IN THE MATTER OF:

**THE LEGAL PRACTITIONERS ACT 1981**

ACTION No. 10 of 2017

and

IN THE MATTER OF:

**DAVID FULLERTON CLELAND**

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**DETERMINATION AS TO PENALTY AND COSTS**

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The Tribunal received written submissions from the Commissioner and the Practitioner addressing both the issue of disciplinary action and the issue of costs.

In addition to the written submissions, submissions were made orally on behalf of the Commissioner and the practitioner on 22 July 2020. Arising out of those oral submissions, written supplementary submissions were received from the Commissioner and the practitioner on the issue of costs, in particular matters relating to the interpretation of Section 85(1a) of the Legal Practitioners Act ("the Act").

We will address the issue of disciplinary action first.

**DISCIPLINARY ACTION**

By letter to the practitioner dated 28 July 2017 (the July 2017 proposal), the Commissioner (BD 182) indicated that in his opinion the practitioner's conduct, as identified in the letter, amounted to professional misconduct in accordance with the definition in s. 69(a) of the Act.

The Commissioner further advised that it was his view that the practitioner's conduct could be adequately dealt with under s. 77J(2) of the Act (BD 184), noting however that the practitioner's conduct was sufficiently serious that it was towards the limit of the type of conduct with which he could deal under that section.

The Commissioner proposed the following action:

- He would reprimand the practitioner.
- He would order the practitioner to pay a fine of $20,000.
- He would make an order suspending the practitioner's practising certificate for a period of 3 months.

The Commissioner sought an intimation from the practitioner as to whether he would consent to the Commissioner taking that disciplinary action.

The Commissioner did not provide any indication in the July 2017 proposal of the reasoning which lead to his conclusion that he considered that the practitioner's conduct was such that he could deal with it under s.77J(2).

In any event, by letter dated 7 August 2017 (BD 201), the practitioner did not consent to the taking of the disciplinary action proposed. Charges were subsequently laid in the Tribunal.

The July 2017 proposal did not include any conditions to be placed on the practitioner's practising certificate.

In the written submissions of the Commissioner it was submitted that there were a number of matters given in evidence by the practitioner about which the Commissioner was not aware at the time of his 2017 proposal:

- The practitioner included his wife Valerie as a substitute beneficiary in the October 2014 Will without instructions (Reasons p. 38).

- The practitioner spent 10-15 minutes explaining to Ms Cleland, in response to her chastisement of him for this inclusion, why it was appropriate to include Valerie as a substitute beneficiary (Reasons p. 38).

- The practitioner when preparing the two Wills was not aware of the conduct rules relating to testamentary capacity and conflict of interest and the Law Society's Guidelines about testamentary capacity (Reasons p. 32).

- After the complaint was published the practitioner gave self-serving advice to Ms Cleland that she should have his colleague, Sarah Southern, prepare a new Will and did not advise the Commissioner of this advice during an investigation of the complaint (Reasons p. 29-30).

The Commissioner invited the Tribunal to consider whether it should impose disciplinary action greater than the July 2017 proposal but within its powers under s.82(6) of the Act or, alternatively, whether it should recommend pursuant to s. 82(6)(v) of the Act that disciplinary proceedings should be issued against the practitioner in the Supreme Court.

The Commissioner further proposed that a condition be placed upon the practitioner's practising certificate preventing him from taking instructions in relation to the preparation of wills either indefinitely if the practitioner consented, or for 12 months if the practitioner did not consent.

In his oral submissions, Mr Keen, Counsel for the Commissioner, made it clear that the Commissioner's position was that the practitioner's conduct did not warrant a strike off and "that is evident in many ways from the 77J proposal".

Counsel went on to submit that the conduct which had been found by the Tribunal does call into question the practitioner's fitness to practise but because of other circumstances, a strike off was not warranted.

Counsel for the Commissioner did not elaborate upon what the other circumstances were to which he was referring.

At p. 8 of the Transcript in an exchange with Member Kennett, Member Kennett questioned, if the Commissioner took the view in light of the findings that this is professional misconduct at the higher end, are you able to explain why it is that the Commissioner is of the view that this is not a matter that might warrant strike off.

Mr Keen – *"I think maybe it is because there's no other findings of misconduct in the history, that's been his view. It's hard to sort of ex temporise my employer's ..."*

Mr Kennett – *"They're your instructions, is the effect of what you are telling me?"*

Mr Keen - *"Yes, they're my instructions."*

*"..... we say it is well open to the Tribunal to refer this matter up if it deemed appropriate."*

**PRACTITIONER'S SUBMISSIONS**

On behalf of the practitioner Mr Ross-Smith submitted that the professional misconduct was within the confined scope of will preparation.

Counsel further submitted that the appropriate disciplinary action was a reprimand and an indefinite condition on his practising certificate preventing him from taking instructions for preparing wills or from preparing a will and that he be fined.

Counsel for the practitioner submitted that there were no previous complaints of any form about either unprofessional conduct or professional misconduct with respect to the practitioner.

In the course of his oral submissions (p. 9 Transcript), Counsel for the practitioner categorised the practitioner's conduct as mishaps regarding the preparation of two wills confined to an area of practice which was outside the practitioner's usual range of experience.

Mr Ross-Smith conceded however that the seriousness was not about doing the will making badly, but rather in the practitioner not recognising his responsibilities in his position as a fiduciary when he is making the will which, at least in testamentary cases, is called a conflict, as the Tribunal has characterised it. Counsel for the practitioner submitted that those things are acknowledged and recognised.

Mr Ross Smith submitted however that the correct message to the public is to restrain the practitioner from drawing another will as a lawyer for the rest of his practising life, that is a better connect to what the practitioner got wrong than to prevent him from practising at all in any practice area. His practice area has been completely unconnected to the activity of drawing a will.

It was submitted that there would be a disconnect between prohibiting the practitioner from practising at all for any period of time, 3 months or otherwise, and what he has got so wrong, whereas to prohibit him from practising in effect, wills and testamentary law for the rest of his life, sends a strong message to the community.

At p. 13 of the Transcript, in response to a question from Member Kennett, counsel for the practitioner conceded that the practitioner accepted that his conduct in the circumstances could amount to something so serious that this Tribunal might want to refer it to the Supreme Court.

Counsel for the practitioner submitted however that the Tribunal should not take that path.

In answer to a question from the Presiding Member (Transcript p.14), Counsel for the practitioner acknowledged that the practitioner recognised that in respect of the making of the two wills his conduct was quite inappropriate.

## DETERMINATION

The Tribunal has the following powers (in summary) arising from its finding of Professional Misconduct:

s.82(6)(a) it (relevantly) may:

(i) reprimand the legal practitioner;

(ii) order the legal practitioner to pay a fine not exceeding $50,000;

(iii) impose conditions upon the legal practitioner's practising certificate

(a) In relation to the legal practitioner's practice not to operate for a period exceeding 12 months (save for the legal practitioner's consent);

(b) Require the legal practitioner to undertake a course of training.

(iv) suspend the legal practitioner's practising certificate for a period not exceeding 12 months; or

(v) recommend that disciplinary proceedings be commenced against the legal practitioner in the Supreme Court.

We do not propose to repeat all of our findings.

Our findings in summary were:

- The practitioner engaged in a course of conduct in relation to the execution of two Wills, one on 3 October 2014, the other on 21 December 2014.
- The conduct included making a will in circumstances where he: was related to the client who was elderly; derived substantial benefit himself; and rendered no advice to the client over the course of making the two wills.
- As part of that process the practitioner, without instructions and indeed in circumstances where he attempted to persuade his client to his view, included clauses in a will which had the effect of potentially benefiting his wife.
- Without any instructions to do so or rendering any advice, the practitioner at the time of the second will, removed the clause benefiting his wife without any advice to his client thereby creating a potential intestacy being the alleged evil he had purported to remedy.
- The practitioner made no notes, kept no records, and failed to advise his client to obtain independent legal advice prior to the preparation of the wills.
- The practitioner took no steps to assess the client's testamentary capacity.
- The practitioner was in a position of conflict

The Tribunal views the conduct of the practitioner extremely seriously.

The Tribunal accepts that the conduct of the practitioner, however it is viewed, is but one factor to be brought to account.

We agree with the submissions made on behalf of the Commissioner that the disciplinary powers of the Tribunal are to protect the public and not to punish a practitioner ***Law Society of South Australia v. Murphy (1999) 201 LSJS 456 at 461.***

We refer also to ***Legal Practitioners Conduct Board v. Kerin (2006) SASC 393.***

Gray J noted at para. 8 –

> *"The Court acts to protect the public and the administration of justice by preventing a person from acting as a legal practitioner, and by demonstrating that the person is, by reason of his or her conduct, not fit to remain a member of the profession. That plays an important part in the administration of justice and in which the public is entitled to place great trust."*

The object of protecting the public includes deterring the practitioner in question and other practitioners ***Law Society of New South Wales v. Foreman (1994) 34 NSWLR 408 at 471.***

By deterring similar misconduct, the Tribunal will maintain professional standards and assure public confidence in the profession ***Legal Practitioners Conduct Board v. Clisby (2012) SACFC 43 at para. 9.***

The public must be protected from legal practitioners who are ignorant of the basic rules of proper professional practice or indifferent to rudimentary professional requirements; ***(Clisby at para. 8)*** because the Tribunal acts in the public interest and not with a view to punishment, personal circumstances and extenuating circumstances are of less importance; ***Murphy at p461 para. 30*** and ***Clisby at para.7***.

Whilst the practitioner submitted references to the Tribunal, they were of a personal nature and did not relate to his conduct and practice as a legal practitioner.

The Tribunal views the practitioner's conduct very seriously and considers such conduct to fall within the upper range of professional misconduct.

We were referred to the decision of ***In re A SOLICITOR (1975) Q.B. 475.***

That was a matter in which a solicitor and his family benefited under client's wills. The client was not offered independent advice.

Whilst the facts are not in every respect similar to this matter, the practitioner in that matter had been struck off the Rolls by the Disciplinary Committee. That decision was upheld on appeal.

The Tribunal is not satisfied that the powers available to it in Sections 82(6)(i), (ii), (iii) and (iv) of the Act, given the findings we have made of the practitioner's conduct and taking into account the general principles to which we have referred, provide an appropriate range of penalty for the practitioner.

We recommend therefore pursuant to s. 82(6)(v) of the Act that disciplinary proceedings be commenced against the legal practitioner in the Supreme Court.

## COSTS

In the first written submissions received on behalf of the Commissioner, the Commissioner sought an order for costs on two bases. First, pursuant to s.85(1a) of the Act, there should be an order for costs in favour of the Commissioner because the practitioner had unreasonably rejected the s.77J(2) proposal.

In the alternative, the Commissioner sought costs pursuant to the general discretion pursuant to s. 85(1) of the Act.

In the first written submissions received on behalf of the practitioner, the practitioner conceded that as, presumably, the Commissioner succeeded on the charge, he was entitled to his costs party and party, pursuant to s. 85 of the Act to be taxed in the Supreme Court if not agreed.

The issue in dispute therefore is whether the Commissioner is entitled to costs pursuant to s. 85(1a) of the Act and if so, what is the nature of those costs.

In his first written submissions the practitioner submitted that there was no proper basis for the award of indemnity costs. He submitted that the Commissioner had not addressed or analysed the principles about the bases for awarding indemnity costs contained in cases such as ***Colgate Palmolive Co v Cussons Pty Ltd (1993)118 ALR 248.***

He submitted that the effect of the Commissioner's submissions was that merely because the Commissioner had succeeded in the proceedings, he should have his costs on an indemnity basis.

When the matter came on for hearing of oral submissions, it was determined that each of the parties should have leave to file supplementary submissions addressing the issue of costs pursuant to s.85(1a) of the Act.

In the course of oral submissions on 22 July (T.4) Counsel for the Commissioner submitted that there were two issues.

First there was a s. 77J proposal. There does not appear to be any contention about that.

The next issue was – has the practitioner unreasonably rejected that proposal?

Counsel for the Commissioner referred to paras. 14 and 15 of his first written submissions.

Those submissions were, in summary, during the investigation of disciplinary process, the practitioner did not concede that his conduct amounted even to unsatisfactory professional conduct and he did not and does not accept any wrongdoing on his part.

The Tribunal's findings have vindicated the Commissioner's view that the practitioner's conduct was professional misconduct at the higher end of the scale and that substantive disciplinary action was required in the public interest.

As to the issue of whether the rejection of the s.77J(2) proposal was unreasonable, it was submitted –

- The practitioner has not conceded any wrongdoing;
- It has caused time and expense of proceedings in the Tribunal;
- The Tribunal has vindicated the Commissioner's view that the practitioner's conduct amounted to professional misconduct;
- The disciplinary action to be imposed by the Tribunal should be equal to or greater than the s.77J proposal.

Counsel for the Commissioner in exchange with the Presiding Member agreed with the proposition that –

- first, the Tribunal has to determine what the penalty is;
- secondly, then determine whether s.85(1a) applies,

that is, whether the penalty imposed by the Tribunal is the same or similar to that outlined in the 2017 proposal by the Commissioner and whether at the stage of the proceedings when the 2017 proposal was put to the practitioner was it unreasonable for the practitioner to reject the proposal?

When an inquiry was made as to whether Counsel for the Commissioner proposed to make any submissions on the topics raised in the course of the exchange with the Presiding Member, Counsel for the Commissioner indicated "no they would not", the Tribunal would need to make those findings.

It was argued on behalf of the Commissioner in the course of the oral submissions, that to apply the principles in ***Colgate Palmolive supra*** would be to fall into error as there is a separate statutory provision which sets out the relevant principles.

Mr Keen also conceded in response to a proposition from the Presiding Member that the fact that you don't accept an offer, does not automatically result in an order that you must pay indemnity costs.

Mr Keen submitted however that when someone rejects an offer in a civil claim and you get less than that offer, well then, the Court will give the other party indemnity costs.

Mr Keen ultimately agreed with the proposition that s.85(1a) imparts the Tribunal with a discretion as to whether it will order indemnity costs.

It is a matter of argument whether in the circumstances of this matter " indemnity costs", should be ordered if the Tribunal finds or determines that the penalty it imposes is the same or more severe than was on offer.

In the supplementary submissions filed on behalf of the Commissioner, it was submitted that the Commissioner's application for indemnity costs is predicated on the Tribunal imposing a penalty on the practitioner that is equal to or greater than the s.77J proposal.

The Commissioner further referred to the preliminary view letters sent to the practitioner BD 148,161 and 172.

In the Commissioner's letter to the practitioner of 17 December 2015, the Commissioner referred to having obtained an opinion from Mr Martin Keith. The letter however outlined in some detail the evidentiary matters and legal principles

upon which the Commissioner relied including reference to the Australian Solicitors Conduct Rules and s.70 of the Act which provides that conduct capable of constituting unsatisfactory professional conduct or professional misconduct includes conduct consisting of a contravention of the Legal Profession Rules.

In the letter of 12 July 2016, the Commissioner identified two main concerns. They were –

1. Failure to properly record instructions including the practitioner's view as to Ms Cleland's capacity at the time. He referred in particular to the potential for a challenge to the will by previous legatees.
2. There was specific reference in that letter to Ms Cleland insisting that the practitioner prepare the 2014 wills however nothing was in writing.

The Commissioner then went on to identify the conflict of interest issues.

We will not in these Reasons repeat all of the matters in that letter; suffice to say it is a comprehensive letter which addresses and traverses all of the issues including responses to arguments made by the practitioner to the issues raised by the Commissioner

Again, we do not propose to reiterate all the matters raised in the letter of 8 September 2016 BD 172 save and except that the Commissioner again squarely put the

Commissioner's case and endeavoured to meet and address matters that had been raised by the practitioner.

Whilst other matters, as have been noted by the Commissioner, came to light during the course of the hearing, being additional matters, it is the view of the Tribunal that the Commissioner did in those prior written communications with the practitioner disclose in abundant detail the nature of the Commissioner's concerns and the issues that the Commissioner considered gave rise to the determination of professional misconduct.

The Commissioner in those communications sought to squarely address the practitioner's responses and rebuttals to his preliminary findings.

The Tribunal in its findings and determinations, has, as it was submitted on behalf of the Commissioner, vindicated the Commissioner's views as to the seriousness of the practitioner's conduct.

The Tribunal considers that in rejecting the Commissioner's s.77J proposal, the practitioner did so in circumstances where he was fully informed by the Commissioner of the relevant factual and legal bases upon which the Commissioner's then-view was founded.

The Commissioner's submissions for indemnity costs were predicated upon a penalty imposed by the Tribunal which is equal to or greater than that proposed by the Commissioner.

The practitioner's supplementary submissions did not address the issue of whether the practitioner unreasonably refused to accept the s.77J proposal.

The practitioner's submissions generally do not address in any meaningful way the issue of whether the practitioner was reasonable or unreasonable in refusing the 2017 proposal.

The practitioner's submissions fundamentally are to the effect that the Commissioner needs to do more than simply establish that the practitioner failed to accept a proposal which had an outcome more favourable to him than determined by the Tribunal.

The practitioner's submission as contained in his Supplementary Submissions, at [12], is that "the Tribunal does not have the power to award other than party and party costs".

Argument has been addressed by both the Commissioner and the practitioner as to the meaning of s.85.

There are two relevant provision :

- S.85(1) provides that the Tribunal may make such orders as to costs against any person on whose application and inquiry has been held, or against any legal practitioner or former legal practitioner whose conduct has been subject to inquiry, as the Tribunal considers just and reasonable.
- S. 85(1a) provides that if –
    - a. the Commissioner has laid a charge under s.82 alleging unsatisfactory professional conduct or professional misconduct on the part of a legal practitioner or former legal practitioner who has refused to consent to the exercise of a power by the Commissioner under s.77J in relation to the alleged unsatisfactory professional conduct or professional misconduct; and
    - b. the Tribunal finds the legal practitioner or former legal practitioner guilty of unsatisfactory professional conduct or professional misconduct and:
    - c. the Tribunal considers that the refusal of the legal practitioner or former legal practitioner to consent to the exercise of the power by the Commissioner was unreasonable, the Tribunal may order the legal practitioner or former legal practitioner to reimburse the Commissioner for costs incurred by the Commissioner in the conduct of the proceedings except to the extent that the legal practitioner or former legal practitioner shows them to have been unreasonably incurred.

The Commissioner therefore has two avenues available to him upon which to seek costs.

Section 85(1)

We do not understand the Commissioner or the practitioner to be in dispute that the costs envisaged by s.85(1) would be costs in accordance with the usual practice and interpretation i.e. party and party costs, although there would be discretion in the Court to make orders for indemnity costs in accordance with the principles in ***Colgate Palmolive.***

We were referred by the Commissioner to ***G E DAL PONTE "Law of Costs" 3rd Ed.*** with respect to the usual accepted general law concept of indemnity costs – the indemnity basis is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of an unreasonable amount or have been unreasonably incurred.

If s.85(1a) were simply to be interpreted as the Commissioner being entitled to costs on a party/party basis or on an indemnity basis applying the principles in ***Colgate Palmolive***, seemingly already encapsulated by s 85(1), it is difficult to see why s.85(1a) would be needed. The Tribunal does not accept as a sensible interpretation of s 85(1a) the practitioner's submission (Supplementary Submissions at [22]) that s 85(1a) essentially serves no purpose other than to identify one single instance empowering the Tribunal to award costs on a party and party basis without fettering

the general discretion of the Tribunal to award costs on a party and party basis by virtue of s 85(1).

Section 85(1a) is a specific legislative provision which enables the Commissioner to seek costs in certain prescribed circumstances.

Those circumstances relate to the exercise by the Commissioner of his powers pursuant to s. 77J and a practitioner's consequent response to that proposal.

Proceedings and inquiries made by the Commissioner pursuant to the provisions of the Act are neither civil nor criminal proceedings. The Commissioner's authority and jurisdiction is derived from the provisions of the Act.

The usual civil process of offer and acceptance of offer or declining to accept an offer are not relevant.

If s. 85(1a) is to have any efficacy, it must be in circumstances where the Act provides a particular mechanism when the Commissioner has endeavoured to resolve the matter by way of a proposal exercised within the parameters of his authority.

Any order for costs pursuant to s. 85(1a) is discretionary.

The provisions of s.85(1a)(c) refer to reimbursement of the Commissioner's costs incurred in the conduct of the proceedings except to the extent that the legal practitioner or former legal practitioner shows them to have been unreasonably incurred.

We agree with the submission made on behalf of the Commissioner that whilst the words "indemnity" are not included in that Section the words "reimbursement" other than costs unreasonably incurred, are words akin to the concept of indemnity costs.

Whilst all costs are a reimbursement in some sense, we determine that the phrase is, for the purposes of these proceedings, akin to indemnity costs.

The issue to be determined now is whether the practitioner was unreasonable in his refusal to consent to the exercise of the power by the Commissioner.

We note that whilst the submissions of the Commissioner and indeed those of the practitioner were framed in terms of the Tribunal imposing a penalty similar to or greater than that imposed by the Commissioner, that is not a specific requirement.

What is required is that a proposal put by the Commissioner was unreasonably rejected by the practitioner. Probably implicit in that is that the Tribunal has imposed a penalty no more favourable to the practitioner than the Commissioner's proposal.

The Tribunal has determined that it is not satisfied that its powers to impose a penalty under the Act are appropriate in the circumstances.

Implicit in that determination is that the Tribunal considers that an exercise of its powers as to penalty (which exceed the powers of the Commissioner) is not appropriate.

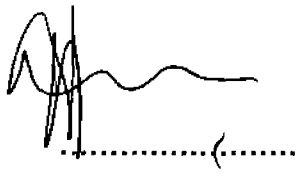
Whilst in due course it is a matter for the Supreme Court to determine penalty, in all of the circumstances of this matter, we determine that it would be appropriate to make an order for costs in favour of the Commissioner pursuant to s.85(1a) of the Act i.e. that the practitioner reimburse the Commissioner's costs in accordance with that section by way of indemnity costs.

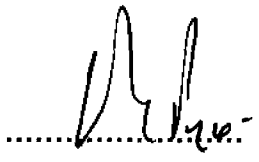
We make this order because we find that the Practitioner's refusal to accept the proposal put by the Commissioner was unreasonable in all the circumstances of the conduct in which he engaged and in the light of the matters put to him by the Commissioner, in particular as set out in the Commissioner's letters of 12 July 2016 and 8 September 2016.

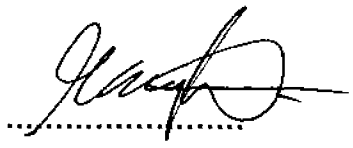
**SUMMARY**

**(1)** The Tribunal recommends pursuant to s.82(6)(v) of the Act that disciplinary proceedings be commenced against the legal practitioner in the Supreme Court.

**(2)** The Tribunal orders pursuant to s.85(1a)of the Act that the practitioner reimburse the Commissioner for costs incurred by the Commissioner in the conduct of the proceedings except to the extent that the legal practitioner shows them to have been unreasonably incurred.







**Mr R Kennett** **Ms M Pyke QC** **Professor G Davis**

9/10/2020