IN THE MATTER OF:

THE LEGAL PRACTITIONERS ACT 1981

Action Nos. 4 & 8 of 2014

Action No. 5 of 2015

and

IN THE MATTER OF:

ALFONSO PAUL STRAPPAZZON

REASONS FOR DECISION

Before the Tribunal for determination are three complaints concerning the practitioner.

The practitioner and the Legal Profession Conduct Commissioner ("the Commissioner") agreed that all matters should be heard together and determined in the one hearing.

Action No. 4 of 2014 is constituted by the further amended charge filed on 15 December 2015 pursuant to leave granted on 14 December 2015.

In summary, that charge alleged unprofessional conduct by the practitioner in respect of his conduct whilst instructed by Mr Rosato in relation to a claim for damages for personal injuries between the period from 1 April 2009 to 28 November 2012.

The Board alleged that each of the counts of misconduct by the practitioner when considered independently, constituted unprofessional conduct. In the alternative, the Board alleged that all of the counts of misconduct in combination constituted a course of unprofessional conduct.

The further amended charge was in substantially similar terms to the amended charge which had been filed on 15 May 2014.

The amendments in the further amended charge related to additional particulars to Count 2 contained in paragraph 2.7

Action No. 5 of 2015 filed on 19 May 2015 which is subject to an application for extension of time filed on the same day supported by the affidavit of Deborah Miles relates to the practitioner's conduct when instructed by Mr Rosato in the same matter, the subject of the charge in Action No. 4 of 2014.

The conduct however took place between 1 July 2007 and 31 March 2009, hence an application for extension of time was made.

In Action No. 5 of 2015 the Commissioner alleged unprofessional conduct constituted by a course of unprofessional conduct between July 2007 and 31 March 2009.

The practitioner at the commencement of the hearing, indicated that he consented to the extension of time for the laying of the charge in Action No. 5 of 2015.

By agreement between counsel for the practitioner and the Commissioner, evidence was heard in relation to that charge in the course of the proceedings.

The determination of the extension of time application had been complicated by the uncertainty arising from the decision of ***Keung & ACM (LPDT 3 OF 2015)*** which effectively determined that the Tribunal did not have jurisdiction pursuant to Section 82(2a)(b) of the Legal Practitioners Act 1981 ("the Act") to extend time in relation to proceedings which related to conduct which occurred prior to 1 July 2014 and for which the time limit had expired. The decision in that matter was the subject of an appeal to the Supreme Court.

Counsel for the Commissioner and the practitioner agreed, given the intertwining of Actions No. 5 of 2015 and 4 of 2014 to await the determination of that appeal concerning the jurisdiction issue before delivery of reasons.

Subsequent to the hearing of this matter and prior to delivery of reasons, the decision in the matter of ***Legal Professional Conduct Commissioner v. Richardson (2016) SASCFC 42)*** was delivered on 20 April 2016.

In that matter, the Full Court of the Supreme Court determined that the Tribunal has jurisdiction to allow an extension of time for the laying of a charge pursuant to Section 82(2a)(b) of the Act with respect to conduct that occurred more than 3 years before 1 July 2014.

Taking into account the consent of the practitioner, the seriousness of the charge and its connection with Action No. 4 of 2014, we consider it appropriate to exercise our discretion and to grant an extension of time within which to lay the charge in Action No. 5 of 2015 (as amended) to 19 May 2015.

Action No. 8 of 2014 was constituted by a charge filed on 12 June 2014.

That charge relates to the practitioner's representation of Mr John Cook during the period 13 November 2006 until November 2013.

The charge alleged unprofessional conduct between February 2007 and November 2013.

In summary the charge arose out of the practitioner's representation of Mr Cook with respect to a claim for property damage to his motor vehicle.

The practitioner was first instructed in November 2006.

Proceedings were ultimately commenced in the Port Adelaide Magistrates Court on 9 October 2012.

Between February 2007 and September 2012 the practitioner mislaid the client's file.

Following a Notice of Intent to inactivate the action issued by the Court on 16 September 2013, the proceedings were dismissed for want of prosecution on 11 November 2013.

The charge further alleged that the practitioner failed to actively communicate with the client.

Before embarking upon a consideration of each of the actions, we make some observations about the relevant legal principles.

The conduct in each charge took place prior to 1 July 2014.

Section 14 of the Legal Practitioners (Miscellaneous) Amendment Act 2013 Schedule 2 Part IV Transitional Provisions provides that for conduct that occurred before 1 July 2014, the relevant definitions to be applied are those definitions in force prior to 1 July 2014 for unprofessional conduct and unsatisfactory conduct.

"Unprofessional conduct" was defined in Section 5 as (relevantly) :

> *"(b) any conduct in the course of or in connection with practice by the legal practitioner that involved substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute."*

"Unsatisfactory conduct" was defined as being :

> *"conduct in the course of or in connection with practice by the legal practitioner that is less serious than unprofessional conduct but involves a failure to meet the standards of conduct observed by competent legal practitioners of good repute."*

The proceedings before the Tribunal are by way of inquiry.

Charges have been laid by the Legal Profession Conduct Commissioner.

The Commissioner bears the onus of establishing that the conduct, the subject of the charge, is unprofessional conduct or unsatisfactory conduct.

In making our determinations in this matter, we are guided by the principles enunciated in ***Briginshaw v. Briginshaw (1938) 60 CLR 362.***

In civil proceedings whilst the Tribunal must be satisfied to a degree of reasonable satisfaction about an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal.

We mention one other matter prior to consideration of the charges.

The practitioner obtained a medical report of a Dr Michael Siaw dated 2 July 2015 (p.932 Exhibit 1) and a medical report of Dr Tony Davis, Psychiatrist, dated 23 July 2015 (p.931 Exhibit 1).

Dr Davis also gave evidence on 18 December 2015.

In his submissions, Mr Bourne for the practitioner at p. 308 of the Transcript, said :

> *"He's not sought to suggest that the health issues touched on in the Commissioner's submissions that the physical health issues of gout and disc bulges, for example, together with, for example, the personality traits, the*

emotional issues, his brother's death, his mother's death and the mental health issues such as were more florid when the practitioner saw Dr Siaw some years ago than when he saw Dr Davis. He accepts all that provides an explanation but no excuse for his behaviour, will no doubt elaborate on that once the Tribunal has made its formal findings to the degree of misconduct."

We agree with the submissions of Mr Bourne that the matters raised in the medical reports are matters which may relate to mitigation with respect to penalty rather than culpability with respect to the allegations made in the charges.

ACTIONS NO. 4 of 2014 & 5 of 2015

We propose to deal with these charges together.

The respondent filed a Response to both charges (being Reply to amended charge Action No. 4 of 2014 on 22 May 2015 and a second Reply to amended charge Action No. 4 of 2014 dated 29 October 2015).

Notwithstanding that leave for an extension of time was required with respect to Action No. 5 of 2015, the practitioner filed a Reply to that charge dated 29 October 2015.

Exhibit 1 comprises the agreed book of documents.

A consolidated charge of unprofessional conduct incorporating the first and second responses of the practitioner with respect to Actions No. 4 of 2014 and 5 of 2015 are contained at pp. 47 and 65 of Exhibit 1.

The consolidation did not include the further amended application filed on 15 December 2015.

At the hearing of the matter, counsel for the Commissioner provided as an aide memoire the consolidated charges, with respect to Action Nos. 4 of 2014 and 5 of 2015, the practitioner's responses together with a transcript summary. That document included the particulars in the further amended charge.

From the outset, we observe that the practitioner admits with respect to Actions No. 4 of 2014 and 5 of 2015 that aspects of his conduct of Mr Rosato's claim constituted unprofessional conduct.

Whilst admitting that "aspects" of his conduct constituted unprofessional conduct, we consider that it is important to highlight significant aspects of the charges, particularly those that we consider to be more serious and to which the practitioner has raised contention in his responses.

At times, the practitioner's evidence on a particular topic diverges from that of Mr Rosato.

We will highlight that divergence of evidence with our findings as appropriate.

Action No 4 of 2014

Essentially, the practitioner admitted that :

- On 16 July 2004 Mr Rosato instructed the practitioner to act for him in relation to a claim for compensation for injuries sustained at work on 3 July 2004.

- It was not until 3 July 2007 that the practitioner issued a summons. He asserted that he did this to protect the rights of Mr Rosato notwithstanding he had misgivings about Mr Rosato's prospects of success and his client's ability to fund the claim.
- On 13 June 2008 the Court issued a Notice of Intent to Inactivate the Action. On 4 August 2008 the action was dismissed for want of prosecution.
- The practitioner obtained an ex parte order to reinstate the action on 18 February 2011.
- The Court again, on 22 August 2011, issued a Notice of Intent to Inactivate the Action.
- The practitioner again applied for an extension of time to serve the summons and statement of claim he had filed on 24 May 2011.
- There were various directions hearings and on 21 May 2012 the defendants filed an application to strike out Mr Rosato's action.
- On 26 September 2012 Mr Milazzo SM heard argument in the Adelaide Magistrates Court and on 28 November 2012. An order was made dismissing the action of the client. The client was ordered to pay the defendant's costs.

The practitioner's response :

a. That he was concerned with prospects of success and the client's ability to fund the claim; and
b. That the defendants offered not to enforce the order for costs made on 26 September 2012 if the client did not appeal the Magistrate's decision;

in no way excuses the sorry history of the practitioner's failure to prosecute Mr Rosato's claim, and to comply with orders of the Court.

We now deal with the particular counts of the charge.

Count 1 of the charge alleged that between 1 April 2009 and 28 November 2012 the practitioner unreasonably delayed prosecuting the client's action. Particulars 1.1-1.4

detail the practitioner's failure to progress the matter and act on his client's instructions.

The practitioner has substantially admitted the particulars.

To the extent to which the practitioner proffered explanations, they were at most, matters which may go to mitigation rather than culpability.

The particulars in paragraph 1.1 alleged that the practitioner failed to request a medical report between 15 April 2009 and 5 November 2009.

The transcript page 44 indicates the practitioner was aware on 15 April 2009, that he had instructions to get a report from Dr Hayes concerning Mr Rosato's residual disability.

At the next appointment on 15 September, some 5 months later, Mr Rosato informed the practitioner that he was seeing Dr Hayes again in October 2009.

The practitioner subsequently wrote seeking a report in November 2009.

The practitioner's response, wherein he asserted that the delay in seeking the report between April 2009 and November 2009, was on account of Dr Hayes seeing Mr Rosato for review, was somewhat disingenuous.

It was only after the practitioner had failed to obtain a report as instructed from Dr Hayes and saw his client again in September 2009 that he became aware of the further appointment in October 2009.

The particulars at paragraphs 1.2 and 1.4 alleged that a report was obtained from Dr Michael Hayes dated 13 April 2010 which provided a clear assessment of loss of function which facilitated a formulation of claim. The practitioner failed to provide the client with any advice as to the potential quantum of his claim and to obtain any instructions as to the appropriate Court in which to institute or maintain his proceedings.

The practitioner's response wherein he asserted that to his knowledge the client was not in a position to meet the costs of a barrister's opinion which was required in order to advise on quantum, was in our view, not supported by the evidence.

In his evidence, Transcript pages 49, 50 Mr Rosato stated that we (he and the practitioner) never talked about money. He could not recall if the practitioner ever gave a figure of what he thought the claim was worth. Mr Rosato did not ask and he received no advice about which Court the case could go to, he did not know the names of the Courts where the case could go to; they never spoke about Magistrates Court, District Court or Supreme Court.

Mr Rosato acknowledged at Transcript p. 50 that he and the practitioner spoke about a barrister, a Mr Di Fazio. Mr Rosato himself, having made inquiries, ascertained that Mr Di Fazio had passed away. There was no further discussion with the practitioner about another barrister nor the costs of a barrister. He was not asked whether he could afford an amount to pay for a barrister.

Transcript p. 51 he indicated that his understanding was the arrangement with the practitioner was no win/no fees because they never spoke about money although that was never specifically discussed.

Transcript p. 51, Mr Rosato acknowledged that he probably had paid for the report of Dr Hayes. He further said that it was not discussed with him whether it was worth getting the opinion of a barrister as to how much his case was worth.

To the extent to which Mr Rosato provided information concerning his financial situation to the practitioner, Transcript pp. 52 and 53, it was that he was having a tough time, had to sell his truck to pay bills, borrowed from relatives and was behind in his mortgage payments. He did not say however that as a result of all of this, he could not carry on with his Court case. He did not instruct as a result the case should go on hold.

In his evidence, p. 163 Transcript, the practitioner referred to his file note p. 308 Exhibit 1 dated 16 February 2011 which noted –

> *"He is working still but things are tough. He is able to work with discomfort, financially also things are tough as well, not much work about, he will need to save to pay future fees etc. Case is not certain and he will need to put aside an amount to secure future counsel fees, discussing generally. He will be selling his truck in the short term in order to pay his ongoing expenses."*

He also referred to having general discussions with Mr Rosato from time to time.

The practitioner agreed with the proposition that there was no file note concerning Mr Rosato's financial position from 16 February 2011 until 7 August 2012.

Transcript p. 165 the practitioner agreed that the basis of his understanding that the client would have significant difficulty in meeting the barrister's fees in particular was based upon the information in that file note.

Transcript p. 166 the practitioner was confident that he had spoken with Mr Rosato with respect to barrister's fees and something to the effect that barristers can be very expensive and he would let him know when the time comes. The practitioner agreed that no particular barrister was discussed and it was at that stage premature until potentially the matter was going to trial or perhaps opinion as to quantum was to be sought.

Transcript p. 167 the practitioner said a barrister costs $2,000 or $3,000 day in the District Court but that would not be in his notes. He agreed that a reference to putting an amount aside for counsel's fees was an indicator that no specific figure was put but rather an abstract.

Transcript p. 168 the practitioner stated that he was confident that he did not speak to a particular barrister or note their fee.

We are satisfied on the evidence of both Mr Rosato and the practitioner that there was no basis for the practitioner to assert that to his knowledge the client was not in a position to meet the costs of a barrister's opinion which was required in order to advise on quantum.

The practitioner has not provided any satisfactory explanation as to why he did not progress the client's action between 21 September 2010 and 15 February 2011, nor as to why he did not advise as to quantum and the appropriate Court in which to institute proceedings. The practitioner's conduct in failing to progress his client's claim was entirely unacceptable.

The most that can be said is that the client was experiencing some financial difficulty. He was advised that the costs of a barrister could be significant and he would be advised in due course.

We accept the evidence of Mr Rosato that no figure was ever discussed with him nor did he ever say that he could not afford a barrister.

Particulars 1.5 set out the orders of the Court relating to the steps the practitioner was to take with respect to the progress of the client's action.

The practitioner admitted breaching the orders of the Court.

In summary, the orders breached included failure to make discovery within the time ordered, failure to provide Form 22 particulars within the time ordered, failure to comply with an extension of time within which to file particulars on 2 occasions by the due date and on the last occasion, filing them significantly out of time, his failure to file affidavit material with respect to the defendants' applications to strike out the claim filed 21 May and 28 June 2012 within the time specified.

The Court ordered on 16 July 2012 that the affidavit material be filed within 14 days ie. by 30 July 2012. The practitioner did not comply within the timeframe but handed up the affidavits to the Court and to the defendant's solicitors on the morning of the hearing on 8 August 2012. The practitioner was ordered to pay the costs of adjournment fixed at $150 personally.

The practitioner's explanations in his response for his failure to comply with the orders were again matters which do not go to culpability but at best, if relevant at all, mitigating factors with respect to penalty.

The practitioner's explanations included other responsibilities, the knowledge perhaps that he can always get a bit of extra time, other work pressures, Transcript p. 176.

We are particularly concerned by the practitioner's comments Transcript pp. 176, 177 – that whilst acknowledging that Court orders are the most serious deadlines, they are very important because they impact on a client's case, went on to say -

> *"having said that, we were given an extension and so eventually the documents were lodged".*

He went on to observe that he was not proud of himself.

The practitioner on his own evidence appears to have little real insight into the importance of complying with the orders of the Court setting time limits for procedural matters. He seemingly treats time limits as aspirational with the expectation that an extension of time will be granted effectively upon request.

We find that the practitioner's responses do not in any way justify or excuse the failure to comply in a timely way with the orders of the Court.

We find, with respect to Count 1, that the practitioner's conduct involves a substantial and recurrent failure to meet the standard of conduct observed by a competent legal practitioner of good repute.

COUNT 2

Count 2 alleged that the practitioner failed to adequately remain in communication with the client in relation to the action and failed to inform the client of matters which the client was entitled to know.

The particulars were substantially admitted and again the practitioner's response and his evidence relate generally to matters we do not consider go to culpability, but rather if anything, mitigation of penalty.

The particulars of Count 2 paragraphs 2.1 – 2.4 allege that the practitioner failed to notify the client of notices to inactivate the action on 22 August 2011, 10 October 2011, 17 October 2011. He did not inform the client of the application to reinstate his action of 15 February 2011 nor did he inform the client that at a directions hearing on 17 May 2012 an order was made that the client pay the costs of each defendant fixed at $100.

In essence, the practitioner in his response, insofar as the Notice of Intent to Inactivate was concerned, asserted that it was always his intention to seek to have the action reinstated if it became inactive.

We refer to our observations in preceding paragraphs of those reasons. The practitioner has, at best, a laissez faire attitude to the conduct of litigation and an expectation that the Courts will extend to him whatever latitude may be required to ensure that the matter is reinstated and ultimately able to be continued until resolution or determination.

We agree with the submission of counsel for the Commissioner that the practitioner's conduct fundamentally fails to appreciate, let alone, comply with his duties and obligations to the client and to the Court.

The practitioner has, it seems, a total lack of insight into his obligations to his client. His failure to advise his client of the costs order made against him is very concerning. It was an obligation on his client and as it transpires (Transcript p. 158) the practitioner, whilst he says he intended to pay the costs personally, did not do so. The excuse being that it had not been followed up (by the defendants), an order had been made and if they had required the funds be paid, he would have paid. In circumstances where the order had been made against his client personally, if the practitioner intended to pay the costs himself, at the very least he should have paid them forthwith.

Particular 2.5 alleges that with respect to the defendants' application to strike out the client's claim on 21 May and 28 June 2012, the practitioner did not advise the client of the applications.

The practitioner admitted that he did not advise the client of the applications on a timely basis.

The practitioner did not deny the allegations made in the particulars of paragraph 2.6. On 28 November 2012, Mr Milazzo SM dismissed the claim and ordered the client pay the costs of the action of both defendants. The practitioner did not speak to the client until 11 December 2012. The time for appeal pursuant to the Supreme Court Civil Rules is 21 days ie. Mr Rosato then only had 8 days within which to appeal if he was so advised.

No real explanation was proffered by the practitioner for this failure to advise the client. The practitioner's failure to communicate with the client in these circumstances in a timely way was inexcusable.

The further amended charge particulars at para. 2.7 allege that the practitioner wrote to the solicitors for the defendants formulating Mr Rosato's claim in the sum of $40,000 plus costs.

It was alleged that the practitioner had not obtained Mr Rosato's instructions prior to formulation nor given him advice as to the quantum of claim or taken appropriate instructions. He had not sought instructions as to the appropriate Court in which to issue proceedings, nor the amount for which his claim should be formulated. He had not advised Mr Rosato that the formulation of his claim for $40,000 plus costs enabled one or both of the defendants to accept the formulation or finalise his claim. Mr Rosato at no stage authorised the practitioner to settle his claim for $40,000 plus costs.

We refer to our previous observations and recounting of the evidence of Mr Rosato concerning the quantification of his claim. At Transcript p. 68 he says that the practitioner did not tell him how much the damages might be. Mr Rosato is not sure whether he had seen the practitioner's letters of 14 July and 16 July 2012 to the defendants' solicitors, formulating the claim.

Transcript p. 69 Mr Rosato said however that he did not know in July 2012 whether the practitioner had written to either lawyer formulating his claim at $40,000.

Transcript p. 76 Mr Rosato gave evidence that if the practitioner had asked him to pay for example $2,000 for a medical report, he would have found the money and

would have asked his family; his income had severely declined and by Christmas 2004 he was on Centrelink benefits.

The practitioner agreed (Transcript p. 203 and following) that he forwarded the formulated claims to the defendants' solicitors pp. 277 – 278 Exhibit 1 and that they were the first formulated claim. He had been requested to do so some time earlier by the solicitors for the defendants.

Transcript p. 204 he indicated that he was aware of the 90 day rule (Rule 21A(1)(ii)) Magistrates Court Rules and that his formulation of claim was substantially out of time.

Additionally, it was not a comprehensive formulation.

Transcript p. 206 the practitioner agrees that he had not advised Mr Rosato about the quantum of his claim at the time he provided the formulation but believe they would have spoken in a generic way.

The practitioner agreed that the formulation was as a result of a request made on 7 February 2012 from Nosworthy Partners (p. 288 Vol. 1).

When questioned (Transcript p. 207) as to how he got from a general discussion with Mr Rosato about quantum and no definitive figure, to a formulated claim of $40,000, the practitioner indicated that that figure represented the jurisdictional limit of the Magistrates Court at the time. He believed there were issues about credibility or whether he would get to first base.

Transcript p. 208 the practitioner agreed that he would have said the matter probably needed to be litigated in the District Court in due course but were issued in the Magistrates Court probably due to the significant differences in terms of the issue fees; he believed that he was aware that if either of the defendants accepted the formulation, he would have settled Rosato's claim.

Transcript p. 209 the practitioner agreed he did not have specific instructions to settle Mr Rosato's claim.

We find the practitioner's conduct an extraordinary dereliction of his duty to his client.

The practitioner's conduct can be summarised as failing to advise his client of the nature or quantum of his claim at any stage, issuing proceedings in the Magistrates Court without any instructions or advice as to the appropriate jurisdiction and then formulating a claim which had the effect of potentially settling the client's claim upon the formulated terms without any instructions to do so.

We are not satisfied on the practitioner's evidence and his demeanour that even now he fully comprehends the extent of his failure to properly perform his duties and obligations to the client.

With respect to the matters raised in Count 3, we find that the practitioner's conduct involved a substantial and recurrent failure to meet the standard of conduct observed by a competent legal practitioners of good repute.

COUNTS 3 & 4

Count 3 alleged that the practitioner swore an affidavit (the practitioner's affidavit) on 14 February 2011 which contained statements which were inaccurate and misleading.

The affidavit was sworn by the practitioner in support of an ex parte application made by the practitioner on behalf of the client to reinstate the action.

In his response to that count, the practitioner denied that the affidavit he swore was inaccurate and misleading.

The practitioner, in his response, sought to refer to the affidavit for its full meaning and effect. The practitioner accepted that his affidavit put a "gloss" on the facts set out in the affidavit so as to put his conduct in the most favourable light.

We will consider Count 4 which alleged that on 15 February 2011 the practitioner filed or caused to be filed in the Adelaide Magistrates Court the practitioner's affidavit knowing the Court would be entitled to rely on the document as his evidence together with Count 3.

The practitioner's response to Count 4 is in terms similar to his response to Count 3.

The practitioner's ex parte application was heard on 18 February 2011.

Mr Gumpl SM ordered that the action be reinstated and gave leave for the plaintiff to amend his claim and also granted an extension of time.

We are unable to accept that the practitioner's affidavit reflects merely a "gloss" over the facts. We do not accept in any event that it was at all appropriate for the practitioner to put a "gloss" on the facts.

The affidavit was sworn in support of an ex parte application. The affidavit of the practitioner is found at p. 175 of Exhibit 1.

Para. 3 of the practitioner's affidavit asserted – *"Letter was sent to the first defendant and the second defendant advising them of the plaintiff's claim. Negotiations have since proceeded with the insurers, the first defendant and the second defendant.*

The practitioner's affidavit was silent, we find deliberately so, as to when letters were sent to the defendants, and negotiations took place - no doubt in an effort to put his actions (or inactions) in the most favourable light.

Counsel for the Commissioner produced as an aide memoire a chronology.

On 23 December 2004 the practitioner wrote to the solicitors for the first defendant.

This was the first and only contact until the first defendant was served with the proceedings on 6 October 2011.

Insofar as the second defendant was concerned, a letter was sent on 25 September 2007. (Vol 1 p. 319)

Service of proceedings was effected on the second defendants (not their insurers) on 6 October 2011. (Vol 1 pp. 301-302 pp. 154, 156-157)

At the time of swearing his affidavit therefore, we find the practitioner was well aware that there had been no negotiations or communications in the case of the first defendant for a period of nearly 7 years and in the case of the second defendant, for nearly 4 years.

We find it is beyond a "gloss" to imply that negotiations had proceeded. The contrary was in fact true, that is, the practitioner had failed to communicate with the defendants for a very significant period time.

Para. 3 of the practitioner's affidavit went on to state that despite their denials of liability, the plaintiff has continued to supply the insurance companies with copies of relevant documents and in particular, medical reports relating to the plaintiff's injuries.

The practitioner agreed that no medical reports were provided to the first defendant after 23 December 2004 and none were provided to the second defendant's insurers between 25 September 2007 and 14 February 2011 – that is for nearly 7 years and nearly 3 ½ years respectively.

We observe that in his reasons for decision in the Magistrates Court proceedings, upon the hearing of the defendants' application to dismiss the plaintiff's claim for want of prosecution heard on 26 September 2012, Mr SH Milazzo SM found that para. 3 of the practitioner's affidavit of 14 February 2011 was misleading. Exhibit 1 p. 775

In his evidence (Transcript p. 215) when asked as to whether he still considered he was putting a gloss on the facts, the practitioner responded that - *"it seems to me that I may have been stretching the truth".* He agreed that it was "stretching the truth" to assert that he had continued to supply the insurance companies with copies of relevant documents and in particular, medical reports.

Again at p. 216, he agreed that it was "stretching the truth" to say that negotiations had proceeded with the insurers.

For the practitioner to "stretch" the truth in an affidavit in support of an ex parte application falls far short of the practitioners obligations to the Court to make full and frank disclosure.

Transcript p. 219 the practitioner agreed that he was aware that an affidavit is a document where the deponent swears on oath to tell the truth about relevant facts, that he is aware that an affidavit is of facts and not hearsay or opinion and he is well aware of what a fact is. He further accepted the proposition that in an appropriately sworn affidavit there is no place for gloss and affidavits must only deal with true facts.

Likewise, when he swore in para. 4 of his affidavit that the plaintiff's injuries had continued to require operative treatment until recent times, the practitioner must have known from his dealings with Mr Rosato and his file notes and medical reports that the operative treatments of Mr Rosato were in November 2004 and December 2006.

At para. 5 the practitioner requested the Court to grant orders as sought to enable the plaintiff to prosecute his claim which he could not do until then for the reasons outlined.

As we have referred to earlier in these reasons, at no time did Mr Rosato ever instruct that he did not wish or was not able to prosecute his claim and he gave no instructions to delay the claim.

We find, from the content of the affidavit and the practitioner's evidence is that the practitioner deliberately and consciously swore an affidavit which was inaccurate and misleading.

As to the practitioner's filing of the affidavit, we accept the submission of counsel for the Commissioner that such actions constituted a serious breach of the practitioner's obligations to the Court, the administration of justice and the opposing parties.

With respect to Counts 3 and 4, we find that the practitioner's conduct involves a substantial and recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute.

COUNTS 5, 6 & 7

These Counts are interrelated and we will deal with them together.

The essence of these Counts is that the practitioner drafted and proffered to Mr Rosato an affidavit for swearing. The practitioner did not advise the client of the purpose of the affidavit nor obtain his instructions to the matters deposed. The affidavit contained incorrect and misleading information and the practitioner knew that this information was misleading.

The practitioner, as a commissioner for taking affidavits, witnessed, signed and dated the client's affidavit where the affidavit was not properly sworn. The practitioner did not take the client's oath on a Bible.

The practitioner sent copies of the client's affidavit to the solicitors for the defendants knowing that the defendants would be entitled to treat the affidavit as the client's evidence.

The affidavit of Mr Rosato is at pp. 249-252 of Vol 1 of Exhibit 1.

In his response the practitioner asserted that he gave a limited but adequate explanation to the client about the purpose of the affidavit. The affidavit was based on instructions previously provided by the client and the practitioner's understanding of the facts pleaded which the client confirmed at the time the affidavit was sworn. The practitioner denied that the facts attested to were incorrect and misleading and asserted that the contents of the affidavit were not inaccurate.

The practitioner asserted that the client gave instructions about his financial circumstances which the practitioner understood to mean the client was impecunious and unable to fund the claim which caused the practitioner not to progress the claim as he otherwise would have although he did not have specific instructions to that effect. The practitioner asserted that he understood the client would have significant difficulty in meeting the barrister's fees in particular. The practitioner asserted that he read the affidavit to the client at the work site where the client appeared to have just completed work for the day. The client appeared to the practitioner to understand and confirm the contents of the affidavit. The practitioner denies that the affidavit was not properly sworn and says that he took the client's oath on a Bible which the practitioner kept in his motor vehicle for that purpose. The client swore on oath and confirmed that the contents of the affidavit were true and correct.

Mr Rosato's evidence was that he recognised the document and his signature on it (Transcript p. 54). He had not read the document prior to attending the Legal Practitioners Conduct Board (Transcript p. 55).

The practitioner attended upon Mr Rosato at his work site and advised him that he needed to sign the papers because the CEO or whatever of the Galaxy Homes had terminal cancer (Transcript p. 56). The practitioner read the papers to Mr Rosato. He estimated it took a minute or a minute and a half. Mr Rosato says he did not read the papers before he signed them and he was not asked to swear. He says the practitioner did not use the words "swear" or "promise" and there was no Bible produced. He would have sworn on a Bible had he been asked. He was not asked whether what was in the papers was true. He signed because he trusted the practitioner. (Transcript pp. 57-58)

Mr Rosato gave evidence that he had never had to sign a document where he had held a Bible and swore. (Transcript p. 59) He had sworn an oath in Court previously and had been given a Bible. It was clear that Mr Rosato had a clear understanding of what it meant to swear on his oath.

Mr Rosato did not agree with certain contents of the affidavit.

In particular (Transcript p. 62) he stated that the practitioner did not tell him on 7 August 2012 what appeared in para. 5 of his affidavit –

> *"I am informed and verily believe that my solicitor Alf Strappazzon continued to correspond with ... the insurers and that ... (Alf) attached a copy of the medical report of Dr Hayes."*

nor para 6 –

"As a consequence these proceedings were put on hold because of my impecunious position."

Transcript p. 63 - Mr Rosato asked what "impecunious" meant. He did not understand it. He did not recall that word being read to him on 7 August 2012 by the practitioner.

Transcript p. 65 – Mr Rosato did not ask for his case to be put on hold. He did not understand that his case had been put on hold and was not told that by the practitioner. He did not recall the phrase "as a consequence these proceedings were put on hold". He would have asked if he had been told that.

Transcript p. 65 para. 6 - In para. 6 of the affidavit it is stated : *"I was unable to meet the expenses of the proceedings and my medical expenses"*. Mr Rosato stated that he was paying his medical expenses and he had not been asked to pay for any expenses of the proceedings, ie. lawyers' fees.

In cross examination by counsel for the practitioner, he was asked questions concerning the Form 22 Personal Injuries particulars dated 28 June 2012 (Exhibit 1 Vol. 2 p. 411).

Transcript p. 80 Mr Rosato agreed that the practitioner got him to sign a document setting out his injuries and the money he had lost, details of his personal particulars, details of his injury and its effect upon him and his work and recreational activities. Mr Rosato could not remember signing but accepted he did because it was his signature on it.

He did not remember the practitioner giving him a Bible and asking him to swear on the Bible. He said he did not see a Bible.

Transcript p. 87 Mr Rosato agreed that the practitioner read the document when he came to see him. He supposed he read it out fully. He did not know about carefully. He does not recall asking any questions about the words in the document.

Transcript p. 88 Mr Rosato said that (the document) "if he would have read and I would have taken attention to what he was reading". He says he would have stopped the practitioner at the point about his financial problems because he did not say to stop, to put the case on hold.

Transcript p. 92 Mr Rosato agreed that apart from disagreeing that the case was put on hold because of his financial position, the other things in the affidavit appeared to be correct.

Transcript p. 92 Mr Rosato does not remember that the practitioner had a Bible for him to hold before he swore the contents were correct. He does not remember that the practitioner had a little green Bible and disputes that the practitioner presented to him the Bible.

In his evidence the practitioner (Transcript p. 124) said that he could not specifically recall if he gave any detailed explanation to Mr Rosato of what the document was to be signed or why. He told him it was an affidavit that needed to be signed by him, he needed to obviously agree with the contents of the document.

Transcript p. 125 the practitioner deposed that he basically told Mr Rosato that an application had been made to dismiss the action. The matter was in Court the

following morning and he had prepared this affidavit for him to sign. He agrees he mentioned the CEO or the person in charge of Galaxy Homes was sick. (Transcript p. 126).

Transcript p. 127 the practitioner stated that he would have said – "...here is the document, I would like you to read it and providing you agree with it, then we'll get it signed."

The practitioner did not specifically remember doing that and in answer to a question from Member Lane and stated that he was relying on his usual practice.

Transcript p. 128 – The practitioner said his usual practice when visiting a client was to have a Bible in his car at all times in the glovebox.

Transcript p. 129 – The practitioner says he sticks to the practice of using the Bible "all the time".

Transcript p. 129 – The practitioner does not recall having the Bible with him, he was relying on his practice. He had absolutely no doubt that he had the Bible. His recollection was that Mr Rosato asked him to read the affidavit to him.

Concerning para. 5 the practitioner said that Mr Rosato's information was on the basis of having been informed that day by the practitioner. With respect to para. 6 concerning putting the proceedings on hold, he says he was intending to convey that Mr Rosato was in a difficult financial position, was having trouble meeting normal expenses and his impression was that Mr Rosato needed some time to raise some funds.

Transcript p. 131 – the practitioner conceded that he had not spoken with a barrister and obtained any estimate concerning fees nor providing an opinion.

Transcript p. 131 – he could not recall whether Mr Rosato ever asked to put proceedings on hold – he does not think that he ever used those words. He was disappointed in himself at the proceedings being on hold for a long while.

We find that the affidavit, certainly with respect to paras. 5 and 6, was misleading.

It is not clear on the evidence how much of the affidavit was read to Mr Rosato.

Mr Rosato is clear that certain parts of the affidavit were not read to him – they were inaccurate and he would have challenged them.

The practitioner has given a number of versions of what took place concerning the signing of the affidavit. At p. 160 of the Transcript, he said that the affidavit would have taken approximately 5 or 6 minutes to read, perhaps another 5 or 6 minutes of explanation and another 5 or 6 minutes for the signing. There were no file notes.

It was put to him that Mr Rosato had said that *"he did not read it himself but you to him"*. When asked whether he agreed, he said *"it was quite possible"* and may have said *".. look, can you read this to me"*.

At Transcript, p.161, when asked whether he was not asserting that he did read it, the practitioner responded – *"I can't recall but Mr Rosato I don't believe would lie. I do believe that he may be mistaken but I certainly would never suggest that he would lie. My recollection is I don't have a recollection whether he read it and then*

asked me to read it to him... I believe my recollection is along the lines of 'Do you wish to read this, if you – otherwise' and he would have said – *'Look, you read it to me and then I'll sign it if I agree with it'".* At p. 162 *"Indeed if he said he did not read it and you read it to him and you cannot recall, isn't the probability that it is as he said?"*

The practitioner responded that that was quite possible.

At p. 199 the practitioner, in response to questioning about whether Mr Rosato read the affidavit, said this :

> *"My recollection is I gave him the document and that he appeared to read it and then gave it back to me and said – 'can you – ok – you read it now' – and I read it out to him."*

At p. 321 Transcript at the resumed hearing on 16 August, the practitioner gave a slightly different version in answer to the question "Did you read the affidavit of Mr Rosato word for word?" he responded *"Yes I did, initially I gave him the affidavit to read and he read it or he appeared to read it and I then said to him - 'Do you understand the contents of the document?' - and he said – 'there are some words I am not quite sure about' – so I then read the entire affidavit to him."*

He confirmed that he gave an explanatory addition.

One of the words may have been the word "impecunious".

The practitioner's evidence on 16 August 2016 appears to have firmed somewhat from his evidence at the earlier hearing.

Effectively it has varied from the complainant Mr Rosato probably did not read the affidavit to he most definitely did read the affidavit.

We can have no confidence in the evidence of the practitioner on that topic.

We find that the affidavit, as read by the practitioner, whether the practitioner purported to read it out in full or give a summary, did not include the phrases Mr Rosato claims were inaccurate - particularly paras. 5 and 6.

We find that at the time of signing the affidavit, Mr Rosato had not been informed that the proceedings had been reinstated and that an application to strike them out was to be argued on the following day.

On the question of whether the oath was administered in accordance with Section 6 of the Evidence Act or not, whilst Mr Rosato was adamant that he did not swear on a Bible, the practitioner was equally adamant that he did, albeit by reference to his usual practice.

There is no doubt that Mr Rosato signed the Form 22 Personal Injury Particulars.

Whilst he said in his evidence that he did not remember signing the documents but accepted that he did because of his signature on it, he was adamant that he not only did not remember being given a Bible and being asked to swear, but he did not see the Bible.

Whilst at first blush it is difficult to reconcile Mr Rosato's memory of not remembering at all signing the document but remembering that he was not given a Bible when he signed it, this evidence must be considered in light of Mr Rosato's evidence we have referred to previously that is that he had never sworn a document on a Bible, but had done so when giving evidence in Court.

We are aware of the seriousness of the allegation made and that failure to administer an oath properly and complete a jurat clause amounts to unprofessional conduct of a serious kind -- we were referred by the Commissioner to the cases of ***John Arthur English v. The Legal Practitioners Complaints Committee No. 2754 of 1985 pp. 5-6*** and ***Legal Practitioners Conduct Board v. Rowe (2012) SASCFC 144 at pp 20-21.***

In making the determination on this topic, we have regard to the principles enunciated in the decision of ***Briginshaw & Briginshaw*** referred to earlier in these reasons.

Our impression of the practitioner as we have referred to throughout these Reasons, is that he has a fundamental misapprehension of his obligations, not only to the client but also to the Court.

On his own evidence, he has been prepared to stretch the truth and on our findings, he included not only in his own affidavit material, but also the affidavit of Mr Rosato, false and misleading information.

Mr Rosato was unshaken in his evidence that he not only knew of what it meant to take an oath, he had taken an oath previously in court proceedings where he had been asked to swear on a Bible.

Mr Rosato was adamant that he had not ever been asked to swear on a Bible with respect to documents and that the practitioner had not asked him to swear the affidavit.

We prefer the evidence of Mr Rosato to that of the practitioner. We find that Mr Rosato has given his evidence in a straight forward manner. Mr Rosato had no reason to be untruthful about this matter. The practitioner himself did not consider Mr Rosato was lying – it being a matter of "recollection".

We are satisfied to the requisite degree of satisfaction that the practitioner did proffer to the client his affidavit for swearing. He did not in some respects, as we have detailed in our Reasons, obtain the client's instructions. In some respects the affidavit was incorrect and misleading and the practitioner knew that elements were inaccurate as we have found. Furthermore, the practitioner did not properly read out or ensure that Mr Rosato read or understood the affidavit before signing it and that the practitioner, as a Commissioner for taking Affidavits, witnessed, signed and dated the affidavit in circumstances where the affidavit was not properly sworn.

We find that the practitioner sent copies of the client's affidavit to the lawyers for the defendants in circumstances where he knew that they would be entitled to treat the affidavit as the client's evidence and filed it at Court.

With respect to counts 5, 6 and 7, we find that the practitioner's conduct involved a substantial and recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute.

We now turn to specifically deal with Action No. 5 of 2015.

For the purpose of so doing, we refer to our findings made with respect to Action No. 2 of 2014.

Count 1 details the practitioner's failure to diligently prosecute the client's claim.

A summons was issued on 3 July 2007 and not served until October 2011.

As we have found in Action No 4 of 2014, we find also with respect to this matter that the claim was not progressed between 2004 and 2011 with respect to the first defendant and between 25 September 2007 and 6 October 2011 with respect to the second defendant.

This Count further alleges that the practitioner took no action to progress the client's claim when the Court issued a Notice of Impending Dismissal of Case on 13 June 2008.

The practitioner responded that it was always his intention to seek to have the action reinstated if it became inactive and on past experience, did not expect any significant difficulty in doing so.

We have referred earlier in these Reasons to the practitioner's laissez faire attitude to the requirements of the Court and his expectations that the Court would simply extend time or reinstate proceedings.

We find that the practitioner's explanation in his response and his evidence does not in any way impact upon his culpability. At best they may be matters that go to mitigation.

The practitioner's explanation does not address why it was that from the dismissal of the client's action for want of prosecution on 4 August 2008 it was not until February 2011, some 2 ½ years later, that the practitioner took action to reinstate the claim.

Count 2 alleged that the practitioner failed to maintain adequate communication with the client.

The practitioner does not dispute that in any real sense. We will not repeat what we have said with respect to the practitioner's failure to communicate with the client in Action No. 4 of 2014.

At p. 44 with respect to Action No. 5 of 2015, we find that the practitioner's conduct as characterised in Counts 1 and 2 involved a substantial and recurrent failure to meet the standard of conduct required by competent legal practitioners of good repute.

We now turn to consider Action No. 8 of 2014. Whilst it is a completely separate Charge concerning Mr Cook, there is regrettably a disturbingly similar course of conduct by the practitioner towards Mr Cook as there was towards Mr Rosato, albeit for different reasons.

The general nature of the allegations is that the practitioner failed to progress the client's claim with respect to a motor vehicle accident being damage to motor vehicle, between February 2007 and November 2013.

The practitioner admits that he took instructions in November 2006, that there was some communication with the insurer of the other vehicle and that in September 2009 – nearly 3 years later - the client instructed the practitioner to issue Court proceedings to recover his losses.

Proceedings were commenced in the Port Adelaide Magistrates Court on 9 October 2012.

What the practitioner now concedes occurred between February 2007 and September 2012, was that he mislaid the client's file – that is for a period of some 4 ½ - 5 years. Transcript pp.134-135.

It would appear that the practitioner admits that he did not inform the client that the file was mislaid – even when he took instructions from him to issue proceedings in September 2009.

Whilst proceedings were issued on 9 October 2012, and contact was made with the defendant's insurer in November 2012, the proceedings were not served.

On 16 September 2013, the Court issued a Notice of Intent to Inactivate the Action.

On 11 November 2013 the action was dismissed.

The practitioner's response was similar to that in relation to the other actions, merely that he considered that if the action became inactive, an application to reinstate would be made without any significant (if any) difficulties.

Count 2 alleged that the practitioner failed to adequately communicate with the client between February 2007 and November 2013.

We find it incomprehensible that the practitioner would not advise his client that he had mislaid the file and endeavour to obtain new instructions.

The practitioner responded that he knew Mr Cook socially and that he informed him during informal contact throughout the period from February 2007 until November 2013 that no progress had been made with respect to his claim and the proceedings.

Even if this were true, which we find it was not, it is a completely misleading statement for the practitioner to make to Mr Cook. The fact was the file was lost and the practitioner had made no attempt or taken any steps to action the matter.

Mr Cook's evidence (in his supplementary statement pp. 63-64 Exhibit 1 Vol. 3, which we accept), is that effectively there was no informal contact with the practitioner where anything was said in terms of the claim.

Mr Cook referred to a time and place to talk personal issues and a time and place to talk professional issues.

The practitioner ultimately conceded in general terms that Mr Cook's recollection would probably be better than his (Transcript p. 179), and he may have been confusing him with his brother.

We find the charge proved and we find that the practitioner's conduct involved a substantial and recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute.

CONCLUSION

With respect to each of the Charges in Actions No 4 and 8 of 2014 and No. 5 of 2015 we find the practitioner was guilty of unprofessional conduct.

We will hear the Commissioner and the practitioner with respect to penalty.

DATED the 12th day of April 2017.

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MAURINE PYKE QC

Presiding Member

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DEBRA LANE

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ANNE BURGESS