SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

LEGAL PROFESSION CONDUCT COMMISSIONER v RADIN

[2024] SASCFC 1

Judgment of The Full Court

(The Honourable President Livesey, the Honourable Justice Bleby and the Honourable Justice S David)

25 March 2024

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT

In January 2023 the Legal Practitioners Disciplinary Tribunal found the respondent practitioner guilty of 11 counts of professional misconduct (or unprofessional conduct where the conduct occurred before 1 July 2014) in circumstances where the practitioner was, at various times, operating under financial pressure.

In July 2023 the Tribunal found that the powers available to it pursuant to the *Legal Practitioners Act 1981* (SA) did not provide appropriate or adequate penalties and, pursuant to that Act, recommended that disciplinary proceedings be commenced in the Supreme Court.

The practitioner's misconduct concerned three separate actions. The first concerned the practitioner's failure to pay the invoices of six barristers during 2016 and 2017. In the case of three barristers the practitioner misappropriated trust monies which were intended to meet their fees.

The second action concerned the practitioner's conduct in 2011 concerning the trust monies of a client who had instructed the practitioner's business partner at a time when they practised together, and false and misleading statements made to the Law Society about whether monies had been repaid into trust. The third action concerned the practitioner's failure to meet his taxation and superannuation obligations for a period ending in 2017, together with a false statement he made about those liabilities to the Law Society.

HELD (the Court) striking the practitioner's name from the roll of practitioners:

1. When the misconduct is viewed as a whole, it represents such a serious departure from the standards reasonably to be expected from members of the legal profession over such a long

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On Appeal from LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL (PROFESSOR G DAVIS AND MS M PYKE KC) NO. 5 AND NO. 6 OF 2020 AND NO. 2 OF 2021

Applicant: LEGAL PROFESSION CONDUCT COMMISSIONER Counsel: MR A COLLETT - Solicitor: LEGAL PROFESSION CONDUCT COMMISSIONER

Respondent: ATANAS MICHAEL RADIN No Attendance

Hearing Date/s: 21/03/2024

File No/s: CIV-23-010508

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period that the Court cannot be confident that the practitioner can ever fulfil the essential obligations associated with legal practice.

2. It is necessary to protect the public from legal practitioners who lack personal integrity and who are indifferent to rudimentary professional standards.

3. Legal practitioners must adhere to the high standards expected of them notwithstanding their own difficulties. A practitioner's adherence to the requirements of ethical conduct cannot be made to depend upon whether the practitioner is personally in financial difficulty or under other kinds of personal stress.

A New Tax System (Pay As You Go) Act 1999 (Cth); *A New Tax System (Goods and Services Tax Transition) Act 1999* (Cth); *Inheritance (Family Provision) Act 1972* (SA); *Legal Practitioners Act 1981* (SA) ss 82, 85, 88A, 89; *Superannuation Guarantee (Administration) Act 1992* (Cth); *Taxation Administration Act 1953* (Cth), referred to.
Briginshaw v Briginshaw (1938) 60 CLR 338; *Carver v NSW Legal Profession Disciplinary Tribunal* (1991) 7 LPDR 8; *Council of the Law Society of New South Wales v Jafari* [2020] NSWCA 53; *Council of the Law Society New South Wales v Rogers* [2021] NSWCATOD 124; *Council of the Law Society of New South Wales v Wilson* [2015] NSWCATOD 83; *Council of the Law Society of New South Wales v Xenos* [2012] NSWADT 283; *DK v AE* [2020] SASC 28; *Kennedy v Broun* (1863) 13 CBNS 677, 727; 143 ER 268, 287; *Law Society of New South Wales v Davidson* [2007] NSWADT 264; *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408; *Law Society of New South Wales v Graham* [2007] NSWADT 67; *Law Society New South Wales v Koffel* [2010] NSWADT 171; *Law Society of New South Wales v McCarthy* [2002] NSWADT 58; *Law Society of New South Wales v McCarthy* [2003] NSWADT 198; *Legal Practitioners Conduct Board v Kerin* [2006] SASC 393; *Legal Profession Conduct Commissioner v Kaminski* [2021] SASCFC 39; *Legal Profession Conduct Commissioner v Kassapis* [2015] SASCFC 37; *Legal Profession Conduct Commissioner v Moore* [2022] SASCFC 2; *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43; *Legal Practitioners Conduct Board v Trueman* [2003] SASC 58; *Legal Practitioners Conduct Board v Wharff* [2012] SASCFC 116; *Law Society of South Australia v Murphy* [1999] SASC 83; *Mostyn v Mostyn* (1870) 5 Ch App 457; *Re Mayes and Legal Practitioners Act* [1974] 1 NSWLR 19; *Re Sharp; Ex Parte Donnelly* (1998) 80 FCR 536; *Re Robb & Anor* (1996) 134 FLR 294; *Rhodes v Fielder, Jones and Harrison* [1919] All ER 846; *Swinfin v Lord Chelmsford* (1860) 5 H&N 890; 157 ER 1436, 1448; *Thornhill v Evans* (1742) 2 Atk 332; 26 ER 601; *Victorian Legal Services Commissioner v Mehri* [2021] VCAT 1246, considered.

LEGAL PROFESSION CONDUCT COMMISSIONER v RADIN
[2024] SASCFC 1

Full Court - Civil: Livesey P, Bleby and David JJA

THE COURT:

Introduction

1 The Legal Profession Conduct Commissioner (the **Commissioner**) seeks orders that:

1. the name of the respondent, Mr Atanas Michael Radin (the **practitioner)** be struck off the roll of legal practitioners; and

2. the practitioner pay the Commissioner's costs.

2 The Commissioner's application is made pursuant to various provisions of the *Legal Practitioners Act 1981* (SA) (as amended) (the **Act)** and the inherent jurisdiction of this Court.[1]

3 On 5 January 2023, the Legal Practitioners Disciplinary Tribunal (the **Tribunal**) found the practitioner guilty of 11 counts of unprofessional conduct (conduct before 1 July 2014) and professional misconduct (conduct after 1 July 2014). In circumstances where the practitioner was, at various times, operating under financial pressure of varying degrees, the Tribunal concluded:[2]

> The findings of the Tribunal, considered overall with respect to all Actions, chronicle a pattern of behaviours by the practitioner over a significant period of time where he has fallen well short of the standard expected of legal practitioners. The practitioner's conduct constituted a substantial and consistent failure to reach or maintain a reasonable standard of competency and diligence.
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> The pattern of behaviours included making false representations, misleading clients and the Law Society, certifying a false document, not maintaining accurate Trust Account Records, failing to pay counsel fees and failing to pay taxes and the superannuation entitlements of his staff.

4 The Tribunal found that the powers available to it pursuant to s 82(6) of the Act did not provide appropriate or adequate penalties and, pursuant to s 82(6)(a)(v) of the Act, recommended that disciplinary proceedings be commenced in the Supreme Court.

5 On the question of costs of the hearing before the Tribunal, the Tribunal ultimately determined to make a lump sum order in the amount of $48,000 pursuant to s 85(1) of the Act.

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1 As for the Act, see ss 89(1), 89(2) and 88A(2).

2 *The Legal Practitioners Act 1981* (SA) *v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 18 July 2023), page 5.

6 The Commissioner has invited this Court to adopt and act on the findings of the Tribunal without further enquiry pursuant to s 89(5) of the Act. We are satisfied that course is appropriate. Those findings are set out in the reasons for decision of the Tribunal delivered on 5 January 2023, as well as in the reasons for determination on penalty and costs delivered on 18 July 2023.[3]

7 Acknowledging that the practitioner does not presently hold a practising certificate, the Commissioner maintains that this Court should find that he is not a fit and proper person to practice the profession of the law.

8 At the hearing on 21 March 2024, the Court ordered that the practitioner's name should be struck from the roll of practitioners and that he must pay costs. These are the reasons for the making of those orders.

The practitioner's background

9 The practitioner was admitted to practice in South Australia on 20 December 1982. In 1989 he was appointed an Executive Senior Member of the Immigration Review Tribunal through which he held primary responsibility for the South Australian and Northern Territory jurisdictions.[4] The practitioner held this position until 1999.[5]

10 The practitioner subsequently commenced employment as a consultant in the legal practice Steven M Clark Pty Ltd.[6] In 2002, the practitioner was offered and accepted equity in the practice, and it was known as Clark Radin Lawyers until its dissolution on 10 June 2011.[7]

11 During this period the practitioner engaged in "essentially full-time tribunal work".[8] On 14 June 2011, the practitioner and Mr Clark dissolved their practice and established two new practices.[9] The practitioner became the director and sole principal of Radin Legal until 19 September 2017, when the practice companies were wound up by order of the Federal Court.[10]

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3 The proceedings commenced on 22 September 2021 before Ms Anne Pike QC, Ms Kay Clarke SC and Professor G Davis. The matter concluded on 5 November 2021. The reasons for decision of the Tribunal were, however, only signed by Ms Pike and Professor Davis. Ms Clarke did not sign the reasons on penalty either.

4 Transcript of Proceedings, *Atanis Michael Radin* (Legal Practitioners Disciplinary Tribunal, M Pyke QC, K Clark SC, Prof G Davis, 22 September 2021) 66.32-38

5 Transcript of Proceedings, *Atanis Michael Radin* (Legal Practitioners Disciplinary Tribunal, M Pyke QC, K Clark SC, Prof G Davis, 22 September 2021) 66.35-36

6 Transcript of Proceedings, *Atanis Michael Radin* (Legal Practitioners Disciplinary Tribunal, M Pyke QC, K Clark SC, Prof G Davis, 22 September 2021) 66.27-29

7 Transcript of Proceedings, *Atanis Michael Radin* (Legal Practitioners Disciplinary Tribunal, M Pyke QC, K Clark SC, Prof G Davis, 22 September 2021) 66.21-24, 68.3-5, 74.33-35

8 Transcript of Proceedings, *Atanis Michael Radin* (Legal Practitioners Disciplinary Tribunal, M Pyke QC, K Clark SC, Prof G Davis, 22 September 2021) 66.31-32

9 Transcript of Proceedings, *Atanis Michael Radin* (Legal Practitioners Disciplinary Tribunal, M Pyke QC, K Clark SC, Prof G Davis, 22 September 2021) 75.1-8

10 Transcript of Proceedings, *Atanis Michael Radin* (Legal Practitioners Disciplinary Tribunal, M Pyke QC, K Clark SC, Prof G Davis, 22 September 2021) 94.22-28, 96.1-3

The findings made by the Tribunal

12 The findings made by the Tribunal were made in actions numbered 5 of 2020, 6 of 2020 and 2 of 2021.

Action No. 5 of 2020

13 The first action concerned the practitioner's failure to pay the invoices of six barristers during 2016 and 2017. Almost all of the relevant facts were admitted by the practitioner. One of the counts was found not proved.[11]

14 During the period 2016 to 2017, the practitioner was the sole director and principal of Radin Legal Pty Ltd trading as "Radin Legal" from offices in Gawler. The practitioner's practice involved briefing counsel from time to time to represent clients in various litigated disputes.

15 The first count concerned the practitioner's failure to pay the counsel fees of Ms Bergin in the sum of $2,112 including GST for representing a client on an application for a freezing order. The practitioner briefed Ms Bergin on 8 August 2017 and, on the same day, she sent a costs agreement. The relevant paragraphs in that agreement stated:

> I confirm that you as solicitor have engaged me as a barrister only to act for you in this matter in which you act for [the client].
>
> …
>
> I confirm that you are retaining me in your own right only and not as agent for the lay client.
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> …
>
> Subject to any other agreement, my fees are payable 14 days after the issue of an invoice.

16 At the time of this retainer, the practitioner told Ms Bergin that the property the subject of the application for a freezing order would be sold and her fees would be paid from the proceeds of sale.

17 Ms Bergin issued invoices following the hearing before Judge Dart in the Supreme Court on 9 August 2017 and the settlement of the substantive litigation between parties on 4 September 2017. The settlement of the property occurred on 15 September 2017.

18 Separately, the practitioner advised his client that he would charge her a maximum of $12,500 from which he would "take care of" Ms Bergin's fees. With

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[11] Concerning the fees of Mr Edward Stratton-Smith in an invoice dated 31 October 2016 in the sum of $3,712.50 in circumstances where, in the absence of evidence from the barrister, the Tribunal was uncertain if and when counsel ever expected to be paid for representing the practitioner before the Tribunal during the latter part of 2016.

the client's written authority, the sum of $12,500 was paid into the practitioner's office account.

19 All of that sum was appropriated by the practitioner for his own fees. Ms Bergin has never received any payment and her fees remain outstanding.

20 The Tribunal rejected the practitioner's explanations for his failure to pay Ms Bergin. These comprised a combination of an asserted misunderstanding that the client would pay Ms Bergin and that, but for his firm being placed into external administration, he may have paid Ms Bergin within a reasonable time.

21 The Tribunal found that the practitioner was well aware of his firm's financial difficulties during September 2017 and was attempting to "juggle funds so to keep the firm afloat". The practitioner was, in those circumstances, prepared to use the settlement monies to pay his own accounts and prefer his own interests over those of counsel.[12]

22 Count 2 concerned the failure to pay Mr Matthew Murphy the sum of $14,520 after the practitioner retained him to represent a client developer in connection with a three-day hearing before the Environment, Resources and Development Court. Mr Murphy's written retainer dated 13 April 2016 sent to the practitioner included the following terms:

> Your Firm is responsible for the payment of my fees, disbursements and GST.
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> …
>
> You acknowledge that failure to pay my fees, in the absence of a genuine dispute, is unethical.
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> …
>
> In the event of a dispute as to my fees you will provide to me written particulars of the grounds on which you dispute my fees within 14 days of the date of the invoice.

23 Mr Murphy's retainer stipulated that payment was to be made regardless of the outcome of the case and, should payment not be made within 60 days, he was at liberty to recover fees from the practitioner's firm "as a debt due under this agreement."

24 Following a request made by the practitioner's firm on 16 December 2016, Mr Murphy estimated his fees at $14,520. The practitioner warned Mr Murphy not to start trial preparation until money was received into trust from the client to cover his fees. The practitioner asked his client to meet outstanding accounts and to put $10,000 into trust on account of Mr Murphy's fees so as to secure his booking for the trial commencing in March 2017. Why the practitioner did not request that the

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[12] *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [10]-[14].

amount to be paid into trust match counsel's estimate of $14,520 does not appear to be explained.

25 In February 2017, the practitioner's trust account records disclosed a deposit by the client of $10,000. Soon after that, Mr Murphy was advised that the client had paid $10,000 into trust and he could commence preparation for trial. That work commenced and included a meeting with the client on the development site at Wallaroo. Following the trial, Mr Murphy issued an account for $14,520 which he reduced so as to ensure that it remained within his estimate.

26 The practitioner appropriated all of the sum of $10,000 and did not ever make payment of any amount owing to Mr Murphy.

27 In May 2017, Mr Murphy was advised by a solicitor in the practitioner's firm that there was a dispute about the practitioner's bill, including Mr Murphy's bill. If there had been a dispute relating to his account, Mr Murphy was never told the particulars of that dispute, contrary to the terms of his retainer.

28 The client asserted "strongly" that the sum of $10,000 paid into trust was on account of the fees of counsel and there was never any dispute about counsel's fees. The client was "shocked" to receive another request for payment of Mr Murphy's fees. The client later complained to the Commissioner that the practitioner had been overcharging and had misused the funds deposited specifically for counsel.

29 The Tribunal found that there was never any genuine dispute about counsel's fees.[13] There was only ever a dispute about the practitioner's fees and this "should not have impacted upon counsel".[14]

30 The Tribunal rejected the practitioner's explanations for what it described as a "blatant misappropriation of trust funds".[15] In particular, the Tribunal found that the practitioner's evidence was self-serving and represented "an attempt to excuse the inexcusable, namely preferring his own interests to those of Mr Murphy and in doing so misappropriating trust funds".[16]

31 Count 3 concerns the practitioner's failure to pay the fees of Mr Paul Bullock in the amounts of $11,687.50 on 15 September 2016 and $545.60 on 13 October 2017.

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13 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [22].
14 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [23].
15 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [21].
16 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [24].

32 The practitioner retained Mr Bullock to represent a client in the defence of a claim made under the *Inheritance (Family Provision) Act 1972* (SA) on the basis that fees would be paid out of estate funds which were expected to be paid into the practitioner's trust account. Following a long mediation, a settlement was reached and, pursuant to the settlement, sums exceeding $200,000 were paid into the practitioner's trust account between December 2016 and January 2017.

33 In December 2016, the practitioner took $45,000 from the monies in trust for his own fees. It transpired that the practitioner paid the balance of the amounts held in trust to his client to assist her to purchase a house. At no stage did he make any payment to Mr Bullock.

34 Unexpectedly, an issue concerning estate tax liability arose for which further advice was given by Mr Bullock and an invoice was rendered for that advice on 13 October 2017.

35 After the advice was given, the practitioner's practice company, Radin Legal Pty Ltd, and service trust company, Radtra Pty Ltd, were both ordered to be wound up by the Federal Court on 19 September 2017.

36 Mr Bullock later made a claim on the fidelity fund for which he accepted a payment of $11,121 exclusive of GST on account of the practitioner's fiduciary or professional default in failing to make payment of counsel fees.

37 The Tribunal found that there was never any express instruction from the client to refuse to pay Mr Bullock and, even if that had occurred, it remained the practitioner's professional obligation to ensure payment of Mr Bullock's fees, if necessary, from his own funds including from the sum of $45,000 which had been transferred to the firm's office account.

38 The Tribunal found that the practitioner ultimately preferred his own interests to those of Mr Bullock, as had been the case with Mr Murphy and Ms Bergin.[17]

39 Count 5 concerned the admitted failure by the practitioner to pay the counsel fees of Ms Di Girolamo in the sum of $880 incurred in connection with a dispute between the practitioner's company, Radtra Pty Ltd, and the Australian Taxation Office.

40 Count 6 concerned the failure to pay the counsel fees of Mr Chad Jacobi incurred in connection with the defence of a claim brought against the practitioner personally by a consultant solicitor for the practitioner's failure to pay consulting fees. Mr Jacobi rendered an account in the sum of $6,666 on 7 August 2016. In this case, however, the practitioner made a part payment of $3,000 and the failure to pay the balance he attributed to his financial difficulties.

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[17] *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [35].

The failure to pay counsel fees

41 Historically, the fees of counsel could not be made the subject of a legal debt and could not be recovered in a court. They were an *honorarium*. That is, barristers were paid because the instructing solicitor was personally "liable" as a matter of honour and etiquette.[18] The earliest case on this approach may be *Thornhill v Evans,*[19] where the Court asked:

> Can it be thought that this court will suffer a gentleman of the bar to maintain an action for fees, which is *quiddam honorarium* or, if he happens to be a mortgagee, to insist upon more than the legal interest, under pretence of gratuity or fees for business formerly done in the way of a counsel?

42 In *Swinfin v Lord Chelmsford,* Pollock CB emphasised that the relationship between barrister and client was not contractual in nature:[20]

> We are all of opinion that an advocate at the English Bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express, or implied. Cases may, indeed, occur, where, on an express promise (if he made one), he would be liable in assumpsit; but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client but the Court in which the duty is to be performed, and the public at large, have an interest.

43 Similarly, in *Kennedy v Broun*, Erle CJ said:[21]

> We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect; and, furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning *advocacy in litigation.*

44 These arrangements extended to all work done by a barrister in the capacity of a barrister.[22] Barristers were paid because the instructing solicitor was personally liable, whether or not the barrister's fee was received from the client.[23]

45 Whilst the law relating to the solicitor's obligation to meet the fees of counsel developed at a time when there was no enforceable contract between solicitors or clients and counsel and, in consequence, payment was enforced as a matter of honour, the ethical obligation in solicitors has not altered even though counsel may now sue an instructor for breach of the retainer.

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18 *Halsbury's Laws of England*, Fifth Edition, 2020, Vol. 66 Legal Professionals, p 289, [877]. The relevant authorities are helpfully reviewed by Lockhart J in *Re Sharp; Ex Parte Donnelly* (1998) 80 FCR 536. Brereton J also reviewed them in *Keesing v Adams* [2010] NSWSC 336, [14]-[17].

19 *Thornhill v Evans* (1742) 2 Atk 332; 26 ER 601.

20 *Swinfin v Lord Chelmsford* (1860) 5 H&N 890; 157 ER 1436, 1448 (Pollock CB).

21 *Kennedy v Broun* (1863) 13 CBNS 677, 727; 143 ER 268, 287 (Erle CJ).

22 *Mostyn v Mostyn* (1870) 5 Ch App 457.

23 *Halsbury's Laws of England*, Fifth Edition, 2020, Vol. 66 Legal Professionals, p 289, [877].

46 In South Australia, the Act has been amended to make it clear that the obligation to meet counsel fees can now be enforced as a debt.[24] Schedule 3 to the Act, which operates by virtue of s 41 of the Act, came into effect on 1 July 2014. Clause 21 of Part 4 of Schedule 3 provides that legal costs, including barrister's fees, are recoverable as a debt from a "law practice" pursuant to a costs agreement made with a barrister in the particular circumstances and manner specified.[25]

47 The breach of the obligation in a solicitor to pay counsel has long been regarded as comprising what is now described as professional misconduct.[26] As Vice President Judge Hampel explained in *Victorian Legal Services Commissioner* v *Mehri*:[27]

> Barristers are entitled to expect, when retained by a solicitor, that they can trust they will be paid for the services they are retained to provide, and paid in accordance with the terms of the retainer, not at the whim of the solicitor. They should be able to trust that a solicitor will use the moneys received from the client for their fees to pay them, not to pay other expenses, for their own benefit.

48 Any failure by a solicitor to pay counsel in full and on time in accordance with a retainer agreed between the solicitor and counsel, absent a genuine dispute or a negotiated payment plan, represents professional misconduct under s 69 of the Act. In particular, and as has been said many times, any failure by a solicitor to pay counsel merely because the client has not paid the solicitor amounts to professional misconduct. It has also consistently been held that a solicitor commits professional misconduct by paying his or her own fees in lieu of counsel's fees.[28] In *Legal Practitioners Conduct Board v Wharff*, the Full Court struck off a solicitor, *inter alia*, for failing to pay a barrister's fees. The Court said:[29]

> A solicitor who engages a barrister or solicitor agent undertakes a personal liability, either in honour or in contract as the case may be, to pay the barrister's or agent's fees, unless otherwise agreed.[30] Where a legal practitioner undertakes such a personal liability, it is

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[24] *Legal Practitioner's Act 1981* (SA), Schedule 3 – Costs disclosure and adjudication, Part 5, sub-cls 24(1)(c) (and following) and 29(6). Clause 1 defines a barrister as a legal practitioner who practises the profession of the law solely as a barrister. See also *Victorian Legal Services Commissioner* v *Mehri* [2021] VCAT 1246, [45] (Vice President Judge Hampel).

[25] Clause 24 of Schedule 3 to the Act stipulates that a costs agreement may be made between, *inter alia*, a "law practice and another law practice that retained that law practice on behalf of a client". That includes a costs agreement between a barrister and a law firm.

[26] *Rhodes v Fielder, Jones and Harrison* [1919] All ER 846, 847; *Carver v NSW Legal Profession Disciplinary Tribunal* (1991) 7 LPDR 8, 12; *Re Robb & Anor* (1996) 134 FLR 294, 310.

[27] *Victorian Legal Services Commissioner* v *Mehri* [2021] VCAT 1246, [45].

[28] *Council of the Law Society of New South Wales v Xenos* [2012] NSWADT 283; *Law Society of New South Wales v Davidson* [2007] NSWADT 264; *Law Society of New South Wales v McCarthy* [2003] NSWADT 198.

[29] *Legal Practitioners Conduct Board v Wharff* [2012] SASCFC 116, [18]. See also *Legal Practitioners Conduct Board v Trueman* (2003) 225 LSJS 503; [2003] SASC 58.

[30] *Rhodes v Fielder, Jones and Harrison* [1919] All ER 846, 847 (Lush J, with whom Sanke J agreed); *Re Robb & Anor* (1996) 134 FLR 294, 310 (Myles CJ, Gallop and Higgins JJ).

> unethical to ignore his or her obligation, and hence a wilful or persistent refusal or failure to pay fees can amount to unprofessional conduct.[31]

49 The failure to pay counsel when a client has provided funds for that explicit purpose is particularly egregious. In *Re Robb & Anor*, the Full Court of the Supreme Court of the Australian Capital Territory said:[32]

> The point is that the delay in paying counsel to be attributed to the solicitors in the present case stems from their assumption that moneys in their office account, received on trust for the client and transferred to the office account for the very purpose of paying counsel, were not affected by their fiduciary duties to the client and were their moneys to pay counsel fees when they chose and that any delay was simply a matter between counsel and themselves.
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> The assumption was totally unjustified. On the contrary, every day of delay in paying counsel from the time of transferring the moneys from the trust account to the office account, was a day in which the solicitors were in breach of their fiduciary duty to the client.

50 The proper conclusion where a client has provided funds on account of counsel's retainer, and the solicitor has paid those funds into the firm account or to others and not counsel, is that the solicitor has misappropriated trust funds. Misconduct of that kind represents a very serious failure to adhere to the high standards expected of legal practitioners.

51 Whilst it may be accepted that a solicitor's straitened financial circumstances may explain a failure to pay counsel, it does not excuse the professional misconduct though it may be relevant to the appropriate disciplinary sanction. The same may be said of a solicitor's delayed payment or part payment after the fees of counsel have fallen due, absent a genuine dispute or a negotiated payment plan.

52 In this case, the misconduct of the practitioner in connection with the retainers with Ms Bergin, Mr Murphy and Mr Bullock is particularly egregious. The misappropriation of trust funds which were agreed to be the source for the payment of counsel is inexcusable. Whilst, standing alone, the practitioner's conduct concerning Ms Di Girolamo and Mr Jacobi might be regarded as less serious, these failings were not isolated. Far from explaining his financial circumstances with candour to counsel in connection with these last two matters, the practitioner appears to have cynically exploited the willingness of counsel to assist him with his own difficulties.

53 Indeed, it is when a legal practitioner is experiencing personal difficulties, including financial difficulties, that the need to adhere to the high ethical standards expected of professional lawyers becomes particularly acute.

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[31] *Rhodes v Fielder, Jones and Harrisons* [1919] All ER 846, 847 (Lush J, with whom Sanke J agreed); *Law Society of New South Wales v McCarthy* [2002] NSWADT 58, [46] (Malloy, Robinson QC and Kirk); *Law Society of New South Wales v Graham* [2007] NSWADT 67, [29] (Karpin ADCJ, Pheils and Fitzgerald).

[32] *Re Robb & Anor* (1996) 134 FLR 294, 310 (Miles CJ, Gallop and Higgins JJ).

54 Whilst the practitioner's conduct occurred some years ago, there is no evidence before this Court to suggest that there has been any attempt to make reparation or to otherwise explain his misconduct in a satisfactory manner.

55 All in all, taken as a whole, the practitioner's conduct demonstrates a fundamental inability to adhere to the high standards expected of legal practitioners when dealing with counsel and when entrusted with client funds. Though, in a sense, the sums involved are not particularly large, that naturally cuts both ways. This course of conduct, of itself, suggests that it would be appropriate to proceed to strike-off.

Action No. 6 of 2020

56 This action concerns the practitioner's conduct concerning the affairs of a client who had instructed Mr Steven Clarke at a time where he and the practitioner practised together through an incorporated legal practice called Juris Prudence II Pty Ltd, which operated the Clark Radin Lawyers Trust Account.[33] The client had instructed Mr Clarke concerning a claim for damages for personal injury sustained in a motor accident as well as in connection with a dispute over a deceased estate.

57 Mr Clark settled the motor accident claim in early 2011 for $48,000 inclusive of interest, costs and disbursements. A little later in 2011, Mr Clark settled the estate matter. The proceeds of settlement for the motor accident claim were received on 24 March 2011. Those proceeds were banked into trust and immediately credited to the firm's ledger concerning the motor accident matter. The following day Mr Clark appropriated the sum of $18,465.06 on account of his costs for the motor accident claim. A few days after that, Mr Clark appropriated the further sum of $25,000 for costs incurred in connection with the estate matter, paying them from trust into the firm's account without the explicit authority of the client to do so.

58 The client made a complaint to the Law Society. After an inspection of the firm's trust account, on 8 August 2011 the Law Society directed Mr Clark and the practitioner to restore the $25,000 taken from trust and allocate it to the client's motor accident trust ledger. The Law Society specified that this should be done by 19 August 2011, at the latest. Despite these directions, Mr Clark and the practitioner did not repay any money until 31 August 2011 and, even then, only an amount of $18,488 was repaid.

59 There are three counts. The first count concerns a letter dated 18 August 2011 signed and sent by the practitioner to the Professional Standards section of the Law Society which was false and misleading as to whether repayment had been made. As for count 2, it was essentially alleged that this conduct was misleading rather than false and misleading. The findings made about these matters were to the following effect.

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[33] The Commissioner obtained an extension of time in order to pursue this action.

60 Soon after the client complained to the Law Society, Clark Radin Lawyers ceased operations on 10 June 2011. Mr Clark and the practitioner opened separate practices from the same offices trading as "Clark Lawyers" and "Radin Legal", respectively.

61 An inspection of Clark Radin Lawyers' trust account records was conducted by Law Society staff on 7 and 28 July 2011. During that month, Mr Clark instructed the practitioner to represent him when dealing with the client and the Law Society on these issues. The practitioner agreed to do so.

62 On 8 August 2011, the Director of Professional Standards at the Law Society wrote to Mr Clark and the practitioner directing that the sum of $25,000 be reinstated to the client's motor accident trust account ledger "as a matter of urgency and in any event by 19 August 2011 at the latest". It was in response to this letter that the practitioner wrote to the Director, signing the letter on his own account as well as on behalf of Mr Clark. Relevantly, the letter included the following:

> We attach herewith documentary evidence of a reinstatement made into the MVA account of [the client] as required by you … we regret to advise that an amount of only $23,315.14 has been reinstated to date.

63 The "documentary evidence" referred to in the practitioner's letter comprised a photocopy of the trust account ledger to which had been added handwriting as follows:

> Credit Balance
>
> 19/8/2011 Reinstatement of Trust Funds from [the practitioner and Mr Clark] as per Law Society letter dated 8/8/2011

64 Beneath this entry appeared the sum of $23,315.14 together with another entry suggesting that $20,000 had been repaid.

65 The bank statements of the Clark Radin Trust Account disclosed that no funds had been transferred by 18 August 2011.

66 At no stage did the practitioner ever correct the false statement conveyed by his letter dated 18 August 2011.

67 As for count 3, soon after the letter dated 18 August 2011, a Trust Account Regulatory Officer from the Law Society spoke with the practitioner on 29 August 2011. In the course of that conversation the practitioner misled the trust account officer by making a false statement.

68 As mentioned, the trust account ledger suggested that a sum of $20,000 had already been returned. This entry was the subject of enquiry. The trust account officer rang the practitioner on the morning of 29 August 2011. The practitioner returned the call late that day. The officer discussed the urgent need to reinstate the monies owing to the client's trust account ledger. She asked the practitioner

whether he had deposited funds or whether the deposit disclosed in the letter dated 18 August 2011 was merely a credit entry.

69 The practitioner told the trust account officer that he had written to the client on 18 August 2011 to advise of the direction from the Law Society when, in fact, the letter told the client that a sum of $23,315.14 had been reinstated to the trust account and was "now payable … within 5 working days".

70 The practitioner told the officer that the funds had actually been repaid. The officer's contemporaneous note of the conversation was to the following effect:

> I asked whether the $20,000 had been actually deposited into trust account, not just credited to [the client's] ledger account, and I asked him to provide me with a copy of the bank statement confirming the same. He confirmed that the funds had been deposited into the trust account …

71 This statement was false.

72 The Tribunal observed that the practitioner had never made any written response to these allegations. Nonetheless, during the hearing he agreed with what was alleged but maintained that it was the responsibility of Mr Clark to address the client's trust monies. The practitioner told the Tribunal that he was not suggesting that Mr Clark had done anything wrong because advice had been received permitting trust transfers to be made without a specific authority. A general form of authority was sufficient.

73 In addition, the practitioner gave evidence by which he attempted to explain why only $18,488 had been reinstated to the client's trust account for the estate matter by 1 September 2011. He referred to difficulties with the National Australia Bank which was exerting pressure because of the poor financial performance of the practice. The practitioner also referred to the Accounts Manager leaving and his best friend and financial adviser coming in to assist as the new Accounts Manager. Before the death of his best friend and financial adviser, the practitioner said that the new Accounts Manager made a number of mistakes including mismanaging the process of reimbursement.

74 Despite this evidence, under questioning from the Tribunal, the practitioner conceded that there was never the money available for the new Accounts Manager to satisfy any instruction he may have given to transfer $25,000. The Tribunal regarded the practitioner's evidence as revealing a lack of insight into his conduct and an incapacity to acknowledge responsibility for his own actions.

75 The Tribunal recorded that the practitioner's evidence then changed. The practitioner suggested that the new Accounts Manager had failed to communicate that there were insufficient funds to permit a transfer of $25,000. Nonetheless, here again the practitioner conceded that it was his obligation to check whether monies

were available before any transfer was made. As the Tribunal recorded,[34] the practitioner made the reluctant concession that the failure was his because he did not check what was happening to see that the direction of the Law Society had been complied with. He accepted that his assertions to the Law Society and to the client were "clearly misleading and untrue" but that there was "no deliberateness nor ill intent".[35]

76 So far as the discussion with the trust account officer was concerned, again the practitioner conceded that he had misled but that this was not deliberate. The Tribunal found that the "inescapable conclusion" was that the practitioner spoke without checking and in "complete disregard" for the veracity of what he was saying.[36]

77 The Tribunal was satisfied that the practitioner knew that no money had been reinstated by the time he wrote the letter to the Law Society on 18 August 2011. It regarded it as "particularly concerning" that the practitioner attempted to distance himself from the transaction by ascribing responsibility to his co-director, Mr Clark, as well as to the new Accounts Manager, now deceased.[37] The Tribunal made these findings on the balance of probabilities bearing in mind the seriousness of the allegations made.[38]

78 Notwithstanding its finding that the practitioner knew that money had not been reinstated, the Tribunal appears to have ultimately accepted that the practitioner was "recklessly careless".[39] This, the Tribunal found, nonetheless amounted to "wilful misconduct".[40]

79 The Tribunal found that as a principal and director of a small incorporated legal practice, on notice that there may be a problem with the trust account, the practitioner had a duty to actively examine the account and supervise the conduct of his fellow principal and new Accounts Manager. The Tribunal concluded that the practitioner's conduct in connection with the letter dated 18 August 2011 amounted to unprofessional conduct because it involved a substantial failure to

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34 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [83].

35 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [83].

36 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [87].

37 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [90].

38 Relying on *Briginshaw v Briginshaw* (1938) 60 CLR 338.

39 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [95].

40 The Tribunal relied on *Re Mayes and Legal Practitioners Act* [1974] 1 NSWLR 19. *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [95].

meet the standard of conduct observed by competent legal practitioners of good repute.[41]

80 As for the conversation with the Law Society's trust account officer, the Tribunal likewise concluded that his misleading conduct amounted to unprofessional conduct, compounded by the earlier conduct in sending the correspondence a few days before.

81 As may be obvious, these findings were expressed in terms which were consistent with the form of the Act at the time of the conduct.

Action No. 2 of 2021

82 This action concerned the practitioner's failure to meet his taxation and superannuation obligations.

83 This part of the case concerned the practitioner's practice on his own account as the sole director and principal of Radin Legal Pty Ltd (**Radin Legal**) from offices in Gawler. There the practitioner employed solicitors and administrative staff. The solicitors were employed by Radin Legal Pty Ltd, whereas the administrative staff were employed by Radtra Pty Ltd, the trustee of a service trust engaged pursuant to a service agreement between Radin Legal Pty Ltd and Radtra Pty Ltd dated 1 July 2011.

84 Whilst the practitioner's wife was the sole director of Radtra Pty Ltd, the practitioner, as shadow director, operated that company.

85 As earlier mentioned, these practice companies were placed in liquidation by order of the Federal Court on 19 September 2017, whereupon Mr Tim Mableson and Mr Martin Lewis, formerly of Ferrier Hodgson but later of KPMG, were appointed joint liquidators.

86 Count 1 concerns the practitioner's failure to fulfil his financial and professional obligations by failing to ensure that both companies paid the amounts required under the *Superannuation Guarantee (Administration) Act 1992* in respect of its employees in the order of $50,000.

87 The Australian Taxation Office filed a proof of debt in the liquidation of Radin Legal Pty Ltd for $16,743.01 concerning its employees for unpaid Superannuation Guarantee Charge.

88 The Australian Taxation Office filed a proof of debt in the liquidation of Radtra Pty Ltd for $33,027.83 concerning its employees for unpaid Superannuation Guarantee Charge.

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[41] *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [97].

89 Count 2 concerns the practitioner's failure to fulfil his financial and professional obligations to ensure that both companies paid the amounts required in respect of Pay-As-You-Go (**PAYG**) taxation as well as Goods and Service Tax (**GST**) from time to time in the order of $325,000. These obligations arose under the *Taxation Administration Act 1953* (Cth), as amended by *A New Tax System (Pay As You Go) Act 1999* (Cth), and the *A New Tax System (Goods and Services Tax Imposition - General) Act 1999* (Cth).

90 The Australian Taxation Office filed a proof of debt in the liquidation of Radin Legal Pty Ltd for outstanding PAYG and GST taxes totalling $142,211.04.

91 So far as Radtra Pty Ltd was concerned, the Australian Taxation Office filed a proof of debt for outstanding PAYG and GST taxes totalling $185,147.20.

92 Count 3 concerns the submission by the practitioner to the Law Society of a statement pursuant to Reg 48 of the *Legal Practitioners Regulations 2014* in late September 2016. The Tribunal found that the practitioner knowingly included information that was false and misleading in a material particular, contrary to Reg 48(5).

93 That statement concerned the receipt or holding of trust money for the period 1 July 2015 to 30 June 2016. The statement which was submitted concerned Radin Legal Pty Ltd. The statement was signed as "complete and correct".

94 The relevant information was contained in Part B at section 18 of the form, "Assessing Risks to the Law Practice", which included nine questions. Question four asked:

> Are taxes and superannuation up to date? (if not provided details including amount(s) owing, relative periods due and any payment arrangement(s))

95 Adjacent to this question appeared two boxes marked "Yes" and "No". The box marked "Yes" had an "X" inserted in it. After this question and answer appeared the following:

> Name of certifying principal: Atanas Michael Radin
>
> I certify that to the best of my knowledge and belief:
>
> (a) the details provided in Part B of the Statement are complete and correct;
>
> …
>
> Signed: [Practitioner's signature]

96 The evidence before the Tribunal demonstrated that, prior to completing this statement, the accounts administrator employed by the practitioner sent an email on Monday, 26 September 2016 with the subject heading "Trust Audit Report". In that email, the accounts administrator wrote:

> Please provide your response to the following questions TODAY so I can finalise the report tomorrow when I am in.
>
> "4. Are taxes and superannuation up to date?"
>
> They have requested details – MICHAEL, DO YOU WANT ME TO PROVIDE DETAILS (ie [taxation] $123,216.99 & [superannuation] $11,898.82) OR JUST TICK "YES"?

97 In response to this email, the practitioner circled "Yes" with a red pen on a hard copy of the email. After writing several other comments onto the email, the email was handed back to the Accounts Administrator.

98 In his evidence the practitioner did not deny any of the underlying facts relevant to these three counts. In relation to the first two counts, the practitioner conceded the existence of significant financial difficulties and cashflow problems over a substantial period. This was described as a "persistently stressed financial situation".[42]

99 The practitioner also conceded that "primacy" was given to the payment of staff wages and important operational expenses rather than taxation obligations.[43] A number of payment arrangements had been entered into with the Australian Taxation Office. The practitioner maintained that the Australian Taxation Office had been "extremely accommodating" over a number of years until 2016.[44] The practitioner took the position that the existence of payment arrangements meant that he in some way had not committed the conduct the subject of these counts. [45]

100 Considerable attention before the Tribunal was devoted to the practitioner's disclosure to staff of the financial difficulties encountered by the practice. This included evidence from a solicitor who had been led to understand that there would be delays in making the requisite payments, including payments in respect of superannuation.

101 Nonetheless, the Tribunal found that the first two counts were proved given the practitioner's severe financial and cashflow difficulties. The practitioner had given priority to meeting certain creditors so as to keep the practice afloat, and to provide an opportunity to trade out of those difficulties, which nonetheless amounted to professional misconduct.[46] The Tribunal found that the practitioner's

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42 *The Legal Practitioners Act 1981 (SA)v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [111].
43 *The Legal Practitioners Act 1981 (SA)v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [111].
44 *The Legal Practitioners Act 1981 (SA)v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [113].
45 *The Legal Practitioners Act 1981 (SA)v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [114].
46 *Council of the Law Society New South Wales v Rogers* [2021] NSWCATOD 124, [33], [44].

failings and guilt were "complete" regardless of the accommodating attitude of the Australian Taxation Office for a time.[47]

102 The Tribunal acknowledged that, in some instances, what might otherwise be professional misconduct may be ameliorated where a practitioner has sought the agreement of staff to trade out of financial difficulties, particularly where the practitioner offers and staff accept the practitioner's personal guarantee regarding eventual payment.[48] The Tribunal was prepared to find that the practitioner's conduct went some way towards informing staff about the non-payment of their superannuation entitlements but:[49]

> The evidence does not, however, go so far as to allow the Tribunal to conclude that either [the employee] in particular or the staff in general knew with any significant degree of specificity the full extent of the practice's financial difficulties or the number and amount of superannuation payments not made. Indeed, accepting [the employee's] evidence, he discovered the true and accurate state of his entitlements position only a few months before his testimony to the Tribunal … There is no evidence before the Tribunal that the practitioner regularly advised the employees that a given superannuation payment, of given amount, would not be paid as due. Nor was there suggestion that the Practitioner promised staff he would meet any outstanding entitlements personally.

103 The Tribunal found that the practitioner's disclosure was insufficient to ameliorate his misconduct.

104 Moreover, whilst some disclosure was made concerning superannuation (count 1) that had no bearing on the practitioner's persistent failure to meet PAYG and GST obligations (count 2). The Tribunal found, therefore, that the practitioner had engaged in professional misconduct in respect of both counts because his failure to meet these liabilities over an extended period involved a substantial or consistent failure to maintain reasonable standards of competence and diligence.

105 So far as count 3 was concerned, in the course of his evidence the practitioner conceded that his answer was not correct and, under cross-examination, he admitted that the correct answer should have been "No". The practitioner, however, relied upon the existence of payment arrangements with the Australian Taxation Office, with which he expected to comply.

106 Although the practitioner asserted that there was no "wilful deliberateness" in connection with his conduct, the Tribunal found that the practitioner's statement was false.[50] Indeed, having regard to the requirement to specify whether any arrangements had been entered into and the practitioner's failure to truthfully

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47 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [135].

48 *Law Society New South Wales v Koffel* [2010] NSWADT 171.

49 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [138].

50 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [155], [156].

answer that part of the question as well, the practitioner's conduct was regarded as a serious departure from his professional and statutory obligations:[51]

> Accordingly, the practitioner's conduct as considered above manifests a serious departure from his professional and statutory obligations such that the practitioner should be considered to be not a fit and proper person to practise the profession of the law. As such, the Practitioner's conduct constitutes professional misconduct.

107 As mentioned, the Tribunal reconvened to hear submissions on penalty and later delivered reasons regarding penalty and costs.[52] So far as costs were concerned, the Tribunal relied, amongst others, on *DK v AE* when awarding a lump sum to the Commissioner.[53]

Principles relating to disciplinary action

108 The relevant principles are not in doubt. Disciplinary powers are exercised by this Court so as to protect the public rather than punish the practitioner.[54] The protection of the public includes deterring other practitioners from engaging in similar misconduct.[55] By deterring misconduct, the Court maintains professional standards as well as public confidence in the legal profession.[56]

109 It is necessary to protect the public from legal practitioners who lack personal integrity and who are indifferent to rudimentary professional standards.[57] It follows that because the Court is acting in the public interest and not with a view to punishment, the personal circumstances of and any extenuating circumstances relating to a practitioner are of less importance than if punishment was the only objective.[58]

110 The ultimate question is whether the practitioner is fit to remain a member of the legal profession.[59]

111 As explained earlier, whilst the practitioner's straitened financial circumstances may, to an extent, explain aspects of his unprofessional conduct or professional misconduct, they do not excuse it. Indeed, the practitioner's failure to ensure the payment of counsel at a time when funds were received into trust from which counsel were to be paid is particularly egregious. The Tribunal was amply

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51 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 5 January 2023), [161].
52 *The Legal Practitioners Act 1981 (SA) v Radin* (Legal Practitioners Disciplinary Tribunal, Prof G Davis and M Pyke KC, 18 July 2023)
53 *DK v AE* [2020] SASC 28, [17] (Nicholson J).
54 *Law Society of South Australia v Murphy* [1999] SASC 83, [30] (Doyle CJ).
55 *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, [471].
56 *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43, [9].
57 *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43, [8].
58 *Law Society of South Australia v Murphy* [1999] SASC 83, [30] (Doyle CJ); *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43, [7].
59 *Council of the Law Society of New South Wales v Jafari* [2020] NSWCA 53, [31].

justified in concluding that the practitioner deliberately preferred his own interests to those of counsel when misappropriating trust funds.

112 The same may be said about the practitioner's failure to act with transparency and candour in respect of the reimbursement of the motor accident claim trust account monies. There is simply with no good excuse for the practitioner's misconduct, especially when misleading the trust account officer.

113 Moreover, the practitioner's failure to meet his taxation obligations over an extended period likewise represents a stark failure to adhere to professional and regulatory obligations. In that connection the completion of a false statement concerning his taxation and superannuation liabilities demonstrates a serious instance of the practitioner's inability to comply with important and serious professional obligations.[60]

The determination of the application

114 It is necessary for this Court to reflect on whether the practitioner is presently a fit and proper person notwithstanding that he no longer holds a practising certificate and, it would appear, has not practised for some time.

115 This Court's consideration must be made against the recognition that, for so long as his name remains on the roll, the practitioner is effectively being held out as fit to practise the profession of the law.[61]

116 It is revealing that the practitioner has made little or no attempt before this Court to explain his conduct. The practitioner failed on two occasions to comply with directions given by the Court. On 3 November 2023 Bleby JA made orders that were not complied with by the practitioner. On 4 March 2024 the practitioner was given an adjournment because he said that he had been overwhelmed by the death of his step-son and his wife's serious illness. He was required to file his outline by 18 March 2024. The practitioner was given liberty to apply if he wished to adduce medical evidence in support of any further adjournment.

117 No outline was received. No application for a further adjournment was made and no medical evidence was adduced. The practitioner has provided no explanation for his failure to comply with orders of this Court, nor for his failure to appear.

118 This Court can have no confidence that the practitioner understands the full import of his transgressions. Indeed, no attempt has been made to go behind his earlier evidence by which, in significant respects, the practitioner attempted to shift the blame for his misconduct onto others.

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60 *Council of the Law Society of New South Wales v Wilson* [2015] NSWCATOD 83.

61 *Legal Profession Conduct Commissioner v Kaminski* [2021] SASCFC 39, [12] (Livesey P, Bleby and David JJA).

119 It must be remembered that the Tribunal's findings were made about conduct which had been engaged in by the practitioner between 2011 and 2017 after many years in practice. The practitioner was neither inexperienced nor new to the legal profession at the time of his misconduct.

120 That these transgressions occurred during a time of very difficult financial circumstances might explain but does not excuse serious professional misconduct. It is necessary for legal practitioners to adhere to the high standards expected of them notwithstanding their own difficulties.[62] Whether a legal practitioner manages trust account monies appropriately does not depend on whether the practitioner is experiencing personal or financial stress. A practitioner's adherence to the requirements of ethical conduct cannot be made to depend upon whether the practitioner is personally in financial difficulty or under other kinds of personal stress.

121 In *Legal Profession Conduct Commissioner v Moore*, this Court considered the "serious and significant mental and physical health issues" of the practitioner, noting that [63]:

> Whilst these provided some explanation for the practitioner's misconduct, they did not ameliorate the seriousness of the practitioner's failure to discharge his duties as a legal practitioner.

122 In that case, the Tribunal had the benefit of medical evidence substantiating the practitioner's mental and physical conditions.[64] The practitioner has provided almost no medical evidence regarding his own mental and physical conditions.

123 When the practitioner's misconduct is viewed as a whole, it represents such a serious departure from the standards reasonably to be expected from members of the legal profession over such a long period that the Court cannot be confident that the practitioner can ever fulfil the essential obligations associated with legal practice.

Conclusion

124 Having regard to the whole of the circumstances before this Court, it is clear that no order short of striking-off is appropriate.

125 For these reasons, the Court made an order made striking the practitioner's name from the roll. The practitioner was also ordered to pay the Commissioner's costs.

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62 *Legal Profession Conduct Commissioner v Kassapis* [2015] SASCFC 37, [37] (Gray, Sulan and Nicholson JJ); *Legal Practitioners Conduct Board v Kerin* [2006] SASC 393, [44] (White J, with whom Duggan J agreed).

63 *Legal Profession Conduct Commissioner v Moore* [2022] SASCFC 2, [35] (Livesey P, Doyle and David JJA).

64 *Legal Profession Conduct Commissioner v Moore* [2022] SASCFC 2, [16]-[19] (Livesey P, Doyle and David JJA).