

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

LEGAL PROFESSION CONDUCT COMMISSIONER v ROMANO

[2017] SASCFC 167

Judgment of The Full Court

(The Honourable Chief Justice Kourakis, The Honourable Justice Blue and The Honourable Justice Parker)

19 December 2017

**PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND
DISCIPLINE - PROFESSIONAL MISCONDUCT AND
UNSATISFACTORY PROFESSIONAL CONDUCT - FALSIFICATION OF
DOCUMENTS AND TRANSACTIONS**

**PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND
DISCIPLINE - DISCIPLINARY PROCEEDINGS - SOUTH AUSTRALIA -
PROCEEDINGS IN TRIBUNALS**

Appeal by the Legal Profession Conduct Commissioner against a decision of the Legal Practitioners Disciplinary Tribunal (the Tribunal).

The practitioner was charged with unprofessional conduct in that on four occasions she made representations to the Legal Services Commission in relation to the grant of a legal aid assignment for her client when she knew or ought to have known that those representations were false. The four representations included two letters in which the practitioner represented that she was acting for a client on criminal charges when in fact the charges had long since been withdrawn and two commitment certificates signed by the practitioner claiming \$929.50 for a psychology report which was not obtained and \$144.10 for attending a pre-trial conference which did not occur in relation to that client.

The Tribunal found the practitioner not guilty of unprofessional conduct and declined to proceed with an inquiry into whether she was nonetheless guilty of unsatisfactory conduct on the basis that it was not charged in the alternative and that further written particulars were required from the Commissioner. The Commissioner appeals against the decision of the Tribunal and seeks an order that the practitioner be found guilty of unprofessional

On Appeal from LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL (MS S MAHARAJ QC, MR R KENNETT AND PROFESSOR G DAVIS) LPDT-15-1

Appellant: LEGAL PROFESSION CONDUCT COMMISSIONER Counsel: MS E F NELSON QC -

Solicitor: LEGAL PROFESSION CONDUCT COMMISSIONER

Respondent: MADDALENA ROMANO

Counsel: MRS M E SHAW QC WITH MS E COUSINS -

Solicitor: CALDICOTT LAWYERS

Hearing Date/s: 07/11/2017

File No/s: SCCIV-17-281

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conduct. Alternatively, the Commissioner contends that the Tribunal wrongly failed to proceed to consider whether the practitioner was guilty of unsatisfactory conduct.

Held per Curiam:

1. On the favourable findings of fact concerning the practitioner's knowledge and belief made by the Tribunal, the practitioner was not guilty of unprofessional conduct (at [64]-[65]).
2. The Tribunal's decision declining to conclude its inquiry into whether the practitioner was guilty of unsatisfactory conduct was vitiated by error. The Commissioner was not bound to provide any further particulars because the particulars of the conduct which was unsatisfactory were materially the same as the particulars for the alleged unprofessional conduct. The Tribunal proceeded on the erroneous view that the Commissioner could abrogate the Tribunal's duty pursuant to s 82(8) of the Legal Practitioners Act 1981 (SA) to consider whether or not the practitioner was guilty of unsatisfactory conduct by declining to further prosecute the charges (at [76]-[79]).
3. The practitioner was guilty of unsatisfactory conduct. The practitioner's failure to properly examine and remind herself of the circumstances of the file on which the claim was made was a gross departure of the standard of professional work expected of a legal practitioner. The practitioner's failure facilitated the making of a claim on the limited public resources of the Legal Services Commission for legal work she had not performed and for a medical disbursement which had not been incurred (at [80]-[83]).
4. The matter is remitted to the Tribunal to determine penalty at ([84]).

Legal Practitioners Act 1981 (SA) s 82, s 86, referred to.

Harrington v Harrington (1979) 22 SASR 449; *LA Ward Racing Syndicate v Trotting Appeal Committee* (1987) 46 SASR 467, applied.

WORDS AND PHRASES CONSIDERED/DEFINED

"Unprofessional conduct", "Unsatisfactory conduct"

LEGAL PROFESSION CONDUCT COMMISSIONER v ROMANO
[2017] SASCFC 167

Full Court: Kourakis CJ, Blue and Parker JJ

THE COURT:

1 On 10 March 2016 Ms Romano was charged in the Legal Practitioners Disciplinary Tribunal (the Tribunal) with unprofessional conduct in that on four occasions she made representations to the Legal Services Commission (the LSC) in relation to the grant of a legal aid assignment for her client, Ms M, when she knew or ought to have known that those representations were false. Ms Romano was at the relevant time a legal practitioner employed by the legal firm Andersons Solicitors (Andersons).

2 The charge of unprofessional conduct was particularised in four ways:

- 1 by letter to the LSC dated 13 March 2012, Ms Romano represented that she was acting for Ms M in the Magistrates Court on extant criminal charges of assault police and resist arrest and that she required a *'physiological'* report for that purpose;
- 2 by letter to the LSC dated 10 April 2012, Ms Romano maintained the first representation and informed the LSC that the charges had been withdrawn at a pre-trial conference;
- 3 on or about 2 April 2012, Ms Romano falsely certified in a LSC commitment certificate that her claim for the payment of an invoice sent by Dr White for a *'psychology'* report on Ms M in the sum of \$929.50 was correct and accurately reflected the services undertaken;
- 4 on 2 April 2012, Ms Romano falsely certified to the LSC in a commitment certificate that a claim for \$144.10 for attending a pre-trial conference was correct and accurately reflected the services undertaken.

3 There is, as will shortly be seen, some significance between the change in the descriptions of the reports italicised. The Legal Profession Conduct Commissioner (the Commissioner) alleged that the statements were false in that, although Ms Romano had acted for Ms M on criminal charges of assault police, resist arrest and disorderly behaviour, the police had withdrawn those charges, on an ordinary remand appearance, well before 13 March 2012 and neither a physiological nor a psychological report had been obtained from Dr White for the purpose of negotiating the withdrawal of the charges or otherwise. The invoice for a psychological report provided with the certificate referred to in the

third charge was a forgery of an invoice which had been presented by Dr White for a report provided in March 2009 on another of Ms Romano's clients, Ms G. Ms Romano had overlooked obtaining a legal aid assignment, or otherwise making arrangements with her client, for the payment of Dr White's report in that matter and at the time of the representations Dr White's office was pressing for payment of that invoice.

4 It was not contested that the letter the subject of the first particular was sent to the LSC by Andersons. However Ms Romano's defence to that particular was that she had signed the letter without reading it. Ms Romano admitted making the handwritten draft of the letter referred to in the second count. A letter differing only slightly from that draft was sent to the LSC after it was signed by her administrative assistant Ms Boyne 'for' Ms Romano. Ms Romano testified that she wrote the draft letter in the mistaken belief, based on the extension of the grant of legal aid documents which she saw on the file, that she had recently attended a pre-trial conference in which Ms M's charges were withdrawn. It was not disputed that the certificates were sent to the LSC by Andersons. Ms Romano admitted filling in and signing the certificates referred to in the third and fourth counts, again believing that she had attended a pre-trial conference and that a report had been obtained. Ms Romano also testified that, noticing that there was no report from Dr White on the file, she left a note on the file directing her administrative assistant, Ms Boyne, not to send the certificates without first finding and enclosing Dr White's report. The handwritten note was not produced in evidence.

5 The charge laid by the Commissioner before the Tribunal did not expressly allege unsatisfactory conduct as an alternative to the charge of unprofessional conduct. The Tribunal found that the letters and certificates made false representations but accepted Ms Romano's testimony that she was not dishonestly involved in that conduct. On 8 November 2016, the Tribunal dismissed the charge of unprofessional conduct but declined to continue any inquiry into whether Ms Romano was nonetheless guilty of unsatisfactory conduct until the Commissioner furnished further particulars of the conduct on which such a finding could be made.

6 The final two paragraphs of the Tribunal's reasons read:

[225] While the Tribunal finds that the charge of unprofessional conduct has not been made out, it abstains from making any orders at this stage dismissing the charge before the Tribunal until the parties have had time to consider these reasons and the Commissioner determine [sic] whether he wishes to proceed any further with this matter in light of these reasons.

[226] Given the protracted history of this matter spanning over 4 years involving investigations by the Commissioner's predecessor, the police, Andersons, the Commission, and the Conduct Board, the Commissioner may well determine not to press this matter any further, given the clear favourable findings made by this Tribunal about the credit of the practitioner, and the less than satisfactory extant

practices and procedures about matters the subject of the charge and the handling generally of legal aid matters at Andersons. That said, this is an issue ultimately for the Commissioner, who would in fairness to him, have before him, for the first time the comprehensive investigation conducted by this Tribunal including cross examination of the key players with able assistance of the senior counsel appearing for the Commissioner and the practitioner.

7 The Commissioner brings this appeal pursuant to s 86 of the *Legal Practitioners Act 1981* (SA) (the LP Act) against the decision of the Tribunal that the respondent, Ms Romano, was not guilty of unprofessional conduct and the decision of the Tribunal not to proceed with its inquiry into whether Ms Romano was guilty of unsatisfactory conduct.

8 The Commissioner's appeal proceeds on an acceptance of the Tribunal's finding that Ms Romano was not dishonestly involved in obtaining, and claiming on, the grant of legal aid but complains that her conduct was such a gross departure from the standard of care expected of a legal practitioner that it constituted unprofessional conduct. In the alternative the Commissioner contends that the Tribunal erred in declining to complete its enquiry because there was no proper reason, in fact or in law, to adjourn the inquiry until the Commissioner had provided further particulars. The Commissioner contends that if the Tribunal's finding that there had been no unprofessional conduct is not disturbed, this Court should nonetheless find that Ms Romano is guilty of unsatisfactory conduct.

9 On the favourable findings of fact concerning Ms Romano's knowledge and belief made by the Tribunal, Ms Romano was not guilty of unprofessional conduct. However, the Tribunal erred in not proceeding with the inquiry. The Commissioner was not bound to provide any further particulars because the particulars of the conduct which was unsatisfactory were, save for the mental element, the same as the particulars for the alleged unprofessional conduct. The objective standard of care of a solicitor in the circumstances of Ms Romano making the subject claims on the LSC is obvious and needed no elaboration. The Tribunal's decision to decline to conclude its inquiry was vitiated by error. The Tribunal proceeded on the erroneous view that the Commissioner could abrogate the Tribunal's duty pursuant to s 82(8) of the LP Act to consider whether or not the practitioner was guilty of unsatisfactory conduct by declining to further prosecute the charges.

10 On the largely admitted facts concerning her conduct, Ms Romano was guilty of unsatisfactory conduct. Ms Romano's failure to properly examine and remind herself of the circumstances of the file on which the claim was made was a gross departure from the standard of professional work expected of a legal practitioner. Ms Romano's failure facilitated the making of a claim on the limited public resources of the LSC for legal work she had not performed and for a medical disbursement which had not been incurred.

Is the Appeal competent?

11 Section 82 and s 86 of the LP Act at the relevant time provided:

82—Inquiries

(1) A charge may be laid under this section alleging unprofessional or unsatisfactory conduct—

- (a) on the part of any legal practitioner; or
- (b) on the part of any former legal practitioner who was at the time of the alleged unprofessional or unsatisfactory conduct a legal practitioner.

...

(4) Where a charge has been laid under this section, the Tribunal must, subject to subsection (5), inquire into the conduct of the legal practitioner or former legal practitioner to whom the charge relates.

(5) The Tribunal may summarily dismiss any charge that it considers frivolous or vexatious.

(6) If after conducting an inquiry under this section the Tribunal is satisfied—

(a) that a legal practitioner is guilty of unprofessional or unsatisfactory conduct it may, subject to subsection (6a), exercise any one or more of the following powers:

- (i) it may reprimand the legal practitioner;
- (ib) it may make orders with respect to the examination of the legal practitioner's files and records by a person approved by the Tribunal (at the expense of the legal practitioner) at the intervals, and for the period, specified in the order;
- (ii) it may order the legal practitioner to pay a fine not exceeding \$10 000;
- (iii) it may make an order imposing conditions on the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate)—

(A) relating to the practitioner's legal practice (provided that, in the case of an order made without the consent of the practitioner, such conditions must not operate for a period exceeding 12 months); or

(B) requiring that the legal practitioner, within a specified time, complete further education or training, or receive counselling, of a specified type;

(iv) it may make an order suspending the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate) until the end of the period specified in the order (not exceeding six months);

- (v) it may recommend that disciplinary proceedings be commenced against the legal practitioner in the Supreme Court; or
 - (b) that a former legal practitioner was, while he or she remained a legal practitioner, guilty of unprofessional conduct, it may order the former legal practitioner to pay a fine not exceeding \$10 000; or
 - (c) that a former legal practitioner was, while he or she remained a legal practitioner, guilty of unsatisfactory conduct, it may order the former legal practitioner to pay a fine not exceeding \$5 000.
- (6a) If a legal practitioner is found guilty only of unsatisfactory conduct, the Tribunal may not impose a fine or suspension on the practitioner or recommend that disciplinary proceedings be commenced against the practitioner in the Supreme Court.

...

- (8) If, after conducting an inquiry into a charge alleging unprofessional conduct by a person who is a legal practitioner or former legal practitioner, the Tribunal—
- (a) is not satisfied that the person is guilty of unprofessional conduct; but
 - (b) is satisfied that the person is guilty of unsatisfactory conduct,
- the Tribunal must find the person not guilty of unprofessional conduct, but may find the person guilty of unsatisfactory conduct.

...

86—Appeal

- (1) Subject to subsection (2), a right of appeal to the Supreme Court lies against a decision of the Tribunal made in the exercise or purported exercise of powers or functions under this Act.
- (2) An appeal must be instituted within one month of the date on which the appellant is notified of the decision unless the Supreme Court is satisfied that there is good reason to dispense with the requirement that the appeal should be so instituted.
- (3) The Supreme Court may, on the hearing of an appeal exercise any one or more of the following powers, as the case requires:
 - (a) affirm, vary, quash or reverse the decision subject to the appeal and administer any reprimand, or make any order, that should have been administered or made in the first instance;
 - (b) remit the subject matter of the appeal to the Tribunal for further hearing or consideration or for rehearing;
 - (c) make any further or other order as to costs or any other matter that the case requires.

...

12 The precise connotation of the word ‘decision’ in an appeal provision depends on its context.¹

13 In *O’Dea v Commissioner of Police*² (*O’Dea*) Parker J considered whether the action of the respondent, in serving a notice upon the appellant to inform him that his rights and duties were affected by an amendment to the *Child Sex Offenders Registration Act 2006* constituted a ‘decision’ and therefore gave rise to a right of appeal under s 42B(2) of the *District Court Act 1991* (SA). Parker J referred to the judgment of Mason CJ in *Australian Broadcasting Tribunal v Bond*³ in which his Honour discussed the meaning of ‘a decision to which this Act applies’ under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Mason CJ held that:⁴

... a reviewable decision is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration.

14 Parker J went on to consider whether the ordinary meaning of the word articulated in that passage had been relevantly modified by the definition of a ‘decision’ contained in s 42B(2) of the *District Court Act*. Even though Mason CJ referred to a decision that was determinative of ‘an issue of fact’, there is no reason to exclude, in relevant statutory context, an issue of law.

15 Section 82(6) of the LP Act expressly authorises the Tribunal to make a disciplinary order of a kind therein prescribed and therefore such an order made by the Tribunal must be a decision within the meaning of that word in s 86 of the LP Act. The exercise of those powers by the Tribunal is of course conditioned upon a finding that the legal practitioner is guilty of unprofessional or unsatisfactory conduct.

16 Section 82 of the LP Act does not expressly confer a power of dismissal other than with respect to a summary dismissal of a vexatious charge. Nonetheless it is necessarily implicit that the Tribunal has a power to dismiss a charge on its merits. The dismissal of a charge must also be a decision to which s 86 of the LP Act applies. There is no good reason to deny the Commissioner the right of appeal in a jurisdiction which is protective and not punitive.

17 The Tribunal’s satisfaction of the guilt of a practitioner, being a condition precedent to the exercise of the power to make a disciplinary order pursuant to s 82(6) of the LP Act, is an essential and distinct step in the Tribunal’s inquiry. Even though s 82(6) and s 82(8) of the LP Act speak of the Tribunal being satisfied of guilt, and not of an adjudication or decision to that effect, a finding

¹ *Harrington v Harrington* (1979) 22 SASR 449; *LA Ward Racing Syndicate v Trotting Appeal Committee* (1987) 46 SASR 467.

² (2016) 125 SASR 159 (Nicholson and Lovell JJ agreeing).

³ (1990) 170 CLR 321.

⁴ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337.

by the Tribunal that it is so satisfied must also be within the meaning of the word decision in s 86 of the LP Act. That construction is supported by the text of s 86(3)(a) of the LP Act which does not equate the decision which is reviewed with disciplinary orders. The power to make disciplinary orders is expressed in a way which is ancillary to the decision which is reviewed. The conferral of a power to remit also suggests that at least some decisions preliminary to the making of final orders are appealable.

18 A more difficult question arises with respect to a finding of fact or holding of law made in the course of the hearing which does not finally determine the question of the guilt of the practitioner. The power to appeal conferred by s 86 of the LP Act is as of right. If a decision includes determinations of intermediate issues there is a grave danger of the fragmentation of hearings because, in the absence of a power to grant or withhold permission to appeal, this Court has no means by which to ensure that interlocutory appeals are brought only when it is in the interests of justice to do so. Not all procedural orders or directions are decisions for the purposes of s 86 of the LP Act. In this respect, it is necessary to characterise the Tribunal's decision not to proceed to conclude its inquiry into Ms Romano's conduct, and to instead order the provision of particulars.

19 It is an implicit condition of the Tribunal's jurisdiction pursuant to s 82 of the LP Act that it accord the parties procedural fairness. It is also necessarily implicit in s 82(4) of the LP Act that the Tribunal will not decline to exercise its jurisdiction for an extraneous reason. The Tribunal's decisions on those questions are jurisdictional. Whether or not the Tribunal is authorised to determine those questions finally for itself need not be decided. It is sufficient to hold, consistently with the judgment of this Court in *O'Dea*, that decisions of that kind are decisions for the purposes of s 86 of the LP Act. Accordingly, a decision to continue an inquiry in a way which necessarily and finally denies procedural fairness is a decision for the purposes of s 86 of the LP Act. So too is a failure to continue an inquiry when there is no proper reason to do so. The Commissioner's appeal is therefore competent.

The evidence

20 On 24 April 2008 Andersons opened a file for a client Ms G on six charges of obtaining Centrelink payments knowing or believing that she was not eligible to receive them contrary to s 135.2(1) of the *Criminal Code Act 1995* (Cth). The cover sheet of the file records that it was a criminal legal aid matter and that Ms Romano was the solicitor charged with its conduct.

21 A letter under Ms Romano's name, but apparently signed by another person, probably Ms Boyne, was forwarded to the LSC on 24 April 2008 seeking a grant of aid for Ms G. On 8 May 2008 a grant of aid in the sum of \$450, equally divided between solicitor and counsel work, was granted for guilty pleas in the Magistrates Court. By letter dated 3 March 2009, apparently signed by Ms Romano, Andersons sought a psychological from Dr White. Ms G was seen

by Dr White on the same day. He provided the report and sent an invoice, dated 10 March 2009, charging a GST inclusive fee of \$929.50. The invoice was numbered 80162 and bore the reference number 2522. Ms G's matter was heard and she received a suspended sentence.

22 Ms Romano completed an LSC commitment certificate on 11 April 2012 claiming the sum of \$450 and certifying that the claim 'is correct and accurately reflects services undertaken'.

23 Andersons opened a 'criminal legal aid' file for Ms M on 7 July 2011 (the Andersons File or the File). The Andersons File was admitted into evidence but Ms Romano testified that it did not appear to be complete. The File was assigned to Ms Romano. The administrative assistant responsible for the File is recorded as Ms Boyne. Ms M was charged on complaint with offences of:

- disorderly behaviour;
- assaulting a member of the police force;
- resisting a member of the police force.

24 On the same day, Andersons wrote to the LSC seeking a grant of aid with respect to Ms M. The letter informed the LSC that Ms M was of Filipino nationality and would require an interpreter.

25 On 13 July 2011, the LSC granted aid to Ms M on the charges of assaulting police and resisting arrest and made a legal aid assignment to Andersons for a Magistrates Court guilty plea in the sum of \$240 for solicitor work and \$240 for counsel work.

26 Ms Romano appeared for Ms M in the Murray Bridge Magistrates Court on 15 August 2011 on which occasion the matter was adjourned to 12 September 2011. A letter dated 18 August 2011 recording that fact was sent to Ms M. That letter also informed Ms M that Andersons were in the process of obtaining funding for a medical report from her treating doctor. Ms M was asked to sign an attached medical authority for that purpose. She did so on 23 August 2011 and returned the form to Andersons.

27 On the Andersons File was a copy of a letter dated 23 August 2011 from Andersons to the LSC seeking an extension of the legal aid assignment to enable Andersons to obtain a medical report from Ms M's treating medical practitioner on her physical limitations consequential upon a stroke which had left her with restricted movement. There is no record that an extension of aid to cover the medical report was granted. The statement of an officer of the LSC placed before the Tribunal does not refer to the request of 23 August 2011, nor to any extension of aid to obtain a medical report about Ms M's physical limitations consequential upon her stroke. A copy of a medical report on Ms M's condition

dated 10 December 2010 apparently prepared for the purposes of another matter and addressed to other solicitors, was on the Andersons File.

28 On 12 September 2011, Mr Gallagher appeared on Ms Romano's instructions and Ms M's matter was again adjourned to 17 October 2011. A letter confirming the adjournment was sent to Ms M on 13 September 2011.

29 On 17 October 2011, Ms M's matter must have been adjourned yet again but there is no letter confirming the adjournment on the Andersons file. However, on 15 December 2011, Ms Romano wrote to Ms M confirming that she had appeared in the Murray Bridge Magistrates Court on 29 November 2011, on which occasion all of the charges were withdrawn.

30 Despite the withdrawal of the charges on 29 November 2011, on 13 March 2012 Andersons sent a letter, signed by Ms Romano, to the LSC asserting that:

- Ms M's matter was listed for a pre-trial conference on 14 March 2012;
- Ms M suffered from physiological issues which had occurred after she suffered a stroke;
- it was important to obtain a physiological report in order to negotiate the resolution of the proceedings with the police prosecutor.

The letter sought funding for that purpose.

31 The Andersons alphanumerical reference on that letter ends with the letter 'A', which indicates that it was typed by an administrative assistant. Ms Romano testified in evidence-in-chief that she did not read the letter of 13 March even though it bore her signature and that she had no recollection of signing it. Ms Romano explained that she would sign letters without reading them because she was rushed and did not have the time to 'sit there and read every letter'. Ms Romano agreed that she may have 'glanced' at the letter but claimed that it 'wouldn't have clicked' to her that the letter was seeking an extension of aid to attend a pre-trial conference which was listed for the very next day on a matter that had been concluded several months earlier. Ms Romano also testified that she never used the word 'physiological' which appeared in the letter.

32 Ms Romano was cross-examined on why she signed the letter of 13 March 2012:

Q Why did you sign the letter on 13 March 2012. I'll take you to it, if that will help - it's at p.102 of that book. It's written on 13 March.

A That's right.

Q And it says 'We note our client's matter is listed for a pre-trial conference 14 March 2012'. That's the day after the letter.

A That's right, yes.

Q At you time you signed that letter, surely you would have known there was no pre-trial conference in [Ms M's] matter the following day.

A And again, as I've explained previously, I don't recall actually seeing the letter, reading the letter. I may have signed it without reading it.

Q Well you did sign it, didn't you.

A That's correct, but I can't remember exactly reading it.

Q But even glancing at it, it would have been obvious you're seeking something for a pre-trial conference the day after the date on the letter.

A Yes, and sometimes I would've received letters which I would've signed, before I left court - 'can you quickly sign off on these' - before you headed out to court or between clients, or whatever.

Q Wouldn't take seconds to read that letter, would it? What ...

A And I may've glanced at it but it wouldn't have clicked. I don't know, I can't say exactly what happened on that day.

33 On 19 March 2012 the LSC responded to the request for an extension of aid and extended the assignment to include the sum of \$131 for attendance at a Magistrates Court pre-trial conference and the sum of \$450 for a medical report.

34 At some point not long before 10 April 2012 Ms Romano handwrote a letter to the LSC for Ms Boyne to type which read:

We confirm that we act for the abovenamed. We note that upon providing prosecution the psychological report prosecution advised that on the next occasion they will be withdrawing the charges.

Therefore at the PTC the matter was withdrawn.

We note that we obtained a psychological report as per our letter dated 13 March 2012. Please find enclosed herewith a tax invoice for your payment.

Please find enclosed herewith our commitment certificates (Extensions 1, 2, 0) for payment.

The words in parentheses are not clear but appear to be as recorded above. There is an arrow drawn from the number 2 to the word disbursement written below it. It will be observed that the letter does not say when the pre-trial conference was held.

35 On 10 April 2012 a letter from Andersons, on the face of it bearing the signature of Ms Boyne 'for Ms Romano', was sent to the LSC informing it as follows:

We confirm that we act for the above named.

We note that upon providing Prosecution the Psychological report Prosecution advised that on the next occasion they will be withdrawing the charges against our client.

Therefore at the pre-trial conference the matters were withdrawn.

We note that we obtained a psychological report as per our letter dated 13 March 2012.

Please find enclosed (*) herewith our Commitment Certificates (Extensions 0 and 1) for payment.

It is to be observed that between the draft and final letters, the only material difference is the omission of the reference to Dr White's tax invoice and the number 2 from within the parentheses.

36 Attached to the letter of 10 April 2012 were commitment certificates carrying the usual certification signed by Ms Romano. The certificates were marked as 'extension 0' on the first assignment for the guilty plea amount and 'extension 1' on both of the certificates for the pre-trial conference attendance and the psychologist's report. There was no 'extension 2' certificate which appears to explain the change between the draft and typed forms of the letter. The certificates were dated 2 April 2012 suggesting perhaps that Ms Romano wrote the draft of the letter of 10 April 2012 on the same day. They certified that the claims were correct and that they accurately reflected services undertaken with respect to:

- the \$480 assignment for the guilty plea;
- the \$144.10 assignment for attendance at a pre-trial conference; and
- the \$929.50 invoiced by Dr White for the psychologist's report.

37 An invoice was also sent with the letter despite the omission of any reference to it. The invoice was an altered copy of the invoice received from Dr White with respect to Ms G. The reference and invoice numbers 2522 and 80162 respectively were retained as was the amount of the invoice. However, the date was changed to 12 March 2012 and Ms M's name was substituted for the name of Ms G.

38 The original invoice from Dr White on Ms G's matter was in the Andersons file. Slips of paper with Ms M's name and the 12 March 2012 date were stuck over Ms G's name and the 10 March 2009 date on that invoice.

39 Ms Romano testified that it was not uncommon for her to see an invoice from Dr White on her criminal files and that she never questioned whether it was a valid invoice or not. Ms Romano accepted that she completed the commitment certificate based on the forged invoice which was on Ms M's file. It is not clear from Ms Romano's testimony whether she saw the invoice on which the slips of paper had been stuck or a photocopy of that original.

40 Ms Romano gave the following evidence about perusing the file and completing the certificates:

Q Can you remember now actually looking at this file at a particular time and completing that commitment certificate by looking at this particular tax invoice, or have you looked at the file and endeavoured to work out what must have happened.

A I would have got the file to close – I would have got all of the commitment certificates that were on the file, had a quick flick through the file to have a look at what had happened on it and then just did my letter of report and signed off on the commitment certificates.

Q When you say did your letter of report – we’ll come to that in a minute – you mean your handwritten notes of that.

A Yes.

...

Q Do you have a specific recollection as to what your thought processes were at the time you did this or have you endeavoured to go back and work out how it must have been you came to complete this.

A I don’t have a specific recollection of what happened on that day that I signed it but I would have had a look at the file, making reference to whatever happened on the file.

Q And was there some indication on the file of a pre-trial conference.

A There was, yes.

Q When was that.

A There was a letter on the file that indicated a pre-trial conference. I would have completed the certificate based on the letter.

Q Yes. And when you say ‘the letter’, do you mean the letter of p. 33.

A That’s correct. And if there was – and I can’t specifically remember the file, if there was a court attendance sheet, because I had them on every file, so I’m assuming there was one at the time for a pre-trial conference attendance.

...

41 Ms Romano went on to explain that she completed the certificate of commitment with respect to the pre-trial conference on signing the letter dated 13 March 2012 requesting an extension of aid for that conference. Ms Romano testified that she might also have signed a court attendance sheet for that day but of course there could be no such court attendance sheet because there never was a pre-trial conference in March 2012. Ms Romano’s testimony was based on her usual practice and not a specific recollection:

Q And again, is that based on you considering what would have happened rather than any specific memory.

A That's correct.

42 In a letter to the Legal Practitioners Conduct Board (the Conduct Board) dated 31 October 2012 Ms Romano had claimed that after signing the commitment certificate relating to Dr White's psychological report she placed a handwritten note to Ms Boyne on the file. According to Ms Romano, the note read:

Was there a report from [Ms M's] doctor, as I cannot see any report on the file. If there is a report in existence then a copy of the tax invoice needs to be sent to the Legal Services Commission in support of the commitment certificate.

43 In her evidence Ms Romano explained why that she placed the note on the file:

Q Why haven't you referred to the medical report [in the handwritten report to the Legal Services Commission].

A Because after I've done that I'd put a note on top of the file asking where the medical report was because that's what was missing from the actual file.

Q All right, if you had seen the medical report on the file would you have ordinarily noted that in this note here.

A If I'd seen it, yes.

Q Because you're supposed to annexe the medical report to the commitment certificate.

A That's correct.

Q So I understand you, if you've seen a medical report this note ordinarily would have a notation that it should be annexed.

A That's correct.

...

CHAIRPERSON

Q Why did you put that on a separate piece of paper.

A Because there was no report and I did – I wanted to make sure there was a report.

Q This is a note, a handwritten note that is proposed to be transformed into a letter, why didn't you simply note it in a letter, that is to say, why did you put it on a separate piece of paper.

A I wanted to draw their attention that there was no report on the file.

Q Yes. What does the separate piece of paper look like, does it look like an A4 sheet like this or Post-It note.

A No, it was an actual A4, half an A4 sheet, which I pinned to the front of the file.

Q So, separately to the front of the file.

A That's correct and I would do that to draw the secretary's attention to anything, so if there was something in addition or something that wasn't normal, that was my practice, that I would attach it to the front separately, to draw their attention and then they would come back to me with it.

Q Yes. Has there ever been a case where you sent the commitment certificate without an accompanying medical report.

A No.

...

MEMBER KENNETT

Q Would it have been your expectation that your note would have found its way onto the file after the secretary's had a look at it.

A I would have expected it.

It is of some importance that Ms Romano in that passage admits to searching the file for Dr White's report.

44 Mr McCaffrie, a partner in Andersons, gave a statement to the Commissioner dated 18 December 2015 saying that he met with Ms Romano on 2 July 2012 and that Mr Stanbury, who was then the General Manager, was also present. Mr McCaffrie explained that his recollection was not as precise as it might have been because of the passage of time. Nonetheless, he stated that he questioned Ms Romano about her involvement in the alleged falsification of the invoice but that she made no admissions to involvement in it.

45 By letter dated 5 July 2012, Mr McCaffrie informed the Conduct Board that Ms Boyne had admitted to his partners that she had fraudulently altered the invoice as part of a plan conceived by Ms Romano:

I interviewed Maddalena Romano on 2 July 2012 and she made no admissions in relation to this behaviour and at the end of the interview I have to say that I was not much wiser as to what had transpired. My General Manager and another Partner later interviewed her Personal Assistant at the time, Lynda Boyne. (I was unavailable).

Lynda Boyne gave a version of events which at least explained what had happened. Lynda's version was that in a former file, funded by the Legal Services Commission, Maddalena had conducted some genuine work on the file for which he had not obtained prior permission and had also sought and obtained a Psychological report from Mr Jack White for which she had not obtained prior funding. As such she did not make a recovery for the value of the legal work nor for the cost of the medical report. When the file of [Ms M] finished with the withdrawal of charges by Police in December 2011, a plan was

hatched to fictionally create additional work and fictionally create a Psychology report to balance out the non-recovery of that work in the earlier file.

Lynda Boyne's version was that the plan was conceived by Maddalena Romano and that she simply carried it out.

What I am presenting is an explanation as to what happened but I am less sure as to the role of either Maddalena or Lynda. Neither employee is currently with us. I say in passing that each resigned earlier this year in what appeared to us at the time to be normal circumstances. We are however left with a reasonable suspicion that on the evidence that we have so far unearthed that, if proven, would lead us to the view that Maddalena Romano may have engaged in some unprofessional conduct. We at this stage are simply reporting this matter to you and detailing as much information as we have. I have been in regular contact with the Legal Services Commission and have been co-operating with them. They are going to undertake an audit of her files. They have also indicated that they have reported the matter to the Police and will be reporting it to you.

46 In a letter to the Director of the LSC of the same date, Mr McCaffrie informed her that Ms Boyne had admitted to the 'General Manager and another Partner of Andersons' that she and Ms Romano concocted a plan, which Ms Boyne carried out, in order to recoup their losses in Ms G's matter by claiming the cost of Dr White's report through a scheme to extend the assignments in Ms M's matter even though that matter had been completed. Mr McCaffrie's letter continued:

The plan devised by Maddalena and Lynda was to try and recoup what they perceived to have been their losses from [Ms M's] file. That is, they were going to try and seek funding for work which was not to be done and also disbursement funding for a Psychology report that was not in fact obtained.

47 Mr McCaffrie informed the Director of the LSC that he interviewed Ms Romano for the second time after being informed by his partners of Ms Boyne's account and that Ms Romano had indicated to him that Ms M's matter was a 'one off' but that she again made 'no comment on Ms Boyne's allegations'.

48 In his statement to the Commissioner, Mr McCaffrie agreed that he had arranged a second interview with Ms Romano after he was told of Ms Boyne's admission but stated as to that interview:

I cannot recall the date of the interview or precisely what was said other than I put to Ms Romano the version of events described to me following the meeting with Ms Boyne. Ms Romano did not offer any meaningful response. She did not comment on the version of events given to us by Ms Boyne and made no admissions or denials.

Mr McCaffrie did not refer to Ms Romano's comment to him that it was a 'one off'.

49 Notwithstanding Mr McCaffrie's letter reporting on Messrs Stanbury's and Hoeschler's interview of Ms Boyne, in a letter of 16 January 2013, Mr Hoeschler informed the Conduct Board as follows:

I then asked Ms Boyne directly as to whether she was involved in the preparation of the invoice in question, Ms Boyne denied any involvement and said that she was seeking legal advice.

50 There was disputed evidence before the Tribunal on the admissions allegedly made by Ms Boyne. In the course of the Commissioner's investigations, statements were provided by the Andersons partners Mr Stanbury and Mr Hoeschler on 15 December and 18 December 2015 respectively.

51 Mr Hoeschler recalled meeting with Ms Boyne in the first week in July. He said that the meeting was conducted by Mr Stanbury. Mr Hoeschler stated that Ms Boyne did not give any meaningful account of what had occurred. Mr Stanbury, on the other hand, could not even recall if the meeting with Ms Boyne went ahead. Mr Hoeschler and Mr Stanbury denied that Ms Romano had made any admission to them.

52 The statements of Mr Hoeschler and Mr Stanbury leave unexplained Mr McCaffrie's letters of 5 July 2012 in which he informed the Conduct Board and the LSC that Ms Boyne had made admissions to them.

53 Ms Boyne gave evidence before the Tribunal. She denied making any admissions to Messrs Hoeschler and Stanbury. Ms Boyne testified that she informed them that she had legal advice not to speak.

54 Ms Boyne testified that:

- solicitors sometimes signed commitment certificates which Ms Boyne had filled out;
- practitioners often completed only part of the certificate and left it for Ms Boyne to complete; and
- she had never admitted to doctoring the invoice.

55 Ms Boyne testified that she had never seen the forged invoice before it was shown to her in July 2012 by Messrs Stanbury and Hoeschler.

The Tribunal's findings

56 The Tribunal did not find Ms Boyne to be a credible witness describing her evidence on all material issues as 'inconsistent, self-serving, evasive, and generally unresponsive to specific and clear questions put to her'.

57 On the other hand, the Tribunal found Ms Romano to be a credible witness and accepted her evidence on all material matters. The Tribunal accepted her evidence that she had a heavy workload. The Tribunal found that her evidence was consistent with documentary evidence and the office practices and procedures adopted at Andersons.

58 The Tribunal accepted and found that Ms Boyne had made the admissions contained in Mr McCaffrie's letter of 5 July 2012, even though that letter was based on the hearsay accounts of Mr Hoeschler and Mr Stanbury, who later denied in evidence that Ms Boyne had made any admission. On the other hand, the Tribunal did not act on Mr McCaffrie's account in the same letter that Ms Romano implicitly admitted knowing involvement in the false claim when she assured him that it was a 'one off'.

59 The Tribunal accepted that Ms Romano was not the author of the March letter and that she had inadvertently signed it. Those findings are supported by Ms Romano's evidence which the Tribunal accepted even though other evidence before the Tribunal does not support those findings.

60 The Tribunal accepted Ms Romano's evidence about the April letter which was signed by Ms Boyne 'for' Ms Romano. The critical aspect of Ms Romano's evidence on the charges relating to the certificates was that she left a note on the file instructing Ms Boyne not to claim for the psychologist's invoice unless the report was found. On that evidence, Ms Romano must have looked for the report on the file. Ms Romano also testified that she saw the letters requesting an extension of aid to obtain the report again demonstrating that she looked through the file. The Tribunal's reasons did not explain how Ms Romano could have looked through Ms M's file without noticing or recalling that Ms M's matter had been finalised some months earlier without obtaining a psychologist's report.

61 In the course of its reasons, at [155] the Tribunal referred to the following contentions made in the Commissioner's written submissions on why a finding should be made that Ms Romano had engaged in unprofessional conduct:

[76] If the Tribunal finds that the practitioner had knowledge of the forged invoice, then there is no doubt that she is complicit in attempted fraud, and that would amount to unprofessional conduct.

[77] If the Tribunal does not find that the practitioner had knowledge of the forged invoice, and instead finds that she ought to have had knowledge of it, that conduct would still amount to unprofessional conduct as being a substantial failure to meet the relevant standard.

[78] If the Tribunal finds that the practitioner personally completed and/or signed commitment certificates which were false and misleading, even if that was done recklessly, then that would still amount to unprofessional conduct.

62 The Tribunal rejected those contentions and dismissed the charge of unprofessional conduct for the following reasons:

[204] Assuming for present purposes that each of the above propositions is correct in principle to support a finding of unprofessional conduct, the Tribunal is not satisfied that the charge of unprofessional conduct with the four particularisations has been made out for the following reasons.

- [205] First, to use the Commissioner's formulation of his case noted above, the Tribunal is unable to find that the practitioner had 'knowledge of the forged invoice... [and was thus] ... complicit in [the] attempted fraud', given the above findings and especially the favourable finding about the credit of the practitioner.
- [206] As this is a serious allegation involving dishonesty on the part of the practitioner, the Tribunal has proceeded with particular care bearing in mind the standard of proof that applies in respect of such allegations and the following authorities.
- [207] Dishonesty is not defined in the Act; however, it is mentioned as one of the constituents of a category of unprofessional conduct defined in s 5 of the Act. It is therefore necessary to consider what dishonesty means in the present context. The Victorian Court of Appeal examined the concept of dishonesty in *Harle v Legal Practitioners Liability Committee*. At issue was whether a solicitor was entitled to indemnity under an insurance policy which did not cover 'dishonesty or fraudulent act or omission of any insured'. Chernov JA (with Calloway and Buchanan JJ agreeing) said the following about the concept of dishonesty (footnotes removed):

'It seems clear enough that where, as here, dishonesty is not used in a special sense in relation to statutory offences, it is not a term of art and is to be given its ordinary meaning. It embraces deliberate conduct which is considered to be dishonest by the standard of ordinary decent people, or put another way, the ordinary standards of reasonable and honest people. Whether particular conduct amounts to dishonesty involves the consideration of the mental state – the knowledge, belief or intention – of the person whose conduct is impugned.

...

- [210] Second, given the Tribunal accepts the evidence of the practitioner in relation to the forged invoice, it is unable to find that the practitioner 'ought to have had knowledge of [the] attempted fraud'. The Tribunal accepts the practitioner's evidence that she had no involvement in or knowledge of the forgery until it was brought to her attention at the 3 July meeting at Andersons. It appears to the Tribunal that it is likely that Boyne, to the exclusion of the practitioner, was actively involved in the falsification of the White invoice, and she when confronted with this fact, attempted to implicate the practitioner in it.
- [211] Third, the Tribunal is unable to find that the practitioner 'personally completed and/or signed commitment certificates which were false and misleading ... recklessly'.
- [212] The concept of recklessness, in the context of a case involving improper conduct by investigating police, was considered in *DPP v Marijancevic*. The Court (Warren CJ, Buchanan and Redlich JJA) set out the following passage from *R v Helmhout*:

'[Recklessness] must involve as a minimum some advertence to the possibility of, or breach of, some obligation, duty or standard of propriety, or of some relevant Australian law or obligation and a conscious decision to proceed regardless or alternatively a 'don't care' attitude, generally.'

...

[214] While, the above comments were made in a criminal context, some assistance can be drawn from them in the present context. It follow that in order for the practitioner's conduct to be properly characterised as reckless, she needed to have adverted to the possible impropriety of that conduct and then proceeded regardless. The Commissioner has failed to establish that this was the practitioner's state of mind at the relevant times.

(citations omitted)

63 We turn to the particulars relating to the covering letter of 10 April 2012, the certificates and the forged invoice. The Commissioner's contentions that Ms Romano was guilty of unprofessional conduct because she ought to have discovered that the invoice had been forged, and that she recklessly completed the certificates for both her work and Dr White's report, did not depend on a finding of recklessness in the sense in which that mental state is understood for the purposes of the criminal law. In particular, it was not necessary to prove that Ms Romano adverted to a probability, or even a possibility, of falsity in order to sustain a finding of unprofessional conduct. Gross negligence in the making of a false or misleading claim for payment may be sufficient because the duties owed by a legal practitioner are more onerous than the standards expected of the general public by the criminal law. Legal practitioners are bound to a higher standard of honest dealing. The professionalism demanded of legal practitioners is not limited to the performance of legal work; it extends to their charging practices.

64 Nonetheless, the Tribunal's finding that Ms Romano did not know that she was claiming for work which had not been done, even though she had searched through the file, can only be explained on the basis that Ms Romano was in such a peculiar mental state, perhaps due to the stresses of winding up her matters before leaving Andersons, that she mindlessly went about her task of billing the LSC. On those findings, there is no basis to interfere with the Tribunal's finding that Ms Romano had not engaged in unprofessional conduct. This is not a case of a practitioner taking a cavalier and self-interested attitude to charging.

65 The Tribunal's findings do not specifically address the particular relating to the 13 March letter. Nonetheless it follows, from an acceptance of Ms Romano's testimony that she signed the letter without reading it, that the charge of unprofessional conduct could not be sustained.

66 Having found Ms Romano not guilty of unprofessional conduct arising out of all particulars, the Tribunal did not then proceed in accordance with s 82(8) of the LP Act to consider whether Ms Romano was guilty of unsatisfactory conduct for reasons which appear below.

67 In the course of closing oral submissions, counsel for the Commissioner submitted that there was no alternative to the charge of unprofessional conduct on the whole of the evidence. The Tribunal understood that to be a submission that the Commissioner did not seek a finding, in the alternative, of unsatisfactory

conduct and had abandoned reliance on s 82(8) of the LP Act. It is difficult to imagine a case in which the Commissioner would ever make that decision and as will be seen the Commissioner had not done so in this case.

68 The distinction between unprofessional and unsatisfactory conduct is, as this case shows, generally a matter of degree. In its context the submission of senior counsel for the Commissioner was properly to be understood as a submission that on all of the evidence, even if Ms Romano's testimonial explanation were accepted, the conduct was so serious that it amounted to unprofessional and not merely unsatisfactory conduct.

69 It is plain from [77] of the Commissioner's submissions reproduced at [61] above that he contended that even if it were accepted that Ms Romano was not dishonestly involved in procuring the grant of aid, it was still unprofessional conduct to take part in the application for legal aid without examining the file more carefully. The oral submissions of senior counsel for the Commissioner in her closing address can, and should, be understood consistently with her written submissions.

70 In any event, in reply, senior counsel for the Commissioner expressly submitted that if the Tribunal was not satisfied that the charge of unprofessional conduct had been made out it should nevertheless find, in the alternative, that the practitioner was guilty of unsatisfactory conduct.

71 The Tribunal decided that it would not entertain the Commissioner's submission that in the alternative Ms Romano was guilty of unsatisfactory conduct 'without affording proper procedural fairness to the practitioner'. Accordingly the Tribunal concluded on the question of the alternative charge:

[219] The Tribunal sought to clarify with the practitioner's senior counsel in the course of her oral submissions as to whether her understanding was the same as that of the Tribunal, namely that the Commissioner was only seeking a finding of unprofessional conduct on an all or nothing basis until the above submission was made in reply. Senior counsel for the practitioner stated that that was her understanding and that is why she had not addressed the issue of unsatisfactory conduct.

[220] Senior counsel for the practitioner further submitted that she had conducted the case on the basis that the Commissioner was only seeking findings of unprofessional and not unsatisfactory conduct and that she had not prepared her case on the alternative footing. She submitted that it would constitute a denial of procedural fairness for the Tribunal to now proceed at this late stage to make findings of unsatisfactory conduct. There is much force in the submissions of the senior counsel for the practitioner.

[221] Whilst it is true, that the Tribunal is charged under the Act to conduct an inquisitorial function, and it is within its power to make findings of unsatisfactory conduct in the alternative where it sees fit to do so, such a finding must only be made upon giving all parties before the Tribunal especially the practitioner in question procedural fairness.

[222] It cannot be said in this particular case that such procedural fairness has been afforded to the practitioner.

[223] In this regard, while some attempt was made by senior counsel for the Commissioner in her reply when questioned by the Tribunal to orally and generally formulate the type of findings of unsatisfactory conduct that was sought, no attempt was made to formulate in writing for the practitioner the precise alternative charge of unsatisfactory conduct with proper particularisation.

[224] In these circumstances, the Tribunal is not prepared to entertain the submission of the Commissioner made late in his reply that the Tribunal ought to find unsatisfactory conduct on the part of the practitioner in the alternative.

72 The Tribunal then commented on how the Commissioner might proceed in the concluding paragraphs of its reasons which are reproduced at [6] above.

73 At a directions hearing held on 23 January 2017, the following exchange took place between the Tribunal and counsel:

CHAIRPERSON: ... So even if one assumes that whatever you say may be correct there comes a time when a person in the position of the Commissioner who is supposed to conduct himself as a model litigant may come to the conclusion that enough is enough given the amount of energy and expenditure that has been injected into this matter over several years and given the very strong findings of this Tribunal unanimously accepting the evidence of the practitioner on issues of credit it is open for the Commissioner, I'm not saying that that's the only conclusion the Commissioner can come to, there are other things he may have, for him to seriously consider whether enough is enough in this matter and it is for the Commissioner to make the decision as to whether he still wants to pursue that issue of unsatisfactory conduct.

MISS NELSON: Those are my instructions.

CHAIRPERSON: The Tribunal has been quite clear that it will not make a finding of unsatisfactory conduct or consider it until the practitioner has proper particularisation of exactly what she is facing and I gather from you that you don't intend to file any further evidence. That is the bit that's concerning me is as to whether the Commissioner has even considered the issue, the primary issue that the Tribunal wanted to leave with the Commissioner. He needs to consider -

MISS NELSON: I can assure you I've spoken to the Commissioner myself shortly before Christmas. He has considered the reasons. My instructions are the Tribunal needs to make an order. Now it's a matter for the Tribunal.

...

CHAIRPERSON: ... But the tentative orders that I had in mind subject to what the other two members think, so what we'll do is we'll finalise our orders and indicate that to the parties and these are my tentative thoughts ... can speak to this in a couple of days' time. But my present inclination is to do this and if the Commissioner is not prepared to let the matter rest in light of the findings of the Tribunal then he particularise within five or seven business days the unsatisfactory charge against the practitioner, also that the Commissioner file written submissions in support of any finding of unsatisfactory conduct that he seeks from the Tribunal within a short

period of time like 10 business days, these submissions not to exceed five pages and that the practitioner has an opportunity to file responding submissions 10 business days after, again submissions not to exceed five pages. ...

...

... We are not saying that as a matter of principle we cannot make or consider the finding of unsatisfactory conduct. As a matter of principle that is open to us but it's procedural fairness which must be given to the practitioner. It is not satisfactory standing from the bar table as we go along as to what the unsatisfactory charge allegation is. She is at least entitled to see in writing precisely the allegation that she's facing. The Commissioner has to spell out precisely the evidence he's relying on in order to request the finding of unsatisfactory conduct and then we have to have the practitioner respond to that and also there is the issue of penalty. What is the penalty that the Commissioner is seeking and what is the practitioner's response to that.

74 On 1 February 2017, the Supreme Court Civil Registry communicated the directions made by the Tribunal to the parties by email as follows:

- 1 The Commissioner file and serve by 10 February 2017 particulars in writing of the basis on which he submits findings of unsatisfactory conduct ought to be made by the Tribunal against the practitioner and an outline of submissions limited to 5 pages in support of such findings and on the issue of penalty.
- 2 The practitioner by 17th of February 2017 file a reply to the particulars referred to in order 1 and responding submissions limited to five pages on what findings ought be made by the Tribunal and on the issue of penalty.

75 The jurisdiction of the Tribunal is to be exercised for the purpose of protecting the public from the unprofessional and unsatisfactory conduct of legal practitioners. The function and jurisdiction of the Tribunal extends beyond arbitrating on the competing claims of the Commissioner and a practitioner.

76 Importantly, the Tribunal's obligation pursuant to s 82(4) of the LP Act is to inquire into the conduct of the legal practitioner to whom the charge relates and not only into the charged conduct. There will usually not be any significant difference between those two subject matters but the choice of legislative language is significant. It emphasises both the inquisitorial powers of the Tribunal and that the purpose of the proceedings is the protection of the public. It is for those reasons that the Tribunal's function is not merely to adjudicate between the practitioner and the complainant on the charge laid.

77 In particular the statutory duty of the Tribunal imposed by s 82(8) of the LP Act to consider whether conduct which is not unprofessional conduct may nonetheless be unsatisfactory conduct, cannot be waived by the Commissioner. It was not, as the Tribunal asserted, a matter for the Commissioner to 'determine whether he wishes to proceed any further with this matter'. The jurisdiction of the Tribunal had been invoked by the Commissioner and it had to run its statutory course. The Tribunal's exercise of its discretion to adjourn the

proceedings was influenced by an extraneous consideration, namely giving the Commissioner an opportunity to decline to further prosecute the matter. The Commissioner, having invoked the Tribunal's jurisdiction, could not by his unilateral act bring it to an end before it had run its statutory course.

78 The other reason advanced for not proceeding with the inquiry was to afford Ms Romano procedural fairness. In this case the Commissioner's primary case was that the practitioner was a knowing party to a scheme to raise a LSC commitment and to procure a payment on that commitment for work done when there was no entitlement to either. The practitioner's defence to that complaint was that she had either signed the relevant correspondence to the LSC which had been prepared by her secretary without reading it or that although she had signed it she had given instructions for the claim not to be made unless and until certain things pertaining thereto had been verified. The Commissioner's alternative case arose squarely out of the issue so joined and was that Ms Romano was nonetheless guilty of unsatisfactory conduct by not properly attending to verifying the propriety of the request for an assignment and the claim on the commitment mistakenly given before lending her signature to them.

79 This was not a case in which in the exercise of the Tribunal's discretion it might require the provision of further particulars. The question was whether on Ms Romano's own evidence she had admitted to a level of carelessness which amounted to unsatisfactory conduct. There was no ground whatsoever on which to require the Commission to furnish further particulars. For this reason too, the Tribunal erred in adjourning its inquiry.

Conclusion

80 A solicitor may properly delegate responsibility for preparing simple correspondence on routine administrative matters to an assistant. Signing correspondence of that kind after only briefly perusing it is not unsatisfactory conduct. The letter of 13 March 2012 was not correspondence of that kind.

81 The letter reported on Ms M's medical conditions and the progress of her criminal proceedings. It sought an extension of a legal aid assignment. Even though the assignment itself cannot result in a payment unless and until the commitment certificates are completed, it creates an imposition on the commitment budget of the LSC.

82 We therefore find Ms Romano guilty of unsatisfactory conduct in relation to the first particular because she signed the 13 March 2012 letter.

83 The question of whether Ms Romano had engaged in unsatisfactory conduct in relation to the other charged particulars and the representations there made to the LSC could only be answered in one way. The rendering of an account or claim for payment by a solicitor cannot, as is sometimes the case in the commercial world, be an ambit claim submitted with only the financial interests

of the legal practitioner in mind. A legal practitioner is duty bound, whether a client requires a formal certificate of the kind used by the LSC or not, to pay close attention to his or her account to ensure that only a fair and reasonable claim for work actually done is submitted. Ms Romano should not have completed the certificate and drafted the letter making the claim on the assignment without actively turning her mind to the matter on which the claim was made. If Ms Romano had taken the time to do so, on an occasion when she was not, as the Tribunal appears to have found, hopelessly distracted, and had turned her attention mindfully to the file, she would have inevitably realised that the claim was a false one. Ms Romano's conduct was unsatisfactory.

84 We:

- 1 allow the appeal;
- 2 make a finding of unsatisfactory conduct in relation to all particulars;
- 3 remit the matter to the Tribunal to determine penalty.