 units action that he knew was false in a material particular, alternatively which the practitioner made recklessly, not caring whether it was true or false in a material particular, namely that the practitioner had since about 1996 known of the related oral agreement or, at least, some aspects of that agreement.

111 The practitioner does not dispute the facts (as opposed to the conclusions in sub-paragraphs (7) - (9) above)) except that he says there was one error in his witness statement in the 2002 units action. It was in 1998, rather than 1996, that the Powers instructed him with respect to that aspect of the related oral agreement by which Mr Bazely would be admitted to the trust. The practitioner by his reply and in evidence continues to assert he had no personal knowledge of the related oral agreement and maintains that what he represented in his answers to the Complaints Committee was not misleading and that his witness statement was otherwise true and correct.

112 This ground in its terms requires proof of the practitioner's alleged state of mind - intention to mislead or recklessness. It is in two parts. The first concerns the Complaints Committee's request for an answer to Mr Price's letter dated 22 January 2002. This letter included the complaint that notwithstanding that his solicitors had warned the practitioner that he might be called as a witness at the trial because he had drafted the deed (recording the 1991 agreement), the practitioner continued to act to prevent him being called as a witness, as (it was asserted) his testimony would have been harmful to the Powers. The practitioner's response to this part of the ground included that he did not give evidence at the trial because he had none to give. He said the issue was not the deed but the collateral dealings (that is, the related oral agreement) between the Powers and Mr Price of which he had no 'personal knowledge'.

113 The second part of the Complaints Committee's ground of complaint was raised in its further letter to the practitioner dated 11 August 2003. In relation to whether the practitioner was a possible witness, the Complaints Committee noted that he had allegedly been a party to discussions involving Mr Price in relation to various aspects of the related oral agreement including the role of Mr Bazeley (and the sharing of costs). The practitioner responded in his letter dated 21 August 2003. He provided and referred to an affidavit of Mr Powers sworn 2 February 2002. This affidavit was made in answer to the injunction sought by Mr Price against the disbursement of trust funds following the compromise between the Powers and Mr Hayes. That affidavit had set out the Powers' version of the related oral agreement. In relation to this, the practitioner said:

I was not present when the agreement [the related oral agreement] was made.

114 Mr Powers' affidavit also referred to the meeting on 19 June 1998 between the Powers and Mr Price at which Mr Price had denied the agreement by which Mr Bazeley was to become a director and shareholder of the trustee. The practitioner said that he had been present at this meeting but as to that:

I would not have thought that anything I saw or heard ... would have been admissible in [the 1998 units action] or would have been a help or hindrance to Mr Price. I was simply a witness to a disagreement between the parties. I had no personal knowledge of the matters discussed.

115 The Complaints Committee's case was notwithstanding these assertions, the practitioner had subsequently given information for and signed his witness statement to the effect that he had instructions from the Powers that there was an agreement between the Powers, Mr Price and Mr Bazeley, that Mr Bazeley would be admitted to the trust, giving rise to the following alternative ground of complaint. The relevant paragraph of that statement had gone through various drafts before it took its final form. In oral submissions, the Complaints Committee referred us to various correspondence between the new solicitors and the practitioner in this respect and to the entire correspondence between the Complaints Committee and the practitioner on the subject.

116 The Complaints Committee's case in summary was that, given the representation in his witness statement, the practitioner clearly did have personal knowledge of aspects of the related oral agreement, at least in relation to Mr Bazeley, in respect of which he was in a position to have given evidence. As it was put by Ms Cahill, the practitioner might have given evidence that at the time he received instructions in relation to the deed, he received, or did not receive, instructions in relation to the related oral agreement. Similarly he might have given evidence about admissions made by the Powers or Mr Price about the existence or otherwise of that agreement. He might have given evidence about a course of conduct of the Powers. From that 'corroborative evidence' (as Ms Cahill described it) inferences might have been drawn as to the existence and terms of the related oral agreement. Moreover, insofar as the practitioner received or did not receive such instructions or learned of such admissions and course of conduct, he clearly had personal knowledge of such.

117 In the practitioner's opening submissions there is a challenge to this ground of the application on the basis that it is not made clear what 'aspects' of the related oral agreement of which it is alleged that the practitioner was aware. Although this submission was not developed, nor

was there a challenge to the cross-examination of the practitioner on this basis, we think it has some merit.

118 It is clear enough that the Complaints Committee relied upon that part of the related oral agreement which concerned the alleged agreement to admit Mr Bazeley to the trust. However, there is nothing in the paragraph of the practitioner's witness statement relied upon which indicates he had knowledge of the related oral agreement beyond this. To the extent that in submissions and in the cross-examination of the practitioner, the Complaints Committee sought to extend its complaint to other aspects of the related oral agreement (in particular in relation to the agreement to share costs) we think it goes outside its pleaded case and is impermissible. Although we do not think that our conclusion would have been different if other aspects of the related oral agreement were relied upon in support of this ground, our reasons are confined to the practitioner's knowledge of the alleged agreement concerning Mr Bazeley.

119 The practitioner's response by his reply, and in his evidence, was that he had assumed that the lawyers at the Complaints Committee would have understood what he meant by having no 'personal knowledge' of the matters discussed; that is, that he had no knowledge of the truth of the statements made to him. Only the Powers had personal knowledge of the truth of those matters. His view was that he could not have given evidence of his instructions or of statements made to him about the related oral agreement because this would have constituted (inadmissible) hearsay evidence. He related in his witness statement in this application that he had told the new solicitors for the Powers in relation to their request that he provide a witness statement in the 2002 units action, that he could only give hearsay evidence on this subject. He also recounted that the relevant paragraph of his witness statement had been challenged and conceded in those proceedings as containing hearsay material and deleted accordingly. The practitioner said in evidence that until Ms Cahill outlined the nature of the complaint during the morning of the hearing, he had not understood in what manner it was contended that his statements could be regarded as misleading.

120 In substance, we accept the practitioner's evidence. We do not think that, by the words used, the practitioner intended to mislead the Complaints Committee or that his use of those words constituted a reckless attempt to mislead the Complaints Committee. We accept that by the use of the words 'personal knowledge' the practitioner meant that the practitioner was not present when the alleged related oral agreement was made and so (as he understood) he could only give impermissible hearsay

evidence, that is based upon what he was told by others, about its making and terms. We think that by referring in context to his 'personal knowledge' the practitioner was indicating such. We also accept that the practitioner did not understand the basis of this ground of complaint until the hearing.

121 The Complaints Committee submitted that in relation to the second part of this ground, it had made known to the practitioner that it was addressing the fact of his being party to discussions about the related oral agreement - not its making. This is not perhaps as clear in the correspondence as Ms Cahill suggests. The Complaints Committee did there put to the practitioner the conflict between what the practitioner had earlier responded and what he said in his witness statement. But we think when he responded to this second letter the practitioner again used the term 'personal knowledge' in the sense we have described. This is made tolerably clear in his response letter dated 21 August 2003 when he gives the description of his being present at the meeting at which Mr Price is said to have denied the agreement with Mr Bazeley. He says that he had no personal knowledge, that is, in effect that he witnessed only what was said about that agreement - not its making. On this basis we also reject the Complaints Committee's submission that the practitioner did not raise this explanation, that is based on the practitioner's meaning of 'personal knowledge, in his responses to the Complaints Committee at the time.

122 In his evidence under cross-examination the practitioner acknowledged that in using the expression 'personal knowledge' he may not have turned his mind to his being in a position to give 'corroborative evidence' of this nature. We believe him in this respect. We do not think in the circumstances his response is therefore to be regarded as reckless. We accept the submission made on the practitioner's behalf that, relevantly, he did not realise that there was a risk that what he stated in his response might have been false.

123 We are not suggesting that it might not have been open in the 1998 units action for Mr Price (or perhaps the Powers) to have called on the practitioner to give evidence in relation to the related oral agreement in the manner Ms Cahill suggested. That is, based on his receipt (or non-receipt) of instructions, statements made to him, or his observation of the parties' course of conduct. So much was suggested by counsel for Mr Price during the 1998 units action. Contrary to the practitioner's closing submissions, we think such constituted circumstantial evidence which would likely have been admissible either as original evidence (relevant, independent of the truth of its contents) or under an exception to

the hearsay rule as constituting admissions. It may have been admissible as evidence of a party's prior inconsistent statement and as going to credit. It was not put on behalf of the practitioner that legal professional privilege would have precluded his being called by Mr Price as to instructions given to him by the Powers. That might have required examination of the waiver of the privilege, again not a matter which was addressed.

124 We mention that there is something rather artificial about much of the parties' submissions concerning the technical basis for the admissibility of such evidence. For instance, that the absence of instructions about the related oral agreement could not, as Mr Viner maintained, constitute 'prospective, concomitant or retrospective evidence' within Wigmore's classification. The Complaints Committee did not make reference to this type of argument in seeking a response from the practitioner. Neither has it invoked these arguments in the context of the counsel as witness ground or some extension of it. In that respect, these technical arguments are unlikely to have been present in the mind of 'a fair-minded and reasonably informed observer'. For his part, we accept the practitioner's evidence that he did not either during the hearing of the 1998 units action or in responding to the Complaints Committee turn his mind to these issues.

125 However, the possibility of the practitioner being called upon to give evidence of this nature (that is based on his instructions) is not conclusive of the issue before us. That is, whether in his response to the Complaints Committee the practitioner was intentionally or recklessly intending to mislead the Complaints Committee. For the reasons we have given we do not think he was. Whether, objectively viewed, his response was in fact misleading, given the basis for the admissibility of his evidence, is arguable, but does not fall for determination.

126 There are other circumstances which lead us to the view that the practitioner was not seeking to mislead the Complaints Committee. It seems to us inherently unlikely in circumstances where, to the practitioner's knowledge, the Complaints Committee was in possession of the relevant documents as to what had taken place, that the practitioner would, in the manner complained of, have sought to mislead the Complaints Committee. We add, although it is of limited weight, that clearly the Complaints Committee was not in fact misled by the practitioner's response.

### **The false witness statement ground**

127           This alternative ground is that by reference to the representations (above) made by the practitioner to the applicant in his letters to the Complaints Committee dated 23 July 2002 and 21 August 2003, it follows that the practitioner provided a witness statement that he knew was false in a material particular, alternatively which the practitioner made recklessly, not caring whether it was true or false in a material particular, namely that the practitioner had since about 1996 known of the related oral agreement or, at least, some aspects of that agreement. As we understand, the argument is that to the extent that the practitioner denied to the Complaints Committee that he had personal knowledge of the agreement concerning Mr Bazeley, he could not honestly make this representation in the witness statement.

128           This alternative ground of complaint may shortly be disposed of. Leaving to one side the question of the error in the date referred to, '1996', there is nothing in the evidence to suggest that the practitioner's representation in his witness statement concerning the nature of his instructions from the Powers was false. Although so much was advanced in the Complaints Committee's submissions at one point, we do not think that a finding that the practitioner did not intend to mislead the Complaints Committee on the basis we have explained above, that is based on his use of the expression 'personal knowledge', requires a finding of falsity in relation to his witness statement. In the course of discussing a witness statement with the new solicitors, the practitioner said he did not believe he had any admissible evidence to give.

129           Towards the end of Ms Cahill's oral submissions when addressing this ground, counsel also referred to the practitioner's error in referring to 1996 rather than, as he now says, 1998. To the extent this error is the basis of the Complaints Committee's complaint of the practitioner making a knowingly or recklessly false statement, we are unable to accept it.

130           When the practitioner was asked in evidence how he came to make reference to 1996 rather than 1998, his reasons were as follows. He explained that the witness statement had been drawn up by the Powers' new solicitors (although obviously based on his advice), that he was under some pressure to complete the statement urgently and that he was recovering from typhoid at the time. It is of note also in this context that in the preparation of the relevant paragraph of the practitioner's witness statement, the new solicitors included a date (1992) in the wrong place. It was in picking up this error and deleting the reference that the practitioner

erroneously substituted '1996'. He also said in effect that he may well have corrected the error between signing the statement and when he was due to give evidence.

131 For the purposes of preparing his witness statement, the practitioner was being asked as to events which had taken place a decade earlier, and it appears (from his correspondence) without the benefit of his original files which were with the new solicitors. The practitioner, who by this time was retired from legal practice, did not have a meeting with the new solicitors, the information he provided being communicated by fax or telephone. In his response letter to the Complaints Committee, the practitioner makes clear that he first learned of the agreement with Mr Bazeley in 1998. Importantly, in the practitioner's correspondence with the Powers' new solicitors as to the terms of his witness statement, he again states (his letter dated 17 August 2004) that he was first told of the agreement with Mr Bazeley in about June 1998. He had 'no personal knowledge' of that agreement. (In that letter he also states that he was not a party to any conversation with Mr Price concerning the costs sharing agreement).

132 Although we accept that the date upon which the practitioner first learned of the agreement with Mr Bazeley may have been of some importance in the new proceedings, particularly if this date was much later than his preparation of the deed, we think the making of the error was no more than an oversight. Certainly we do not think there was anything in the reference to 1996 which might be regarded as the practitioner deliberately seeking to obtain an advantage for the Powers by a misrepresentation. There is no evidence of some dishonesty or wrongful intent in his conduct.

133 In the circumstances, we do not regard this error by the practitioner in his witness statement as constituting unprofessional practice or unsatisfactory professional conduct.

### **The improper advice ground**

134 The Complaints Committee's contentions are as follows:

- (1) In November 1995 the Powers and the executors for Mr Ryan's estate commenced the 1995 shares action for the transfer of shares in the company by Mr Hayes and Mr Price to the Powers in accordance with the 1990 agreement;

- (2) The practitioner was the solicitor of record for the Powers in the 1995 shares action;
- (3) Mr Price gave evidence on the Powers behalf at the trial of the 1995 shares action and for that purpose the practitioner prepared a witness statement containing evidence Mr Price proposed to give at the trial (Mr Price's witness statement);
- (4) The practitioner provided Mr Price with a copy of Mr Price's witness statement under cover of a letter dated 15 September 2007;
- (5) Relevantly, in that letter the practitioner stated:

In preparation for our meeting tomorrow I now forward an annotated copy of your statement dated 25 March 1997.

It would save a lot of time if you, Sheila and Alan [the Powers] could consider the statement and the annotations before the meeting.

Note that that [sic] 6 critical events have been marked.

These events are critical because they are essential to our case.

It is therefore essential that your statement and the Powers statement be in tune as to those events at least. ...Perhaps you could spend some time tonight going through the statement with Alan and Sheila (ie the Powers) to iron out any bumps.

135 The material facts, save as to the practitioner's intent, are not denied by the practitioner. By his reply however, the practitioner contends that his letter was not an attempt to encourage Mr Price to give evidence different from the evidence which he believed to be true. The reply also includes by way of explanation:

- (1) Mr Price was a 'fully participating' party to the action not merely a witness of fact;
- (2) Mr Price and Mr Powers were members of the commune and had discussed the facts litigated in the 1995 shares action both before and after the practitioner commenced to act. This fact was disclosed in the course of the hearing;

- (3) Mr Price provided advice and assistance to the Powers throughout the course of the litigation;
- (4) Both Mr Price and Mr Powers were subject to rigorous cross-examination at the trial;
- (5) The trial judge commented on the extent to which in his evidence Mr Powers may have recalled discussions at the meeting from the discussion of his evidence with Mr Price;
- (6) The Powers and Mr Price resided in Denmark and the practitioner practised in Perth.
- (7) The objective of the practitioner's letter was to alert Mr Price to the principal issues of fact and to elicit his evidence on certain matters which had occurred as early as 1990, seven years earlier, and to question and test the evidence to be given by him, drawing attention to difficulties with his evidence.

136 These matters were developed in the written submissions filed on the practitioner's behalf which added:

- (a) Mr Price was not a client of the practitioner;
- (b) Mr Price's witness statement was to be a *template* and the basis for the evidence to be given by the Powers.

137 The matters (above) in sub-paragraph (2) (as it relates to the period after the practitioner commenced to act), sub-paragraph (5) (which we discuss further below) and sub-paragraph (b) seem rather to vindicate this complaint than to justify the practitioner's conduct. The matter in sub-paragraph (3) meant that Mr Price was likely to show the letter to the Powers or relay its contents, and to encourage their participation in providing a common version of events. The other matters are of limited relevance. We do not think these matters individually, cumulatively or collectively constitute a defence to the charge.

138 In his opening submissions, Mr Viner also submits that the allegation is dependent upon a proper construction of the words used by the practitioner and his 'innocent' intention in using those words. As to that, the meaning of the words cannot be derived from the practitioner's subjective intent at the time he wrote the letter. Their meaning must be

determined on the basis of how they would reasonably be understood by the recipient; that is based upon the ordinary meaning of the words used.

139 In that respect, we think the effect of the words in their ordinary meaning carry the import advanced by the Complaints Committee in articulating this ground, that is, that Mr Price confer with the Powers with the objective to render the evidence that he proposed to give at trial on the critical issues of fact identified consistent with the evidence proposed to be given by the Powers. Once that position is reached, we regard the practitioner's actual subjective intention as of limited importance (although relevant to penalty). The offence lay in writing and sending the letter in those terms. In any event we find, based on the language of the letter and the evidence generally, that the practitioner wrote it with the objective identified. We do not think any other interpretation is open on the evidence.

140 Mr Viner also pointed out in the opening submissions that the charge was not that the practitioner intended that Mr Price should fabricate or concoct his evidence or give evidence that he would not otherwise have given in truthful testimony. We accept that this is so. The danger was however, that in advising the parties to confer with the identified purpose, it would have this effect. It is relevant to note that this was not a situation where Mr Price was being asked to provide something in the nature of a background paper to the case. The practitioner was in a position to identify 'six critical events ... essential to our case'. In relation to the evidence to be given on 'those events at least' as the practitioner expressed it, and their separation from the body of evidence on other matters is important in this context, he was concerned to see that the parties in effect reconcile their evidence (putting it 'in tune' and 'ironing out bumps') so as to present a consistent narrative.

141 The matter does not appear to have been specifically addressed in the Law Society of Western Australia *Professional Conduct Rules*. Ms Cahill referred us to the current version of the *Western Australian Bar Association Conduct Rules*. These include at [43] - [45]:

A barrister must not suggest or condone another person suggesting in any way to any prospective witness (including a party of the client) the content of any particular evidence which the witness should give at any stage in the proceedings.

A barrister will not have breached Rule 43 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with

the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.

A barrister must not confer with ... more than one lay witness (including a party or client) at the same time, about any issue: (a) as to which there are reasonable grounds for the barrister to believe it may be contentious at a hearing; (b) which could be affected by, or could affect, evidence to be given by any of those witnesses; unless the barrister believes on reasonable grounds that special circumstances require such a conference.

142 In the usual case, counsel in preparing a witness statement or otherwise preparing a witness to give evidence, may properly draw matters to the witness's attention, clarify matters, question and test the witness's recollection of events and advise the witness as to the course of proceedings, including the likely nature and scope of cross-examination. In doing so, however, in no circumstances may counsel suggest the answer which the witness ought give or put the witness under pressure to provide other than a truthful account of their evidence; nor may a witness be rehearsed, practised or coached in relation to their evidence or the way in which it should be given. See DA Ipp *Lawyers' Duties to the Court* (1998) 114 *Law Quarterly Review* 63 at 91 - 2 (an article cited by Mr Viner in a different context).

143 As a matter of best practice (as Ms Cahill puts it) a legal practitioner should advise his witnesses not to confer together in relation to their evidence. Lay clients and witnesses are unlikely to appreciate the need, so far as is possible, for their evidence to be the product of their own independent knowledge and recollection unaffected by the views or evidence of others. That is the rationale (or one of them) for an order for witnesses out of court and for the practice by which practitioners do not confer with more than one witness at the same time.

144 In a recent decision, an appeal was allowed because of the coaching of the witnesses involved. See *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110 at [30]:

In the present case it is hard to see that the intention of the teleconference with witnesses discussing amongst themselves the evidence that they would give was for any reason other than to ensure, so far as possible, that in giving evidence the defendant's witnesses would all speak with one voice about the events that occurred. Thus, the evidence of one about a particular matter which was in fact true might be overborne by what that witness heard several others say which, as it happened, was not true. This seriously undermines the process by which evidence is taken. What was done was improper.

145 It will be apparent that the practitioner's expressed intent, as we have  
found it, was to achieve the very object which Sheller JA expressed as  
'improper'.

146 The practitioner's conduct was in an abstract sense inimical to the  
interests of justice to the extent his witnesses' evidence was not the  
product of their own independent recollection. Moreover, in the  
1995 shares action Templeman J disbelieved the evidence of Mr Powers  
as to whether there had been an express agreement to transfer the shares  
(the heart of the case), because he found that Mr Powers' evidence as to  
that was 'prompted by his recollection of what Mr Price had said in his  
witness statement to that effect'. This finding clearly reflected on the  
credibility of Mr Powers (and Mr Price). It reveals the disservice to a  
client of the type of encouragement which the practitioner gave to his  
witnesses to discuss and 'harmonise' their evidence.

147 We regard the practitioner's conduct as, to a substantial degree,  
falling short of the standards of his profession.

148 The nature of this unprofessional conduct raises a serious question as  
to whether it ought be categorised as professional misconduct under the  
LP Act. However, in opening the case, Ms Cahill described the conduct  
as 'unsatisfactory conduct'. In light of that description, we think the  
appropriate course is to make a finding of unsatisfactory professional  
conduct for the purposes of the LP Act.

### ***Findings***

149 In summary we find the practitioner guilty of unsatisfactory  
professional conduct under the LP Act on two grounds as alleged, namely:

- (1) continuing to act for Mrs Powers without obtaining her  
consent to informing the Court of the incorrect statement  
in her testimony;
- (2) suggesting to a witness proposed to be called by the  
practitioner that the witness confer with other proposed  
witnesses with the objective of rendering the evidence the  
witness proposed to give on critical issues of fact  
consistent with the evidence proposed to be given by such  
other witnesses.

150           We will hear the parties on penalty.

I certify that this and the preceding [150] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

---

**JUDGE T SHARP, DEPUTY PRESIDENT**