

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

LEGAL PRACTITIONERS CONDUCT BOARD v PRESCOTT

[2014] SASCFC 41

Judgment of The Full Court

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

24 April 2014

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

PROFESSIONS AND TRADES - LAWYERS - MISCONDUCT, UNFITNESS AND DISCIPLINE - DISCIPLINARY ORDERS - STRIKING OFF AND ANCILLARY ORDERS

Application by the Legal Practitioners Conduct Board for an order striking off the defendant, Mr Prescott, from the Roll of Practitioners. The proceedings are brought on the recommendation of the Legal Practitioners Disciplinary Tribunal following the Tribunal's findings that Mr Prescott was guilty of unprofessional conduct. The conduct which amounted to this unprofessional conduct was Mr Prescott's involvement in the billing of a group of investors, the Lateral Investor clients, and management of their potential claim to recover losses by the firm Townsends in 1998 (the first charge) and Mr Prescott's practising while his practising certificate was suspended and involvement in billing for work undertaken by him while his practising certificate was suspended in 2006 by the firm Grope Hamilton (the second charge).

The Tribunal found in relation to the first charge that Mr Prescott knowingly gave false evidence on oath before it in 2011 when he denied that he became aware that trust funds had been appropriated to payment of Townsends' bills until July 1998.

An appeal brought by Mr Prescott against the Tribunal's finding on the first charge was dismissed by the Full Court on 21 December 2012.

Mr Prescott contends that this Court should not act on the false testimony finding in the strike off application because, even though his testimony in the 2011 hearing was false, he had deluded himself into believing the truth of that testimony.

**Applicant: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MR C MCCARTHY -
Solicitor: MS E J MANOS OF LEGAL PRACTITIONERS CONDUCT BOARD
Defendant: MICHAEL TREVOR PRESCOTT Counsel: MR J WELLS QC WITH MR A DAL CIN
- Solicitor: GUARNA LEGAL**

Hearing Date/s: 28/08/2013 to 02/09/2013

File No/s: SCCIV-12-1567

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Held (the Court):

1. Having regard to the improbability and inconsistencies in Mr Prescott's evidence, the Court finds that in the 2011 hearing Mr Prescott knowingly recanted from the account of events he gave in the 2007 hearing in an attempt to escape the consequences of his professional misconduct. The Court so finds beyond reasonable doubt (at [66]).
2. A practitioner who knowingly gives false testimony on a material matter in disciplinary proceedings destroys the personal integrity on which membership of the legal profession rests (at [9]).
3. The practitioner's name should be struck off the Roll of Practitioners pursuant to s 89 of the Legal Practitioners Act 1981 (SA) (at [91]).

Legal Practitioners Act 1981 (SA) s 82, s 86, s 89, referred to.

Prescott v Legal Practitioners Conduct Board [2012] SASFC 145; *CJ v VAJ* (1998) 197 CLR 172, considered.

WORDS AND PHRASES CONSIDERED/DEFINED

"further evidence"

"strike off"

LEGAL PRACTITIONERS CONDUCT BOARD v PRESCOTT
[2014] SASCFC 41

Full Court: Kourakis CJ, Peek and Blue JJ

1 **THE COURT:** The Legal Practitioners Conduct Board (the Conduct Board) brings these proceedings pursuant to s 89 of the *Legal Practitioners Act 1981* (SA) (the Act) seeking an order that Mr Prescott's name be struck off the Roll of Practitioners. The proceedings are brought on the recommendation of the Legal Practitioners Disciplinary Tribunal (the Tribunal) made pursuant to s 82(6)(a)(v) of the Act, following the Tribunal's findings that Mr Prescott was guilty of unprofessional conduct. An appeal, brought by Mr Prescott against the Tribunal's recommendation pursuant to s 86 of the Act (the findings appeal), was dismissed by this Court on 21 December 2012.¹

2 The conduct which constituted the unprofessional conduct founding the Tribunal's recommendation arose out of the engagement of the firm Townsends by a group of investors (the Lateral Investor clients) to pursue professional liability actions against financial advisers for bad investment advice. Mr Prescott was at that time a salaried solicitor and was given the conduct of the file but a partner of the firm, Mr Reynolds, had some ongoing involvement with it. Mr Prescott had joined Townsends in 1997. He was an experienced practitioner. When Mr Prescott joined the firm, it was contemplated that he would become a partner and he was admitted to partnership on 1 July 1998.

3 The Board laid a charge against Mr Prescott and one of the Townsend Partners, Mr Reynolds, with respect to their conduct of the Lateral Investor clients' matter on 14 July 2006. The Tribunal's findings of unprofessional conduct in the management of the Lateral Investor clients' file were summarised in paragraph [9] of this Court's judgment in *Prescott v Legal Practitioners Conduct Board* (Prescott No 1)² as follows:

Count 1A Appropriating \$42,741.60 from a single trust account opened on behalf of all of the clients on seven occasions between March and October 1998 without providing bills for legal costs contrary to s 41(1) of the Act.

Count 1B Appropriating the sum of \$3,830 on one of those occasions in July 1998 contrary to the express terms on which the money had been paid into trust by one of the clients, Mr Wetherall.

Count 2A Failing to provide the clients with trust account statements within a reasonable time of the appropriation.

Count 2B Failing to keep a separate trust account ledger in respect of each client contrary to regulation 14(1) and (2) of the *Legal Practitioners Regulations 1994* (SA).

¹ *Prescott v Legal Practitioners Conduct Board* [2012] SASCFC 145.

² *Prescott v Legal Practitioners Conduct Board* [2012] SASCFC 145.

Count 3 Gross overcharging.

Count 4 Failing to communicate adequately with the clients.

4 The Tribunal also found that Mr Prescott knowingly falsely testified about his state of knowledge, and involvement in, Townsend's charging practices on the Lateral Investors file (the false testimony finding). The findings of the Tribunal were made after the conclusion of a hearing heard in 2011 (the 2011 hearing) after an earlier hearing (the 2007 hearing) was abandoned because of Mr Prescott's ill health. The Tribunal described Mr Prescott's testimony in the 2011 hearing as an untruthful reconstruction of events calculated to absolve him from any responsibility for the firm's failures to comply with the requirements of the Act by sending out accounts before, and trust account statements after, taking money out of trust and depositing it into the firm's account.

5 Mr Prescott contends that this Court should not act on the false testimony finding in the strike off application because, even though his testimony in the 2011 hearing was false, he had deluded himself into believing the truth of that testimony. That submission was founded in part on the opinion of the psychologist Mr Ireland. This Court gave permission to Mr Prescott to adduce evidence from Mr Ireland on the strike off application even though Mr Prescott had failed to lead evidence of the issue of his state of mind during the 2011 hearing before the Tribunal or on the findings appeal. The Board disputed Mr Ireland's opinion and called a psychiatrist, Dr Raeside, in support of its position. Mr Prescott also gave evidence before this Court to lay the foundation for Mr Ireland's opinion.

6 On 6 September 2007, the Board laid a second charge of unprofessional conduct against Mr Prescott. Count 1 charged that he failed in respect of the 2005/2006 financial year to deliver a practitioner's statement to his auditor by 31 August 2006,³ failed to retain cheque books for the trust account⁴ and failed to submit an audit report by 31 October 2006.⁵ Counts 2 and 3 charged that he practised as a legal practitioner and charged clients for work undertaken by him during November 2006 while his practising certificate was suspended by operation of section 33(2) of the Act.⁶

7 On 16 October 2012, the Disciplinary Tribunal found each count proved and found Mr Prescott guilty of unprofessional conduct.

8 On 21 December 2012, a Judge of this Court ordered that the conduct the subject of the Tribunal's finding be taken into account by this Court in

³ In contravention of regulation 25 of the *Legal Practitioners Regulations 1994* (SA) ("the Regulations").

⁴ In contravention of regulation 21 of the Regulations.

⁵ In contravention of section 33(1)(b) of the Act.

⁶ In contravention of section 22 of the Act.

determining appropriate orders to be made on the Board's application for an order that Mr Prescott's name be struck off the Roll of Practitioners.

9 For the reasons which follow, we do not accept Mr Prescott's testimony and prefer the expert evidence of the psychiatrist Dr Raeside to that of Mr Ireland. The appropriation of substantial amounts of trust money for fees without first complying with the statutory and professional obligation to provide a bill for the costs charged is a serious abuse of the trust and confidence reposed in a legal practitioner. A practitioner who knowingly gives false testimony on a material matter in disciplinary proceedings destroys the personal integrity on which membership of the legal profession rests. The order of the Court will be that the practitioner's name be struck off the Roll of Practitioners of this Court. Our reasons follow.

Failure to adduce further evidence of state of mind on the findings appeal

10 The grounds on which the findings appeal was brought included the following:

5.2 The Tribunal should not have made any finding of untruthfulness in circumstances where that was not necessary for the purpose of disposing of the case. In any event, the Tribunal should not have proceeded to do so in the absence of an amended charge alleging that the appellant had given deliberately false evidence (cf, Reasons, paragraph 175).

...

5.4 The Tribunal's finding that the change in Mr Prescott's evidence between the 2007 hearing and the 2011 hearing was untruthful was not reasonably open on the evidence to the requisite standard of proof because:

- (i) The Tribunal failed to give effect to its finding that Mr Prescott was suffering from depression during 2007.
- (ii) The evidence given in each of 2007 and 2011 was so many years after the facts in issue that it was unsafe to make any such finding to the requisite standard of proof.
- (iii) The Tribunal failed to give any, or any adequate consideration to the question whether the appellant was honestly mistaken in his evidence either in 2007 or 2011.
- (iv) The Tribunal failed to give effect to the undisputed and indisputable fact that by reason of his depressive illness, the practitioner was not able to function well enough in the 2007 hearing to avoid errors, including errors of memory, under the stress of examination and cross examination.

...

- (vii) The Tribunal erroneously relied upon the expert opinion of Dr Raeside as to the reliability of the appellant in his evidence in the 2007 hearing, which opinion –

1. Impermissibly usurped, and was allowed to usurp the statutory role, function and duty of the Tribunal to determine the facts;
2. was formed from the reading of the transcript of the 2007 evidence of the appellant and following a conference with the Board's counsel and solicitor, as to the content of which conference neither the Board nor the Tribunal of its own motion called evidence.

11 Ground 5.2 encompassed a complaint that the finding that Mr Prescott had dishonestly given evidence in the 2011 hearing was made without giving him an opportunity to put a state of mind defence to the false testimony charge. The remaining grounds impugned the finding of fact that Mr Prescott had knowingly given false evidence by contesting the Tribunal's evaluation of the psychiatric evidence concerning Mr Prescott's mental state in 2007. However, it was always open to Mr Prescott to seek the permission of the Court to adduce further evidence on the findings appeal of the kind ultimately given on this application by Mr Ireland in anticipation.

12 The power to receive further evidence is wide.⁷ The term 'further evidence' extends beyond the concept of 'fresh evidence' on which a motion for a new trial under common law procedural rules might be founded. If Mr Prescott had adopted that course and the further evidence was received, the matter might have been remitted to the Tribunal for further hearing or heard in this Court.

13 It is also an important consideration that on the findings appeal, in addition to complaining of the failure to afford procedural fairness, Mr Prescott sought to overturn the false testimony finding on the grounds:

- that the Tribunal mistakenly evaluated the evidence of Mr Prescott's psychiatric condition when he gave evidence in 2007, and
- that the Tribunal erred in its findings about Mr Prescott's knowledge of the billing practice in 1998.

14 The issue now agitated, which is whether Mr Prescott now honestly believes the truth of his account of his knowledge of the billing practice, is inextricably connected to the issues concerning what his knowledge of that practice was, in fact, at the time and his state of mind when giving evidence in 2007. There was every reason therefore to hear the evidence of Mr Ireland on the findings appeal if Mr Prescott intended to rely on it for the alternative position he now takes. We accept that the failure to obtain and then lead evidence from Mr Ireland on the findings appeal was not part of a deliberate forensic strategy to maximise the prospects of success on the grounds which were argued on the findings appeal. However, the fact of the matter is that the position now argued

⁷ *CDJ v VAJ* (1998) 197 CLR 172 at [53] per Gaudron J, at [108]-[115] per McHugh, Gummow and Callinan JJ.

on the strike off application, based on Mr Ireland's opinion, cuts across the position Mr Prescott took before this Court on the findings appeal.

15 For the above reasons, it was arguably an abuse of the process of this Court, on the application to strike Mr Prescott's name from the Roll of Practitioners, to contest the most important of the adverse findings made by the Tribunal and confirmed by this Court. However, having regard to our decision against Mr Prescott on the merits of the issue, it is not necessary to decide finally whether the forensic course he pursued was an abuse of process.

The course of the proceedings

16 A detailed history of the proceedings before the Tribunal is set out in this Court's judgment in the findings appeal, *Prescott (No 1)*,⁸ but it is useful to provide a condensed summary here.

17 The 2007 hearing before the Tribunal was conducted over various dates in that year. In September 2007 Mr Prescott gave evidence and was in cross-examination when the Tribunal adjourned for the day on Friday 21 September. On Sunday 23 September, Mr Prescott wrote to the Tribunal informing it that, after reflecting on the evidence he had given in the preceding week, he had formed the view that his statement of position required amendment to correct errors. On Monday 24 September Mr Prescott applied for the hearing to be adjourned on the ground that he was suffering depression.

18 The 2007 hearing was adjourned from time to time thereafter. In the time that elapsed, one member of the Tribunal panel died and another was appointed to the magistracy. Mr Prescott opposed the Tribunal's proposal to reconvene with a new panel and brought proceedings in this Court to enjoin it from so doing. When those proceedings were dismissed, Mr Prescott asked the Tribunal to permanently stay its proceedings. He only abandoned that application shortly before the charges were again listed for hearing. The newly constituted Tribunal heard evidence over eight days in July, October and December 2011 (the 2011 hearing).

19 In the 2007 hearing, Mr Prescott testified that Mr Reynolds informed him of the first payment of money from the trust account into the firm account, to pay for his work, on about 9 March 1998 in a conversation with Mr Reynolds at the doorway of his office. In his evidence, Mr Prescott conceded that at that time he knew that draft bills which he had prepared had not been sent to the Lateral Investor clients. According to Mr Prescott, Mr Reynolds assured him that the Law Society had approved the maintenance of a single trust account for the Lateral Investor clients and the way in which that account was being managed by Townsends. In particular, Mr Prescott testified that Mr Reynolds informed him that the Law Society had approved a practice of appropriating money from the

⁸ *Prescott v Legal Practitioners Conduct Board* [2012] SASFC 145.

trust account without sending a bill for work done to the Lateral Investor clients. In the 2007 hearing, Mr Prescott conceded that from the time of that conversation he understood that such bills as he might draw thereafter would be paid from the trust account without first being sent to the clients. We will refer to that practice as the secret billing practice.

20 In the 2011 hearing Mr Prescott recanted from the concessions about his knowledge of the secret billing practice which he had made in the 2007 hearing. He testified instead that he had assumed that, because the bills which he had drawn and forwarded to Mr Reynolds for approval were never returned to him in a finalised form, they were never finalised or acted upon. Mr Prescott's evidence was that, even though he was performing a great deal of work on the Lateral Investor clients' file, and preparing substantial bills for that work, he believed that no trust monies were appropriated on account of fees for his work. Mr Prescott claimed in the 2011 hearing that he was first informed by Mr Reynolds of the secret billing practice not in March 1998, but in July 1998, after the appropriation of the trust money deposited by one of the Lateral Investor clients, Mr Wetherall. The transfer of Mr Wetherall's trust money was recorded in the trust account ledger as having been made in late July 1998. Mr Prescott insisted that that was when he first learnt of the 9 March transfer and the subsequent transfer made on 5 June. According to Mr Prescott, until that time, he believed that the bills he had prepared were drafts only and that Townsends had not been paid for the work charged in those bills.

21 Mr Prescott testified in the 2011 hearing that he was still under examination in chief in the witness box in the 2007 hearing when he realised that his testimony, that he had first learnt of the secret billing practice as early as March 1998, was mistaken. In the 2007 hearing, Mr Prescott first testified that he was informed of the secret billing practice as early as March 1998 on Thursday 20 September 2007 in the course of his evidence in chief. He completed his evidence in chief on Friday 21 September 2007 and his cross-examination commenced on the same day. Mr Prescott testified in the 2011 hearing that he persisted with his mistaken account of when Mr Reynolds first disclosed the secret billing practice in cross-examination "because I couldn't work out how I was to change – get the answer".

22 In the 2011 hearing, in order to explain the change in his position about when he first learnt of the secret billing practice, Mr Prescott adduced psychiatric evidence from Professor McFarlane that he was suffering from a major depressive illness during the 2007 hearing. The Board adduced evidence from Dr Raeside contradicting that opinion. The competing psychiatric evidence was summarised by this Court in the findings appeal (*Prescott (No 1)*)⁹ as follows:

[166] It is necessary to refer to the psychiatric evidence about Mr Prescott's depressive condition before stating our final conclusions. Mr Prescott was diagnosed with

⁹ *Prescott v Legal Practitioners Conduct Board* [2012] SASCFC 145.

major depression after the 2007 hearing. On 26 November 2007, the psychiatrist Professor McFarlane prepared a report in which he diagnosed Mr Prescott as suffering from a major depressive disorder. He opined that Mr Prescott was not fit to give evidence. He reported that Mr Prescott did not have an underlying dissociative disorder or neurocognitive process that interfered with his capacity to register and integrate material before him. Instead Professor McFarlane reported that Mr Prescott's behaviour had "arisen from his underlying anxiety and characteristic difficulties in confronting discrepant and inconsistent material because of the extreme anxiety which it has caused him". On 9 July 2008, Professor McFarlane provided a report that Mr Prescott had fully recovered from his depressive illness.

[167] In 2009, Professor McFarlane reported that Mr Prescott's anxiety condition was such that when he gave his evidence in 2007 he would have been "unable to focus and direct his attention to the salient and relevant details". Professor McFarlane gave evidence in the 2011 hearing in support of the opinions expressed in his reasons.

[168] The Board relied on reports from Dr Raeside and called him to give evidence before the Tribunal. Dr Raeside expressed the opinion that, on his reading of the transcript of Mr Prescott's 2007 testimony, "... Mr Prescott may not have been functioning at his best given his depressive illness in combination with the stress of being examined and cross-examined in court. ... he still appears to have performed quite well". Dr Raeside saw no reason why from a "psychiatric perspective ... the transcript could not be relied on".

23 The Tribunal accepted the evidence of Dr Raeside over that of Professor McFarlane and found that Mr Prescott knew of the secret billing practice from March 1998. This Court's reasons affirming the Tribunal's findings are summarised in the following paragraphs (*Prescott (No 1)*)¹⁰:

[182] On Mr Prescott's own testimony in the 2007 hearing, upon which the Tribunal was entitled to act as containing admissions against interest, the evidence that Mr Prescott was knowingly involved in the trust appropriations was overwhelming. Even if Mr Reynolds' testimony that he acted on the requisitions made by Mr Prescott were rejected, and it were accepted that Mr Reynolds was the prime mover of the scheme, the evidence that Mr Prescott knowingly participated in it is overwhelming. The inference that Mr Prescott knew that the bills would not first be sent to the clients, even when he prepared the first bill, can be drawn from the way in which that bill was addressed, together with the evidence of his subsequent involvement in the preparation of bills and requisitions. That inference is reinforced by the inference which can be drawn from the false statements made to the Conduct Board referred to at [162]-[165] above.

[183] The Tribunal's conclusion that Mr Prescott's testimony in the 2011 hearing was a deliberately untruthful reconstruction of events follows ineluctably from the following evidence:

- The objective evidence of his knowing involvement of the scheme referred to at [133]-[135] and [175]-[182];

¹⁰ *Prescott v Legal Practitioners Conduct Board* [2012] SASFC 145.

- Mr Reynolds' testimony referred to at [121]-[132];
- Mr Prescott's testimonial admission in the 2007 hearing, referred to at [141]-[148], that he knew that the first appropriation was made without a bill being sent to the clients;
- The circumstances surrounding the sixth appropriation referred to at [157]-[158];
- The fundamental inconsistency between Mr Prescott's 2007 testimony in which he admitted learning of the first appropriation in March 1998 and his testimonial assertion in the 2011 hearing that he only became aware of any appropriations in August 1998 which is incapable of explanation by way of mistake or confusion;
- The lack of any support in the psychiatric evidence for the existence of a mental state which could explain the inconsistency referred to at [166]-[172];
- The many inconsistencies and improbabilities in Mr Prescott's account of the circumstances surrounding his signing of the trust account statements; and
- The knowingly false statement to the Conduct Board referred to at [162]-[165] above.

24 In these proceedings, Mr Prescott does not object to the Court adopting the findings of the Tribunal as to his knowing involvement in the secret billing practice on the Lateral Investor clients' file in 1998. That is perhaps not surprising given the strength of the evidence, referred to in passages just cited, that Mr Prescott was knowingly involved in the improper appropriations and this Court's confirmation of the Tribunal's findings in *Prescott (No 1)*. Nonetheless, Mr Prescott urges the Court not to adopt the Tribunal's finding that his testimonial denial of knowing involvement in the secret billing practice in the 2011 hearing was intentionally untruthful.

25 It is as well to commence with the obvious. One would not expect, in the ordinary course of human behaviour, a genuinely mistaken belief to develop in the way which Mr Prescott contends. Mr Prescott's case is that during the 2007 hearing he was already suffering from the delusion that he was first told of the secret billing practice in July 1998, but mistakenly testified inconsistently with that delusion that he knew of the secret billing practice as early as March 1998. It is, on his account, an unhappy accident that he was not able to communicate the delusional belief under which he laboured over the days he was examined and cross-examined in the 2007 hearing. The obvious alternative explanation is that over the weekend, after the first week of the 2007 hearing, he came to appreciate the seriousness of his knowing involvement in the secret billing practice, to which he had admitted, and decided to recant that testimony to escape censure for his misconduct.

26 To counter that adverse inference, Mr Prescott adduced in this Court the evidence of Mr Ireland to which we earlier referred. A report of Mr Ireland was received by the Court and he was examined and cross examined on it. Mr Ireland proffered the opinion that Mr Prescott suffered a psychological condition when he testified in 2011 which caused him to “passionately and honestly believe” in the truth of the account which he gave. Mr Ireland opined that that belief developed at some time which he could not precisely determine between 2007 and 2011. As we have already observed, on Mr Prescott’s evidence, he was already suffering from the delusion about when he first learnt of the secret billing practice when he testified in the 2007 hearing. Mr Prescott’s reliance on Mr Ireland’s opinion is inconsistent with the position he took in the 2011 hearing about the state of his mental health. In the 2011 Tribunal hearing, and on the findings appeal, Mr Prescott’s position was that his testimonial admission in the 2007 hearing that he knew of the secret billing practice from March 1998 was unreliable because, at that time, he was suffering from a major depression, but that he had recovered by the time of the 2011 hearing. His position in these proceedings is that he was still suffering from a delusion when he testified in the 2011 hearing. Mr Prescott contends that, by reason of that impairment of his recollection, he honestly and passionately believed when he testified in the 2011 hearing, and still believes, contrary to the fact of the situation, that he did not know of the secret billing practice until July 1998.

27 Before dealing in greater detail with Mr Ireland’s opinion, it is convenient to set out Mr Prescott’s evidence before this Court because, to a large extent, this Court’s assessment of Mr Prescott’s state of mind in the 2011 hearing will depend on our assessment of the credibility of his testimony before this Court.

28 Mr Prescott testified that he had little recollection of the 2007 hearing. He explained that his preparation for that hearing was limited because he was finding it difficult to face up to the predicament in which he found himself. He did not recall very much about his letter to the Tribunal. Mr Prescott told this Court that he had found it difficult to communicate with his counsel during the 2007 hearing because he was avoiding “the whole issue”. He could not recall whether there was a break between the completion of his evidence-in-chief and the commencement of cross-examination. Mr Prescott testified that, after the Tribunal adjourned on Friday 21 September 2007, he went straight to the office of Mr Hamilton. The letter to the Tribunal was written on the next day Saturday 22 September. Mr Prescott could not recall what the particular errors in his evidence, referred to in the letter, were.

29 Mr Prescott was asked by a member of the Court whether, as at September 2007, he considered that his memory of his discussions with Mr Reynolds had been adversely affected by the passage of time since the occurrence of the events in 1998. Mr Prescott answered that he didn’t think so “because it was something that stuck in my mind”. He explained that he wasn’t as certain about the timing of the conversation but that his recollection was that it was the middle of the year

or just after the middle of the year. When asked whether the conversation might have been in March, he answered that he was “pretty certain it was in the middle of the year”.

30 Mr Prescott testified that he was in a “much better state of mind” at the time of the 2011 hearing than he had been in 2007 and that he was not receiving any counselling or psychiatric treatment, nor was he taking any medication for any psychiatric condition, at the time of the 2011 hearing.

31 Mr Prescott denied that he had psychological issues of the kind from which he suffered in 2007 when he gave his evidence in the 2011 hearing. On a scale of ten, Mr Prescott placed his anxiety levels in the 2007 Tribunal hearing at between nine and ten and at five in the 2011 Tribunal hearing. By way of comparison, Mr Prescott placed his anxiety level when appearing before courts as a solicitor at about one, and his level of anxiety in giving evidence before this Court at three or four. Mr Prescott agreed that, when asked during the 2007 hearing whether the stress he was feeling was affecting his answers, he denied that it was.

32 Mr Prescott agreed that he had read the transcript of his evidence in the 2007 hearing as part of his preparation for the 2011 hearing.

33 Mr Prescott acknowledged to this Court that the effect of his 2007 testimony was that he had known about the secret billing practice from March 1998. Mr Prescott explained to this Court that in 2011 he was determined to correct the evidence he had given in the 2007 hearing that he knew of the secret billing practice as early as March 1998.

34 In the course of his cross-examination in this Court, Mr Prescott accepted that he initially made the mistake of saying that he had first heard of the secret billing practice during his evidence-in-chief. He accepted that he found giving his evidence-in-chief in the 2007 hearing less stressful than the cross-examination but nonetheless claimed that he was “still under huge stress and enormous difficulty”.

35 Mr Prescott was taken in cross-examination to a number of passages in the transcript of his evidence in the 2007 hearing in which he admitted that he was aware of the secret billing practice as early as March 1988. At times Mr Prescott suggested to this Court that those answers were ambiguous about the timing of the conversation with Mr Reynolds. At other times he accepted that his 2007 evidence-in-chief was to the effect that the conversation with Mr Reynolds was in March. However, when asked whether he appreciated that his evidence-in-chief on that aspect was mistaken as, or immediately after, he gave that evidence he answered:

A I can't be specific on that, I can remember it happening but just when is very difficult.

36 Mr Prescott was asked whether there was any reason preventing him from speaking frankly to his counsel about his evidence-in-chief. Mr Prescott answered “I can’t remember, specifically, except that I was in psychological chaos”.

37 Mr Prescott explained to this Court why he so strongly wished to correct the errors that he had made in the 2007 hearing in this way:

A Well, there are three reasons for that. One, I was under oath and there was an answer that was incorrect. Secondly, I wanted to make sure that the record was correct, that the correct evidence was before the courts and also I, morally, couldn’t live with the idea that wrong evidence had been put into the transcript. I felt strong to correct it.

38 Mr Prescott gave evidence that when he signed the letter which was sent to the Tribunal over the weekend he believed that the testimony which he had given in the previous week was “incorrect” in “several places”. Mr Prescott testified that the effect of the evidence which was incorrect was:

A That I had known no accounts had gone out and the monies were transferred sometime early in 1998 and not in July or August.

39 Mr Prescott gave evidence in this Court that in 2010 he had received advice “not to challenge or seek to correct the record” but that he declined to accept it because:

A I couldn’t live with the idea that there was something on that evidence which was not correct. As I say, I felt morally obliged to correct that to the court as a solicitor, that I had given evidence on oath.

40 In his evidence to this Court, Mr Prescott accepted that he did not take any steps to correct the secret billing practice even after he became aware that a further appropriation from the Lateral Investor clients’ trust account had been made, without a bill being sent to the clients, in August 1988.

41 Mr Prescott testified that he had no current recollection of reading the letter which Mr Wetherall sent after he had received a trust account statement in August 1998. In that letter, Mr Wetherall complained to Mr Prescott that the money he had paid into the trust account had been used contrary to the express written conditions he had attached to that payment.

42 This Court’s reasons in *Prescott (No 1)* explain that the trust transfers to pay the substantial amounts charged for legal work during 1998 were authorised by the Townsends’ partners, Mr Reynolds and Mr Townsend, but that Mr Prescott personally approved the payment of small amounts for his travel expenses to interview clients in the south-east of the state.¹¹ Mr Prescott was

¹¹ *Prescott v Legal Practitioners Conduct Board* [2012] SASFC 145.

asked in this Court why he had personally approved the appropriations for his travel without first sending out bills. Mr Prescott answered:

A It is very difficult to remember. I think Reynolds said that had been approved and that was the way to do it. It is hard to remember now any specifics on that.

43 The appropriations to cover travel expenses were made before the appropriation of Mr Wetherall's trust monies which, according to Mr Prescott's testimony in the 2011 hearing, and before this Court, preceded the disclosure by Mr Reynolds of the secret billing practice. Mr Prescott's answer is therefore inconsistent with his evidence in the 2011 hearing.

44 Mr Prescott testified in this Court that he could not say whether he properly understood the questions asked of him in the 2007 hearing. On another occasion when taken to an answer he gave in the 2007 hearing concerning when he first became aware of the secret billing practice, Mr Prescott answered:

A I can't remember the answer. I can't remember the circumstance. All I know is that, as I said before, I first learned in July or August.

45 When taken to yet another answer in the 2007 hearing in which he had indicated that he became aware of the practice in March 1998 Mr Prescott again answered:

I repeat again; it was not until July or August I knew about it.

46 When pressed Mr Prescott answered:

I repeat again, it was not until July or August I knew for the first time.

47 Mr Prescott confirmed that by those answers he meant that it was not until July or August that he was aware that there were any appropriations and that appropriations were made without first sending a bill. Mr Prescott was asked why he did not send out the bills he prepared for his work after he learnt of the transfers so that the Lateral Investor clients would know how much costs had been incurred and the detail of those costs. Initially Mr Prescott suggested that Mr Reynolds refused to allow the bills to be sent out. He then recanted that testimony and responded that he could not recall why he had not sent out the bills.

48 Mr Prescott testified that he appreciated that the trust account statements, which he signed in August 1998, showed that trust money had been appropriated on account of legal fees. Mr Prescott could not recall whether, when he signed the trust account statements which were sent to the Lateral Investor clients for the first time in August 1998, he knew that no bills had been sent. Mr Prescott accepted that, after he became aware of the unauthorised transfers in August 1998, he could have taken steps such as reporting the matter to the Law Society or communicating with his clients about the transfers.

49 Mr Prescott testified before this Court that his wife became aware of the disciplinary proceedings against him on the weekend before his evidence in the 2007 hearing commenced. In an affidavit sworn on 20 January 2011, he had deposed that it was on the weekend after the 2007 hearing adjourned on Friday that his family became aware. He deposed in that affidavit that he believed they had learnt from a cause list. Mr Prescott testified to this Court that he subsequently realised that he must have been mistaken about how his wife learnt of the hearing. Mr Prescott described his affidavit as “confusing” and testified before this Court that he could not recall what he believed when he swore the affidavit. Mr Prescott’s evidence on this issue was evasive and quite unsatisfactory.

50 Before this Court, Mr Prescott was challenged in cross-examination about his mental state and the degree of his confusion when he gave evidence in the 2007 hearing. After being pressed about an answer given during the 2007 hearing in which he had indicated that he first became aware of the secret billing practice in March 1998, the following exchange took place:

A No, probably not. I reiterate again, I was in a very poor mental state particularly to get to the end of that particular era and what was happening, I would have agreed to anything.

Q It does not suggest that you are agreeing to anything, you respond in a way that says ‘Unfortunately I knew that’.

A I can’t tell you what happened on that occasion in terms of my mind because I was too mentally confused. I remain on that point.

Q So as I understand your answer that you were giving on a number of occasions this morning, you are now saying that when you look at these types of questions and answers you were mentally confused?

A I was definitely mentally confused the whole time.

Q Why doesn’t it pertain to some of the other evidence in 2007?

A Strange question.

Q No, it is not. You are identifying this issue, the first trust appropriations and when the bills were sent to clients, that that is in error?

A Yes, I think I said earlier back in March that once I made the – I couldn’t work out in my mind because I was so confused how to correct it.

51 In the course of the 2007 hearing the following exchange occurred between Mr Prescott and counsel for the Board:

Q So you are content with the answers you have given today?

A You worry me when you say that.

52 Before this Court Mr Prescott denied that his comment was light hearted
and claimed that the response “is more likely to show I was disturbed”.

53 We found Mr Prescott’s testimony generally unconvincing. His
explanation for testifying in the 2007 hearing that he was first informed of the
secret billing practice in March 1998, and for failing to “correct” that testimony
and indeed perpetuating it even though he believed it to be mistaken whilst
continuing to give his evidence, is inherently improbable: he was an experienced
legal practitioner who was represented by counsel. Mr Prescott’s selective recall
of the events and circumstances connected with the 1998 conduct of the Lateral
Investor clients’ file and the subsequent Tribunal hearings was inconsistent. His
demeanour when giving evidence before this Court exuded a sense of self
assurance and confidence which was incongruous with his claim that he has been
overwhelmed by the disciplinary proceeding he has faced over the last decade.

54 We turn to the evidence of Mr Ireland on the genuineness of Mr Prescott’s
belief in his account of the events of 1998.

55 Mr Ireland measured Mr Prescott’s performance over several standard
psychometric tests. The tests revealed that Mr Prescott had high levels of
symptom aetiology associated with depression and anxiety related to the
disciplinary proceedings brought against him. Mr Ireland interpreted the tests as
indicating that Mr Prescott was presenting himself “in an open and non-defensive
manner with no evidence of any motivational distortion”. In weighing
Mr Ireland’s opinion about the results of those tests, it is important to understand
that the tests he administered were general in nature and were not adapted to test
the inconsistencies between the testimony he gave in the 2007 and 2011 hearings.
Indeed, Mr Ireland did not read the transcript of Mr Prescott’s evidence in those
hearings before his first interview of Mr Prescott or even before reaching his
opinion.

56 To understand Mr Ireland’s opinion, it is necessary to set out at some length
his report of 19 March 2013:

...

In my opinion Mr Prescott was in [a psychological state of crisis] at this time when going
through the Tribunal process. His crisis state deepened when he had to respond to the
questions of the Tribunal in September 2007. These questions were experienced as
severe stressor which posed a significant threat to his sense of identity as a lawyer,
husband and ethical individual. He experienced both a very high level of emotional
instability and immobility in the lead up to the examination in September 2007 while at
the time of the examination he described the presence of extreme emotional arousal and
symptoms of cognitive distortion as detailed above together with detachment and
relatively automatic behaviour which is typically seen when individuals are experiencing
acute trauma. Diagnostically he was certainly experiencing a high level of depression
and anxiety prior to and following the events of September 2007 such that he met the
criteria for a **Major Depressive episode (DSM-IV-TR, 2000)** as diagnosed by Professor
McFarlane soon after. I also consider that his state of crisis was such that his reaction and

experience was akin to that shown by those experiencing an **Acute Stress Disorder (DSM-IV-TR, 2000)** when examined in September 2007, with him being confronted with a stressor which represented a serious psychological threat to his sense of identity.

... His memory for events around the tribunal hearing in 2007 has very much become distorted; he remembers some things acutely such as saying to Mr Hamilton after giving evidence that he had made an error, but other things such as events around that time he cannot recall; again I find this consistent with the disrupted memories seen in individuals who have experienced an acute trauma reaction and experience. He recovered his composure after some 3 to 6 months following the events of September 2007 and after 12 months was able to find a position and return to work although avoiding high pressure and high responsibility roles.

In giving evidence in October 2011 to the Tribunal, he felt a high level of stress and anxiety, but my review of him indicated that he was able to maintain his mental composure with no evidence of the kind of cognitive distortion that appeared to have been present back in 2007.

On review he now demonstrates a high degree of passion for wanting to correct the record and the evidential error he believes he made in testimony to the 2007 Tribunal. I view his passion as consistent with what is seen in individuals following on from earlier traumatic experiences where there is often a strong desire to try to restore one's sense of control over what happened to them, and in his case restore his reputation and sense of self as an honest man.

Given my analysis that he was traumatised by his experience in 2007 and that this led to a post trauma syndrome which continues to be evident through to the present, I believe that the effects of this syndrome would have been present in 2011. Thus while I do think he was competent to give evidence in 2011 in terms of not being overwhelmed by anxiety, I also believe that he was also driven to try to "correct the record" as he saw it at that time and that he would have believed that the evidence he gave at that point in time was his honest belief.

...

57

Mr Ireland's final conclusions can be summarised as follows:

- (a) Mr Prescott was not currently suffering a post-traumatic stress disorder but rather an adjustment disorder with mixed anxiety and depressed mood (DSM-IV-TR, 2000);
- (b) Mr Prescott was anxious and distressed at the time he gave evidence in October 2011 but he was not experiencing the acute cognitive and emotional disability and turmoil that he was experiencing when he gave evidence at the time of the 2007 review;
- (c) Mr Prescott's earlier traumatic experience could reasonably be expected to have contributed to memory distortion and gaps that may have affected the accuracy of his recall of information at least from 2007 when he subsequently gave evidence in 2011;
- (d) Mr Prescott was *driven* to try to correct the record in 2011 as he saw it and in doing so restore his sense of himself as a decent and honest man;

- (e) Mr Prescott was in an intense state of crisis and shock and was functioning in a manner consistent with what is seen when someone is suffering from an Acute Stress Disorder. In such a state I believe his capacity to give reliable testimony would have been very much compromised. I think it is entirely likely that in such a state he could well have agreed without thinking to many of the accusations put to him no matter what the underlying truth may or may not have been;
- (f) Mr Prescott displays the kind of distorted and patchy memory of events and sequences at this time that is consistent with what I have seen in trauma survivors looking back on their trauma experiences, while he remains sensitive to thoughts and reminders of the events he endured;
- (g) Mr Prescott currently displays evidence of a very strong desire to “correct the record” which is consistent with someone who is trying to take back control following the trauma he endured in 2007. Mr Ireland drew an analogy with the adult who was a victim of childhood sexual abuse who now wants to have his or her story told and to be believed and by doing so restore some sense of control to self over what he or she endured;
- (h) Mr Ireland was not able to say that the evidence which Mr Prescott gave in 2011 is an accurate recall of what actually happened, but it was his opinion that Mr Ireland passionately and honestly believed the evidence he gave in 2011 was accurate and honest testimony driven by the psychological damage done to his sense of self in 2007 and his very strong desire to “correct the record”. It may represent what he would like to believe is truth as opposed to what actually happened but he now firmly believes it to be the truth.

58 It is to be noted that Mr Ireland accepted that Mr Prescott did not suffer from a post traumatic stress disorder. Instead he described the symptoms of the “crisis state” which he diagnosed as being akin to those of post traumatic stress disorder. Mr Ireland accepted that his diagnosis of a “crisis state” had not been accorded formal recognition as a psychiatric classification. Mr Ireland testified that “crisis states” are relatively brief, lasting something in the range of six to eight weeks but that they can recur.

59 Mr Ireland was asked how he had found it possible to conclude that Mr Prescott genuinely believed his account of events given in the 2011 hearing without analysing the actual inconsistencies in his testimony. Mr Ireland responded that his responsibility was not to test what Mr Prescott actually said, or did not say, in giving evidence but to address his psychological state. Mr Ireland accepted that his approach necessarily limited the opinion he could give to one as to whether Mr Prescott’s condition was one which was capable at a theoretical level of causing him to believe passionately and honestly in the truth of the evidence he gave in 2011 even if it was, objectively, mistaken.

60 Mr Ireland gave evidence that people might drift in and out of crisis states over a long period of time. He testified that Mr Prescott would have come to believe in the truth of his 2011 evidence sometime between 2007 and 2011. Of course, on Mr Prescott’s evidence, he had come to believe that even as he was still giving his testimony in 2007, but presumably that recollection might also be

a genuine but wrong reconstruction of his state of mind, if Mr Ireland's thesis were to be accepted.

61 Mr Ireland accepted that Mr Prescott was not suffering from a psychiatric disorder when he gave his evidence in the 2011 hearing.

62 It is trite but necessary to observe that the entrenched long term delusion claimed by Mr Prescott is fundamentally inconsistent with the "crisis state" condition postulated by Mr Ireland. It is impossible to explain the long term condition on which Mr Prescott's case rests by reference to a series of recurrences because, on that theory, there must have been lucid periods when Mr Prescott recovered a sound recollection of events. Not surprisingly, no evidence of a condition so farcical was given.

63 As we earlier observed, the Board disputed the opinions of Mr Ireland and relied on the evidence of the psychiatrist Dr Raeside. Dr Raeside testified that there was no diagnosable psychiatric disorder known as a "crisis state". Dr Raeside gave evidence that psychiatrists use the expression as a descriptive term to refer to a heightened state of emotion resulting in admissions to hospital following self harm responses to personal crises. Dr Raeside testified that the effect of trauma on memory differs between individuals: some victims of extreme trauma may not have a recollection of the traumatic events at all whilst others may have a very specific and clear recollection. In Dr Raeside's experience, an obsession to correct the record is often found in persons suffering personality disorders such as narcissistic personality disorders or paranoid personality disorders of the sort sometimes found in vexatious litigants. In Dr Raeside's opinion, such obsessions were "not psychiatric illnesses as such", but "can be so maladaptive to warrant a diagnosis of personality disorder". Dr Raeside found no evidence of any such disorder in Mr Prescott.

64 It is necessary to set out at length the analysis of Mr Ireland's opinions essayed by Dr Raeside in his report of 21 March 2013:

Finally, with respect to Mr Ireland's report, I have concerns about his opinion on the ultimate issue, namely Mr Prescott's truthfulness or otherwise before the tribunal in 2011. This is clearly the "ultimate issue" decided by the Tribunal on the basis of considerable evidence provided to them. Further, regardless of the accuracy of their finding, this does not appear to have been based on psychological grounds, but rather on the material presented to them.

Mr Ireland notes Mr Prescott's "very strong desire to 'correct the record' and again I find this consistent with someone who is trying to take back control" following the stress of 2007. He adds "I cannot say that the evidence he gave in 2011 is an accurate recall of what actually happened, but it is my opinion that he passionately and honestly believed the evidence he gave in 2011 was accurate and honest testimony and that as explained above it was driven by the psychological damage done to his sense of self in 2007 by his then traumatic experience which led to his very strong desire to 'correct the record'. It may represent what he would like to believe as opposed to what actually happened but he now firmly believes it to be the truth".

Mr Ireland does not explain further as to how he formed the opinion that Mr Prescott “honestly believed the evidence” that was given. Clearly Mr Prescott expressed that view to Mr Ireland and to myself, but I do not believe that it is the role of a psychiatrist or psychologist by virtue of their expertise, to come to a conclusion as to someone’s honesty and truthfulness.

I also note that Mr Ireland has not read the transcripts of Mr Prescott’s evidence before the Tribunal in 2007.

...

3.2 *the findings by the Tribunal and the Full Court that Mr Prescott’s evidence was factually wrong and deliberately so (particularly the discussion at paragraph 183 of the Reasons of the Full Court); and other matter you consider relevant and material – is there a basis upon which Mr Prescott’s evidence could be found to have been given with a genuine belief in its truthfulness if so, how strongly do you hold that opinion and why? If you do not hold that opinion please state the basis upon which you have formed that view.*

I do not believe that the question as to Mr Prescott’s truthfulness or otherwise before the Tribunal in October 2011 is one that a psychiatrist or psychologist is disqualified to answer, particularly in the absence of any mental illness.

However, the issue as to whether he had a genuine belief may be a topic for expert opinion. In my view, such opinion should be limited to any specific psychiatric disorder or marked psychological disturbance that would otherwise affect a person’s ability to interpret, make sense of, and communicate accurately their perceptions and judgment. In other words, if a person was suffering from a delusional belief (a fixed, false belief that is unshakable to counter argument) then that would be of particular relevance that the person may be expressing something that is clearly untrue, yet they believe. There is no evidence that Mr Prescott was suffering any delusional beliefs or other psychotic symptoms.

It is obviously possible that a person may believe that they are correct when the facts do not support their belief. In other words they may be in error. This would be a normal human experience and again is not necessarily a question for psychiatric or psychological opinion.

A person may hold a genuine belief as a result of reconstructed information on which they form that belief. In other words, the original facts may become obscured by other “facts” or assertions, and a person may eventually become confused as to the basis on which they are forming their belief. This would be similar to the above example of being in error, yet believing one is correct. Again this would be a normal human experience.

In Mr Prescott’s case the other significant factor is clearly the complexity and duration of the legal proceedings against him, with large amounts of detailed evidence. This would only compound the above difficulties that one might have in recalling accurately information on which to form a belief. This would further be complicated by the intervening depressive illness, particularly around the time he gave evidence earlier in 2007. In that regard, Mr Prescott may have held genuine beliefs in 2007 about some matters which, as he himself said, he later discovered to be incorrect.

However, I understand that in this case the finding of unprofessional conduct relates to evidence he gave in 2011 (not 2007). At that time, I do not believe that he was suffering any significant psychiatric or psychological disturbance that would otherwise have impaired his ability to know the truthfulness or otherwise of his comments. Whether he actually held a genuine belief is for others to determine, which appears to have been the case before the Tribunal.

65 We prefer the opinions of Dr Raeside to those of Mr Ireland. In particular we do not accept that the “crisis state” described by Mr Ireland is a psychiatric or other mental disorder. It appears to describe no more than the, not uncommon, human characteristic of wanting to believe accounts of events which absolve personal responsibility or guilt. On some occasions some people may come to genuinely believe in such innocent states of affairs whilst others may knowingly give false accounts in order to conceal their wrongdoing. Mr Ireland’s opinion that a “crisis state” may lead to the former “genuine” but mistaken belief can be accepted, but it may also generate the latter response. In accordance with Dr Raeside’s evidence, we find that Mr Prescott was not suffering psychiatric, psychological or other mental disorders which caused him to honestly believe in the truth of the testimony he gave in the 2011 hearing and before this Court.

66 We accept that Mr Prescott has at times suffered a sense of crisis and some associated anxiety and depression because of the disciplinary proceedings he has faced. However, having rejected the existence of the disorder postulated by Mr Ireland, and having regard to the improbability and inconsistencies in Mr Prescott’s evidence, we have no hesitation in finding that in the 2011 hearing Mr Prescott knowingly recanted from the account of events he gave in the 2007 hearing in an attempt to escape the consequences of his professional misconduct in the management of the Lateral Investor clients’ file in 1998. We so find beyond reasonable doubt.

The second charge

67 During the 2005/2006 financial year, Mr Prescott practised as a sole practitioner, having commenced sole practice in mid 2000. He became a partner of Grope Hamilton Lawyers. His files were generally transferred to Grope Hamilton Lawyers and he wound down his sole practice. As at 30 June 2006, \$24,933.59 was still held in Mr Prescott’s trust account.

68 On 15 August 2006, Mr Prescott’s auditor, Mr Willington, attended at Mr Prescott’s office to commence work on the audit for 2005/2006, but he was unable to complete it because Mr Prescott did not have the cheque book for the trust account.

69 On 27 August 2006, Mr Prescott wrote to Mr Willington saying that he could not locate the cheque book and had not completed the trust account balances. He enclosed a partially completed regulation 25 practitioner’s statement which contained no financial details and was not signed, certified or dated by him.

70 On 29 August 2006, Mr Willington wrote to Mr Prescott in reply identifying immediate actions required. Mr Prescott did not take any further action until after the deadlines for submission of his practitioner's statement on 31 August or of the audit report by 31 October 2006.

71 On 1 November 2006, Mr Prescott's practising certificate was automatically suspended by operation of section 33(2) of the Act. Mr Prescott continued to work as a legal practitioner at Grope Hamilton Lawyers throughout November in the usual way.

72 On 29 November 2006, Denise Watkins, Director of Professional Standards, telephoned Mr Willington. He informed her that the audit report had not been completed because he was awaiting instruction from Mr Prescott.

73 On 30 November 2006, Ms Watkins telephoned Mr Prescott. She asked him why he had not completed his audit. He responded that there were a few bits and pieces that he still had to find and he had been too busy. Ms Watkins informed him that he had been suspended under section 33(2) of the Act since 31 October for failing to lodge an audit report. Ms Watkins informed him that his auditor had contacted Mr Prescott several times to finalise the audit but he had not received any response. Mr Prescott responded that he was very busy.

74 On 30 November and 1 December 2006, Ms Watkins wrote to Mr Prescott confirming that his practising certificate was suspended and that he was not entitled to practise or charge for any legal work undertaken whilst under suspension.

75 On 1 December 2006, Mr Prescott signed a completed practitioner's certificate and Mr Willington signed an audit report. The audit report was lodged with the Law Society.

76 On 4 December 2006, Mr Prescott sent by facsimile to client E in the Northern Territory a bill dated 30 November 2006 for work undertaken in November 2006 totalling \$10,193 and client M in the Northern Territory a bill dated 30 November 2006 for work undertaken in November 2006 totalling \$11,394.¹²

77 Between 10 January and 12 April 2007, Mr Prescott caused bills to be rendered by Grope Hamilton Lawyers to seven South Australian clients. Each bill included a charge for work undertaken by Mr Prescott in November 2006 in amounts ranging from \$50 to \$305.

Conduct up to 30 November 2006

78 Mr Prescott gave evidence before the Disciplinary Tribunal that he did not become aware that his practising certificate had been automatically suspended

¹² All dollar figures are exclusive of GST and disbursements.

until Ms Watkins telephoned him on 30 November 2006. Mr Prescott gave evidence that his understanding after the telephone call was that any work which he had undertaken in November 2006 was not to be billed because his practising certificate had been suspended.

79 In his evidence, and in his earlier responses to the Board, Mr Prescott suggested that he never received Mr Willington's letter dated 29 August 2006 and that until 30 November 2006 he believed that Mr Willington had gone ahead and lodged the audit report without any further communications between them.

80 Form 4 contained in Schedule 1 of the *Legal Practitioners Regulations 1994* (SA) required the auditor to annex to his or her statutory declaration the regulation 25 practitioner's certificate as well as the audit report. Mr Prescott had not delivered a practitioner's statement containing the financial information required by the Regulations and shown on the form. He had not completed on the draft statement sent by him to Mr Willington on 27 August 2006 the amount standing to the credit of the Legal Practitioners Combined Trust Account, the names of clients on behalf of whom he was holding trust money and the amount for each, particulars of trust ledger accounts with a dormant balance with explanation why they were dormant or the balances held in ADI accounts. He had not certified, signed or dated the draft statement. Mr Willington could not have completed an audit report without receiving a completed practitioner's statement. In addition, Mr Willington did not have the cheque book which he needed to complete the audit and Mr Prescott had not obtained the presented cheques from his bank in substitution for the cheque book.

81 Mr Willington's statement was tendered in evidence before the Tribunal and Mr Willington was cross-examined by counsel for Mr Prescott. Mr Willington stated that he telephoned Mr Prescott's office after his letter of 29 August 2006 following up the missing cheque book. This was corroborated by the note made by Ms Watkins on 29 November 2006 when she telephoned Mr Willington. This was also corroborated by Ms Watkins' evidence that Mr Prescott's explanation to her on 30 November 2006 for not having his trust account audit report lodged was that he had been very busy as opposed to telling her that he believed that Mr Willington had lodged it.

82 The Tribunal found that Mr Prescott was responsible for failing to provide the practitioner's statement by 31 August 2006 and failing to ensure that the audit report was provided by 31 October 2006. The Tribunal specifically rejected the criticisms made by Mr Prescott of Mr Willington and Ms Watkins as being responsible for his own defaults.

Conduct after 30 November 2006

83 Mr Prescott gave evidence that he billed clients E and M on 4 December 2006 because he believed that he was entitled to practise in the Northern

Territory on a basis of one matter at a time. His evidence-in-chief was as follows:

I had had a matter in the late 90's in the Northern Territory and I had the opposition practitioner refuse to talk to me because I had no right to practice in the Northern Territory and my recollection is that I gained a right of practice for one matter at a time in the Northern Territory and my belief was that had continued through to and past this time.

84 Mr Prescott acknowledged that, after the Board commenced its investigation into his conduct the subject of the charge, he made enquiries of the Northern Territory Law Society and they had no record of any application by or certificate granted to him. He acknowledged that in reality he did not have any right to practise in the Northern Territory.

85 A letter from the Law Society of the Northern Territory was tendered which recorded that since 1997 interstate legal practitioners entitled to practise in their own home state have been entitled to practise in the Northern Territory.¹³ Under section 134L of the *Legal Practitioners Act* (NT), as in force in the late 1990's, an interstate legal practitioner was still required to maintain professional indemnity insurance through the Law Society of the Northern Territory, unless exempted. There was no reason for Mr Prescott to have obtained a right to practise in the Northern Territory on the basis on which he described, namely that the Northern Territory would grant a perpetual right to practise without ongoing lodgement of information or payment of fees on the basis that the practitioner only undertakes one matter at a time.

86 In relation to two of the seven South Australian clients who were charged for work undertaken by Mr Prescott in November 2006, Mr Prescott produced earlier draft work in progress printouts and bills on which he had crossed through the entries for November 2006 and gave evidence-in-chief that he did this to ensure the clients were not charged. However, he was unable to explain why the bills which were finalised and issued to the clients included work undertaken in November 2006. Mr Prescott did not give an explanation in evidence-in-chief why the other five bills included charges for work undertaken in November 2006.

87 Mr Prescott's overall explanation for clients being billed for work undertaken by him in November 2006 was oversight. Mr Prescott admitted that he did not inform the accounts staff at Grope Hamilton Lawyers of his suspension or its consequences and did not tell Mr Hamilton until January 2007. He took no effective steps to prevent clients being billed for work undertaken by him in November 2006. He did not disclose to clients that he had been suspended and did not consider that it was a matter for him to refund the fees wrongly charged or to invite Grope Hamilton Lawyers to do so.

88 Before the Tribunal, Mr Prescott denied the allegation in count 3 that he had charged clients for work undertaken in November 2006 on the ground that

¹³ *Legal Practitioners Act* s (NT) 134G.

Grope Hamilton Lawyers, and not he, had charged the clients. Given that Mr Prescott was a partner of the firm (albeit not a full profit sharing partner) and admitted that he authorised each of the bills, that defence was not tenable and was rightly rejected by the Tribunal. The Tribunal described Mr Prescott's explanation why some bills included charges for work done during his suspension as "confusing and unsatisfactory". The Tribunal found that Mr Prescott "ignored the effects of his suspension upon his ability to practise and charge clients". It found that he "continued to perform such duties as if the suspension did not exist." The Tribunal found that Mr Prescott had no regard of the consequences which arose as a result of his suspension.

89 The gravamen of Mr Prescott's conduct the subject of count 1 is that he took no steps after 27 August 2006 to complete, certify or sign the practitioner's statement which was due on 31 August 2006 and, given that the practitioner's statement was an essential prerequisite for the auditor to complete his audit report, he took no further steps thereafter until 30 November 2006 to ensure that the audit report was lodged in compliance with his obligations. Mr Prescott attempted to attribute responsibility for these failings to Mr Willington and Ms Watkins and only begrudgingly accepted his own responsibility. The underlying contraventions of the Act and the Regulations are not in themselves at the higher end of the range of seriousness of professional misconduct. However, Mr Prescott's avoidance of responsibility and willingness to give evidence in an attempt to exculpate himself or minimise his breaches cause concern whether he is a fit and proper person to remain a legal practitioner.

90 The gravamen of Mr Prescott's conduct, the subject of counts 2 and 3 is that Mr Prescott authorised the rendering of bills to nine clients for work undertaken by him in November 2006 when he was not entitled to practise and for which the firm was not entitled to charge. Mr Prescott's explanations for his conduct were unsatisfactory. The fact that charges were made for work undertaken when he was not entitled to practise as a legal practitioner is a serious matter, although not at the higher end of the range of seriousness of professional misconduct. Again, it is Mr Prescott's avoidance of responsibility for his actions, failure to disclose what had happened to clients or until belatedly to Mr Hamilton, failure to take any action to initiate an offer by the firm to refund amounts wrongly charged to the clients and his willingness to give evidence in an attempt to exculpate himself or minimise his breaches which cause concern whether he is a fit and proper person to remain a legal practitioner.

Conclusion

91 The unprofessional conduct which has been proved against Mr Prescott demonstrates a reckless approach to the standards of legal work and ethical behaviour expected of a legal practitioner. That conduct in itself would require the imposition of severe sanctions in order to protect the public. Mr Prescott's tardy and imperfect attendance to the requests of professional bodies, and ultimately his dishonesty when called on to account for his behaviour before the

Legal Practitioners Disciplinary Tribunal, call for the strongest of disciplinary measures to adequately protect the public. There is no alternative to an order striking Mr Prescott's name from the Roll of Practitioners.

92 We so order.