[2013] WASAT 117

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and SEGLER [2013] WASAT 117
MEMBER	**:**	JUDGE T SHARP (DEPUTY PRESIDENT) MS F CHILD (MEMBER) MR C PHILLIPS (SENIOR SESSIONAL MEMBER)
HEARD	**:**	17, 18 AND 19 APRIL 2013 WRITTEN SUBMISSIONS 29 APRIL 2013
DELIVERED	**:**	2 AUGUST 2013
FILE NO/S	**:**	VR 43 of 2012
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND MARTIN LEE SEGLER Respondent

Catchwords:

Legal practitioner - Professional misconduct - Unsatisfactory professional conduct - Failure to pay trust money into a trust account - Failure to carry out work or adequate work - Failure to account for money received - Failure to reach or maintain a reasonable standard of competence and diligence - Failure to respond to correspondence from another legal practitioner - Misleading or

attempting to mislead the Court - Failure to respond to enquiries of the Complaints Committee

Legislation:

Family Law Amendment Rules 2005 (No.2) (Cth), r 10.01
Family Law Rules 2004 (Cth), Div 10.1.2
Legal Practice Act 2003 (WA), s 3, s 137
Legal Profession Act 2008 (WA), s 4(a), s 205(1), s 215, s 215(2), s 402, s 403, s 404, s 406, s 442, s 520(1), s 622(2)
Legal Profession Conduct Rules 2010 (WA)

Result:

Findings of professional misconduct in relation to some of the allegations

Summary of Tribunal's decision:

The Legal Profession Complaints Committee alleged that Martin Lee Segler engaged in professional misconduct by:

- failing to pay trust money into a trust account;
- failing to carry out work or adequate work which he had agreed to do for clients;
- failing to account for money received;
- failing to reach or maintain a reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian practitioner;
- failing to respond or adequately respond to correspondence from another legal practitioner;
- misleading or attempting to mislead the Court in a family law dispute;
- failing to clearly indicate a pending trial date to a client's new solicitor;
- failing to meet with a client after judgment was entered against the client in a criminal matter;
- failing to respond to the Complaints Committee's enquiries; and
- failing to properly notify clients of his retirement from practice in May 2010.

The Tribunal considered these allegations and the grounds for them. It concluded that the practitioner was guilty of professional misconduct by:

- failing to pay trust money into a trust account;
- misleading or attempting to mislead the Court;
- one count of failing to reach or maintain a reasonable standard of competence and diligence; and

- failing to respond to the Complaints Committee's enquiries and summonses.

The Tribunal concluded that the remaining allegations had not been established.

Category: B

Representation:

Counsel:

Applicant	:	Ms R Fogliani
Respondent	:	In person

Solicitors:

Applicant	:	Legal Profession Complaints Committee
Respondent	:	N/A

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

Briginshaw v Briginshaw (1938) 60 CLR 336
Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115
Legal Profession Complaints Committee and Lee-Steere [2010] WASAT 189
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170
The Legal Practitioners Complaints Committee v De Alwis [2006] WASCA 198

REASONS FOR DECISION OF THE TRIBUNAL:

1 The respondent (**Practitioner**) at all relevant times was an Australian lawyer as defined under s 4(a) of the *Legal Profession Act 2008* (WA) (**Legal Profession Act**). On 10 May 2010 he was suspended from practising for three months and closed his practice. Since then, he has not practised and has not held a practising certificate.

2 During the relevant period the Practitioner practised as a sole practitioner and latterly as a legal practitioner director of an incorporated legal practice named Segler Enterprises Pty Ltd.

3 In an application dated 13 March 2012, the Legal Profession Complaints Committee (**Committee**) brought a number of complaints of professional misconduct or unsatisfactory professional conduct against the Practitioner. The conduct complained about occurred between August 2007 and March 2011.

Applicable legislation

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

5 Under s 406 of the Legal Profession Act, Pt 13 of the Legal Profession Act (complaints and discipline) applies to former Australian legal practitioners in relation to conduct occurring when they were Australian legal practitioners. Also, under the same section, Pt 13 applies to Australian lawyers in relation to conduct occurring while they were Australian lawyers, but not Australian legal practitioners.

6 Accordingly the Legal Profession Act applies to the Practitioner and to the alleged conduct the subject of the Committee's application.

Professional misconduct and unsatisfactory professional conduct under the Legal Profession Act

7 The Committee alleges that the Practitioner engaged in 'unsatisfactory professional conduct' or 'professional misconduct', being terms used and defined in the Legal Profession Act. The term 'unsatisfactory professional conduct' is defined in s 402 of the Legal Profession 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 as including '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 practitioner is not a fit and proper person to engage in legal practice'.

8 Section 404 of the Legal Profession Act gives instances of conduct capable of constituting unsatisfactory professional conduct or professional misconduct. These include such matters as a contravention of the Legal Profession Act, failure to comply with an order of the Committee and charging excessive legal costs.

9 It should be noted that the definitions of 'professional misconduct' and 'unsatisfactory professional conduct' are expressed as inclusory only. It is clear from the Legal Profession Act that the references to competence and diligence and the examples given in s 404 are not intended to cover all instances of unprofessional conduct. 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 Legal Profession Act as either 'unsatisfactory professional conduct' or 'professional misconduct'. It follows that the more serious form of unprofessional conduct (that which is regarded as disgraceful or dishonourable) will likely fall under the more serious statutory form of professional misconduct. 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 of unsatisfactory professional conduct.

10 Legal profession rules, such as the *Professional Conduct Rules* issued by the Law Society of Western Australia and, latterly, the *Legal Profession Conduct Rules 2010* (WA) provide a guide as to what is regarded in Western Australia as proper professional behaviour. A breach of these rules could constitute either unsatisfactory professional conduct or professional misconduct, again depending on whether the breach concerned represents behaviour falling short of the standards of the profession or whether the behaviour concerned is regarded as disgraceful or dishonourable.

11 What the Committee must show to the Tribunal is:

a) the nature of the charge which it is making against the Practitioner and the evidence which supports that charge;

b) the relevant conduct rules or practice governing the matter;

c) the extent to which there has been a departure from those rules or that practice; and

d) whether in all the circumstances the Practitioner's conduct may be said to constitute unsatisfactory professional conduct or professional misconduct.

The standard of proof

12 The standard of proof which the Committee must meet in proving its case is the civil standard, namely proof on the balance of probabilities. However, 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'; ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 (***Briginshaw***) at [362].

13 As the High Court expressed the position in ***Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*** (1992) 67 ALJR 170, 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.

14 Allegations of professional misconduct are undoubtedly serious, thus it is considered in proceedings such as these that the Tribunal must feel an actual persuasion of the occurrence or existence of the relevant facts before being satisfied that an allegation has been made out.

15 In this case, some of the events relied upon by the Committee extend back some five or six years. To the extent that proof is established by reference to documents, this delay may be of little consequence. However, when the issue is dependent on the Practitioner's recall of events and witnesses' recall of the same events, some allowance must be made for the inevitable effect of such delay upon those parties' ability to recall those matters and the accuracy of their recall.

The Practitioner's records

16 In the Practitioner's Witness Statement dated 15 April 2013, the Practitioner explained his record keeping system during the later years of his practice.

17 He says that he administered the operation of his legal practice through his two computers. On his desktop computer he maintained legal practice folders upon which he kept copies of, for example, the terms of retainer and agreement as to costs documents, receipts of money paid, tax invoices issued, along with all of his correspondence, court documents and 'Documents downloaded from legal databases which were pertinent to my instruction and the case I was to present'.

18 The Practitioner also maintained a second computer, being a laptop. On that, he maintained a 'running schedule' of his work, which he operated through a software application known as 'iBiz'. He said that the desktop computer and the laptop computer did not share the iBiz programme and he could only access that programme through the laptop computer.

19 In the Practitioner's Book, he includes documents which he says he was able to retrieve electronically through the desktop computer or from records in hard copy physically retained by him.

20 The Practitioner then goes on to say that in or around June 2010, he ceased paying his subscription to the iBiz software programme but had not appreciated that by so doing he lost all access to the records of his work performed. He then says that the hard drive of the laptop computer failed around the same time and therefore he has no record whatsoever of whatever data had been stored on that computer.

21 The Committee does not contest any of these facts.

22 While this explains the lack of documentation in support of some of the Practitioner's responses, it does not explain why the documents which the Practitioner did have were only filed on 18 February 2013, which in turn required the Committee to amend some of its allegations. We refer again to these amendments later in these reasons.

The hearing

23 The hearing of this matter took place on 17, 18 and 19 April 2013. At the hearing, the Committee tendered a book of documents (**Committee's Book**) and a supplementary book of documents (**Committee's Supplementary Book**). The Practitioner filed a written

response to the Committee's allegations (**Practitioner's Response**) and his own book of documents dated 15 April 2013 (**Practitioner's Book**).

24 The Committee then filed a number of witness statements to which we will refer as we deal with each complaint. The Practitioner also filed his own witness statement (**Practitioner's Witness Statement**).

The complaints against the Practitioner

25 The complaints against the Practitioner and the grounds upon which the Committee relies for alleging professional misconduct or unsatisfactory professional conduct, as the case may be, by the Practitioner are set out in the Committee's application in substantially the following terms:

Complaint 1

26 The Practitioner engaged in professional misconduct in the course of acting for his client, Ms Josette Hamilton (**Ms Hamilton**), by:

(a) on various dates between 9 August 2007 and 22 January 2009, failing to deposit trust moneys, as defined in s 3 of the 2003 Act, that he had received from Ms Hamilton to the credit of his trust account as required by s 137 of the 2003 Act, and

(b) on various dates between 13 March 2009 and 6 April 2009, failing to deposit trust money, as defined in s 205(l) of the Legal Profession Act, that he had received from Ms Hamilton to the credit of his trust account as required by s 215(2) of the Legal Profession Act.

Complaint 2

27 The Practitioner engaged in professional misconduct in the course of acting for his client, Mr Hase Basagic (**Mr Basagic**), by:

(a) on or about 25 February 2008 failing to deposit trust moneys, as defined in s 3 of the 2003 Act, in the sum of $3,500 that he had received from Mr Basagic to the credit of his trust account as required by s 137 of the 2003 Act; and

(b) between 25 February 2008 and 10 May 2010:

(i) failing to carry out work for Mr Basagic which he had agreed to do; and

(ii) failing to account to Mr Basagic for the monies received from him and retained by the Practitioner for work to be performed by the Practitioner; and

(c) failing to notify Mr Basagic that he had ceased to act for him from or about 10 May 2010.

Complaint 3

28 The Practitioner engaged in professional misconduct in the course of acting for his client, Mr Lazo Glusica (**Mr Glusica**), by:

(a) on or about 28 March 2008 failing to deposit trust moneys, as defined in s 3 of the 2003 Act, in the sum of $5,000 that he had received from Mr Glusica to the credit of his trust account as required by s 137 of the 2003 Act;

(b) between 28 March 2008 and 10 May 2010:

(i) failing to carry out work for Mr Glusica which he had agreed to do; and

(ii) failing to account to Mr Glusica for the moneys received from him and retained by the Practitioner for work to be performed by the Practitioner; and

(c) between 13 May 2008 and 1 May 2009 in the course of acting on behalf of Mr Glusica in relation to Supreme Court action number CIV 1511 of 2008 substantially or consistently failing to reach or maintain a reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

Complaint 4

29 The Practitioner engaged in professional misconduct in the course of acting for his client, Ms Edith Julia Mateljan (**Ms Mateljan**), in Family Court (**Family Court**) proceedings PTW 3210/2008 (**Mateljan proceedings**) by:

(a) between 13 September 2008 and 29 September 2009 repeatedly failing to respond or to adequately respond to correspondence from the legal practitioner representing

Ms Mateljan's de facto husband who was the applicant in the Mateljan proceedings;

(b) on 11 May 2009, intentionally, alternatively recklessly, misleading or attempting to mislead the court by informing Her Honour Justice Crisford that:

(i) disclosure of certain documents had been made;

(ii) a valuation of the family home had been made by a valuer agreed by both parties to the Mateljan proceedings; and/or

(iii) neither party had made an offer of settlement;

when he knew or ought to have known that these submissions were not correct and were misleading, or had reckless disregard as to whether they were correct and misleading; and

(c) following termination of his retainer, providing the client file of Ms Mateljan to other solicitors, namely Marks & Sands, without clearly indicating to Marks & Sands that a trial was listed to be heard in the Family Court on 26 July 2010.

Complaint 5

30 The Practitioner engaged in professional misconduct in the course of acting for his client, Mr Ralph Condelli (**Mr Condelli**), by:

(a) on 14 January 2009 failing to deposit trust moneys, as defined in s 3 of the 2003 Act, the sum of $3,185 that he had received from Mr Condelli to the credit of his trust account as required by s 137 of the 2003 Act.

(b) between 14 January 2009 and 10 May 2010:

(i) failing to carry out work for Mr Condelli which he had agreed to do; and

(ii) to account to Mr Condelli for the moneys received from him and retained by the Practitioner for work to be performed by the Practitioner.

Complaint 6

31 The Practitioner engaged in professional misconduct or unsatisfactory professional conduct in the course of acting for his client, Mr Kenneth Eric Johnston (**Mr Johnston**), by:

(a) failing, without good reason, to meet with Mr Johnston or to ensure that any representative of the Practitioner met with Mr Johnston after judgements of convictions were entered against Mr Johnston in the District Court at Geraldton on 18 March 2009;

b) on various dates between 18 October 2007 and 19 February 2009, failing to deposit trust moneys, as defined in s 3 of the 2003 Act, that he had received from Mr Johnston to the credit of his trust account as required by s 137 of the 2003 Act; and

(c) on various dates between 9 March 2009 and 8 April 2009, failing to deposit trust money, as defined in s 205(l) of the Legal Profession Act, that he had received from Mr Johnston to the credit of his trust account as required by s 215(2) of the Legal Profession Act.

Complaint 7

32 The Practitioner engaged in professional misconduct in the course of acting for his client, Mr Adjin Dzemailoski (**Mr Dzemailoski**), by:

(a) on or about 23 February 2010 failing to deposit trust money, as defined in s 205(l) of the Legal Profession Act, in the sum of $3,000 that he had received from Mr Dzemailoski to the credit of his trust account as required by s 215(2) of the Legal Profession Act;

(b) between 23 February 2010 and 10 May 2010:

(i) failing to carry out work for Mr Dzemailoski which he had agreed to do; and

(ii) failing to account to Mr Dzemailoski for the moneys received from him and retained by the Practitioner for work to be performed by the Practitioner; and

(c) between 1 February 2010 and 15 June 2010 in relation to proceedings between Mr Dzemailoski and Narinder Kaur Dzemailoski in the Family Court substantially or consistently failing to reach or maintain a reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian practitioner.

Complaint 8

33 The Practitioner engaged in professional misconduct by:

(a) on various dates between 30 June 2010 and in or about March 2011 failing to respond to the Committee's reasonable enquiries;

(b) failing to comply with a summons to Produce Documents issued on 18 August 2010 and 2 September 2010 in breach of s 520(1) of the Legal Profession Act; and

(c) failing to respond to a letter from the Senior Trust Account Inspector dated 9 June 2010 requesting confirmation of the findings set out in a 'Report on Examination of Office and Practice Records of Martin Lee Segler' dated 9 June 2010.

Complaint 9

34 Further or in the alternative to Complaints 1 to 8 the Practitioner engaged in professional misconduct between about 9 August 2007 and March 2011 by engaging in all of, or any combination of the conduct referred to in Complaints 1 to 8.

The facts alleged, the parties' contentions and the Tribunal's findings

35 In its application, the Committee set out a statement of facts and contentions in respect of each of the complaints referred to above. The Practitioner prior to the hearing informed the Committee and the Tribunal that he does not contest the facts alleged by the Committee in support of Complaints 1, 2(a), 3(a), 5(a), 6(b) and (c) and 7(a), although he disputes that the conduct in question constitutes professional misconduct or unsatisfactory professional conduct.

36 At the commencement of the hearing, the Practitioner also conceded the facts contained in the grounds for Complaint 8; (T:5-6; 17.04.13).

37 Also, at the commencement of the hearing the Committee, with the consent of the Practitioner, sought leave to amend the grounds of some of the complaints set out in its application. The Tribunal gave leave accordingly.

38 For convenience, we will set out in full the complaints and the grounds for those complaints in each of the cases where they have been amended.

39 We then set out in respect of each complaint the facts alleged by the Committee and the Committee's contentions in respect of those facts, the Practitioner's response and the findings of the Tribunal.

Complaint 1 - Hamilton

40 The grounds in Complaint 1 remain as set out earlier in these reasons.

Complaint 1 - the facts according to the Committee

41 On or about 30 July 2007 the Practitioner received instructions from Ms Hamilton to represent her in relation to a dispute with Stephen Bruno Battaglia in the Family Court. Ms Hamilton signed a written 'Terms of Retainer and Agreement as to Costs', (**Hamilton Retainer**) which included a term that required Ms Hamilton to pay to the Practitioner a retainer in the amount of $1,500 'for the professional service to be performed for [Ms Hamilton]'.

42 In accordance with the terms of the Hamilton Retainer, on 9 August 2007 Ms Hamilton paid the amount of $1,500 to the Practitioner.

43 On or about the dates indicated, in the course of acting for Ms Hamilton, the Practitioner received the following amounts of money from Hamilton:

9 August 2007	$1,500
18 October 2007	$5,000
22 January 2009	$1,000

44 (collectively referred to as the **2003 Hamilton money**).

45 On or about the dates indicated, in the course of acting for Ms Hamilton the Practitioner also received the following amounts of money from Hamilton:

13 March 2009	$20,000
6 April 2009	$20,000

46 (collectively referred to as the **2008 Hamilton money**)

Complaint 1 - the Committee's contentions

47 The Committee's case is that the 2003 Hamilton money that had been received by the Practitioner from Ms Hamilton was 'trust moneys' for the purposes of s 3 of the 2003 Act. This is because they had been received by him in the course of legal practice in Western Australia for the use or benefit of Ms Hamilton but were under the exclusive control of the Practitioner.

48 As a result the Practitioner was required, by s l37 of the 2003 Act, to deposit the 2003 Hamilton money to the credit of a trust account.

49 However, contrary to s 137 of the 2003 Act, the Practitioner, or someone acting under his direction, deposited the 2003 Hamilton money into his general bank account.

50 In respect of the 2008 Hamilton money received by the Practitioner from Ms Hamilton, the Committee says that this was 'trust money' for the purposes of s 205(l) of the Legal Profession Act, as the 2008 Hamilton money had been entrusted to him in the course of or in connection with the provision of legal services by him.

51 As a result the Committee contends that the Practitioner was required, by s 215(2) of the Legal Profession Act, as soon as practicable after receiving the 2008 Hamilton money, to deposit it in a general trust account of the Practitioner's practice.

52 However, contrary to s 215(2) of the Legal Profession Act, the Practitioner, or someone acting under his direction, deposited the 2008 Hamilton money into the Practitioner's general bank account.

The Practitioner's response in respect of Complaint 1

53 The Practitioner does not dispute the facts set out above in respect of Complaint 1. Further, he does not disagree with the Committee's analysis of the relevant requirements under the 2003 Act in respect of the 2003 Hamilton money and under the Legal Profession Act in respect of the 2008 Hamilton money.

54 The Practitioner initially denied that he failed to deposit trust money into his trust account and said that he was expressly instructed by Ms Hamilton to receive that money as payments to him. It was only

after the Practitioner obtained legal advice in preparation for the hearing of this matter that he was prepared to concede that the money in question was in fact trust money.

55 The Practitioner now concedes that the Hamilton Retainer was 'deficient'; (Practitioner's Witness Statement paragraph 9). The Practitioner says that he now appreciates, having received and accepted independent legal advice, that the Hamilton Retainer 'did not authorise payment for my own benefit prior to delivery of services'. He says that he now understands the position. He says that it was never his intention to circumvent or infringe provisions of the 2003 Act or the Legal Profession Act. He points out that his trust account had been audited for the financial years to 30 June 2007, 2008 and 2009 respectively and a 'satisfactory report in respect of each account and year' had been issued. He also points out that an inspector from the Legal Practice Board conducted a 'random audit' of his trust account and entries in his general account in 2009 and he received no adverse report or comment as a result of that inspection; (Practitioner's Witness Statement paragraph 10).

Complaint 1 - the findings of the Tribunal

56 Section 137 of the 2003 Act provides that every legal practitioner practising in this State who receives money in advance of provision of legal services must deposit that money to the credit of a trust account. That money must be retained in that account until it is dealt with as directed by the person concerned. It is only if the person directs otherwise that these provisions do not apply; (s 137(2) of the 2003 Act).

57 Section 215 of the Legal Profession Act contains corresponding provisions.

58 The Practitioner admits to the conduct alleged and the Tribunal finds, on the Practitioner's admission, that the Practitioner failed to deal with trust moneys pursuant to s 137 of the 2003 Act and failed to deal with trust money pursuant to s 215 of the Legal Profession Act.

59 The Practitioner had been in practice since 1980 until his retirement in 2010 and can be regarded as an experienced legal practitioner. He has held, amongst other roles, the position of managing partner for several years in a mid-sized legal practice in Perth. His failure to appreciate the statutory requirements for trust money cannot be explained by inexperience or mere 'error'; (Practitioner's Witness Statement paragraph 18).

60 Integrity in dealing with clients' money is crucial to a lawyer's continuing entitlement to practice; see for example ***The Legal Practitioners Complaints Committee v De Alwis*** [2006] WASCA 198. At [106], the Court said:

> Conduct of this kind is serious and has often been treated as such by the courts. One example is the case of *In re A Practitioner* (1982) 30 SASR 27. A practitioner failed to pay cheques into a trust account and instead disbursed the proceeds for profit. An equivalent sum was ultimately paid by the practitioner into the trust account and no loss or delay was suffered by the client. When called upon to explain the irregularities, the practitioner at first gave a misleading and untrue explanation. The Court ordered that he be struck off the roll of practitioners. King CJ said (at 31) that, despite the fact that the practitioner always intended to pay the money back, his conduct was:
>
> > … an affront to the sanctity of the practitioner's Trust Account and this Court has a duty to vindicate the inviolability of the trust imposed upon a practitioner to treat his clients' money in all respects as their money and to use their money for their purposes and no other. The public can feel confidence in legal practitioners and their handling of their money only if they know that there is involved no element of judgment on the part of the practitioner, and that their money must remain in his Trust Account until it is disbursed in accordance with their direction; because no matter how good the intentions of a practitioner might be, no matter how confident he might be that the money can be made good, whenever a client's money is deliberately used for a purpose other than the purpose for which the client entrusted it to the practitioner, there is an act of dishonesty on the part of the practitioner and one which exposes the client to some element of risk as to his money.

61 Consistent with the Tribunal's findings in the past, we consider that the Practitioner's failure to pay trust money into a trust account, even in the absence of dishonesty, is professional misconduct. The Tribunal therefore finds that this complaint has been made out. The Practitioner is guilty of professional misconduct on the grounds set out in Complaint 1 of the Committee's application.

Complaint 2 - Basagic

62 This allegation has been amended; (T:24; 17.04.13). Complaint 2 now reads as follows, the added words being shown in italics:

63 The Practitioner engaged in professional misconduct in the course of acting for his client, Mr Basagic, by:

(a) on or about 25 February 2008 failing to deposit trust moneys, as defined in s 3 of the 2003 Act, in the sum of

$3,500 that he had received from Mr Basagic to the credit of his trust account as required by s l37 of the 2003 Act.

(b) between 25 February 2008 and 10 May 2010:

(i) failing to carry out work *or adequate work* for Mr Basagic which he had agreed to do; and

(ii) failing to account to Mr Basagic for the monies received from him and retained by the Practitioner for work to be performed by the Practitioner.

(c) failing to notify Mr Basagic that he had ceased to act for him from or about 10 May 2010.

Complaint 2 - the facts according to the Committee and the Committee's contentions

64 It is not in dispute that on or about 22 February 2008, at a meeting in the Practitioner's office, the Practitioner provided some advice to Mr Basagic and received instructions from Mr Basagic to act on his behalf to relation to a dispute between Mr Basagic and an entity trading under the name Furniture Carpet & Timber Flooring Traders (**Traders**). The dispute concerned what Mr Basagic regarded as a defective installation of a timber floor at his property at 248 Armadale Road, Kewdale.

65 At that meeting, the Practitioner gave Mr Basagic a written 'terms of retainer and agreement as to costs' (**Basagic Retainer**). The Basagic Retainer included a term that required Mr Basagic to pay to the Practitioner an amount of $3,500 'for the professional service to be performed'. The Committee contends that Mr Basagic did not sign the Basagic Retainer. On 25 February 2008, Mr Basagic paid an amount of $3,500 to the Practitioner. The Practitioner issued Mr Basagic with a receipt for that money.

66 The Committee says that the $3,500 that had been received by the Practitioner from Mr Basagic was 'trust moneys' for the purposes of s 3 of the 2003 Act as it had been received by him in the course of legal practice in Western Australia for the use or benefit of Mr Basagic but was under the exclusive control of the Practitioner. As a result the Practitioner was required, by s 137 of the 2003 Act, to deposit the $3,500 to the credit of a trust account.

67 However, contrary to s l37 of the 2003 Act, the Practitioner, or someone acting under his direction, deposited the $3,500 into his general bank account.

68 The Committee's case is then that Mr Basagic attempted to contact the Practitioner after 25 February 2008 but was unable to do so. The Committee accordingly alleges that Practitioner did not carry out adequate work on behalf of Mr Basagic in relation to the dispute between Mr Basagic and Traders other than meeting with him on 22 February 2008.

69 The Committee further contends that when the Practitioner ceased to practice as a legal practitioner, he did not at any time advise or inform Mr Basagic that he had ceased to practice as a legal practitioner and that he had ceased to act on his behalf as a consequence.

70 Also, the Committee says, the Practitioner has not at any time issued an invoice to Mr Basagic or otherwise accounted to him for the $3,500 received from him.

The Practitioner's response in respect of Complaint 2

71 The Practitioner accepts that the Basagic Retainer included a term that required Mr Basagic to pay to the Practitioner a retainer in the amount of $3,500 'for the professional service to be performed for [Mr Basagic]'. The copy of this document which appears in the Committee's Book at pages 35 and 36 has been signed by the Practitioner but not by Mr Basagic, although the Practitioner says that Mr Basagic did in fact sign that agreement. As will be seen, Mr Basagic subsequently accepted this.

72 The Practitioner concedes that the Basagic Retainer 'was deficient as aforesaid said for my intended purposes'; (Practitioner's Witness Statement paragraph 24). He repeats what he said in this regard in response to the corresponding allegation under Complaint 1 - Hamilton.

73 However, he takes issue with Mr Basagic's recollection of other events. He agrees that he met initially with Mr Basagic on 22 February 2008. He said that he then wrote to him that evening and then consulted with him again on 25 February 2008. On the second occasion Mr Basagic signed the Basagic Retainer and paid to the Practitioner the sum of $3,500. The Practitioner says that he provided Mr Basagic with a receipt for that money 'then and there'.

74 The Practitioner then says that at that meeting he agreed to write to Traders in terms which they discussed. The file note of that meeting

appears at page 39 of the Practitioner's Book. He then prepared and sent a letter of demand to Traders on 11 March 2008; (Practitioner's Book page 40), after he had 'considered substantial reports and quotations'; (Practitioner's Witness Statement paragraph 28).

75 The Practitioner denies the allegation made by Mr Basagic that he advised Mr Basagic to have the flooring which had been installed 'ripped up and then replaced by somebody else'. He also denies Mr Basagic's allegation that he advised Mr Basagic to 'take the old floor and drop it off at Furniture Carpet and Timber Flooring Traders once it had been ripped up'. The Practitioner's recollection of events is that Mr Basagic's son sent him numerous photographs of the work the subject of the dispute and then Mr Basagic was to commission a report on the defective work by an expert. The Practitioner said that he did not consider that the report already prepared for Mr Basagic was sufficient and that the Practitioner required a report from the contractor who had actually carried out the remedial work; (T:227; 19.04.13).

76 The Practitioner says that he had a further meeting with Mr Basagic and his son on 1 September 2008. He has produced a file note of that meeting; (Practitioner's Book page 42). Most further communications with Mr Basagic were through Mr Basagic's son. The Practitioner said that Mr Basagic worked 'up north somewhere'; (T:245; 19.04.13) and that he had instructed the Practitioner to deal with his son. He said that he kept telling Mr Basagic's son that he needed the further report; (T:248; 19.04.13).

77 The Practitioner also produced a copy of a letter dated 27 April 2010 and addressed to Mr Basagic at 248A Armadale Road, Kewdale (Practitioner's Book pages 43-44). That letter contains the advice that the Practitioner is to retire from legal practice with effect from 10 May 2010 and that he was no longer in a position to continue representing Mr Basagic in his claim against Traders.

Complaint 2 - the evidence

78 Mr Basagic provided an affidavit sworn by him on 6 February 2013 and a further affidavit sworn by him on 14 March 2013. He also supplemented his evidence orally (through an interpreter) at the hearing and was cross-examined.

79 In his earlier affidavit he says that the Practitioner 'never did anything for me after I paid him the money'. He also says that he had never seen the Basagic Retainer before it was shown to him by the Committee.

80 In his further affidavit, Mr Basagic gave evidence that he had also never before seen the letter from the Practitioner of 27 April 2010; (Respondent's Book pages 43-44) and had never received it. He also said that he had never received the tax invoice dated 27 April 2010 which appears in the Respondent's Book at pages 45-48.

81 Under cross-examination it was put to Mr Basagic that all of the documents in the Respondent's Book from pages 36-48 inclusive must have been previously seen by Mr Basagic, because it was from Mr Basagic that the Committee obtained copies of those documents. Mr Basagic replied that he 'cannot remember all of these little details - come on - when I lost a significant amount of money, and I was signing documents and nothing was being sent to me' (T:153; 18.04.13).

82 The Practitioner then showed Mr Basagic a further copy of the Basagic Retainer; (Respondent's Book pages 37 and 38) which included Mr Basagic's signature. Despite what he had said in his earlier affidavit, Mr Basagic confirmed that this was in fact his signature. He then said that he remembered signing the document but said that he never received a copy of it; (T:150; 18.04.13).

83 It was also put to Mr Basagic that when he first met with the Practitioner, in the company of Mr Basagic's son and his friend Mr Dzemailoski, on 22 February 2008, no papers were exchanged. Mr Basagic agreed, saying that they just had a conversation and then three days later he returned to the Practitioner's office with the agreed payment. Mr Basagic added that 'all in all, I think I saw him three times' (T:154; 18.04.13).

84 In connection with Mr Basagic's address for correspondence, Mr Basagic also explained (T:155; 18.04.13) that there are in fact two houses, both belonging to him, at 248 Armadale Road. One has the address 248A Armadale Road.

85 Finally, Mr Basagic was shown a copy of the letter from the Practitioner bearing the date 27 April 2010 and addressed to Mr Basagic at 248A Armadale Road (Respondent's Book page 43). This was the letter which contained an advice from the Practitioner to Mr Basagic that he was retiring from legal practice with effect from 10 May 2010 and was no longer able to represent him.

86 Mr Basagic was asked whether or not he had ever seen this letter before and he answered 'no'; (T:158; 18.04.13).

Complaint 2 - the findings of the Tribunal

87 The Practitioner admits the facts alleged by the Committee in respect of Complaint 2(a), namely that he failed to deposit trust moneys into a trust account. The Tribunal's finding in respect of Complaint 2(a) is that the Practitioner is guilty of professional misconduct, for the reasons set out in the Tribunal's findings under Complaint 1 - Hamilton.

88 We then turn to the remainder of this complaint. It is clear to the Tribunal that Mr Basagic was unhappy that the work which the Practitioner was engaged to carry out was not completed. We do not, however, accept Mr Basagic's evidence that the Practitioner advised him to take up the defective flooring and return it to the contractors. This would have been completely contrary to Mr Basagic's interests.

89 There is no doubt that Mr Basagic did not achieve the outcome which he was seeking. There is also no doubt that the Practitioner did not progress the matter in the way in which Mr Basagic saw as being the most appropriate. However, it is unclear what work the Practitioner agreed to do. The Practitioner wrote to Traders and met with Mr Basagic on at least one further occasion after the sum of $3,500 was paid. Mr Basagic's son was involved to some extent but it is unclear as to what extent. The Tribunal therefore cannot conclude that the Practitioner failed to carry out work which he agreed to do.

90 The progress or otherwise of the matter from September 2008 until the Practitioner's retirement from practice in May 2010 is also unclear. Mr Basagic's evidence is that he continued to try to contact the Practitioner during that time but was unable to do so. The Practitioner's evidence is that he was in fact progressing the matter by collecting photographs of the defective workmanship from and otherwise dealing with Mr Basagic's son and in particular he was awaiting a further report as to why the flooring needed to be replaced.

91 The Tribunal considers that there is insufficient evidence to conclude that the Practitioner failed to carry out adequate work.

92 We find that Complaint 2(b)(i) has not been made out.

93 We now turn to Complaint 2(b)(ii) and Complaint 2(c). The Practitioner has produced a copy of a letter to Mr Basagic informing Mr Basagic of his retirement and enclosing his final account (Respondent's Book pages 43-48). Mr Basagic's statement that he did not receive these documents could lead us to one of three conclusions. It could be that the letter did not reach him because of the way in which it was addressed. Alternatively, it could be that the Practitioner never sent

it to him. The third possibility is that Mr Basagic was mistaken when he said he did not receive it.

94 In light of the fact that Mr Basagic also said that he did not receive the Basagic Retainer and only withdrew that statement when a signed copy of the Basagic Retainer was shown to him, we prefer the latter explanation. Mr Basagic left the Tribunal with the view that he was uninterested in anything other than his desired outcome with regard to his dispute with Traders. His evidence was given with great anger, making proper examination impossible, and he showed poor recollection of events.

95 We conclude that Complaints 2(b)(ii) and 2(c) have not been made out.

Complaint 3 - Glusica

96 This allegation has also been amended; (T:65; 17.04.13). The Committee not only sought and obtained leave to add words to the allegation in the same way as it did in Complaint 2, but also sought leave to withdraw part of the complaint; (T:65; 17.04.13). Leave was given and this complaint now reads as follows, sub-paragraph (b)(ii) having been removed and the added words being shown in italics.

97 The Practitioner engaged in professional misconduct in the course of acting for his client, Mr Glusica, by:

> (a) on or about 28 March 2008 failing to deposit trust moneys, as defined in s 3 of the 2003 Act, in the sum of $5,000 that he had received from Mr Glusica to the credit of his trust account as required by s 137 of the 2003 Act;
>
> (b) between 28 March 2008 and 10 May 2010:
>
> (i) failing to carry out work *or adequate work* for Mr Glusica which he had agreed to do; and
>
> (ii) (withdrawn); and
>
> (c) between 13 May 2008 and 1 May 2009 in the course of acting on behalf of Mr Glusica in relation to Supreme Court action number CIV 1511 of 2008 substantially or consistently failing to reach or maintain a reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian practitioner.

Complaint 3 - the facts according to the Committee and the Committee's contentions

98 Around or during February 2008, the Practitioner received instructions from Mr Glusica to represent him in relation to a dispute with The National Mutual Life Association of Australia Limited (**National Mutual**) in connection with an alleged failure by National Mutual to pay under an income protection insurance policy. He agreed to conduct proceedings in the Supreme Court up to and including a mediation conference.

99 On 28 March 2008 the Practitioner and Mr Glusica entered into a written agreement entitled 'Terms of Retainer and Agreement as to Costs' (**Glusica Retainer**) pursuant to which it was agreed that Mr Glusica would pay to the Practitioner a retainer in the amount of $5,000 '*in respect of the presentation to the Supreme Court of Western Australia by Writ of your claim for specific performance of your contract for income protection insurance and related damages, to and including a Mediation Conference'*.

100 In accordance with the terms of the Glusica Retainer, on 28 March 2008 Mr Glusica paid the Practitioner an amount of $5,000 in cash.

101 The Committee says that the $5,000 that had been received by the Practitioner from Mr Glusica was 'trust moneys' for the purposes of s 3 of the 2003 Act because it had been received by him in the course of legal practice in Western Australia for the use or benefit of Mr Glusica but was under the exclusive control of the Practitioner.

102 As a result the Practitioner was required, by s 137 of the 2003 Act, to deposit the $5,000 to the credit of a trust account.

103 However, contrary to s 137 of the 2003 Act, the Practitioner, or someone acting under his direction, deposited the $5,000 into his general bank account.

104 On 13 May 2008 the Practitioner filed a writ of summons in the Supreme Court of Western Australia against National Mutual, on behalf of Mr Glusica. In the general indorsement of claim it was alleged that National Mutual had breached a policy of income protection insurance held by Mr Glusica or, in the alternative, had breached its duty of utmost good faith to Mr Glusica in respect of that policy.

105 On 11 August 2008, at a status conference before Acting Registrar Christo, orders were made requiring Mr Glusica to file and

serve a statement of claim by 26 September 2008. Further orders were made for the filing of a defence and for discovery to be completed.

106 That statement of claim was not filed in accordance with the orders and on 17 November 2008, at a further status conference, Acting Registrar Christo vacated those orders and made further orders that the parties to the action submit themselves to mediation.

107 The action was eventually listed for mediation on 27 March 2009. However, the Practitioner failed to attend a status conference before Registrar Rimmer on 18 March 2009. The mediation conference was vacated and the status conference was adjourned to 6 April 2009.

108 At the status conference on 6 April 2009, which the Practitioner did attend on behalf of Mr Glusica, Registrar Rimmer made orders to the effect that unless a statement of claim was filed and served by 28 April 2009 the action would be struck out and that Mr Glusica would be liable to pay National Mutual's costs. The status conference was otherwise adjourned to 4 May 2009.

109 The Committee says that the Practitioner failed to advise Mr Glusica of the orders that had been made on 6 April 2009, in particular the order requiring a statement of claim to be filed and served by 28 April 2009.

110 The Committee also says that, without a reasonable excuse, the Practitioner failed to file and serve a statement of claim by 28 April 2009 or at all.

111 As a consequence of the Practitioner's failure to file and serve a statement of claim by 28 April 2009, Registrar Rimmer made orders on 1 May 2009 that Mr Glusica's claim against National Mutual be struck out with judgment entered for National Mutual. The Registrar also ordered that Mr Glusica pay National Mutual's costs of the action.

112 The Committee alleges that the Practitioner failed to inform Mr Glusica of the orders that had been made by Registrar Rimmer on 1 May 2009, or to seek his instructions as to how he wanted to proceed with the action in light of those orders. The Committee also says that the Practitioner further failed to provide Mr Glusica with any advice in relation to the possible courses of action that might be taken to set aside the judgment that had been entered in favour of National Mutual.

113 Further, the Committee says that the Practitioner failed to inform Mr Glusica that he should obtain independent legal advice as to what

recourse Mr Glusica might have against the Practitioner due to his failure.

The Practitioner's response in respect of Complaint 3

114 The Practitioner concedes that the Glusica Retainer 'was deficient as aforesaid for my intended purposes'; (Practitioner's Witness Statement paragraph 32). He repeats what he said in this regard in response to the corresponding allegation under Complaint 1 - Hamilton.

115 The Practitioner says that he does not have a 'comprehensive recollection' of Mr Glusica's file but he concedes that he 'missed the timeline' for the filing of Mr Glusica's statement of claim. He also concedes that default judgment was then entered against him. The Practitioner says that this oversight was caused by an error in his 'file review program' and he did not appreciate his error until he received a copy of the case management Registrar's order which appears in the Committee's Book at page 117.

116 The Practitioner strenuously denies failing to provide adequate advice to Mr Glusica and refers to the 'many more hours' that he spent on the matter; (Practitioner's Witness Statement paragraph 39). The Practitioner maintains that the reason why he is unable to produce much by way of correspondence with Mr Glusica is that Mr Glusica asked him not to write to him but rather to provide advice to him in person; (Practitioner's Witness Statement paragraph 37).

117 The Practitioner says that he informed Mr Glusica of his error in failing to file the statement of claim and advised Mr Glusica that he ought to seek recompense through the Practitioner's insurer in respect of that error. He says that he informed Mr Glusica that he would need to instruct other solicitors for this purpose.

118 The Practitioner says that his next contact with Mr Glusica was on 25 September 2009 when Mr Glusica requested that his file be returned. He says that Mr Glusica collected his file from the Practitioner's office on 1 October 2009.

Complaint 3 - the evidence

119 Mr Glusica provided a witness statement sworn by him on 23 January 2013. He provided supplementary oral evidence at the hearing and was cross-examined.

120 Mr Glusica's evidence is that he had instructed the Practitioner to represent him in a dispute which he was having with National Mutual. He met with the Practitioner in or around February 2008 and discussed

the proceedings generally. He said that the Practitioner told him that matters of this nature usually settled at mediation.

121 Mr Glusica says that he paid the sum of $5,000 to the Practitioner in or around March 2008, his understanding being that this was the amount required to represent him in the proceedings up to and including the mediation conference.

122 Mr Glusica departed for an overseas holiday in June 2008 and says that while he was overseas he spoke with the Practitioner twice to discuss the proceedings. He returned in September 2008 because the Practitioner had informed him that the mediation process was about to begin.

123 He then says that from the time he returned from overseas, he was initially unable to contact the Practitioner and he eventually contacted the Court himself in order to ascertain the status of his matter. He established that the Practitioner had been required to file a statement of claim and that the Practitioner had sought further time to do this. When he eventually spoke to the Practitioner, he accepted the Practitioner's reasons for failing to return his calls and agreed that the Practitioner would continue to represent him.

124 A further period ensued when Mr Glusica was unable to contact the Practitioner and in or around July 2009 he visited the Court personally and was informed that his matter had been struck out. He then contacted the Practitioner's officer, spoke to the Practitioner's secretary and collected his file. He says that he has not spoken to the Practitioner since then.

125 In his oral evidence, Mr Glusica denied discussing with the Practitioner the possibility of obtaining independent advice in respect of a potential claim against the Practitioner; (T:86; 17.04.13). He was shown a copy of a letter apparently sent to him by the Practitioner on 1 October 2009 referring to instructions received by the Practitioner on 25 September 2009 and returning his files, apparently as requested; (Practitioner's Witness Statement Attachment 'MLS2'). Mr Glusica denied receiving or seeing that letter; (T:73; 17.04.13).

126 Mr Glusica confirmed that the papers which he had collected from the Practitioner comprised two lever arch files which were 'full of documents'; (T:73-74; 17.04.13).

127 Under cross-examination, Mr Glusica denied recalling anything that the Practitioner put to him. In particular, he denies that the Practitioner advised him to seek advice from another lawyer about making a formal

claim against the Practitioner. He said that he did not in fact make any claim against the Practitioner.

128 Mr Glusica agreed with the Practitioner, however, that the reason why he had not received much written advice from the Practitioner was that he had expressly requested the Practitioner not to write to him, on the basis that he did not understand every thing in the letters; (T:82; 17.04.13).

Complaint 3 - the findings of the Tribunal

129 Dealing first with the allegation under Complaint 3(a), the Practitioner admits the facts alleged by the Committee, namely that he failed to deposit trust moneys into a trust account. The Tribunal's finding in respect of Complaint 3(a) is that the Practitioner is guilty of professional misconduct, for the reasons set out in the Tribunal's findings in respect of Complaint 1 - Hamilton.

130 It is difficult to consider separately Complaint 3(b)(i), which is an allegation by the Committee that the Practitioner failed (between 28 March 2008 and 10 May 2010), to carry out work or adequate work for Mr Glusica which he had agreed to do, from Complaint 3(c) which specifically relates to Supreme Court Action CIV 1511 of 2008. The Committee accepts that the Practitioner filed a writ of summons against National Mutual on 13 May 2008. Mr Glusica appears to have been satisfied that the matter was being properly and adequately progressed at least up to the point when the Practitioner informed Mr Glusica that he needed to return from overseas. We therefore do not understand there to be a complaint against the Practitioner in respect of his performance or failure to perform during the time from 28 March 2008 to the date of filing of that writ of summons. The Committee's concerns start at the point when the writ of summons was lodged and, if there are concerns about the Practitioner's performance up to that point, they have not been enunciated or substantiated.

131 The Tribunal finds that Complaint 3(b)(i) has therefore not been made out except to the extent that it includes the specific complaint in Complaint 3(c).

132 It would be unrealistic to expect of a legal practitioner that he or she will never make a mistake or miss an appointment or deadline. However, if a practitioner consistently fails to comply with the orders of a court to the effect that the client's interests are significantly prejudiced then the Tribunal regards this as gross neglect which justifies a finding of professional misconduct. In this case, the effect of the Practitioner's

neglect was that default judgment was entered and costs awarded against his client.

133 The fact that the Practitioner was insured, irrespective of whether or not he advised Mr Glusica of this, does not excuse him.

134 The Tribunal finds that Complaint 3(c) and Complaint 3(b)(i), to the extent that it is included, have been made out. In relation to Supreme Court action number CIV 1511 of 2008, the Practitioner substantially failed to reach and maintain a reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. The Practitioner is guilty of professional misconduct.

Complaint 4 - Mateljan

135 The grounds in Complaint 4 remain as set out earlier in these reasons.

Complaint 4 - the facts according to the Committee and the Committee's contentions

(a) Failure to respond to correspondence

136 Ms Mateljan was the respondent in the Mateljan proceedings in the Family Court. Lyndsay Michael Carlisle (**Carlisle**) was Ms Mateljan's de facto husband and the applicant in the Mateljan proceedings.

137 The Mateljan proceedings related to the distribution of family property, including the family home at 92 Blackbutt Grove, Gabbadah (**Blackbutt Grove house**). Carlisle was represented by Mr EJ Wall of EJ Wall & Associates (**Wall**) and Ms Mateljan was then represented by Dwyer Durack.

138 Despite attempts to reach a settlement in respect of the Blackbutt Grove house, no agreement was reached. Wall filed an application for final orders with supporting documents on 1 July 2008 in the Family Court and served these on Dwyer Durack.

139 On or about 16 July 2008, Ms Mateljan terminated the services of Dwyer Durack and instructed the Practitioner to represent her in the matter. The Practitioner filed with the Family Court a Notice of Address for Service on 18 July 2008.

140 At a hearing on 29 July 2008 the Family Court ordered that a conciliation conference take place on 13 November 2008 and made

various other orders (**29 July 2008 Orders**) (Committee's Book pages 127-131) which included relevantly the following orders:

- Paragraph 3: within 42 days each party is to provide certain listed financial and taxation records to the other party;
- Paragraph 4: no later than 12 August 2008 Ms Mateljan is to file a response and a financial statement;
- Paragraph 7: within 28 days the parties are to do all things necessary to obtain a joint valuation of the Blackbutt Grove house;
- Paragraph 8: the costs of the valuation are to be borne equally;
- Paragraph 9: within 42 days each party is to provide certain listed documents relating to the financial situation of each of them.

141 By letter dated 3 September 2008 to the Practitioner, (Committee's Book page 132) Wall requested service of the forms referred to in Paragraph 4 of the 29 July 2008 Orders within 10 days, failing which he proposed to apply to have the Mateljan proceedings listed as undefended. The Practitioner did not respond.

142 On 17 September 2008 Wall filed an application to have the Mateljan proceedings listed as undefended. The Practitioner then filed the required documents on 1 October 2008 and by consent the application was adjourned.

143 By letter dated 24 October 2008 to the Practitioner, (Committee's Book pages 138-139) Wall:

(a) in preparation for the conciliation conference on 13 November 2008 and in accordance with Paragraph 7 of the 29 July 2008 Orders, proposed a joint appointment of Grundmann & Associates to value the Blackbutt Grove house;

(b) attached a draft letter to Mr Grundmann;

(c) forwarded a list of Carlisle's documents previously disclosed to Dwyer Durack and asked if copies of those documents were required by the Practitioner;

(d) renewed a request for production of a number of Ms Mateljan's documents the subject of Paragraphs 3 and 9 of the 29 July 2008 Orders; and

(e) advised that at no stage had Ms Mateljan provided disclosure of any documents.

144 By letter dated 28 October 2008 to the Practitioner (Committee's Book page 143), Wall informed the Practitioner that the appointment of a valuer was now very urgent so that a valuation could be obtained prior to the conciliation conference and enquired if the draft letter (which he again attached) to Grundmann & Associates could be sent. The Practitioner failed to respond.

145 In a telephone call with Wall on 30 October 2008, the Practitioner advised that he proposed to appoint a different valuer to value the Blackbutt Grove house. He did not say who he proposed would conduct the valuation or what their costs would be. By letter of the same date to the Practitioner (Committee's Book page 144), Wall stated that unless these details were provided Carlisle would apply for an order appointing Grundmann & Associates to conduct the valuation.

146 On 10 November 2008 Wall filed with the Family Court particulars for the conciliation conference (Committee's Book pages 145-152), which recorded that Ms Mateljan had failed to comply with orders concerning disclosure and the joint valuation of the Blackbutt Grove house.

147 At the conciliation conference on 13 November 2008 various orders were made (**13 November 2008 Orders**) (a copy of the file note is in the Committee's Book at pages 153-154). Relevantly, Order 8 was that within 28 days each party was to make to the other an offer to settle the case, such offer to expressly state it was made under Div 10.1.2 of the *Family Law Rules 2004*.

148 On 17 November 2008, Wall addressed to the Practitioner a written offer of settlement, expressed to be made under Div 10.1.2 *Family Law Rules 2004* (Committee's Book page 156).

149 Also by letter dated 17 November 2008 (Committee's Book page 155), Wall again requested the Practitioner provide him with a list of Ms Mateljan's disclosure documents, stating:

> ... At the Conference you showed the writer a large folder of disclosure documents. We note that we have never received a disclosure list and these documents have not previously been disclosed in the proceedings. Could we now please have your disclosure list?

150 By letter dated 20 November 2008 to Wall, the Practitioner stated that:

- he had received Wall's letters to him of 17 November 2008;
- his client was not obliged to disclose any documents because she was considering the settlement offer put to her; and
- he was obtaining mortgage statements from the ANZ Bank; (Committee's Book page 157).

151 By letter dated 26 November 2008 to the Practitioner, (Committee's Book page 161), Wall pointed out that those mortgage statements were in Carlisle's disclosure list. He provided another copy of the list, and asked if the Practitioner required production of copies of any of the documents listed.

152 By letter dated 10 December 2008 to the Practitioner (Committee's Book pages 162-163), Wall;

(a) requested a response to Carlisle's offer of settlement;

(b) stated that Ms Mateljan had never provided any disclosure at all in the Mateljan proceedings; and

(c) advised that unless disclosure was provided within 10 days Carlisle would apply to have the Mateljan proceedings restored to the undefended list.

153 By letter dated 15 December 2008 to Wall (Committee's Book page 164), the Practitioner declined to provide disclosure until Ms Mateljan received copies of ANZ Bank mortgage statements. He wrote:

> Until such time as copies of the statements are provided to me I do not propose to provide you with the disclosure you have requested ... .

154 Wall responded to the Practitioner by letter dated 18 December 2008 (Committee's Book page 165), advising that he had previously offered to provide the statements upon payment of reasonable photocopying charges. The Practitioner did not respond.

155 Wall reiterated his position by letter dated 16 January 2009 (Committee's Book page 166). The Practitioner did not respond. On 2 April 2009 Wall applied to have Carlisle's application restored to the undefended list. Carlisle's affidavit sworn on 2 April 2009 in support

outlined Ms Mateljan's failure to provide disclosure and cooperate in a joint valuation; (Committee's Book pages 167-204).

156 On 11 May 2009 the Mateljan proceedings came before the Duty Judge, her Honour Justice Crisford (**11 May 2009 hearing**). The 11 May 2009 hearing is also relevant to the next part of this complaint, which is that at this hearing the Practitioner misled the Family Court. Following submissions from the parties, her Honour ordered that Ms Mateljan have a further 21 days to comply with paragraphs 3, 8 and 9 of the 29 July 2008 Orders. She also ordered the parties to take all necessary steps forthwith to comply with Order 8 of the 13 November 2008 Orders.

157 By letter dated 28 May 2009 to the Practitioner (Committee's Book pages 206-207), Wall requested a copy of the valuation which the Practitioner had told the Family Court at the 11 May 2009 hearing had been undertaken.

158 By letter dated 11 June 2009 (Committee's Book page 210), the Practitioner:

- provided Wall with a list of Ms Mateljan's disclosure documents relevant to Paragraphs 3 and 9 of the 29 July 2008 Orders (**11 June 2009 list**) but did not offer to produce any of the documents;
- advised that he was providing a copy of an estate agent's appraisal of the Blackbutt Grove house and suggested that, should this not be acceptable to Carlisle, Hegney Property Valuations be jointly appointed as the valuer;
- did not enclose the appraisal; and
- suggested that the parties exchange Form 60 settlement offers.

159 By letter dated 9 July 2009, (Committee's Book pages 211-212), Wall requested a copy of the appraisal and copies of a number of the documents appearing on the 11 June 2009 list. He noted that the offer of settlement made by Carlisle on 17 November 2008 would be reviewed on receipt of the property appraisal. The Practitioner did not respond.

160 By letter dated 17 July 2009 to the Practitioner (Committee's Book page 216), Wall again called for disclosure, sent a further copy of Carlisle's disclosure list and asked if the Practitioner required any of the documents.

161 By letter dated 3 August 2009 to the Practitioner (Committee's Book page 217), Wall again requested a copy of the appraisal. The Practitioner did not respond.

162 By letter dated 25 August 2009 to the Practitioner (Committee's Book page 219), Wall advised he would refer the Mateljan proceedings back to the Family Court for liberty to proceed on an undefended basis because of the failure to comply with procedural orders. By letter dated 16 September 2009 (Committee's Book page 220), Wall advised the Practitioner that Carlisle's application to proceed on an undefended basis had been listed for hearing on 29 September 2009.

163 At the hearing on that date, her Honour Justice Crisford ordered that the parties jointly instruct Hegney Property Valuations and adjourned the matter to a special appointment on 2 October 2009.

(b) Misleading conduct

164 At the 11 May 2009 hearing the Practitioner informed the Family Court (**first submission**) that there was no issue of disclosure raised at the conciliation conference and that:

> The solicitors on record who preceded my coming on record I understand gave disclosure …
> (T:4; 11.05.09)

165 The Committee contends that first submission was untrue and misleading because the Practitioner knew or ought to have known that no disclosure of Mateljan's documents had been provided to Carlisle. The Committee says that in previous correspondence with the Practitioner, Wall had sought disclosure and the Practitioner had declined to provide it.

166 The Committee alleges that the Practitioner made the first submission with the intention of misleading the Family Court or in reckless disregard as to whether the Family Court would be misled or not.

167 At the same hearing, the Practitioner also made the following submission (**second submission**) and answered her Honour's enquiry as follows:

> SEGLER, MR: The valuation has been undertaken, but it had to be redone. Its only been redone in the last month ....
>
> HER HONOUR: So … there was a joint valuation done of 92 Blackbutt Road.

> SEGLER, MR: Yes.
> (T:5; 11.05.09)

168 The Committee says that the second submission was untrue and misleading because the Practitioner knew or ought to have known that no joint valuation of the property had been carried out and that it was not until October 2009 that a jointly appointed valuer was agreed.

169 The Committee alleges that the Practitioner made the second submission with the intention of misleading the Family Court or in reckless disregard as to whether the Family Court would be misled or not.

170 Also at the 11 May 2009 hearing, the Practitioner informed her Honour (**third submission**) that Carlisle had not made a formal written offer of settlement following the conciliation conference. This exchange took place:

> SEGLER, MR: I don't have one [a formal written offer of settlement] from the applicant.
>
> WALL, MR: That's not correct your Honour. I can show you the one made, but of course your Honour probably shouldn't see the amount.
>
> HER HONOUR: No, I don't want to see that. Are you saying you haven't received an offer?
>
> SEGLER, MR: I haven't received a Form 60 from Mr Wall, no.
> (T:6; 11.05.09)

171 The Committee says that the third submission was misleading in that it conveyed the impression that Carlisle had not made a formal written offer of settlement.

172 The Committee also informs the Tribunal that the provision for the use of a Form 60 for offers of settlement was removed in September 2005 by *Family Law Amendment Rules 2005 (No 2)* (Cth) and since that date r 10.01 of the *Family Court Rules 2004* (Cth) stipulates that offers of settlement must not be filed in the Family Court.

173 The Committee's allegation is that the Practitioner did not disclose that he had received Wall's letter dated 17 November 2008 which set out an offer of settlement under Div 10.1.2 *Family Law Rules 2004* or that he had informed Wall that his client was considering the settlement offer.

174 The Committee says that the Practitioner made the third submission with the intention of misleading the Family Court or in reckless disregard as to whether the Family Court would be misled or not.

(c) Termination of retainer

175 In a letter dated 30 April 2010, (Committee's Book pages 252-253), the Practitioner advised Ms Mateljan that the trial of the Mateljan proceedings had been listed for two days commencing on 26 July 2010. In that letter the Practitioner also advised Ms Mateljan that he would be unable to represent her at the trial as he was 'soon to retire from legal practice after thirty years'. The Practitioner recommended that Ms Mateljan provide him with instructions to 'brief' a practitioner from Marks & Sands to manage her file.

176 It is not disputed that on or about 18 May 2010, Ms Mateljan gave those instructions to the Practitioner and that some time between 18 May 2010 and 20 July 2010 the Practitioner transferred Ms Mateljan's file to Marks & Sands.

177 On or about 19 July 2010, (Committee's Book page 259), Ms Mateljan received a letter from Carlisle's solicitor advising that he had attempted, without success, to contact the Practitioner in writing. As a consequence of receiving that letter, Ms Mateljan made contact with Marks & Sands and subsequently provided them with instructions to represent her at the trial that was listed to commence on 26 July 2010.

178 It is common ground that as at 23 July 2010, the Mateljan proceedings were not ready to proceed to trial. A number of documents were required to be filed including a chronology, papers for the Judge, a notice of disputed facts, an assets and liabilities spreadsheet, an updated Form 13 Financial Statement and a Minute of Proposed Orders Sought at Trial.

179 The Committee's allegation against the Practitioner is that he did not, at the time he handed the file over to Marks & Sands or at any time, clearly indicate to Marks & Sands, or to Ms Mateljan, the fact that there was impending work that was required to be done or that the Mateljan proceedings had been listed for trial to commence on 26 July 2010.

The Practitioner's response in respect of Complaint 4

180 The Practitioner denies each allegation made by the Committee in relation to Complaint 4.

(a) Failure to respond to correspondence

181 The Practitioner denies engaging in professional misconduct between 13 September 2008 and 29 September 2009, by repeatedly failing to respond adequately or otherwise to correspondence from another solicitor. He says that he 'more than adequately dealt with that correspondence'; (T:254; 19.04.13). However, the Practitioner says that, save for the documents retained on his desktop computer, he cannot produce copies of any of Ms Mateljan's papers because he passed them to Marks & Sands when authorised to do so by Ms Mateljan; (Practitioner's Witness Statement paragraph 44).

182 The Practitioner, however, refers to the documents at pages 127-245 of the Committee's Book and states that these documents demonstrate his preparedness to reply to Wall. The Practitioner further states that the correspondence issued by him was appropriate for Ms Mateljan's purposes without necessarily wasting her costs. The Practitioner states that his position is also supported by the documents at pages 57-79 of the Practitioner's Book.

183 The Practitioner also says that he had no confidence in Carlisle's solicitor and he was concerned by 'Mr Wall's apparent lack of understanding of case management as conducted in the Family Court'; (Practitioner's Witness Statement paragraph 49).

(b) Misleading conduct

184 The Practitioner further denies that he ever attempted to mislead or deliberately or recklessly misled her Honour Justice Chrisford in relation to disclosure or efforts to ascertain the value of the Blackbutt Grove house. The Practitioner says that at all material times he acted upon the information he received from Ms Mateljan's former lawyers and instructions from Ms Mateljan. The Practitioner says that he understood that pre-action discovery had already been made and that the parties had agreed for a real estate agent to value the property.

185 In relation to the issue around the offer for settlement, the Practitioner contends that such offers were, at the time, to be made through a Form 60 of the forms published in relation to the *Family Law Rules 2004*. The Practitioner says that the written offer of settlement, which appears at page 156 of the Committee's Book, was not in the form of a Form 60. Therefore, the Practitioner alleges, his advice to her Honour was technically correct. The Practitioner further states that Wall was uncooperative in providing Ms Mateljan with appropriate information in respect of mortgage payments made by her former partner, which were integral to the settlement of the proceedings.

The Practitioner alleges that this delayed consideration of 'an otherwise meaningless offer presented by Mr Wall'; (Practitioner's Witness Statement paragraph 48).

(c) Termination of retainer

186 The Practitioner also denies engaging in professional misconduct following the termination of his retainer by not advising Marks & Sands, when he delivered Ms Mateljan's papers, that a trial had already been listed. The Practitioner states that he had appropriately advised Ms Mateljan and Marks & Sands prior to handing over the papers which he held. At paragraph 50 of the Practitioner's Witness Statement, the Practitioner says:

> Prior to delivering up Ms Mateljan's files to Marks & Sands, I recall that I advised Mr Culshaw that the proceedings had been listed for trial and that I had prepared Ms Mateljan's affidavit of evidence-in-chief, an electronic copy of which is now produced … and would have been on the file as handed over to Marks & Sands as would have been correspondence and or documents from the Family Court confirming the listing for trial.

187 The Practitioner said that he provided Mr Culshaw with the date of the trial; (T:265; 19.04.13).

188 The Practitioner says that the affidavit of Mr Culshaw sworn on 13 March 2013 is consistent with his evidence in respect of the handover of Ms Mateljan's file to Marks & Sands.

189 The Practitioner further contends that the witness statement of Dorothy Anne Matias sworn on 11 March 2013 makes it apparent that she was not made aware by her principal of the imminent trial, that she did not pursue the authority required by her firm in respect of Ms Mateljan's further instruction and that the Committee had held the relevant file for such a period of time that it made it impossible for Ms Matias to complete Ms Mateljan's instructions.

Complaint 4 - the findings of the Tribunal

190 In respect of Complaint 4, the Tribunal makes the following findings:

(a) Failure to respond to correspondence

191 In respect of the Committee's allegation that the Practitioner is guilty of professional misconduct by repeatedly failing to respond or adequately respond to correspondence from another legal practitioner, the Tribunal finds that this allegation has not been made out.

192 The Practitioner's conduct in his dealing with Wall, it must be said, is less than ideal, but it does not in our view constitute conduct which is regarded as disgraceful or dishonourable. It is, of course, open to the Tribunal under s 442 of the Legal Profession Act to make a finding of unsatisfactory professional conduct even though the referral alleged professional misconduct, but we do not consider that the conduct falls short to a substantial degree of the standards of the profession.

193 It is of course a fundamental obligation of a lawyer to act always with courtesy in dealing with another. That courtesy extends to replying to relevant and reasonable written requests. This must be despite any ill feeling that may have existed between the Practitioner and Wall. However, we do not consider that this requirement necessarily leads to the conclusion that every letter sent to a legal practitioner must be replied to. A legal practitioner must be free to act for his or her client in a manner which that practitioner considers to be in the client's best interests. The Practitioner says that he was conscious of the amount of costs being incurred by his client and we accept that. We also accept the Practitioner's submission that he did in fact correspond with Wall when he considered it necessary to do so. The correspondence that we have seen seems to us to be, in the main, measured and courteous.

(b) Misleading conduct

194 In respect of the Committee's allegation that the Practitioner is guilty of professional misconduct by intentionally misleading or attempting to mislead the Family Court, however, the Tribunal finds that the Practitioner is guilty of professional misconduct.

195 Her Honour had asked the Practitioner for his response to Wall's suggestion to her that the Practitioner was 'refusing to comply with disclosure'; (T:3-4; 11.05.09). The Practitioner then made the first submission, namely that it was his understanding that Ms Mateljan's former solicitors had given disclosure and that no issue of disclosure was raised at the conciliation conference. Her Honour pressed this point and asked the Practitioner whether the 29 July 2008 orders had been complied with. The Practitioner did not answer that question, instead saying that he did not have a copy of the orders. He then stated that, so far as he was aware, the only direction that had not been complied with was that the costs of the valuation of the Blackbutt Grove house were to be borne equally.

196 This was not true and it is clear from the correspondence between the Practitioner and Wall that the Practitioner knew that this was not true. Some discovery may have been given previously, but the Practitioner was aware that her Honour was referring to compliance with

the 29 July 2008 orders, which were made subsequent to Ms Mateljan's engagement of the Practitioner.

197 Further, when her Honour asked the Practitioner whether a joint valuation had been carried out in respect of the Black Butt Grove house, he replied in the affirmative. Again, this was simply untrue. An appraisal of the property by an estate agent may well have been conducted, but by no stretch of the imagination could this be regarded as a joint valuation of the property.

198 Finally, after Wall informed her Honour that no formal written offer of settlement had been made by Ms Mateljan following the conciliation conference, the Practitioner told her Honour that he had not received an offer from Carlisle either. When her Honour asked the Practitioner directly:

> Are you saying you haven't received an offer?
> (T:6; 11.05.09)

the Practitioner replied:

> I haven't received a Form 60 from Mr Wall, no.
> (T:6; 11.05.09)

199 The Practitioner had in fact received an offer of settlement on behalf of Carlisle and it was not contained in a Form 60. However, regardless of whether that distinction is technically correct, her Honour was clearly left with the impression that no offer had been made.

200 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 Judges' attention; ***Kyle v Legal Practitioners' Complaints Committee*** [1999] WASCA 115 (***Kyle***) at [12]. As officers of the court, practitioners must realise that their obligations to the court are paramount and supersede the interests of their client. As this Tribunal has observed on a number of occasions, there are few areas of professional misconduct more serious than misleading a court.

201 We should add that the Tribunal does not consider that the Family Court was in fact misled by the Practitioner for any length of time or that the Family Court acted on the Practitioner's misleading statements. However, that is not the issue. As Ipp J said ***Kyle*** at [20]:

> … 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.
>
> …

202 The Practitioner misled the Family Court as soon as he had made the first, second and third submissions and the Tribunal regards this conduct as disgraceful.

(c) Termination of retainer

203 In respect of the Committee's allegation that the Practitioner is guilty of professional misconduct by failing to clearly indicate to Marks & Sands that a trial was listed to be heard in the Family Court on 26 July 2010, the Tribunal finds that this allegation has not been made out.

204 Mr Culshaw says that he received Ms Mateljan's file from the Practitioner in person in early June 2010. He spoke to the Practitioner at the time, but he cannot recall particulars of that discussion. He does recall, however, his 'awareness … that there was a trial within close proximity of our meeting and that [Marks & Sands] were waiting for was the authority to act [sic].' His concern was only that the Practitioner had not provided him with any written authority from Ms Mateljan for Mr Culshaw to act and Mr Culshaw was aware of that fact at the time when he received the file.

205 Ms Matias in her evidence also says that she was aware 'towards the end of June 2010' that a trial was listed in July 2010.

206 It is clear, therefore, that the Practitioner did in fact advise Marks & Sands that a trial was listed to be heard in July 2010 which is the basis of this complaint.

Complaint 5 - Condelli

207 This complaint has also been amended; (T:162; 18.04.13). Complaint 5 now reads as follows, the added words being shown in italics:

208 The Practitioner engaged in professional misconduct in the course of acting for his client, Mr Ralph Condelli (**Mr Condelli**), by:

> (a) On 14 January 2009 failing to deposit trust moneys, as defined in s 3 of the 2003 Act, the sum of $3,185 that he had received from Mr Condelli to the credit of his trust account as required by s 137 of the 2003 Act.

(b) Between 14 January 2009 and 10 May 2010:

(i) failing to carry out work *or adequate work* for Mr Condelli which he had agreed to do; and

(ii) failing to account to Mr Condelli for the moneys received from him and retained by the Practitioner for work to be performed by the Practitioner.

Complaint 5 - the facts according to the Committee and the Committee's contentions

209 On or about 13 January 2009, the Practitioner received instructions from Mr Condelli to commence proceedings on his behalf in the District Court of Western Australia against two parties to whom we will refer in these reasons as **Wales**.

210 On 13 January 2009 the Practitioner and Mr Condelli entered into a written 'Terms of Retainer and Agreement as to Costs' (**Condelli Retainer**) under which it was agreed that Mr Condelli would pay to the Practitioner a retainer in the amount of $3,185 'in respect of the commencement of [Mr Condelli's] District Court Action'.

211 In accordance with the terms of the Condelli Retainer, on 13 January 2009 Mr Condelli paid the Practitioner an amount of $3,185.

212 The Committee says that the $3,185 that had been received by the Practitioner from Mr Condelli was 'trust moneys' for the purposes of s 3 of the 2003 Act as it had been received by him in the course of legal practice in Western Australia for the use or benefit of Mr Condelli but was under the exclusive control of the Practitioner. As a result the Practitioner was required, by s 137 of the 2003 Act, to deposit the amount of $3,185 to the credit of a trust account. However, contrary to s l37 of the 2003 Act, on 14 January 2009 the Practitioner, or someone acting under his direction, deposited that sum into his general account.

213 The Committee also alleges that the Practitioner failed to commence proceedings in the District Court of Western Australia against Wales, or carry out any or any significant work in respect of the commencement of any proceedings which he had agreed to do.

214 The Committee further alleges that the Practitioner has not at any time issued an invoice to Mr Condelli or otherwise accounted to him for the $3,185 received from him.

The Practitioner's response in respect of Complaint 5

215 The Practitioner concedes that the Condelli Retainer that he had prepared and presented to Mr Condelli for signature 'was deficient as aforesaid for my intended purposes'; (Practitioner's Witness Statement paragraph 51). He repeats what he said in this regard in response to the corresponding alleagation under Complaint 1 - Hamilton.

216 The Practitioner says that, despite what the Committee alleges, he did in fact spend considerable time reviewing CCTV and DVR footage of the incident which gave rise to the legal action against Wales, considering a claim for criminal injuries compensation and considering Mr Condelli's instructions in relation to the rejection of his evidence of self-defence given to the Fremantle Magistrates Court; (Practitioner's Witness Statement paragraph 54).

217 In respect of the particular work which the Practitioner carried out for Mr Condelli, the Practitioner says that he prepared a writ of summons, and he instructed a private investigator to establish the whereabouts of some of the parties involved in Mr Condelli's legal action; (T:266-267; 19.04.13).

218 The Practitioner refutes the allegations made against him by the Committee on this ground.

Complaint 5 - the evidence

219 Mr Condelli gave evidence to the Tribunal in an affidavit sworn by him on 5 February 2013 and in a further affidavit sworn by him on 14 March 2013. He supplemented his evidence orally at the hearing and was cross-examined by the Practitioner.

220 Mr Condelli's evidence is that the Practitioner had been providing legal services to him for some time. In or around January 2009, he instructed the Practitioner to represent him in proceedings against Mr D Wales, Mr S Wales and the owners of the Metropolis Nightclub in Fremantle. The Practitioner was also representing him in relation to 'one count of unlawful assault occasioning bodily harm'.

221 He recalls the Condelli Retainer but he cannot recall whether he actually signed the document. He did however pay the Practitioner a sum of money at his initial meeting or shortly after that. He said that the Practitioner told him that the money would be held in the Practitioner's trust account and would be drawn upon when the Practitioner 'did work in the proceedings'.

222 Although Mr Condelli cannot recall the amount of money which he paid to the Practitioner, he states that he does recall that the Practitioner 'advised me that it would cost $644 to lodge and serve the Writ and it would cost $2451 to draft a Statement of Claim'.

223 On 28 April 2009, Mr Condelli sent an email to the Practitioner, asking the Practitioner to let him know when the Statement of Claim had been lodged. Mr Condelli says he did not receive a response to this request. However, on 15 January 2010 he received an email from the Practitioner informing him that he had ascertained the residential addresses of both of Messrs Wales and he was seeking payment into his trust account of something to the order of $500 to cover the cost of obtaining this information and certain other details required in connection with the proceedings; (Committee's Book page 285).

224 Mr Condelli then sent the Practitioner two emails, both dated 16 January 2010; (Committee's Book pages 286 and 287). In the first email, Mr Condelli confirms having deposited the amounts requested into the Practitioner's trust account. He adds that he is concerned that 'the delay in your services is proving a great inconvenience to me'. In his second email he expressly requests that the Statement of Claim is served on 'Metropolis by the end of next week too'.

225 Mr Condelli then recalls that, shortly before the proceedings were listed for trial, the Practitioner contacted him to say that he was unable to represent him at trial because 'he was no longer able to practice' [sic]. He said that the Practitioner told him that he would still draft the Statement of Claim in the proceedings, although Mr Condelli says that he is unable to recall whether he saw a copy of the Statement of Claim.

226 In his supplementary affidavit, Mr Condelli says that he had been shown a copy of a letter dated 20 April 2010 which the Practitioner says he sent to Mr Condelli, confirming that he was retiring from legal practice; (Practitioner's Book page 96). Mr Condelli says that he does not remember seeing that letter or having received it. He also says that he did not receive the tax invoice at pages 97 - 100 of the Practitioner's Book and that he had never previously seen this document. He said he would have recalled seeing the letter because Mr Segler described his case as complicated.

227 At the hearing, Mr Condelli told the Tribunal that at all relevant times his mail was sent to a post office box in Northlands; (T:174; 18.04.13).

Complaint 5 - the findings of the Tribunal

228 In respect of the allegation under Complaint 5(a), the Practitioner admits the facts alleged by the Committee, namely failing to deposit trust moneys into a trust account. The Tribunal's findings in respect of Complaint 5(a) is that the Practitioner is guilty of professional misconduct, for the reasons set out in the Tribunal's findings in respect of Complaint 1 - Hamilton.

229 In respect of Complaint 5(b)(i), Mr Condelli's evidence is that the Practitioner was or had been acting for him in connection with a number of different matters. Those matters included proceedings in both the Magistrates Court and in the District Court. Mr Condelli told the Tribunal on numerous occasions during both his cross-examination and re-examination that his memory of events was unclear. What is clear is that Mr Condelli had been happy with the Practitioner's performance and services up to the time when he instructed the Practitioner to commence proceedings against Wales in January 2009. However, what had obviously appeared to the Practitioner at the time to be a fairly straightforward matter was either more complicated than the Practitioner had first envisaged or the Practitioner had become distracted by other events. In any event, it is unnecessary to come to any conclusion on that point. It is apparent that the Practitioner had failed to inform his client of whatever difficulties he was encountering, but that is not the allegation against him. The Committee's complaint is that he failed to do adequate work for his client. While the evidence is sufficient to show that the Practitioner's communication with his client was, again, less than ideal, we are not satisfied to the required standard that the Practitioner did in fact fail to progress the matter

230 We do not consider that Complaint 5(b)(i), failing to carry out work or adequate work for Mr Condelli which he had agreed to do, has been made out.

231 Further, we do not consider that Complaint 5(b)(ii) has been made out. On his own admission, Mr Condelli says that his recollection of events around the relevant time are 'hazy'; (T:184; 18.04.13). The Practitioner rendered certain individual accounts to Mr Condelli which Mr Condelli says he received and paid. He says he always marks the word 'Paid' in his own handwriting on accounts received and paid by him; (T:174; 18.04.13). The only account in issue is the final account, which the Practitioner says he sent under cover of a letter dated 20 April 2010. Mr Condelli says he did not receive that letter or the account.

232 The account itself required no action on the part of Mr Condelli because no payment was required. Mr Condelli would have accounted sometime previously for the money paid by him to the Practitioner under the Condelli Retainer and in the Tribunal's view it is possible that he simply disregarded it. Mr Condelli says that he would have remembered the letter itself had he received it because it pointed out, for the first time according to Mr Condelli, that there were difficulties with his claim. However, the Tribunal considers that it must have been clear to Mr Condelli prior to that stage that there were such difficulties.

Complaint 6 - Johnston

233 Complaint 6 remains as set out earlier in these reasons.

Complaint 6 - the facts according to the Committee and the Committee's contentions

234 In or about 7 June 2007 the Practitioner received instructions from Mr Johnston to represent him in relation to charges on indictment of three counts of indecent assault and one count of sexual penetration without consent.

235 The Practitioner gave Mr Johnston a written 'Terms of Retainer and Agreement as to Costs' (**Johnston Retainer**), which included a term that required Mr Johnson to pay to the Practitioner a retainer in the amount of $1,750 'for the professional service to be performed for [Mr Johnston]'. However, the Committee says that Mr Johnston never signed the Johnston Retainer.

236 On 7 June 2007 Mr Johnston paid an amount of $1,750 to the Practitioner as a retainer for the Practitioner's professional services.

237 On or about the dates indicated, in the course of acting for Mr Johnston the Practitioner, or someone at his direction, received the following amounts of money from Mr Johnston:

7 June 2007	$1,750
18 October 2007	$2,000
11 April 2008	$5,000
12 August 2008	$7,000
2 February 2009	$5,000
19 February 2009	$4,000

238 (collectively referred to as the **2003 Johnston money**)

239 The Committee says that the 2003 Johnston moneys that had been received by the Practitioner from Mr Johnston were 'trust moneys' for the purposes of s 3 of the 2003 Act as they had been received by him in the course of legal practice in Western Australia for the use or benefit of Mr Johnston but were under the exclusive control of the Practitioner.

240 The view of the Committee is that, as a result, the Practitioner was required by s l37 of the 2003 Act to deposit the 2003 Johnston moneys to the credit of a trust account.

241 However, contrary to s 137 of the 2003 Act, the Practitioner, or someone acting under his direction, deposited the 2003 Johnston moneys into his general bank account.

242 On or about the dates indicated, in the course of acting for Mr Johnston the Practitioner received the following amounts of money from Mr Johnston:

9 March 2009	$2,000
12 March 2009	$8,000
1 April 2009	$3,000
8 April 2009	$2,500

243 (collectively referred to as the **2008 Johnston money**)

244 The Committee says that the 2008 Johnston money received by the Practitioner from Mr Johnston was 'trust money' for the purposes of s 205(l) of the Legal Profession Act, because the money had been entrusted to him in the course of or in connection with the provision of legal services by him.

245 As a result, in the Committee's view, the Practitioner was required by s 215(2) of the Legal Profession Act, as soon as practicable after receiving the 2008 Johnston money, to deposit it in a general trust account of the Practitioner's practice.

246 However, contrary to s 215(2) of the Legal Profession Act, the Practitioner, or someone acting under his direction, deposited the 2008 Johnston money into the Practitioner's general bank account.

247 Between 16 and 18 March 2009 the Practitioner appeared on behalf of Mr Johnston at his trial in the District Court at Geraldton

248 By the verdict of the jury, delivered on 18 March 2009, Mr Johnston was found guilty of one count of indecent assault and

one count of sexual penetration without consent. After judgments of convictions were entered, sentencing was adjourned to take place on 15 May 2009. Mr Johnston was remanded in custody to appear on that date.

249 The Committee alleges that the Practitioner failed, without good reason, to meet with Mr Johnston or to ensure that any representative of the Practitioner met with Mr Johnston after Mr Johnston was remanded in custody on 18 March 2009.

250 The Committee says that the first time that the Practitioner made any contact with Mr Johnston following his conviction was on 31 March 2009.

The Practitioner's response in respect of Ground 6

251 The Practitioner concedes that the Johnston Retainer 'was deficient as aforesaid for my intended purposes'; (Practitioner's Witness Statement paragraph 57). He repeats what he said in this regard in response to the corresponding allegation under Complaint 1 - Hamilton.

252 The Practitioner also concedes that he received the 2003 Johnston money and the 2008 Johnston money, all of which was paid into his general account, not into his trust account.

253 However, the Practitioner denies failing to meet with Mr Johnston after he was remanded in custody on 18 March 2009. He says that immediately after Mr Johnston's conviction, he attended upon Mr Johnston's wife who gave the Practitioner her husband's medication to pass on to Mr Johnston because he intended to visit him in custody. However, when the Practitioner attempted to meet with Mr Johnston, he said that he was told that Mr Johnston had been taken to Hakea Prison in Perth. He returned the medication to Mrs Johnston and was informed the next day by Mrs Johnston that her husband had been returned to Greenough Regional Prison. The Practitioner says that he then contacted Mr Johnston and remained in contact with him whilst preparing 'other documents for the management of his affairs and a proposed appeal'; (Practitioner's Witness Statement paragraph 58).

Complaint 6 - the evidence and the findings of the Tribunal

254 The Committee conceded at the hearing that the grounds for Complaint 6(a) are 'not one of the stronger grounds'; (T:291; 19.04.13). The Tribunal would have to agree.

255 Mr Johnston gave evidence to the Tribunal in an affidavit sworn by him on 4 February 2013. He appeared by video conference at

the hearing to supplement his evidence orally and he was cross-examined by the Practitioner.

256 Mr Johnston told the Tribunal that he recalled very little about what had occurred after his conviction, reminding us that it was four years ago (T:121; 18.04.13).

257 In his affidavit, Mr Johnston says that the Practitioner met with him for about five minutes immediately after his conviction. His evidence under cross-examination about what was discussed is confused; (T:122; 18.04.13). At one point he said that there had been no appeal made in respect of his conviction, but at another stage he described the grounds of the proposed appeal which he had discussed with the Practitioner; (T:124-129; 18.04.13). He is, however, unclear as to when and where this discussion took place.

258 In any event, on Mr Johnston's evidence, the Practitioner did in fact meet with Mr Johnston on 18 March 2009 after his conviction and accordingly the Tribunal finds that Complaint 6(a) has not been made out.

259 The Practitioner admits the facts alleged by the Committee in respect of Complaints 6(b) and (c), namely failing to deposit trust moneys or trust money into a trust account. The Tribunal's finding in respect of Complaints 6(b) and 6(c) is that the Practitioner is guilty of professional misconduct, for the reasons set out in the Tribunal's findings in respect of Complaint 1 - Hamilton.

Complaint 7 - Dzemailoski

260 This complaint has been amended; (T:32; 17.04.13). Complaint 7 now reads as follows, the added words being shown in italics:

261 The Practitioner engaged in professional misconduct in the course of acting for his client, Mr Dzemailoski, by:

(a) on or about 23 February 2010 failing to deposit trust money, as defined in s 205(l) of the Legal Profession Act, in the sum of $3,000 that he had received from Mr Dzemailoski to the credit of his trust account as required by s 215(2) of the Legal Profession Act;

(b) between 23 February 2010 and 10 May 2010:

(i) failing to carry out work *or adequate work* for Mr Dzemailoski which he had agreed to do; and

(ii) failing to account to Mr Dzemailoski for the moneys received from him and retained by the Practitioner for work to be performed by the Practitioner; and

(c) between 1 February 2010 and 15 June 2010, in relation to proceedings between Mr Dzemailoski and Narinder Kaur Dzemailoski in the Family Court, substantially or consistently failing to reach or maintain a reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian practitioner.

Complaint 7 - the facts according to the Committee and the Committee's contentions

262 The Committee says that in or about February 2010 the Practitioner received instructions from Mr Dzemailoski to represent him in relation to proceedings in the Family Court commenced by Narinder Kaur Dzemailoska, who was represented by GK Family Law (**Dzemailoski proceedings**).

263 On or about 23 February 2010 the Practitioner and Mr Dzemailoski entered into a written agreement entitled 'Costs Agreement', (**Costs Agreement**), which included a term that required Mr Dzemailoski to pay to the Practitioner an 'initial retainer' in the amount of $3,000 (Committee's Book pages 399-403).

264 On 23 February 2010, Mr Dzemailoski paid an amount of $3,000 to the Practitioner as an 'initial retainer' in accordance with the terms of the Costs Agreement. On the same date the Practitioner issued Mr Dzemailoski with a 'Receipt of initial retainer' in relation to the payment of the amount of $3,000 (Committee's Book pages 404), and paid the amount of $3,000 into his general account for his own use.

265 The Committee alleges that the $3,000 received by the Practitioner from Mr Dzemailoski was 'trust money 'for the purposes of s 205(l) of the Legal Profession Act, as the money had been entrusted to him in the course of or in connection with the provision of legal services by him.

266 As a result, the Committee says, the Practitioner was required by s 215(2) of the Legal Profession Act, as soon as practicable after receiving the $3,000, to deposit it in a general trust account of the Practitioner's practice.

267 However, the Committee says, contrary to s 215(2) of the Legal Profession Act, the Practitioner, or someone acting under his direction, deposited the $3,000 into the Practitioner's general bank account.

268 By letter dated 3 March 2010 to GK Family Law (Committee's Book page 408), the Practitioner noted there was a procedural hearing in the Dzemailoski proceedings scheduled for 11 March 2010 and forwarded by way of service:

(a) Notice of Address for Service by Form 8;

(b) Response to an Application for Final Orders by Form 1A; and

(c) A Financial Statement by Form 13.

269 The forms attached to that letter appear at pages 409-428 of the Committee's Book.

270 At the procedural hearing on 11 March 2010 attended by the Practitioner, a conciliation conference was listed to take place in the Family Court on 2 June 2010. The Committee says that from or about 11 March 2010, Mr Dzemailoski made numerous attempts to contact the Practitioner by telephone to discuss the progress of the Dzemailoski proceedings. Despite those attempts, the Committee says that the Practitioner failed to reply to Mr Dzemailoski and failed to keep him informed about the progress of the Dzemailoski proceedings. In particular, the Committee says that the Practitioner failed to advise Mr Dzemailoski that a conciliation conference had been listed on 2 June 2010. As a result, there was no appearance by or on behalf of Mr Dzemailoski at that conference and an order was made that Mr Dzemailoski pay the costs of the conference.

271 The Committee then alleges that in or about early June 2010 the Practitioner advised Mr Dzemailoski that he was retiring from legal practice and that he was going to send his file to Marks & Sands. However, the Committee says that the Practitioner did not send Mr Dzemailoski's file to Marks & Sands and did not advise Mr Dzemailoski to seek alternative legal representation as soon as possible.

272 The Committee says that during a telephone conversation between Mr Dzemailoski and the Practitioner on or about 14 June 2010, Mr Dzemailoski instructed the Practitioner to provide him with an

itemised account of the fees that he had incurred to date and to send his file to him.

273 The Committee alleges that despite those instructions the Practitioner failed to provide Mr Dzemailoski with an itemised account or any account of the fees that he had incurred to date and failed to send his file to him.

274 The Committee also says that the Practitioner has not at any time issued an invoice to Mr Dzemailoski or otherwise accounted to him for the $3,000 received from him.

The Practitioner's response in respect of Complaint 7

275 The Practitioner's response in respect of this complaint was brief.

276 The Practitioner concedes that the Costs Agreement which he had drawn and presented to Mr Dzemailoski was 'deficient as aforesaid for my intended purposes'; (Practitioner's Witness Statement paragraph 60).

277 The Practitioner goes on to say that Mr Dzemailoski had previously instructed him in relation to his matrimonial affairs, 'in respect of which he was successful and had paid to me a retainer and thereafter had received an account of my professional fees, which he did not take any issue with'; (Practitioner's Witness Statement paragraph 61). He says that he takes 'issue with Mr Dzemailoski's evidence as presented in his affidavit'; (Practitioner's Witness Statement paragraph 62).

Complaint 7 - the evidence

278 Mr Dzemailoski gave evidence in an affidavit sworn by him on 11 August 2010. He also provided a witness statement sworn him by 1 February 2013. He gave further evidence in an affidavit sworn by him on 12 April 2013. He provided supplementary oral evidence at the hearing and was cross-examined.

279 Mr Dzemailoski's evidence is that he first met with the Practitioner when the Practitioner acted for him in relation to a previous marriage in 2005. He says that the Practitioner subsequently acted for him in relation to a dispute which he had with the City of Stirling.

280 He says that the Practitioner told him that his costs of representing Mr Dzemailoski in the Family Court proceedings generally would be between $3,000 and 20,000. Mr Dzemailoski said that the Practitioner told him that he needed to make a 'down payment' in the sum of $3,000 which Mr Dzemailoski paid in cash.

281 Mr Dzemailoski then says that the Practitioner advised him that he was required to file with the Family Court, amongst other things, a financial statement. Mr Dzemailoski said that he prepared his financial statement with the assistance of his daughter and provided a draft to the Practitioner. The Practitioner then 'typed it up at his office while my daughter and I were there'. He does not recall the date when that occurred.

282 He says that this was the only work that the Practitioner carried out for him in respect of the Dzemailoski proceedings.

283 He says that he tried on numerous occasions to contact the Practitioner after that date but 'was unable to get hold of Mr Segler and he never wrote to me, I went to his office in Hay Street Perth to see him [sic]. This was around the beginning of June 2010'.

284 He says that the Practitioner in due course contacted him and told him that the Practitioner was retiring. He says that the Practitioner told him that he was sending his file to Mr Culshaw of Marks & Sands. However, he says that when he telephoned Marks & Sands they told him that they knew nothing about his file.

285 According to Mr Dzemailoski, the last time that the Practitioner telephoned him was on 14 June 2010, when 'we discussed what he should do with my file and I asked him to send my file to me at my home'.

286 In his later evidence, Mr Dzemailoski says that when the Practitioner 'finally returned my telephone call' the Practitioner told him that the file was with a 'colleague of his'. Mr Dzemailoski says that he is unable to remember the name of the person he mentioned. He also says that he is unable to recall whether he collected his file.

287 He says that he never received any invoices for professional fees from the Practitioner, nor did he receive a letter from the Practitioner addressed to him and dated 26 April 2010.

288 He had been shown a letter from the Practitioner addressed to him dated 26 April 2010 and a copy of a tax invoice of professional fees from the Practitioner dated 26 April 2010. He says that he has never seen either of these documents and did not receive them.

289 Under cross-examination, Mr Dzemailoski conceded that he had some difficulty in recalling the dates when certain events occurred. He pointed out that it was a long time ago, that his matrimonial difficulties had caused him stress and that he was, and continued to be,

'under medication'; (T:45; 17.04.13). He also conceded that, despite what he had said in his written evidence, the Practitioner had prepared the financial statement on his behalf, and had in addition also prepared a response to an application for final orders and a related affidavit; (T:46-50; 17.04.13). He agreed that this may have been in February 2010, not March 2010. He also said that, despite what he had said in one of his affidavits, he was aware that the Practitioner had attended court on his behalf on 11 March 2010; (T:51; 17.04.13).

Complaint 7 - the findings of the Tribunal

290 In respect of Complaint 7(a) the Practitioner admits the facts alleged by the Committee, namely failing to deposit trust money into a trust account. The Tribunal's finding in respect of Complaint 7(a) is that the Practitioner is guilty of professional misconduct, for the reasons set out in the Tribunal's findings in respect of Complaint 1 - Hamilton.

291 Turning to Complaint 7(b), the Tribunal does not consider that this complaint has been made out. In respect of the alleged failure to carry out work or adequate work for Mr Dzemailoski which he had agreed to do, the Tribunal is satisfied that the Practitioner did in fact complete the work which he was instructed to do up until the date when he ceased practice, 10 May 2010. The Practitioner told Mr Dzemailoski that his file had then been passed to Marks & Sands and Mr Dzemailoski has agreed that he was in fact told this. Clearly, the Practitioner could not attend the conciliation conference on behalf of Mr Dzemailoski and if the Practitioner believed that Marks & Sands had accepted instructions to attend the conference on behalf on Mr Dzemailoski, then his involvement with the matter was at an end.

292 It is clear that no one attended the conference on behalf of Mr Dzemailoski but it is unclear whether or not it was the Practitioner or Marks & Sands who were responsible for that happening. Other than Mr Dzemailoski's evidence that Marks & Sands told him that they had no knowledge of his file, there is nothing to persuade the Tribunal to the necessary standard that the Practitioner was at fault. Accordingly, Complaint 7(b)(i) has not been made out.

293 In respect of Complaint 7(b)(ii), again we have conflicting evidence between the Practitioner, who says that he rendered a final account to Mr Dzemailoski for the money received from him and retained by the Practitioner and evidence from Mr Dzemailoski that he did not receive that account. Mr Dzemailoski, however, concedes that his recollection of events is not clear and the Tribunal considers that it is unlikely that the final account, in all of the circumstances, would have been of much concern to Mr Dzemailoski. Once more, the witness

expressed great anger towards the Practitioner and appeared increasingly upset during his cross-examination. His evidence was therefore difficult to properly examine. Accordingly, the Tribunal is not satisfied to the necessary standard that this complaint has been made out.

294 For the same reasons given in respect of the Tribunal's decision on Complaint 7(b)(i), we do not consider that Complaint 7(c) has been made out. The Practitioner had completed the work required of him up to and including the date when he retired and for the Committee to succeed in respect of this complaint it would have been necessary to show that the Practitioner failed to take necessary steps, (T:224; 19.04.13) to ensure that someone appeared at the conciliation conference on behalf of Mr Dzemailoski following the Practitioner's retirement. The Practitioner maintains that he did take the necessary steps and the Tribunal has not been persuaded to the requisite standard to the contrary.

Complaint 8

295 Complaint 8 remains as set out earlier in these reasons.

Complaint 8 - the agreed facts and the Committee's contentions

296 As mentioned earlier in these reasons, the facts in respect of Complaint 8 are not in dispute.

(a) Hamilton matter

297 In a letter to the Practitioner dated 23 March 2010, the Committee advised the Practitioner that Hamilton had made a complaint about him. He was not required to make any submissions in respect of the matters complained of until further details of the complaint had been received from Hamilton.

298 The Practitioner's wife, Sharon Segler, responded on behalf of the Practitioner on 26 March 2010.

299 In a letter to the Practitioner dated 1 July 2010, addressed to him at his post office address, the Committee provided the Practitioner with further details of the complaints that had been made by Hamilton and requested the Practitioner's submissions in response to the complaint within 21 days of the date of the letter.

300 The Practitioner did not personally respond to the letter of 1 July 2010, but in a letter dated 9 July 2010 the Practitioner's wife purported to make submissions in response to that complaint on behalf of the Practitioner. In part, the letter stated that 'Mr Segler shall respond

to that letter [of 1 July 2010] in due course, however please accept this submission from me as having been sighted and approved for release to you by my husband in the interim'. However, the Practitioner did not at any time make any submissions or personally reply to the letter from the applicant dated 1 July 2010.

301 In a letter to the Practitioner dated 16 August 2010, addressed to him at his post office address, the Committee again requested that the Practitioner make submissions in response to the complaint within 10 days.

302 The Practitioner did not respond to the letter of 16 August 2010 within the time allowed or at all.

303 The Committee wrote a letter to the Practitioner's wife on 16 August 2010, addressed to her at the Practitioner's post office address, advising her that 'it is appropriate that [the Practitioner] responds personally [to the letter of 1 July 2010] and if he wishes to adopt your submissions dated 9 July 2010, that he confirms in writing to this office that he adopts your submissions as his own'.

304 The Practitioner did not respond personally to the letter of 16 August 2010 nor did he confirm in writing that he adopted the submissions that had been made by his wife on 9 July 2010 as his own.

305 In an email to the Committee dated 17 August 2010, the Practitioner's wife, in reply to the Committee's letter of 16 August 2010:

(a) made her own observations about the complaints that had been made by Hamilton;

(b) advised the Committee that the Practitioner had been very unwell 'these past weeks with a back injury'; and

(c) indicated that the Practitioner intended responding to the various letters that had been sent by the Committee and sought further time for that response to be provided.

306 On 9 September 2010, in a letter addressed to her at the Practitioner's post office address, the Committee advised the Practitioner's wife:

(a) that no response had been received from the Practitioner;

(b) that it had not received any medical report explaining why the Practitioner was unable to respond to the complaints that had been made by Hamilton; and

(c) that it was necessary for the Practitioner to respond to the complaints personally and that if he wished to adopt the submissions that had been made by the Practitioner's wife then he had to confirm that fact in writing.

307 The Practitioner's wife responded to the letter of 9 September 2010, but the Practitioner did not.

308 In a letter to the Practitioner dated 22 February 2011, addressed to him at his post office address, the Committee referred, amongst other matters, to the letters dated 1 July and 16 August 2010 and requested the Practitioner to make submissions in response within 14 days.

309 The Practitioner did not respond to the letter of 22 February 2011 within the time allowed or at all.

(b) Basagic matter

310 By letter to the Practitioner dated 30 June 2010, addressed to him at his post office box address, the Committee:

(a) informed the Practitioner that Mr Basagic had made a complaint about him;

(b) enclosed a copy of Mr Basagic's written complaint; and

(c) requested that the Practitioner make submissions to the Committee in response to the complaint within 21 days of the date of the letter.

311 The Practitioner did not respond to the letter of 30 June 2010 within the time allowed or at all.

312 In a letter to the Practitioner dated 19 August 2010, addressed to him at his post office box address, the Committee referred to the letter dated 30 June 2010 and again requested that the Practitioner make submissions in response to the complaint within 10 days.

313 The Practitioner did not respond to the letter of 19 August 2010 within the time allowed or at all.

314 In a letter to the Practitioner dated 31 August 2010, addressed to him at his post office box address, the Committee referred to the letters

dated 30 June and 19 August 2010 and requested that the Practitioner make submissions in response to the complaint within 10 days.

315 The Practitioner did not respond to the letter of 31 August 2010 within the time allowed or at all.

316 In a letter to the Practitioner dated 19 November 2010, addressed to him at his post office box address, the Committee referred to the letters of 20 June, 19 August and 31 August 2010. The Committee also referred to summonses dated 18 August and 2 September 2010, that had been issued by the Committee to the Practitioner to produce certain documents pursuant to s 520(l)(a) and (c) of the Legal Profession Act. The Committee requested the Practitioner to make submissions within 14 days regarding whether his conduct in failing to respond to enquires of the Committee and to comply with the summonses may amount to unsatisfactory professional conduct or professional misconduct.

317 The Practitioner did not respond to the letter of 19 November 2010 within the time allowed or at all.

(c) Glusica matter

318 In a letter to the Practitioner dated 26 May 2010, sent by registered post to the Practitioner's home address in White Gum Valley, the Committee:

(a) informed the Practitioner that Mr Glusica had made a complaint about him;

(b) enclosed a copy of Mr Glusica's written complaint; and

(c) requested that the Practitioner make submissions to the Committee in response to the complaint within 21 days of the date of the letter.

319 The letter was returned to the Committee on 7 July 2010, unclaimed.

320 In a letter to the Practitioner dated 28 June 2010, addressed to him at his post office address, the Committee requested a response to the letter of 26 May 2010 by 5 July 2010. Included with the letter was a copy of the letter dated 26 May 2010 together with attachments.

321 However, the Practitioner did not respond to the letter dated 28 June 2010 within the time allowed or at all.

322 In a letter to the Practitioner dated 7 July 2010, addressed to him at his post office address, the Committee requested a response to its letters dated 26 May and 28 June 2010 within 10 days.

323 The Practitioner did not respond to those letters within the allowed time or at all.

324 In a letter to the Practitioner dated 19 November 2010, addressed to him at his post office address, the Committee again requested a response to its letters dated 28 June and 7 July 2010 within 14 days.

325 The Practitioner did not respond to those letters within the allowed time or at all.

(d) Mateljan matter

326 In a letter to the Practitioner dated 6 December 2010, addressed to him at his post office address, the Committee provided him with a copy of Ms Mateljan's written complaint form dated 29 July 2010 together with some attachments and requested the Practitioner to provide submissions about the matters raised in Ms Mateljan's complaint within 21 days.

327 The Practitioner did not respond to the letter from the Committee within the time allowed or at all.

(e) Condelli matter

328 In a letter to the Practitioner dated 16 June 2010, addressed to him at his post office address, the Committee:

(a) informed the Practitioner that Mr Condelli had made a complaint about him;

(b) enclosed a copy of Mr Condelli's written complaint; and

(c) requested that the Practitioner make submissions to the Committee in response to the complaint within 21 days of the date of the letter.

329 The Practitioner did not to respond to the letter of 16 June 2010 within the time allowed or at all.

330 In letters to the Practitioner dated 6 August 2010 and 17 August 2010 respectively, addressed to him at his post office address, the Committee again requested the Practitioner to make submissions in response to the complaint.

331 The Practitioner failed to respond to the letters of 6 August 2010 and 17 August 2010 within the time allowed or at all.

332 In a letter to the Practitioner dated 19 November 2010, addressed to him at his post office address, the Committee informed the Practitioner that the Committee was investigating his conduct in:

(a) failing to respond to the Committee's request for submissions on Mr Condelli's complaint contained in its letter dated 16 June 2010;

(b) failing to respond to the Committee's request for submissions on Mr Condelli's complaint contained in its letter dated 6 August 2010;

(c) failing to respond to the Committee's request for submissions on Mr Condelli's complaint contained in its letter dated 17 August 2010; and

(d) failing to comply with the summonses issued pursuant to s 520(l)(b) Legal Profession Act dated 2 September 2010 which were served on and received by his wife on his behalf.

333 The Committee requested the Practitioner to make submissions to the Committee in respect of the conduct, and whether it may amount to unsatisfactory professional conduct or professional misconduct, within 14 days.

334 The Practitioner did not respond to the letter from the Committee within the time allowed or at all.

(f) Johnston matter

335 In a letter to the Practitioner dated 10 March 2010 and addressed to him at his legal practice the Committee:

(a) confirmed that a Ms C Townsend had made a complaint about him on behalf of Mr Johnston;

(b) enclosed a copy of Ms Townsend's written complaint form and attachments;

(c) requested that the Practitioner provide information about a number of other issues and comply with a summons issued pursuant to s 520(l)(b) of the Legal Profession Act dated 15 January 2010 which, in addition to

requiring the client file to be produced (which was), required production of the Practitioner's accounting record; and

(d) requested that the Practitioner make submissions to the Committee in response to the complaint within 21 days of the date of the letter.

336 In a letter to the Practitioner dated 21 May 2010 and a summons issued pursuant to s 520(l)(b) Legal Profession Act dated 21 May 2010 and served personally upon the Practitioner at his residential address in White Gum Valley, the Committee sought further information from the Practitioner.

337 The Practitioner by letter dated 31 May 2010 and sent by email responded to the Committee's letter of 21 May 2010. Additionally the Practitioner requested that further communication be addressed to his post office address.

338 In a letter to the Practitioner dated 6 July 2010, addressed to him at his post office address, the Committee sought further information from him and requested a response within 21 days of the date of the letter.

339 The Practitioner did not respond to the letter dated 6 July 2010 within the time allowed or at all.

340 In letters to the Practitioner dated 12 August and 24 August 2010 addressed to him at his post office address, the Committee requested a response from him to its letter dated 6 July 2010 within 10 days and 14 days respectively.

341 The Practitioner did not respond to either of those letters within the times allowed or at all.

342 In a letter to the Practitioner dated 16 December 2010, addressed to him at his post office address, the Committee:

(a) referred to the letters dated 6 July, 12 August and 24 August;

(b) made reference to a number of other allegations of unsatisfactory professional conduct and professional misconduct; and

(c) requested the Practitioner provide his submissions in respect of the matters raised in the letter within 14 days.

343 The Practitioner did not respond to the letter of 16 December 2010 within the time allowed or at all.

(g) Dzemailoski matter

344 In a letter to the Practitioner dated 18 August 2010, addressed to him at his post office address, the Committee:

(a) informed the Practitioner that Mr Dzemailoski had made a complaint about him;

(b) enclosed a copy of Mr Dzemailoski's written complaint together with copies of two statements made by Mr Dzemailoski dated 11 August 2010; and

(c) requested that the Practitioner make submissions to the Committee in response to the complaint within 14 days of the date of the letter.

345 The Practitioner failed to respond to the letter from the Committee within the time allowed or at all.

346 In a letter to the Practitioner dated 17 November 2010, addressed to him at his post office address, the Committee:

(a) again enclosed copies of Mr Dzemailoski's written complaint form, together with a copy of two statements made by Mr Dzemailoski dated 11 August 2010;

(b) referred to a summons issued pursuant to s 520(l)(b) of the Legal Profession Act dated 18 August 2010 and sent to his post office box and a further summons dated 2 September 2010 issued pursuant to s 520(l)(b) of the Legal Profession Act which was served on and received on his behalf by his wife;

(c) requested that the Practitioner make submissions to the Committee in response to the complaint and comply with the summonses within 14 days; and

(d) requested that he provide submissions about a number of other allegations of unsatisfactory professional conduct and professional misconduct.

347 The Practitioner failed to respond to the letter from the Committee within the time allowed or at all.

(h) Failing to comply with summonses

348 On 18 August 2010 the Committee issued two summonses to the Practitioner to produce certain documents pursuant to s 520(l)(a) and (c) of the Legal Profession Act by 4 pm, Friday 27 August 2010 in respect of the Basagic matter and Dzemailoski matter. The summonses were served on the Practitioner by ordinary post.

349 The Practitioner failed to respond to the summonses within the time allowed or at all.

350 On 2 September 2010 the Committee issued three summonses to the Practitioner to produce certain documents pursuant to s 520(l)(a) and (c) of the Legal Profession Act by 4 pm, Friday 10 September 2010 in respect of the Basagic matter, the Dzemailoski matter and the Condelli matter.

351 The summonses were served on the Practitioner's wife, who accepted service on behalf of the Practitioner, on 2 September 2010.

352 The Practitioner did not comply with the summonses within the time allowed or at all.

(i) Failing to respond to Senior Trust Account Inspector

353 On 5 May 2010 the Senior Trust Account Inspector of the Legal Practice Board, Ms Anna Young, (**Inspector**) conducted an inspection of the Practitioner's practice.

354 As a consequence of that inspection the Inspector produced a report dated 9 June 2010.

355 Under cover of a letter dated 9 June 2010 the Inspector forwarded a copy of her report to the Practitioner and requested the Practitioner to 'provide written confirmation of the findings of the report within 21 days and advise if you disagree with any of my conclusions and, if so, which ones and why'.

356 The Practitioner did not respond to the letter of 9 June 2010 within the time allowed or at all.

The Practitioner's response in respect of Ground 8

357 The Practitioner says that, following the closing of his legal practice, the Committee was aware or should have been aware of his ongoing health problems, his personal financial difficulties and the fact that he was 'incapable of dealing with the mess I had made of my professional life'; (Practitioner's Witness Statement paragraph 65).

358 In the circumstances, the Practitioner says, it was unreasonable for the Committee to press him in relation to their inquiries. At the hearing, he told the Tribunal:

> Well, if I was able to be able to deal with it, if I was not incapacitated, then I accept that I would have been accountable at that time, but I don't accept it was reasonable of them to press me at that time. The situation as I now understand it has been explained to them. (T:238; 19.04.13)

Complaint 8 - the findings of the Tribunal

359 In ***Legal Profession Complaints Committee and Lee-Steere*** [2010] WASAT 189 (***Lee-Steere***), this Tribunal observed that the reputation of the legal profession in the eyes of the public and among its members depends to a large extent upon the power and ability of the Committee to regulate effectively the activities of all legal practitioners: ***Lee-Steere*** at [22].

360 We went on to say, at [24]:

> In our view it is unacceptable, both to members of the public and to the profession, for a practitioner to undermine the authority of a regulatory body by ignoring its requests for information or failing to respond to those requests with alacrity and with complete honesty. To flaunt that authority is to fly in the face of the legislative intent and disables the body from executing its statutory functions. Such conduct is viewed by this Tribunal in a most serious light and will not be countenanced.

361 The Tribunal concluded that such conduct brings the profession into disrepute and does not constitute a standard of practice which members of the public and members of the profession can reasonably expect; ***Lee-Steere*** at [32].

362 We see no reason to depart from this position. We find that the Practitioner has ignored requests from the Committee for information and has failed to respond to those requests with alacrity or at all. We consider that conduct to be disgraceful and accordingly we find the Practitioner guilty of professional misconduct.

363 We accept the Practitioner's submission that he was unwell and distressed at the relevant time but in no way can that excuse the Practitioner's conduct. It may, however, go to the severity of any penalty imposed.

Complaint 9

364 Complaint 9 remains as set out earlier in these reasons.

Complaint 9 - the Committee's contentions

365 By reason of all of, or any combination of, the facts, issues and contentions set out in Grounds 1 to 8, the Practitioner's conduct substantially and consistently failed to reach or maintain a reasonable standard of competence and diligence.

366 By reason of all of, or any combination of, the conduct referred to in Grounds 1 to 8, the Practitioner engaged in conduct would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence.

367 By reason of all of, or any combination of, the conduct referred to in Grounds 1 to 8 the conduct of the Practitioner requires a finding that the Practitioner is not a fit and proper person to engage in legal practice.

Complaint 9 - the findings of the Tribunal

368 The Tribunal has some difficulty in understanding what is being alleged against the Practitioner. Clearly, the Practitioner shares those difficulties.

369 This was taken up with the Committee at the hearing during the Committee's closing submissions. Counsel for the Committee said this:

> Ground 9 - perhaps it could be called a catch-all ground. Ground [9] is that if, in relation to some of the grounds, findings are made of fact that support a particular contention but in relation to that particular contention maybe one finding of fact on one subparagraph is made, and the tribunal considers that's not sufficient to get you across the line with professional misconduct, then ground 9 is there to allow the tribunal to add them all up and to say, "Well, when one considers all of that, it is professional misconduct".

370 Upon reflection, the Tribunal intends to proceed on the basis that this complaint falls away because of the Tribunal's earlier findings. The Tribunal does not propose to consider this complaint any further.

Orders

1. There is a finding that Mr Martin Lee Segler is guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) by, on various dates between 9 August 2007 and May 2010, failing to deposit trust moneys as defined in s 3 of the *Legal Practice Act 2003* (WA) and trust money as defined in s 205(1) of the *Legal Profession Act 2008* (WA) to the credit of his trust account.

2. There is a finding that Mr Martin Lee Segler is guilty of professional misconduct by, between 13 May 2008 and 1 May 2009 in the course of acting on behalf of Mr Lazo Glusica in relation to Supreme Court action number CIV1511 of 2008 substantially failing to reach or maintain a reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

3. There is a finding that Mr Martin Lee Segler is guilty of professional misconduct by, on 11 May 2009, intentionally misleading or attempting to mislead the Family Court by informing her Honour Justice Crisford that:

    (a) disclosure of certain documents had been made;

    (b) valuation of a property had been made by a valuer agreed by both parties to the proceedings; and

    (c) neither party to the proceedings had made an offer of settlement;

    when he knew or ought to have known that these submissions were not correct and were misleading.

4. There is a finding that the Practitioner engaged in professional misconduct by:

    (a) on various dates between 30 June 2010 and in or about March 2011 failing to respond to the Legal Profession Complaints Committee's reasonable enquiries;

    (b) failing to comply with summonses to produce documents issued on 18 August 2010 and on 2 September 2010 in breach of s 520(1) of the *Legal Profession Act 2008* (WA); and

    (c) failing to respond to a letter from the Senior Trust Account Inspector dated 9 June 2010 requesting confirmation of the findings set out in a 'Report on Examination of Office and Practice Records of Mr Martin Lee Segler dated 9 June 2010'.

5. The Tribunal found that other allegations of professional misconduct made against Mr Martin Lee Segler were not made out.

6. The Legal Profession Complaints Committee is to file and serve any submissions on penalty within 28 days of publication of these reasons.

7. Mr Martin Lee Segler is to file and serve any submissions on penalty within 28 days of the service of the Legal Profession Complaints Committee's submissions.

8. Subject to any further order of the Tribunal, the question of penalty is to be dealt with on the papers.

I certify that this and the preceding [370] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUDGE T SHARP, DEPUTY PRESIDENT