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LEGAL PRACTITIONERS
DISCIPLINARY TRIBUNAL

IN THE MATTER OF

THE LEGAL PRACTITIONERS ACT 1981

IN THE LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

ACTION NO. 10 OF 2015

AND IN THE MATTER OF

NATHAN WILLIAM THOMPSON

# LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL'S DECISION WITH REASONS

**INDEX**

## Introduction

1. By charge dated 18 August 2015, Nathan William Thompson ("**Practitioner**") has been charged with unprofessional conduct upon the complaint of the Legal Profession Conduct Commissioner ("**LPCC**") pursuant to s.82(2) of the *Legal Practitioners Act (1981)* (as Amended) ("**Act**").

2. There are five counts, the sixth matter raised in the charge being an application for an extension of time.

3. On 7 October 2016, the Tribunal published reasons for extending time and ordered that pursuant to s.82(2a)(b) of the Act, the time within the LPCC may lay the charge the subject of this matter be extended to 19 August 2015.

4. The conduct the subject of the Charge is alleged to have occurred between 14 October 2010 and 15 March 2011.

5. On 1 July 2014, the *Legal Practitioners (Miscellaneous) Amendment Act (2013)* ("**Amendment Act**") amended the Act in a number of respects, including disciplinary proceedings.[1]

6. Schedule 2 to the Amendment Act contains related amendments and transitional provisions. In the Amendment Act, the Act is referred to as "the principal Act".

7. Section 14 of Part 4 to Schedule 2 to the Amendment Act provides as follows:

> *"14 (1) Subject to this Schedule, the principal Act as amended by this Act applies in relation to -*
>
> *(a) any complaint received by the Commissioner or for which the Commissioner has assumed the conduct; and*
>
> *(b) any investigation commenced or continued by the Commissioner; and*

[1] In *Legal Profession Conduct Commissioner v Richardson* [2016] SASCFC 42, at [24], the Full Court of the Supreme Court determined that the legislative intention was that the *Amendment Act* should govern both the commencement and prosecution of proceedings in the Tribunal regardless of when the conduct occurred.

*(c) any disciplinary proceedings commenced by the Commissioner, the Society or another person or for which the Commissioner has assumed the conduct,*

*whether the conduct to which the complaint, investigation or proceedings were laid occurred before or after the relevant day.*

*(2) The principal Act as amended by this Act applies in relation to conduct that occurred before the relevant day as if -*

*(a) "unsatisfactory professional conduct" were replaced with "unsatisfactory conduct" wherever occurring; and*

*(b) "professional misconduct" were replaced with "unprofessional conduct" wherever occurring; and*

*(c) "unsatisfactory conduct" and "unprofessional conduct" had the same respective meanings as in the principal Act as in force immediately before the relevant day.*"

8. The "relevant day" is defined in section 5 of Part 4 to Schedule 2 as "... *the day on which Section 44 comes into operation*". Section 44 of the Amendment Act came into operation on 1 July 2014.

9. The Charge is one of "unprofessional conduct" which is the language of the Act as it existed prior to the Amendment Act coming into force so that the conduct the subject of the Charge falls to be considered by reference to the definitions of "unprofessional conduct" in s.5 of the Act as it existed prior to 1 July 2014.[2]

**The Charge**

*Unprofessional Conduct*

10. The definition of "unprofessional conduct" in s.5 of the Act, as it applied at the time of the alleged conduct, is as follows:

"'*unprofessional conduct', in relation to a legal practitioner, means -*

[2] See *Mericka v Rathbone* [2016] SASCFC 95 (26 August 2016) per Doyle J at [79]-[82].

(a) *an offence of dishonest or infamous nature committed by the legal practitioner in respect of which punishment by imprisonment is prescribed or authorised by law; or*

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

11. The five counts cover the period from 14 October 2010 to 15 March 2011. Together with the Particulars to each count, the charge sheet comprises some ten pages.

12. By Response dated 7 December 2015, the Practitioner filed a Response to each Count in which the majority of the allegations are admitted. There are however some instances where a further explanation or a defence is proffered by the Practitioner. Those instances are dealt with below.

13. Rather than set out the Charge in full, the Tribunal attaches at Annexure 1 to these Reasons, a table setting out each Count and the Practitioner's corresponding response.

14. Without Particulars, each of the five counts reads as follows:

"1. The Practitioner engaged in unprofessional conduct in that on 14 October 2010, he provided false and misleading information to Master Blumberg in the District Court when seeking permission to bring an application to set aside the default judgment obtained on 16 August 2010 in Action 1841 of 2009 *Motor Accident Commission v Marko Kristo.* The practitioner provided false and misleading information by:

A. Stating that the defendant, Mr Kristo, had not received certain correspondence from himself, when the practitioner knew such correspondence did not exist;

B. Failing to tell the Court that it was his fault and not the defendant's fault that default judgment had been obtained in the proceedings

... (particulars provided) ...;

2. The Practitioner engaged in unprofessional conduct in that on 25 January 2011, when he attended before Master Blumberg to seek an extension of time within which to comply with orders made in the proceedings on 14 October 2010, he provided to the Court false and misleading information by:

   A. Telling the Court that to date the defendant had not been able to provide instructions or arrange for an affidavit in support of such an application to be drafted, when the practitioner had made no attempt to obtain instructions from the defendant on the issue.

   ... (particulars provided) ...;

3. The Practitioner engaged in unprofessional conduct in that on 15 February 2011 he affirmed and caused to be filed an affidavit in the proceedings when he knew, or ought to have known, that it contained false and misleading information and that the court would or may rely upon it.

   ... (particulars provided) ...;

4. The Practitioner engaged in unprofessional conduct in that on a date between 25 January 2011 and 15 February 2011 inclusive, the practitioner prepared and on 15 February 2011 witnessed and caused to be filed an affidavit of the defendant, knowing that it contained material that was false and misleading and that the court would or may rely upon it.

   ...(particulars provided) ...;

5. The Practitioner engaged in unprofessional conduct in that between 25 January 2011 and 15 March 2011 the practitioner intentionally falsified the client file for the defendant maintained by him at Westside Community Lawyers by creating and inserting on the defendant's file, file copies of correspondence which had not been sent and file notes of attendances upon the defendant which were not genuine and contemporaneous, but had been created to give the misleading appearance

that he had managed the file differently to how it had been managed.

... (particulars provided)..."

*Denials/explanations in the Response*

15. As noted above, in the Response, there are some allegations where the Practitioner either admits the allegation but then provides an explanation or alternatively, denies an allegation and pleads an alternative position.

16. Those matters concern whether certain letters were sent, whether a telephone conversation occurred and whether the Practitioner held a genuine belief at a particular point in time. With the exception of genuine belief, the LPCC says that it is not in a position to agree that letters were sent or that a telephone conversation occurred but does not contest those allegations. [3]

17. Those matters, including the one factual matter in dispute, are set out below:

17.1. 30 June 2010 letter.[4]

The Practitioner relies on a letter he alleges was sent on 30 June 2010 to the client, Mr Kristo. This letter is pleaded in the Practitioner's Response at [1A], [3.4.3], [4.7.2], [4.7.5] and [5.8].

The LPCC does not challenge that allegation.[5] In view of there being no challenge to the Practitioner's Response, the Tribunal accepts a letter dated 30 June 2010 was sent. The letter in Exhibit C1 at p96 is a recreation of a letter the Practitioner says he sent and so by definition, it cannot be in the same terms as the original letter, a fact the Practitioner accepts.[6] Nonetheless the Tribunal accepts that effect of the letter is the same.

17.2 12 October 2010 telephone note.[7]

The Practitioner relies on this telephone attendance note recording the content of a

[3] T27.36-28.10.
[4] Ex C1, p96.
[5] T11.17-21, T27.36-28.24.
[6] T114.20-37, T115.2-T116.12.
[7] Ex C1, p107.

conversation with Mr Kristo he alleges occurred on 12 October 2010.

This telephone conversation is pleaded in the Practitioner's Response at [3.4.4], [3.4.5], [4.7.6], [4.7.7] and [5.4].

The LPCC does not challenge those allegations.[8] In view of there being no challenge to the Practitioner's Response, the Tribunal accepts the telephone note dated 12 October 2010 accurately records the telephone conversation with the client.

17.3 Letters dated 1 March 2011 and 9 March 2011.[9]

The Practitioner relies on these two letters which he alleges were sent on the respective dates.

The letters are pleaded to in the Practitioner's Response at [5.8.9] and [5.8.10] respectively.

The LPCC does not challenge those allegations.[10] In view of there being no challenge to the Practitioner's Response, the Tribunal accepts the letters dated 1 March 2011 and 9 March 2011 were sent.

17.4 Genuineness of belief

The Practitioner alleges a genuine belief at [4.7.10].

The LPCC challenges that genuine belief.[11]

**Procedural History**

18. This matter proceeded to a hearing on 1 and 2 March 2017. Although a disputed facts hearing over the genuine belief issue, nonetheless the hearing proceeded at large. The Practitioner gave evidence and was cross-examined by Counsel for LPCC. A number of documents were tendered including three witness statements, being those of Matthew

[8] Supra, T11.17-21, T27.36-28.24
[9] Ex C1, p104, 105.
[10] Supra, T11.17-21, T27.36-28.24
[11] T27.36-T28.10.

Fuss[12], Clinton Vonow[13] and Allison Kathryn Jean Thompson[14].

19. Each of the witness statements went to the issue of character as well as, to a limited degree, observations concerning the behaviour of the Practitioner and symptoms displayed by him against a background of him suffering from depression.

20. At the conclusion of the hearing, the matter was adjourned for closing submissions.

21. After the matter had adjourned, the Tribunal communicated with the parties in relation to what it considered to be an absence of psychiatric evidence on three issues ("**Tribunal Request**") and gave the Practitioner the opportunity to adduce psychiatric evidence addressing those issues and any other matters of a psychiatric nature, if so advised.

22. Those three issues were as follows:

    22.1. The Practitioner's current psychiatric state;

    22.2. The extent of the Practitoner's depression during the events in question (acknowledging that is necessarily an after the event assessment);

    22.3. The prognosis for the Practitioner's depression and in particular:

        22.3.1. the likely effects of stress on the manifestation of the Practitioner's depression;

        22.3.2. the extent of the stress that is likely to bring about manifestation of the symptoms of depression; and

        22.3.3. how, if at all, it can be managed.

23. When the matter resumed for closing submissions on 25 and 26 July 2017, the Tribunal Request was tendered by the Practitioner along with letters to Medical Practitioners, seeking reports addressing the Tribunal's Request and the reports in response.[15]

24. Neither the LPCC nor the Tribunal required the Medical Practitioners to attend for cross-

[12] Ex P9.
[13] Ex P10.
[14] Ex P11.
[15] Ex P15. The request from the Tribunal is at Ex P15, tab 1.

examination.

25. The Tribunal received both written and oral submissions and has taken into account all the evidence and the submissions of Counsel for the Practitioner and the LPCC.

26. A number of authorities were provided to us by the Practitioner and the LPCC. The Tribunal has considered those authorities but makes the observation that each case necessarily has to be determined on its own particular facts and circumstances.

27. To the extent the Tribunal does not deal with each authority or address each submission in these Reasons, that does not mean it has not taken it into account.

**The Charge is proven**

28. The Practitioner has admitted the majority of the factual allegations and confirmed that admission at the hearing[16]. Accordingly, subject to the disputed factual matter which goes not to the finding of unprofessional conduct but the circumstances of the admitted unprofessional conduct, the Tribunal formally finds the charge of unprofessional conduct proven.

29. Apart from the disputed factual matter between the LPCC and the Practitioner, the remaining issue between the parties is whether the Tribunal should deal with this matter itself in accordance with the provisions of s.82(6)(a)(i)-(iv), (b), (c) of the Act, or whether it recommends that disciplinary proceedings be commenced against the Practitioner in the Supreme Court in accordance with s.82(6)(a)(iv) of the Act.

30. The Practitioner submits that the Tribunal should deal with this matter itself. The LPCC says that the appropriate order is that the Tribunal recommend that disciplinary proceedings be commenced against the Practitioner in the Supreme Court.

31. These are very serious charges. The Tribunal recommends that disciplinary proceedings be commenced against the Practitioner in the Supreme Court and sets out in detail its findings and reasons for making that recommendation below.

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[16] T3.35-T4.3.

**Relevant Principles**

32. In carrying out its functions, the Tribunal bears in mind that its predominant role in considering disciplinary matters is the protection of the public.[17] In *The Law Society of South Australia v Murphy*[18], Doyle CJ said[19]:

> "The Court is concerned to protect the public, not to punish a practitioner who has done wrong, although of course the removal of the practitioner's name from the Roll will operate as a punishment"

33. *In Legal Practitioners Conduct Board v Jones*[20], Layton J considered the adequacy of an order made by the Legal Practitioners Disciplinary Tribunal and in referring to the protection of the public observed as follows[21]:

> "The protection of the public is not just limited to situations where clients have suffered loss and/or damage in a financial or personal sense ... Protection of the public interest includes ensuring that professional standards of legal practice are maintained and are seen to be maintained. ..."

34. In *Jones*, Layton J allowed the Legal Practitioner's Conduct Board's appeal from the Legal Practitioners Disciplinary Tribunal and recommended that disciplinary proceedings be commenced against the practitioner in the Supreme Court.[22]

35. As to the approach to be adopted by the Tribunal, in his closing submissions Mr Wells QC who appeared for the Practitioner submitted that the inquiry to be undertaken by the Tribunal is twofold. The first stage of the inquiry is to follow the observations of Debelle J in *Legal Practitioners Conduct Board v Fletcher*[23], i.e. a careful consideration of the nature and the circumstances of the unprofessional conduct to determine whether they reveal features of unfitness which are, on the one hand, no more than temporary or circumstantial and the other, show that the Practitioner lacks the necessary underlying

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[17] *The Law Society of South Australia v Murphy* (1999) 201 LSJS 456, 460-461.
[18] Supra.
[19] Supra at 460.
[20] [2009] SASC 347,
[21] At [54].
[22] At [53].
[23] [2005] SASC 382, [21].

qualities of character and trustworthiness. The second stage is an assessment of whether notwithstanding the conduct, the Practitioner remains fit to practise with little or no apprehension on the part of the Tribunal of lapse.[24]

36. The passage in *Legal Practitioner's Conduct Board v Fletcher* referred to is as follows:

> "When disciplinary proceedings are commenced against a legal practitioner, the Court is acting in the public interest and is primarily concerned to protect the public: *Wentworth v the New South Wales Bar Association* (1992) 176 CLR 239 at 250-251; *The Law Society of South Australia v Murphy* (1999) 201 LSJS 456 at 460-461. The Court must carefully consider the nature and circumstances of the unprofessional conduct. The question which the Court has to determine is whether it has been shown that the practitioner is not a fit and proper person to practise: *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 297-298; *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 189; *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408; *The Law Society of South Australia v Rodda (2002)* 83 SASR 541 at 545. The orders to be made by the Court are directed to ensuring that, to the extent that the practitioner is not fit to practise, the entitlement to practise is either restricted or denied: *Foreman's Case* per Mahoney JA at 441."

37. As to Mr Wells QC's submission, to the extent it is directed at two separate and distinct stages, the Tribunal does not accept the independence of those two stages. Doyle CJ noted in *Murphy*[25], that the role of the Tribunal is to protect the public and not punish the practitioner who has done wrong. If, as a result of its inquiry into the circumstances charged, the Tribunal finds a practitioner's conduct coming within the definition of unprofessional conduct, that immediately raises the question of whether the conduct is such that the practitioner is not a fit and proper person to practise and if fit to practise, under what conditions (if any). It is at that stage that the Tribunal considers what powers it has to deal with the matter, given the seriousness of the Charge. It may be, for example, that the facts of the Charge are such that the Tribunal considers the particular

[24] T219.5-220.13.
[25] Supra.

circumstances and the extent of the matters such as the practitioner's insight into the consequences of his or her conduct that the Tribunal can deal with the matter in a way that protects the public. Alternatively, it may be that the facts are such that irrespective of the extent of the practitioner's insight, remorse or other ameliorating factors, nonetheless the facts demonstrate a lack of fitness to practise either at all or only under strict conditions which are beyond the power of the Tribunal.

**Facts**

*Introduction*

38. Exhibit C1 is the agreed book of documents. Under cover of a letter from his Solicitors, Iles Selley, dated 8 July 2011, by undated letter the Practitioner self-reported his conduct ("**Self-Report Letter**")[26] to the Legal Practitioners Conduct Board. The facts of this matter are taken, both from that letter as well as from the Practitioner's evidence.

39. In his evidence, the Practitioner confirmed the truthfulness of the matters in the Self-Report Letter subject to one correction concerning the events of 30 June 2010[27]. The Practitioner was assisted in preparing the Self-Report Letter by his solicitors and Senior Counsel.[28]

40. The Practitioner obtained a degree in Behavioural Science in 2001 before taking a year off and then studying Law at Flinders University. He undertook study in Behavioural Science because he had an interest in Psychology and he considered he could pair it with some level of legal studies as well. In the year between finishing his Behavioural Science degree and commencing his Law degree, he worked at Big W as a manager. He was admitted as a Legal Practitioner in the Supreme Court of South Australia on 3 December 2007.

41. He commenced work on a restricted practising certificate at Lawson Smith in the litigation section following his admission, resigning from that firm in November 2008 for

[26] Ex C1, pp27-36.
[27] T29.6-29, T59.20-T61.10.
[28] Self-Report Letter, Ex C1, p 36, 4th last paragraph.

the purposes of overseas travel with his wife.

42. As it happened, that travel did not eventuate and in July 2009, he commenced employment with a Community Legal Centre, Westside Community Lawyers ("**Westside**"), on a 2-year contract. He resigned his employment with Westside on Friday 11 April 2011 and has not practised, nor renewed, his practising certificate since that time.

43. At all material times, the Practitioner was the subject of a restricted practising certificate.

44. His supervisor at Westside was Mr David Bulloch, who was also the Managing Lawyer at Westside.

45. This matter involves the conduct of the Practitioner in relation to a client of Westside named Mr Marko Kristo. The Practitioner had the conduct of Mr Kristo's matter during his employment by Westside.

*Employment at Westside*

46. Upon commencing his employment at Westside, the Practitioner met with Mr Bulloch and it was arranged that they would meet on a weekly basis. As it eventuated however, due to the commitments of Mr Bulloch, as well as the Practitioner's commitments, the meetings were often postponed or did not occur.[29]

47. The Practitioner says that there were no procedures for correspondence to be signed off by a principal or more senior practitioner in the firm, nor any procedure for court documents to be settled. Although the Practitioner consulted Mr Bulloch, he found his feedback blunt and on occasions intimidating such that he preferred not to trouble him.

48. In or about October 2009, the Practitioner was asked by Mr Bulloch to take on the responsibility as the firm's Finance Officer in addition to his professional work load. The incentive for doing so, according to the Practitioner, was that his position in the practice would become permanent, rather than on contract. He agreed to take on that role.

49. The role of Finance Officer involved preparing Monthly Accounts, Board Reports,

[29] ExC1, p28.

attending Board Meetings, preparing Quarterly Reports for the Attorney-General's Department and Quarterly Reports to the Office of Consumer and Business Affairs, dealing with the Australian Taxation Office, as well as the payment of creditors, rent and recovering costs on files in which costs had been awarded in favour of Westside's clients.[30]

50. In addition to those duties, the Practitioner had responsibility for running a weekly after-hours clinic staffed by volunteer practitioners.

*The Kristo File - period to 14 October 2010*

51. In November 2009, Mr Kristo attended at Westside seeking legal advice in relation to a summons issued out of the District Court of South Australia by the Motor Accident Commission ("**MAC**") whereby, pursuant to s.124A of the *Motor Vehicles Act*, MAC sought recovery of monies paid by it to the occupant of another motor vehicle with which Mr Kristo's vehicle had collided in 2002.

52. Minter Ellison acted for the MAC.

53. The matter was a straightforward recovery action by the MAC. The sum sought was in the order of $800,000.

54. The Practitioner wrote to Mr Kristo on 23 November 2009 confirming Westside would act for him and sent a retainer agreement.

55. In early 2010, there was a period of negotiation with Minter Ellison in an attempt to resolve the claim.

56. On 23 March 2010, Minter Ellison provided a financial questionnaire to the Practitioner for Mr Kristo to complete so that the MAC could assess Mr Kristo's ability to pay.[31] On that basis, Westside agreed with Minter Ellison on behalf of their respective clients that in the interim no steps would be taken in the District Court proceedings.

57. In accordance with the agreement between the parties, the Practitioner attended a status hearing in the District Court on 31 March 2010 before Master Norman which was

[30] Ex C1, p29.
[31] Ex C7.

adjourned to 26 May 2010 and again, to 30 June 2010 to allow negotiations to continue. Mr Kristo was excused from filing a Defence until further order.

58. The Practitioner asserts in his Self-Report Letter[32] that "*it took some months for Mr Kristo to return the completed financial questionnaire despite several reminders from me in writing and by telephone*". Notwithstanding he swore to the accuracy of the corrected Self-Report Letter, it emerged during cross-examination that the Practitioner received the questionnaire from Minter Ellison on 23 March 2010 but did not forward it to Mr Kristo until 18 May 2010, a period of some two months. Even then, the Practitioner required its return by 21 May 2010[33]. That delay should have been disclosed in the Self-Report Letter and is an illustration of the less than complete history revealed by the Practitioner in the Self-Report Letter. In making that observation, no criticism is intended or directed in any way at the Practitioner's solicitors or Senior Counsel.

59. Ultimately, the questionnaire was completed by Mr Kristo on or about 15 June 2010[34]. The Practitioner recalls examining the detail in the questionnaire and speaking with Mr Kristo briefly by telephone about the matter shortly thereafter. The Practitioner formed the view that the questionnaire that Mr Kristo had filled out was materially deficient.

60. On 30 June 2010, the Practitioner appeared before Master Norman, at which time an order was made that Mr Kristo file a Defence by 21 July 2010.

61. The Practitioner continues in his Self-Report Letter[35] that on 30 June 2010 he telephoned Mr Kristo after the hearing, during which he reported on the orders made by Master Norman and told him it was necessary for him to make an appointment so that he could take instructions to draw a Defence. The Practitioner asserts that Mr Kristo said he would make an appointment within the week but says he does not have a contemporaneous file note of that telephone attendance. The Practitioner corrected this aspect of the Self-Report Letter by his solicitors' letter dated 16 August 2010[36] whereby he confirmed that he spoke to Mr Kristo before the hearing and not after.

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[32] Ex C1, p31, 3rd paragraph.
[33] Ex C7, C8, T136.32-T138.32, T141.33-T143.3.
[34] T58.10-31.
[35] Ex C1, p31, 6th paragraph.
[36] Ex C1, p62, [2]. T60.10-23.

62. The letter from Iles Selley to the Legal Practitioners Conduct Board dated 16 August 2012 also states that the Practitioner recalls sending a letter to Mr Kristo on 30 June 2010[37]. The letter dated 30 June 2010, amongst other things, was confirmed by Iles Selley as being a reconstruction of an original letter which the Practitioner believes to be an accurate record of the original letter that was sent to Mr Kristo on 30 June 2010.[38]

63. It seems Mr Kristo did not make an appointment to see the Practitioner and the Defence due on 21 July 2010 was not filed. In his evidence, the Practitioner said he had not received a response from Mr Kristo following his letter to him dated 30 June 2010 and is unable to recall whether at any time between his telephone conversation on 30 June 2010 and 21 July 2010 he telephoned the client to remind him of the need to attend for the purposes of obtaining instructions.[39]

64. No Defence having been filed by 21 July 2010, Ms Helyard of Minter Ellison wrote two letters dated 22 July 2010 and 4 August 2010 respectively and had a telephone conversation with the Practitioner on 28 July 2010 in relation to Mr Kristo filing a Defence.[40] The Practitioner does not recall the telephone conversation with Ms Helyard on 28 July 2010 but accepts the accuracy of what is contained in Ms Helyard's notes.[41]

65. The Practitioner described his reaction to receiving a letter from Minter Ellison dated 22 July 2010 as one of panic.[42] He says that he was absolutely swamped and that it was around that time that "... *the depression had really started to kick in*"[43]. The Practitioner's reaction was the same to the second letter he received from Minter Ellison dated 4 August 2010[44]. He did not seek help from Mr Bulloch.[45]

66. Notwithstanding this accommodation by Minter Ellison, the Practitioner took no steps as he assumed it would be necessary for the MAC to issue an application for default

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[37] Ex C1, p62 [3].
[38] Ex C1, p62. The reconstructed letter is at Ex C1, p96.
[39] T63.2-63.12.
[40] Ex P3, P4.
[41] T135.1-T136.5.
[42] T62.28-34.
[43] T62.38-T63.2.
[44] Ex P4.
[45] T63.31-64.15.

judgment to be entered as a consequence.[46] In answer to a question from the Tribunal, the Practitioner agreed that he was expecting to receive an application for default judgment and was relying on such an application as a "backstop" or a warning for him for him to act on the matter.

67. No application for default judgment was served on either the Practitioner or Mr Kristo. On 16 August 2010 the MAC obtained a default judgment against Mr Kristo in the District Court for the sum of $793,782.91 plus costs and interest.

68. On 26 August 2010, Minter Ellison issued an Examination Summons against Mr Kristo which was personally served on Mr Kristo on 8 September 2010, returnable 14 October 2010.

69. The Practitioner asserts he met with Mr Kristo about the Examination Summons on 12 October 2010.

70. There was some uncertainty during the hearing as to whether the Practitioner met with Mr Kristo on 12 October 2010 or there was simply a telephone call from Mr Kristo to the Practitioner on that day.

71. At [5.9] of the Charge, the LPCC alleges the Practitioner falsely created and inserted on the file, amongst other things, a telephone attendance note dated 12 October 2010.[47]

72. At [5.9] of his Response, the Practitioner denies the allegation. Previously, at [3.4.4]. [3.4.5] and [4.7.7] of his Response, the Practitioner alleged that on 12 October 2010 he was instructed by Mr Kristo to make an application to seek to set aside the default judgment against Mr Kristo. The Practitioner's Response does not say whether that instruction was given over the telephone or personally.

73. As noted above, the LPCC does not contest whether that telephone attendance note was genuine.[48]

74. As to a personal attendance, during opening submissions, Mr Wells QC confirmed the

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[46] T65.12-T66.3.
[47] Ex C1, p107.
[48] T11.7-24.

Practitioner's position that there was also an attendance by Mr Kristo at Westside's office on 12 October 2010.[49]

75. In a letter from the Practitioner to Mr Kristo dated 14 October 2010[50], the Practitioner refers to Mr Kristo's attendance at Westside's office on Tuesday, 12 October 2010.

76. That letter is admitted by the Practitioner in his Response to be false.[51]

77. The Tribunal notes in passing that in a letter from Iles Selley to the LPCB dated 23 March 2012,[52] the Practitioner's solicitors set out a list of a number of documents, clarifying whether each document in the list was a reconstruction or contemporaneous and whether it was false or accurate. The letter dated 14 October 2010 does not appear in that list.

78. In his evidence, the Practitioner said that Mr Kristo rang him, he believes on 12 October 2010. He has no specific recollection of the conversation but that Mr Kristo came into the office that day with a copy of the Examination Summons. When Mr Kristo attended, he and the Practitioner discussed that default judgment had been entered, Mr Kristo was somewhat surprised by that fact, the Practitioner advised Mr Kristo that an application to set aside judgment would need to be made and that the Practitioner said he would attend the Examination Summons on his behalf. The appointment with Mr Kristo lasted no more than 10 or 15 minutes.[53]

79. There is no attendance note of Mr Kristo attending in person at the Practitioner's office at Westside on 12 October 2010.

80. There is no correspondence or record of any contact with Mr Kristo between 30 June 2010 and 12 October 2010, save for a telephone attendance note dated 22 July 2010 which reads "*Called re judgment. No response msg bank full*"[54].

81. The Practitioner admits that he fabricated that telephone attendance note between 25

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[49] T11.11, T12.7-12.
[50] Ex C1, p101.
[51] See Charge [5.8.6] and Response [5.8.6].
[52] Ex C1-P40.
[53] T66.20-T68.10.
[54] T153.1-19.

January 2011 and 15 March 2011.

82. Notwithstanding the lack of any specific pleading that Mr Kristo attended on the Practitioner in person on 12 October 2010, the admitted falsity of the telephone note dated 22 July 2010 and the admitted falsity of the letter dated 14 October 2010[55], the Tribunal accepts that Mr Kristo attended at the Practitioner's office on 12 October 2010.

***Count 1 - 14 October 2010 hearing***

83. The first Count relates to the attendance by the Practitioner before Master Blumberg on 14 October 2010.

84. Save and except that the Practitioner asserts and the Tribunal accepts a letter was sent by him to Mr Kristo on 30 June 2010, the Practitioner admits that on that occasion he provided false and misleading information to the Court by stating that Mr Kristo had not received certain correspondence when he knew such correspondence did not exist and by failing to tell the Court that it was his fault and not the defendant's fault that default judgment had been obtained in the proceedings.

85. The Particulars to the first count, insofar as relevant, assert that:

    85.1. By letter dated 22 July 2010, Minter Ellison wrote to the Practitioner and requested the Practitioner file and serve the Defence within seven days by close of business on 29 July 2010[56];

    85.2. By letter dated 4 August 2010, Minter Ellison wrote to the Practitioner and requested the Practitioner file and serve a Defence within seven days by close of business on 11 August 2011 or they would seek their client's instructions to apply for default judgment[57];

    85.3. The Practitioner proffered to the Court as a basis for permitting an application to be made, Mr Kristo had not received correspondence from the Practitioner when the Practitioner knew he had not sent any correspondence to the defendant after

[55] Ex C1, p101.
[56] Particulars [1.6], Ex P3.
[57] Particulars [1.7], Ex P4.

30 June 2010[58];

85.4. The Practitioner's explanation to the Court that Mr Kristo had not received correspondence from the Practitioner suggested that Mr Kristo's non-receipt of such correspondence had prevented the filing of a Defence[59];

85.5. The Practitioner failed to tell the Court that the failure to file a Defence was his fault and not the fault of the defendant.[60]

86. Although the Practitioner admits the Particulars and pleads the letter dated 30 June 2010, and the instructions dated 12 October 2010, the Particulars identify no other correspondence which was said by the Practitioner to the Court that had been sent. Nonetheless, the issue is temporal[61] in that although the Practitioner wrote to Mr Kristo on 30 June 2010, the submission he made to Master Blumberg was made on 14 October 2010, some 10 weeks later.

87. On the basis of the admitted matters in the Practitioner's Response, the Practitioner was not frank with the Court and misled the Court in support of the opportunity to make an application to set aside the default judgment in order to conceal his own failure to progress the file and comply with the Court's orders.

88. Further, in his Self-Report Letter, the Practitioner summarises his attendance before Master Blumberg in the following terms:[62]

> "The Examination Summons was returnable for Master Blumberg in the District Court on 14 October 2010. I attended that hearing on behalf of Mr Kristo. I explained to Master Blumberg that Mr Kristo maintained that he had a good defence to the proceedings and that I was instructed to apply to have the default judgment set aside. His Honour directed that Mr Kristo, if so advised, issue an Application to set aside the judgment and file and serve that Application and any supporting Affidavit returnable for the next adjourned date being 25 January

[58] Particulars [1.13].
[59] Particulars [1.14].
[60] Particulars [1.15].
[61] T22.7-T24.11.
[62] Ex C1, p32, 4th paragraph.

2011".

As is apparent from that content of that paragraph, which is the only paragraph that deals in any detail with the hearing before Master Blumberg on 14 October 2010, the Practitioner did not disclose in the Self-Report Letter about the reasons for the failure to file a defence, nor does he mention in his Self-Report Letter the fact that Minter Ellison had written to him on two occasions. Again, the history provided by the Practitioner in the Self-Report Letter is incomplete.

*Christmas 2010*

89. The Practitioner continues in his Self-Report Letter that he was embarrassed by the default judgment and because Master Blumberg's orders afforded him a luxurious period to prepare the application to set aside, he did not deal with the matter promptly.

90. The Practitioner states[63] that in the weeks leading up to Christmas he became increasingly anxious about the issue but felt "*paralysed*" and unable to deal with the matter. He asserts he was suffering from clinical depression through this period which, coupled with the fear of the consequences of failing to successfully set aside the judgment, meant that he felt he was unable to act. He says that he preferred not to think about it and there were times when he would wake up in the middle of the night in fear of the matter. He became increasingly anxious to the point where he would be sick physically after reflecting on the issue.

91. The next part of the Practitioner's Self-Report Letter[64] reiterates that the Practitioner was acutely embarrassed in failing in his duty to Mr Kristo to ensure that a Defence was filed by 21 July 2010, that this failure had exposed Mr Kristo to a very significant judgment sum when on the information he had provided the Practitioner believed Mr Kristo had a good defence to the claim and that the Practitioner was too scared to bring his failing to the attention of Mr Bulloch to seek his assistance.

92. The Practitioner says that it was not until 24 December 2010 that Mr Bulloch enquired of him how the Kristo matter was going to which he replied "*It should resolve*". In so

[63] Self-Report Letter, Ex C1, p32.
[64] Self-Report Letter, Ex C1, p33, 1st paragraph.

saying, the Practitioner admits he lied to Mr Bulloch.[65]

93. The Practitioner then gives an example in his Self-Report Letter of feeling humiliated in speaking to Mr Bulloch in relation to a probate matter[66]. He also gave evidence about this incident.[67]

94. Mr Bulloch was not called to give evidence before the Tribunal.

95. In any event, the Practitioner says that he thought he could deal with the matter and get the judgment set aside, however he was paralysed and continued to avoid confronting it.[68]

96. The Practitioner continues that he cannot recall what steps he took between 14 October 2011 and 25 January 2011 to take instructions to draw affidavits in support of the proposed application. It is apparent from cross-examination that he did nothing during that period, indeed there was no contact between the Practitioner and Mr Kristo between 12 October 2010 and 15 February 2011[69].

97. Nonetheless, the Practitioner asserts in the Self-Report Letter[70] that:

> "I am confident that he never chased me to ascertain what was happening with his matter, nor did he make an appointment to give me instructions. With the benefit of hindsight, his ambivalence about the matter made it easier for me to avoid giving it attention".

98. Although the Practitioner has acknowledged his failure to carry out his professional obligations in acting for Mr Kristo, and Mr Wells QC went to pains to emphasise that the Practitioner was not attributing any blame to the client[71] for not contacting the Practitioner, nonetheless, the Tribunal received the distinct impression that the Practitioner continues to ascribe some blame to the client for his failure to contact the Practitioner. Hence, the reference to the client's "*ambivalence about the matter*".[72] That

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[65] Self-Report Letter, Ex C1, p32, penultimate paragraph, T127.1-7.
[66] Self-Report Letter, Ex C1, p33, 2nd paragraph.
[67] T51.6-T52.11.
[68] Self-Report Letter, Ex C1, p33.
[69] T145.14-23, T148.15-18, T149.7-12.
[70] Self-Report Letter, Ex C1, p33.
[71] T275.14-T277.12.
[72] Self-Report Letter, Ex C1, pp33-34.

attitude is also reflected in his oral evidence[73]. The Tribunal understands that the evidence concerning the failure of the client to contact the Practitioner is directed at the genuine belief issue but in the Tribunal's view, that issue also carries with it a suggestion of blame.

***Count 2 - 25 January 2011***

99. The matter came back before the Court on 25 January 2011 at which time no application to set aside judgment had been filed. The Practitioner attended the hearing and sought and obtained an extension of time until 28 February 2011 to file and serve the application and any supporting affidavits.

100. That hearing is the subject of Count 2 which alleges that the Practitioner engaged in unprofessional conduct on 25 January 2011 when he attended before Master Blumberg to seek an extension of time with which to comply with orders made in the proceedings on 14 October 2010 and provided to the Court false and misleading information. The Practitioner admits that allegation.

101. As to the particulars to Count 2, insofar as relevant, the Practitioner admits:

101.1. "2.4 the practitioner informed the Court that although the defendant had indicated he wished to apply for the judgment to be set aside, he had not yet been able to provide instructions or arrange for an affidavit of merits to be drafted.

"2.5 At 25 January 2011, the practitioner had not contacted the defendant since the last Court appearance on 14 October 2010 for the purpose of seeking his instructions in relation to the application."[74]

102. In his Self-Report Letter, the Practitioner deals with the hearing on 25 January 2011 in these terms[75]:

"When the matter came back before Master Blumberg on 25 January 2011 an

[73] T125.14-23, T148.15-18.
[74] Particulars [2.4, 2.5].
[75] Ex C1, p34, 2nd paragraph.

Application to set aside the judgment had still not been filed. I attended the hearing and sought and obtained an extension of time until 28 February 2011 to file and serve the Application and any supporting Affidavits".

103. There is no disclosure by the Practitioner in his Self-Report Letter that on that occasion he misled the Court as set out above.

***Count 3 - Practitioner's Affidavit 15 February 2011***

104. On 15 February 2011, the Practitioner affirmed an affidavit which was taken by another practitioner employed by Westside. That affidavit is the subject of Count 3 of the Charge.

105. Count 3 reads:

> "3. The Practitioner engaged in unprofessional conduct in that on 15 February 2011 he affirmed and caused to be filed an affidavit in the proceedings when he knew, or ought to have known, that it contained false and misleading information and that the court would or may rely upon it."

106. The Practitioner admits the allegations contained in Count 3.

107. Insofar as relevant, the Particulars and the Practitioner's response are as follows:

107.1. "3.4 The practitioner's affidavit deposed *inter alia* -

3.4.1...

3.4.3 At paragraph 10: "*I sought instructions from the Defendant but was unable to contact him.*" As at 15 February 2011, the practitioner knew that he had not contacted the defendant to seek his instructions for this purpose."

107.2. In his response to [3.4.3] the Practitioner admits that paragraph 10 of his affidavit was misleading, "*... but says that he contacted Mr Kristo by telephone on 30 June 2010 and that he wrote to Mr Kristo by letter dated on or around 30 June 2010.*"

Again, although the Practitioner did seek instructions from the defendant on or about 30 June 2010, the timing difference between the request for instructions on 30 June 2010 and the swearing of the affidavit on 15 February 2011, without disclosing that time difference, makes the affidavit misleading.

107.3. At [3.4.4], of the Particulars:

> "3.4.4 At paragraph 16: *'I am now instructed to make the within application'*."
>
> As at 15 February 2011, the practitioner knew that he had not contacted the defendant to seek instructions for this purpose."

107.4. In his response at [3.4.4], the Practitioner admits that paragraph 16 of his affidavit was misleading and continues "... *but says that on 12 October 2010 he was instructed by Mr Kristo to make an application to seek the set aside the default judgment against Mr Kristo*".

107.5. Although Mr Kristo contacted the Practitioner on 12 October 2010 and instructed him to make an application to set aside the default judgment, by reason of the time difference between 12 October 2010 and 15 February 2011, the use of the word "now" connotes a recent instruction and the instruction deposed to in paragraph 16 of the Practitioner's Affidavit is misleading.

107.6. At [3.4.5] of the Particulars:

> "3.4.5 At paragraph 23: '*In the circumstances I am instructed to apply pursuant to Rule 230 of the District Court Rules to set aside the judgment signed on 16 August 2010*'. As at 15 February 2011, the Practitioner knew that he had not contacted the defendant to seek instructions for this purpose."

107.7. In his response at [3.4.5] the Practitioner pleads that he:

> "3.4.5... admits that paragraph 23 of his affidavit affirmed 15 February 2011 was misleading but says that on 12 October 2010 he was instructed by Mr Kristo to make an application to seek to set aside the default

judgment against Mr Kristo".

107.8. The same point about timing set out above applies to paragraph 23 of the Practitioner's Affidavit.

107.9. There follows a second paragraph 3.4.5 of the Particulars which should read 3.4.6. That sub-paragraph reads as follows:

> "3.4.5 (sic 3.4.6) At paragraph 11: '*The plaintiff's solicitors advised by letter dated 4 August 2010 that they would seek default judgment if a defence was not filed by 11 August 2010*'. The practitioner failed to depose to his earlier receipt of the letter from the plaintiff's solicitor dated 22 July 2010 reminding him that the defence was now late and that the defendant was in default of Master Norman's orders, and requesting a defence be filed instead within a further 7 days."

That allegation is admitted.

108. The Particulars at [3.5] deal with a number of other paragraphs of the Practitioner's affidavit which go to factual matters and are not presently relevant. The allegations are admitted.

***Count 4 - Affidavit of Mr Kristo[76] sworn 15 February 2011***

109. On 15 February 2011, the Practitioner prepared and witnessed an affidavit of Mr Kristo as part of the required documents for the application to set aside default judgment. This affidavit is the subject of Count 4 and the Practitioner deals with this affidavit in his Self-Report Letter[77].

110. Count 4 provides:

> "4 The Practitioner engaged in unprofessional conduct in that on a date between 25 January 2011 and 15 February 2011 inclusive, the practitioner prepared and on 15 February 2011 witnessed and caused to be filed an affidavit of the defendant, knowing that it contained material that was

[76] Ex C1, p93.
[77] Letter of Self-Report, Ex C1, p34.

false and misleading and that the court would or may rely upon it."

111. Subject to what appears below, that allegation is admitted.

112. Insofar as relevant, the Particulars and the Practitioner's Response are as follows:

112.1. "4.6 The affidavit the practitioner prepared for the defendant to swear contained statements which were false and misleading, and which the practitioner knew were false and misleading[78]."

The Practitioner admits that allegation.

112.2. Paragraph 4.7 of the Particulars sets out the misleading nature of the affidavit in a series of sub-paragraphs which again, insofar as relevant, together with the Practitioner's Response, are as follows:

112.2.1. "4.7.1 Paragraph 4 of the defendant's affidavit deposed '*I was informed by my solicitor that a Defence was to be filed on 21 July 2010 ...*'

4.7.2 As at 15 February 2011 the practitioner knew that he had not, at the relevant time, informed the defendant of the requirement to file a defence by 21 July 2010".

112.2.2. In his Response at [4.7.2], the Practitioner admits that paragraph 4 of the affidavit sworn by the defendant was misleading "... but says that by letter dated on or around 30 June 2010, he informed Mr Kristo that a Defence was due to be filed by 21 July 2010.

Once again, when the affidavit is taken as a whole, the issue is temporal[79] and the affidavit was misleading.

112.2.3. "4.7.3 Paragraph 4 of the defendant's affidavit further deposed '... *however I did not provide my solicitor with instructions in relation to the preparation and filing of a defence, ...*

[78] Particulars [4.6], Response [4.6].
[79] T25.4-23.

4.7.4 Paragraph 5 of the defendant's affidavit deposed *'I failed to provide [sic] and default judgment was signed in 16 August 2010'.*

4.7.5 As at 15 February 2011 the practitioner knew that he had not, prior to the signing of judgement (sic), communicated with the defendant to seek such instructions as asserted in paragraphs 4 and 5 of the defendant's affidavit."

112.2.4. The Practitioner's Response to [4.7.5] admits that paragraphs 4 and 5 of Mr Kristo's affidavit were misleading but alleges that despite informing Mr Kristo the Defence was due to be filed on 21 July 2010 and that he would need to make an appointment, the Practitioner did not receive instructions from Mr Kristo as to that Defence.

Given the Tribunal has found that the letter of 30 June 2010 was sent, again the issue is one of timing and to that extent, the affidavit was misleading.

112.2.5. "4.7.6 Paragraph 6 of the defendant's affidavit deposed '*I received notice in September 2010 that I was required to attend an Examination Summons on 14 October 2010. I informed my solicitor of same, but did not attend nor provide instructions in relation to the preparation of any application*'.

4.7.7 As at 15 February 2011, the practitioner knew he had not sought instructions from the defendant prior to 14 October 2010."

112.2.6. The Practitioner's Response at [4.7.7] asserts that the Practitioner "... *was instructed by Mr Kristo by telephone on 12 October 2010 to make an application to seek to set aside the default judgment but otherwise admits the allegations contained in paragraph 4.7.7*".

Insofar as [4.7.7] of the Charge alleges that Practitioner had not sought instructions prior to 14 October 2010, that is clearly correct since it was Mr Kristo who contacted the Practitioner by telephone on 12 October 2010

following receipt of the examination summons and then attended in person at the Practitioner's office. Either during the telephone conversation or at the personal attendance, or both, Mr Kristo instructed the Practitioner to make an application to set aside the default judgment. Again however, the issue is one of timing and what was not put in the affidavit namely, that the Practitioner made no attempt to contact Mr Kristo between on or about 12 October 2010 and 15 February 2011.

To that extent, the affidavit was misleading.

112.2.7. "4.7.8 In paragraph 7 of his affidavit the defendant deposed '*The delay in time is due to my own oversight and lack of understanding and failure to respond to my solicitor's correspondence*'.

4.7.9 As at 15 February 2011, the practitioner knew that this statement was false and misleading. The practitioner knew there had been no oversight by the defendant or failure by the defendant to respond to the practitioner's correspondence. The practitioner had not sent any correspondence to the defendant between 30 June 2010 and 15 February 2011."

The Practitioner admits the allegations contained in [4.7.8] and [4.7.9].

113. Having prepared the affidavit, the Practitioner made an arrangement to see Mr Kristo at his workplace but upon attending, found he was not there. He contacted him and met him at a service station at Croydon for the purposes of witnessing Mr Kristo's affidavit.

114. The Practitioner continues in his Self-Report Letter[80] that he recalls discussing the proposed affidavit with Mr Kristo at the service station and explained to him that he would need to swear the affidavit to support the application to set aside the judgment. He read each paragraph aloud to Mr Kristo and asked whether he agreed with it and Mr Kristo confirmed he was happy with the affidavit.

[80] Self-Report Letter, Ex C1, p34, 5th last paragraph.

115. The Practitioner admits the affidavit was sworn without a bible[81], however there is no charge relating to that fact. The Tribunal considers the failure to swear on a bible to be significant. Mr Kristo could have affirmed the affidavit but did not. The taking of an oath is a fundamental and important part of a legal practitioner's obligations. It cannot be merely ignored as incidental to other unprofessional conduct and the Tribunal considers that failure, of itself, to constitute unprofessional conduct. Although the Practitioner has not been charged with unprofessional conduct arising out of that failure and whilst not conclusive in the Tribunal's decision to recommend the commencement of disciplinary proceedings in the Supreme Court, it is one of the many factors that the Tribunal takes into account in reaching its decision in this matter.

116. Prior to dealing with the dispute of factual issue over genuine belief or not, the balance of the Particulars to Count 4 and the Practitioner's Response is:

> "4.7.11 Paragraph 9 of the defendant's Affidavit deposed '*I now ... am in a position to provide prompt instructions to my solicitors to ensure these proceedings will go smoothly*'.
>
> 4.7.12 As at 15 February 2011 the practitioner knew that the defendant had not previously failed to provide prompt instructions in relation to the proceedings."
>
> The Practitioner admits the allegations in subparagraphs 4.7.11 and 4.7.12.

117. "4.8 The statements contained in the defendant's Affidavit at sub paragraphs 4.7.1 to 4.7.12 inclusive above were misleading in that they conveyed a false impression to the Court that the defendant was at fault, in circumstances where this was not the case."

The Practitioner admits the allegations.

***Disputed Factual Issue***

118. The Particulars in sub-paragraph 4.7.10 of the Charge and the Practitioner's Response

[81] Self-Report Letter, Ex C1, p34, 5th last paragraph.

read as follows:

> "4.7.10 Paragraph 8 of the defendant's Affidavit deposed '*I am intimidated by the legal process and* have essentially ignored these proceedings.'(sic) As at 15 February 2011, the Practitioner knew the defendant had not ignored the proceedings and was not at fault."

119. The Practitioner's Response reads:

> "4.7.10 ... the Practitioner admits that paragraph 8 of the affidavit of Mr Kristo sworn 15 February 2011 was misleading "... but says that at the time he prepared the affidavit, he genuinely believed that Mr Kristo had 'essentially ignored these proceedings' but he now understands that Mr Kristo had not ignored the proceedings, but had placed his trust in the Practitioner and that Mr Kristo was largely ignorant of the legal process."

120. The LPCC challenges whether the Practitioner held the genuine belief he asserts he held at the time.

*The Evidence*

121. In the Self-Report Letter, the Practitioner makes no mention of this part of Mr Kristo's Affidavit such that the factual dispute has arisen out of the Charge and the Practitioner's Response.

122. In a subsequent affidavit sworn 29 March 2011[82] and filed in the District Court Action on 30 March 2011, Mr Kristo deposed to his affidavit sworn 15 February 2011 and corrected parts of that affidavit which he swears are not true.

123. At [1] of his affidavit sworn 29 March 2011, Mr Kristo identifies three paragraphs which he says are wrong. At [1.3], he deposes in relation to paragraph 8 of his 15 February 2011 affidavit that:

> "1.3 It is wrong to say in paragraph 8 that I 'have essentially ignored these proceedings'."

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[82] Ex P6.

124. In evidence in chief, the Practitioner confirmed the truth of his statement that he genuinely believed that Mr Kristo had essentially ignored the proceedings and explained why.[83] He referred to a meeting with Mr Kristo and his father in the first three months of 2010 at or about the time the matter was called on for a status hearing on 31 March 2010.[84] However, subsequently he confirmed that he did not know when the meeting between himself, Mr Kristo and his father occurred[85].

125. He said[86] that he received the impression for his genuine belief from the fact that Mr Kristo did not seem engaged in the meetings that he had with him, that in the meeting he held with his father, Mr Kristo was not the one who was driving it but he sat quietly other than becoming agitated in relation to a discussion about medical costs, the fact that he was not receiving contact from Mr Kristo as opposed to his experience with other clients, that Mr Kristo exhibited defensive body language and that the way he sat conveyed a message to him that he was not interested. He said that Mr Kristo would not pay attention and did not make much in the way of eye contact, his voice was flat and that he rarely asked any questions. When speaking to him on the telephone, his voice was flat.

126. When he witnessed Mr Kristo's affidavit on 15 February 2011 at a service station in Croydon, the Practitioner said that Mr Kristo did not seem to be interested because he was not asking the Practitioner any questions.[87]

127. In cross-examination he confirmed that the basis of his belief that Mr Kristo had essentially ignored the proceedings was his body language at interviews and that he didn't appear to look at the Practitioner or be very talkative. When it was pointed out to him there was only one face to face meeting in the period from 30 June 2010 to 15 February 2011, the Practitioner responded that he was also referring to his body language in the meeting with Mr Kristo's father as well.[88] However, as noted above, although the Practitioner was uncertain about when that meeting with Mr Kristo's father occurred, he initially gave evidence that it occurred in the first three months of 2010, some six months

[83] T74.4-10.
[84] T74.16-36.
[85] T78.13-31.
[86] T77.1-T78.11.
[87] T86.27-28.
[88] T10-28.

before the 12 October 2010 meeting.

128. As to the 12 October 2010 meeting with Mr Kristo, the Practitioner explained that the examination summons had been issued because of the default judgment, that if the default judgment was set aside then the summons would go away. He agreed that Mr Kristo was shocked to learn that he had a judgment against him and that he instructed the Practitioner to apply to set aside the default judgment.[89]

129. The Practitioner continued in his evidence under cross-examination to confirm that there was no contact by him[90], that it was he who did not make contact and did not do his job[91] and that the basis of his belief was based on his dealings with Mr Kristo.[92]

130. He acknowledged that as at 15 February 2011, he wasn't doing his job properly, but that he formed his genuine belief on the basis of both the client's and his actions.[93]

131. As to what caused him to review whether his genuine belief was mistaken, he said that it was reflecting on the matter and speaking to his solicitors and more experienced practitioners, as a result of which he came to the conclusion that Mr Kristo was not ignoring the proceedings.[94]

132. Under cross-examination, the Practitioner reiterated his genuine belief at the time as follows:[95]

> "Q And we know that from 12 October to 15 February, there's no communication between you and him generated by you.
>
> A Yes, or by generated by him (sic).
>
> Q And there's nothing initiated by him to you.
>
> A Yes, and as I said, that formed part of my belief.

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[89] T147.3-30.
[90] T122.1.
[91] T122.1-.24.
[92] T123.6-.9.
[93] T125.14-24.
[94] T124.12-16, .30-.37
[95] T148.15-T149.6.

Q Well, that's what I am coming to that by 15 February, the very last time you see Mr Kristo, he, in effect is saying to you 'I'm very shocked that this judgment exists, I want you to make it go away. Do what you have to do to make it go away because if you can make it go away, you tell me the summons will go away'.

A Yes.

Q How could you on 15 February have the genuine belief that you professed to have that he had essentially ignored the proceedings when the last time you had seen him you did all of those things.

A And I think I answered that earlier today and yesterday in that referring to the effect of things like that in the meetings that I'd had with him and by the fact that he hadn't then contacted me through that time. I'm not saying in any way that it abrogates my responsibility or that I should - or that - I needed to have contacted him, I am accepting that entirely. But what I'm saying that caused me to have that belief was the fact that I hadn't heard from him. Now I have acknowledged in my pleadings that that belief was mistaken and he just relied on me to do my job but at the time, the fact that I hadn't heard from him caused me to have that belief."

133. Mr Kristo's reaction to being told default judgment had been entered against him as quite "shocked" is not consistent with him ignoring the proceedings. It is however consistent with a client who is relying completely on his solicitor, having instructed him to make the application to set aside the default judgment.

134. Notwithstanding those instructions, the Practitioner did nothing until on or about 15 February 2011 at which time he drafted an affidavit in which Mr Kristo deposes that he had "essentially ignored these proceedings".

135. The Practitioner knew he had taken no action and although he asserts a genuine belief based on a prior impression, which must be prior to 12 October 2010 because he expressed Mr Kristo's reaction on 12 October 2010 as "shocked" followed by an

instruction to set aside default judgment, there is nothing other than the lack of contact from Mr Kristo or by the Practitioner upon which to base his genuine belief.

136. It is apparent from the Practitioner's admitted misleading of the Court on 14 October 2010 and 25 January 2011 and his admitted lying to Mr Bulloch[96], that he was acting out of self-interest.

137. The Practitioner was acutely aware of his own failures in relation to Mr Kristo's file and by asserting a genuine belief, was attempting at the time to deflect attention from those failures. In so doing, he attributed blame to the client in circumstances where he was the author of those problems.

138. In all the circumstances, the Tribunal does not accept that the Practitioner genuinely held the belief he says he held as at 15 February 2011.

***Count 5 - The Practitioner recreates and fabricates file documents***

139. The parties tendered a Statement of Agreed Facts[97]. Those agreed facts are identified as such in the factual narrative relating to this Charge which follows.

140. The reconstruction and fabrication of the file is the subject of Count 5. That Count reads as follows:

> "5 The Practitioner engaged in unprofessional conduct in that between 25 January 2011and 15 March 2011 the practitioner intentionally falsified the client file for the defendant maintained by him at Westside Community Lawyers by creating and inserting on the defendant's file, file copies of correspondence which had not been sent and file notes of attendances upon the defendant which were not genuine and contemporaneous, but had been created to give the misleading appearance that he had managed the file differently to how it had been managed." (particulars provided)

141. The Practitioner admits the allegations in Count 5 but denies certain of the documents,

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[96] Self-Report Letter, Ex C1, p32, penultimate paragraph; T127.1-7.
[97] Ex C14.

identified in sub-paragraphs 5.8 and 5.9, were falsely created.

142. As to the Particulars in Count 5, insofar as relevant, the Practitioner:

142.1. at [5.7] admits that on or about 15 March 2011, he produced the file in respect of the proceedings to his employer;

142.2. at [5.8] admits that:

"5.8 Between 25 January 2011 and prior to producing the defendant's file to his employer on 15 March 2011, the practitioner falsely created and inserted on the defendant's file copies of correspondence which he never sent to the defendant on the dates attributed or at all, namely:..."

The documents are then identified at [5.8.1]-[5.8.10] and are listed below together with the Practitioner's response.

5.8.1- letter from the Practitioner to the defendant dated 30 June 2010 - denied. This letter has been dealt with above and the Tribunal has found the letter was sent.

5.8.2- letter from the Practitioner to the defendant dated 15 July 2010[98] - admitted.

5.8.3- letter from the Practitioner to the defendant dated 22 July 2010[99] - admitted.

5.8.4- letter from the Practitioner to the defendant dated 5 August 2010[100] - admitted.

5.8.5- letter from the Practitioner to the defendant dated 17 August 2010[101] - admitted.

5.8.6- letter from the Practitioner to the defendant dated 14 October 2010[102] -

[98] Ex C1, p97.
[99] Ex C1, p98.
[100] Ex C1, p99.
[101] Ex C1, p100.
[102] Ex C1, p101.

admitted.

5.8.7- letter from the Practitioner to the defendant dated 25 January 2011[103] - admitted.

5.8.8- letter from the Practitioner to the defendant dated 15 February 2011[104] - admitted.

5.8.9- letter from the Practitioner to the defendant dated 1 March 2011[105] - denied. This letter has been dealt with above and the Tribunal has found the letter was sent.

5.8.10- letter from the Practitioner to the defendant dated 9 March 2011[106] - denied. This letter has been dealt with above and the Tribunal has found the letter was sent.

143. At Particular [5.9], the allegations by the LPCC concern telephone attendance notes which are alleged to have been falsely created and inserted on the file such that they were not genuine and contemporaneous as follows:

> "5.9 Between 25 January 2011 and prior to producing the defendant's file to his employer on 15 March 2011, the practitioner falsely created and inserted on the file, notes of attendance on the defendant which were not genuine and contemporaneous:
>
> 5.9.1 telephone attendance note dated 22 July 2010[107];
>
> 5.9.2 telephone attendance note dated 12 October 2010[108];
>
> 5.9.3 telephone attendance note dated 14 January 2011[109]".

144. The Practitioner admits the allegations in [5.9.1] and [5.9.3] but denies the allegations in

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[103] Ex C1, p102.
[104] Ex C1, p103.
[105] Ex C1, p104.
[106] Ex C1, p105.
[107] Ex C1, p106.
[108] Ex C1, p107.
[109] Ex C1, p108.

[5.9.2].

145. The telephone attendance note dated 12 October 2010 has been dealt previously and the Tribunal has found the note accurately records the telephone conversation with the client.

146. On 11 March 2011, the Practitioner met with Mr Bulloch as part of an initiative introduced by Mr Bulloch to conduct "A to Z file reviews" with all practitioners. On the Friday prior to the long weekend in March 2011, the Practitioner told Mr Bulloch that default judgment had been signed in the Kristo matter and that he had filed an application to have it set aside. Mr Bulloch informed the Practitioner that Mr Koziol would run the application.[110]

147. The Practitioner accepts[111] that he failed to maintain a proper file in respect of the matter.

148. He explains that because of his workload, coupled with his duties as Finance Officer for the Practice, he took work home and prepared correspondence and the like on his home personal computer, saving documents to a USB which he intended to download at the office in order that proper working files could be maintained. He says that did not happen such that his file maintenance procedures slipped considerably. He has since been unable to find the USB, however he asserts in the Self-Report Letter[112] that the correspondence was printed at the office and sent.

149. The Practitioner had to hand the file over to Mr Koziol but as he could not find the USB on which he believed file copies of relevant correspondence would be found, the Practitioner says he panicked. Over the long weekend, the Practitioner went into the Westside office at the Parks Community Centre to fabricate or recreate the documents, as the case may be.[113] On the Tuesday after the long weekend, the Practitioner handed the file to Mr Koziol as Mr Bulloch was not in the office. Mr Koziol was instructed to run the file. A further meeting would be held to discuss the file on Mr Bulloch's return.[114] Within a day or two of receiving the file, Mr Koziol read it carefully. His examination of

[110] Ex C14 - Statement of Agreed Facts, paragraph 1.
[111] Self-Report Letter, Ex C1, p31, penultimate paragraph.
[112] Ex C1, p32, first 2 lines.
[113] Ex C14, Statement of Agreed Facts paragraph 2.
[114] Ibid, paragraph 3.

the file and other records maintained by Westside Lawyers led him to believe that documents on the file were not genuine but had been recently created.[115] Mr Koziol told Mr Bulloch of his belief. The Practitioner understood at that time that Mr Koziol believed some letters to be fabricated due to the poor nature of the formatting, as the text did not line up with the letterhead. Mr Bulloch then spoke to the Practitioner about the perceived fabrication. the Practitioner initially prevaricated, but then quickly admitted that there were documents on the file that were not contemporaneous or genuine.[116] The Practitioner admitted that he had fabricated or recreated the documents on the file.[117] Mr Bulloch reported the matter to Mr David Meyer who is the Chair of Westside Lawyers Board of Management. Mr Meyer met with the Practitioner and Mr Bulloch,[118] urged the Practitioner to self-report and arranged for him to consult with Iles Selley Lawyers.[119]

150. Subject to the correspondence and the telephone note referred to and which the Tribunal has found occurred or were sent as the case may be, the Practitioner cannot say with certainty either that the recreated file notes record a telephone conversation between him and Mr Kristo which in fact occurred or that the recreated correspondence reflects correspondence which was in fact sent.[120]

151. Insofar as the Practitioner seeks to explain the absence of documents by reference to him losing the USB, that does not explain the handwritten telephone notes which would not appear on a USB.

152. After Mr Koziol took over the file, Mr Kristo told Mr Koziol that the affidavit which he swore on 15 February 2011 was incorrect. As stated above, Mr Kristo swore a further affidavit on 29 March 2011 in which he deposed that the Practitioner had not explained to him the earlier affidavit and that it contained a number of inaccuracies.[121]

153. The Tribunal has referred to a letter from Iles Selley to the Legal Practitioners Conduct

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[115] Ibid, paragraph 4.
[116] Ibid, paragraph 5.
[117] Ibid, paragraph 6.
[118] Ibid, paragraph 7.
[119] Ibid, paragraph 8.
[120] Ex C1, p35,last sentence.
[121] Ex P6.

Board dated 23 March 2012[122].which sets out a list of the documents on the file. The letter identifies a number of documents and states whether they are a reconstruction or contemporaneous, false or accurate, when they were created and the method of reconstruction or source of the document.

154. That list contains a number of different categories of documents as follows:

154.1. documents which have been reconstructed but believed to be contemporaneous and accurate - 5 in number with one exception being document 105 in the list[123];

154.2. documents which have been reconstructed, but believed to be accurate - 3 in number with one exception being document 105 in the list[124];

154.3. fabricated and false - 5 in number;

154.4. reconstruction in the morning following a telephone conversation - document no. 77 in the list[125];

154.5. reconstruction - possible fabrication - document no. 78 in the list[126];

154.6. unsure if contemporaneous or reconstructed - 3 in number - document nos. 86, 88, 89 in the list.

155. There is no suggestion of other files on which the Practitioner was working as suffering from the same problem. In a letter from Westside to the Legal Practitioners Conduct Board[127], Mr Bulloch reported that the management of the Kristo file appeared to be an isolated matter and that he is not aware of any other client file in which letters have been fabricated or where the court has been intentionally misled.

156. The fabrication and recreation of documents is at the extreme end of unprofessional conduct.

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[122] Ex C1, pp 40-45.
[123] Ex C1, p43.
[124] Ibid.
[125] Supra, p42.
[126] Supra, p42.
[127] Ex C1, p37.

**The Medical Evidence**

157. One of the issues in this matter which falls for consideration by the Tribunal is the state of the Practitioner's mental health, what influence that might have had on his conduct and whether he is fit to practise.

158. In his evidence in chief, the Practitioner expanded upon his depressive illness.

159. He started to feel that things were spiralling out of control in the middle of June 2010[128] but no later than the start of July 2010. During this time he suffered physical symptoms such as vomiting or dry retching, shaking, sweating. He described his state of mind as being dark, he was struggling to find motivation to do anything, he didn't like to socialise, he was monosyllabic and had suicidal ideation and he wanted to kill himself. He suffered from these symptoms most days. On occasions, when he was getting into the car and heading off to work, he wanted to drive into another car because he didn't know what to do any more. Although he had maintained friendships, he became withdrawn. He did not think of consulting a doctor because he did not know what to do. He found the depression paralysing and he felt pressures arising from his work. His drinking habits changed in that he drank more at night. His wife noticed it and asked him to reduce his drinking but he couldn't do so consistently.

160. He described his feelings once he tendered his resignation and left the employment of Westside, as bringing with it a sense of huge relief that left him crying and shaking.[129]

161. During this time it is apparent from his evidence that he received no support from Mr Bulloch[130] and he was too scared to bring his failure to the attention of Mr Bulloch and to seek his assistance.[131]

162. He says that he did not recreate the documents with the intention of misleading the court or Mr Kristo but he accepted that he created the documents to mislead Mr Bulloch because he was too ashamed to admit that he had not kept proper file notes, had allowed

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[128] T61.19-20.
[129] T70.3-73.24
[130] T50.38-T52.11, T53.9-.38, T54.19-T55.8, T64.1-.4.
[131] Ex C1 p33, 2nd paragraph.

correspondence to go missing and was in fear of the potential consequences.[132]

163. He did not file a defence to the proceedings by 21 July 2010 as ordered by Master Norman because he was absolutely swamped and it was about that time that the depression "*had started to really kick in*".[133]

164. When he received the letter dated 22 July 2010 from Minter Ellison[134]chasing up the filing of a defence, he said that at that time he was in a state of panic which became worse because he was further out of time. He would not have gone to Mr Bulloch at that time for assistance for the reasons he explained.

165. Notwithstanding his depression, only one file was affected and in answer to a question from member Camatta as to what was it that was unique about Mr Kristo's file that caused the Practitioner to feel that things were spiralling out of control, the Practitioner was unable to provide an answer and could not think of anything that was unique about the file that would cause the difficulties he had with it.[135]

166. He attributes his failure to act on Mr Kristo's file to his illness.[136]

167. He confirmed that his general physical and mental condition in the latter part of 2010 continued, leaving him "paralysed" and unable to attend to the Kristo deadlines.[137]

168. In his Self-Report Letter,[138] the Practitioner stated that from August 2010 when he first learnt of the default judgment until February 2011 when he drew and filed the application and supporting affidavits he was, "*... paralysed in fear of the consequences of my failures. There were times when I would be physically ill when reflecting on what had occurred and what might be done to overcome the client's predicament. It became so distressing for me to dwell on the matter that I tried to put it out of my mind.*"

169. As at 15 February 2011, he did not think he was doing his job properly yet he says he

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[132] Self-Report Letter, Ex C1 p36. first paragraph
[133] T62.38-T63.2
[134] Exhibit P3
[135] T80.10-28
[136] T81.27-T82.3.
[137] T83.16-38
[138] Self-Report Letter, ExC1, p29, 4th paragraph.

formed the genuine belief that it was the client's problem as well as his.[139] The Tribunal has found that the Practitioner did not have that genuine belief at the time.

170. The Practitioner continued that by the middle of February 2011 he was emotionally very sick and paralysed by fear or inertia.

171. The Practitioner was not cross-examined about his symptoms.

172. Notwithstanding his evidence as to his state of mind in mid-February 2011, within four weeks, on the long weekend in March 2011, he had the capacity to go into the office after hours and fabricate the file in the way alleged and admitted.[140]

173. As to that long weekend, on the Friday before the long weekend in March 2011, the Practitioner had told Mr Bulloch of the default judgment against Mr Kristo for nearly $800,000.[141] It was put to the Practitioner that over the long weekend he gathered the inner strength and wherewithal to be able to fabricate the file. The following exchange occurred[142] in cross-examination:

> "Q ... That whatever had been happening in February causing this paralysis, this feeling of being in such a deep, dark abyss; nonetheless you were able to gather your wits on the March long weekend, appreciate the enormous problem you had created for yourself and set about attempting to minimise that problem by producing a fabricated file of what should have happened. That's the only proposition I'm putting to you that over the long weekend, you must have been able to gather the inner strength and the wherewithal to be able to do that because we know you did it. You must agree with that, mustn't you.
>
> A Not in the way you're phrasing it Mr Crocker, no. And I'm sorry if I'm misunderstanding you but I think you're trying to say that I had recovered.
>
> Q No, I'm suggesting that your state of mind on the March long weekend

[139] T125.13-24.
[140] T125.26-T126.19.
[141] T127.8-10.
[142] T129.6-T130.3.

was such that you realised the enormity of the consequences that would flow from what you had told Mr Bulloch on the Friday. You appreciated the enormous difficulties and consequences that would flow if you handed over the file on Tuesday in the shape it was and that you therefore called upon whatever reserves you had and realised that the only way you could make it better was to set about fabricating the file and all I'm asking you is that must be right because we know that's what you did.

A And I just think you and I have a different interpretation of my mind at the time. I'm not denying in any way that it was a complete abrogation of my responsibilities as a solicitor, I'm not denying in any way that it was completely unprofessional. I'm not denying in any way that it was misconduct. I was in a very bad place I recreated the file, it shouldn't have been done. As I said, it was such a job that even the most cursory examination discovered that the file was recreated."

174. That passage of evidence needs to be seen against the Practitioner's Self-Report Letter, Ex C1, p29[143] where the Practitioner says:

> "*I now know from seeking medical assistance that I was suffering from depression throughout that period and that my condition has been exacerbated by recent developments and my failures having been exposed*".

175. Although not asked what constituted those "recent developments", the context clearly indicates the discovery not only of the Practitioner's failure to manage Mr Kristo's file competently by filing a defence within time and then by failing to issuing and prosecuting an application to set aside default judgment promptly, but also the discovery of his actions in fabricating documents and recreating the file.

176. He sought medical advice and was told that to remain with Westside would not assist in his recovery. It was due to that, in part, that he resigned with his final day of employment

[143] 4rd last paragraph

being Friday, 15 April 2011.[144]

177. By consent, three statements were admitted into evidence from people who had known the Practitioner for varying periods of time. Each of the witness statements provided character evidence for the Practitioner. Two of the witness statements corroborated the Practitioner's symptoms.

178. None of the witnesses were required for cross-examination.

*Statement of Matthew David Fuss*[145]

179. Mr Fuss was admitted as a legal practitioner on 8 May 2006 and had known the Practitioner since they were both working at Big W at Marion in or about 2000.

180. Insofar as the events at Westside are concerned, Mr Fuss states that he was aware at the time that the Practitioner, whilst working at Westside was struggling, working long hours and would sometimes be physically sick with stress on the way to and from work.[146]

*Statement of Clinton Vonow*[147]

181. Mr Vonow also met the Practitioner when they were both working at Big W at Marion in or about 2000.

182. Mr Vonow gives no evidence about his observations of the Practitioner during the relevant time.

*Statement of Allison Kathryn Jean Thompson*[148]

183. Ms Thompson is the Practitioner's wife, has a Bachelor of Behavioural Science and a Bachelor of Nursing both from Flinders University, a Graduate Diploma of Nursing from Adelaide University and practises as a Registered Nurse. Ms Thompson observed that once the Practitioner became employed at Westside, he would come home late and leave for work early. She became very concerned when it reached the stage where he would vomit before leaving for work in the morning, would not eat properly, was not talkative

[144] Self-Report Letter, Ex C1 pp29,30.
[145] Ex P9.
[146] Ex P9 [15].
[147] Ex P10.
[148] Ex P11.

but would go to work.[149] At home, he drank more than normal at night during the period and his outward going nature disappeared. She observed that he was obviously troubled, was tense, not relaxed, monosyllabic, preferred not to go out and in her view, was clearly depressed. She feared for him and he confided to her that he had had suicidal thoughts.[150]

184. During the time she was worried that he was suicidal, stressed and depressed, he was struggling to function and was not sleeping properly.[151]

**Medical Reports**

185. Medical reports were tendered as follows:

185.1. report of Dr Jill Maxwell 15 December 2015[152];

185.2. report of Dr Jill Maxwell 14 September 2016[153];

185.3. report of Dr Jill Maxwell 31 May 2017[154].

185.4. report of Megan Jones 29 January 2016[155];

185.5. report of Dr Rammal 19 January 2016[156];

185.6. report of Dr Michael Clarke, Psychiatrist 11 May 2017[157].

***Dr Jill Maxwell***

186. Dr Maxwell has produced three reports; her curriculum vitae was tendered.[158]

187. Dr Maxwell is a vocationally registered General Practitioner with over 30 years of general practice experience in Adelaide. She is a member of the Royal Australian College of General Practitioners and a member and Fellow of the Australian Medical Association. She provides confidential counselling to members of the legal profession

[149] Ex P11 [13].
[150] Ex P11 [14],[15].
[151] Ex P11 [16].
[152] Ex C1, p17.
[153] Ex C1, p19.
[154] Ex P15, tab 5.
[155] Ex C1, p21.
[156] Ex P5.
[157] Ex P15, tab 3.
[158] Ex P16.

who request that service under the Law Care Scheme.

*First Report*[159]

188. In her first report dated 15 December 2015, Dr Maxwell records that she first saw the Practitioner at her practice on 31 March 2011 on reference from Law Care. She then saw him on 5 July 2011, in November 2011, January 2012, February 2012 and August 2012. All consultations concerned his mental health issues.

189. At his consultation on 31 March 2011, he gave a family history of depression and that he suffered with depression both as a law student and early in his working days which went untreated.[160] She diagnosed him as suffering from severe clinical depression and gave him a certificate off work for 5 days.

190. At his second appointment on 5 April 2011, Dr Maxwell referred the Practitioner to Psychologist, Ms Megan Jones and kept him on anti-depressant medication.

191. She considers that his bout of severe depression was precipitated by stress in the workplace. His history and presentation in March 2011 is consistent with the depression having been present for some time and it is likely to have reduced his capacity to undertake work.

192. In her opinion, the Practitioner's depression would only surface under very stressful conditions.

*Second Report*[161]

193. In her second report dated 14 September 2016, Dr Maxwell reported that she had seen the Practitioner again on 26 July 2016, that being the only time she had seen him since August 2012. He was still on anti-depressant medication.

194. At that stage, the Practitioner's depression was well-managed and his presentation was very different from that in 2012, at which time he was incapacitated by depression.

195. She observed that the Practitioner has depression requiring lifelong medication and has a

[159] Ex C1, p17.
[160] Ex C1, p17, Report of Dr Maxwell 15/12/15.
[161] Ex C1, p19.

very good insight into his depression. In her view, there is nothing that would prevent him from discharging his duties as a legal practitioner.

196. He would probably need to continue medication for life and may benefit from some counselling if there are significant life stressors. She expects him to manage any stressors with minimal outside help.

*Third Report*[162]

197. Dr Maxwell's third report is dated 31 May 2017.

198. She confirms her diagnosis of major depression and in association with the depression the Practitioner suffered from an anxiety disorder. She refers to the evidence before the Tribunal of insomnia, vomiting, dry retching, paralysis, sweating, racing heart, inability to talk to colleagues and avoiding social contact, which in her opinion are all caused by his depression and associated anxiety disorder. She formed this opinion from the observations of meeting the Practitioner on the first occasion in March 2011, subsequent consultations and her reading of the transcript of these proceedings together with her knowledge of depression based on her professional experience and the DSM-IV and DSM-V criteria for major depressive disorder and anxiety disorders.

199. She reports that the Practitioner feared going to work but had limited focus and concentration which led to some work being completed, while other work remained not just unattended, but deliberately outside his consciousness until it demanded his attention - equivalent to a "fight or flight response".

200. In her opinion, in 2010 and 2011 the Practitioner's depression was not being treated, was severe and causing the symptoms listed in her report. Her reading of the transcript of the evidence before the Tribunal combined with her regular examinations of the Practitioner during 2011, leads her to the assessment that his ability to manage most files was not always consistent with his state of mind at the time.

201. In Dr Maxwell's view, it is standard behaviour for someone feeling overwhelmed to deal

[162] Ex P15, tab 5.

with the immediate presenting issues while ignoring those that are not causing any current pressure.

202. She confirms that the Practitioner's description of the feelings had caused him to completely avoid attending to one particular file i.e. Kristo, and then in desperation to attempt to reconstruct it as an accurate recollection of his mind state and the events.

203. As to the reconstruction of the file, Dr Maxwell's view is that that was done in extreme desperation when the threat of discovery of his previous avoidance was imminent. She considers that the position put by Counsel for the LPCC in relation to the reconstruction of the file is appropriate for someone with a "sound mind" but not someone suffering from major depression and an anxiety disorder[163]. In her opinion, that behaviour was consistent with "vigilance in preparation for future danger" i.e. the behaviour of someone whose mind was disturbed by depressive and anxiety mood disorders.[164]

204. Mr Wells QC dealt with the approach of Counsel for the LPCC in his closing submissions at which time he relied on Dr Maxwell's opinion.[165]. Counsel for LPCC responded, albeit at a general level and submitted that the observations about the Kristo file made by Dr Maxwell are limited. Her understanding of what was done is benign and does not take account of the full history of the matter.

205. It is apparent that Dr Maxwell was provided with the transcript of the evidence before the Tribunal and other documentation[166], however that is very different from seeing the Practitioner giving evidence and making observations of the Practitioner.[167]

206. There is some force in the LPCC's submissions. On the Practitioner's own evidence, he saw Dr Maxwell when his symptoms had been exacerbated by his actions[168]in fabricating and recreating the file and that fact being discovered. Importantly, there is no suggestion that the Practitioner's actions were in some way involuntary or unintentional.[169]

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[163] As to that position, see T129.6-T130.3.
[164] Page 2, [3].
[165] T266.21-32.
[166] Ex P15 tab 4 letter Iles Selley to Dr Maxwell 18 April 2017 pp1,2 and3
[167] T346.7-T348.4.
[168] Ex C1, P29, 3rd and 4th last paragraphs.
[169] T256.35-T258.19, particularly at T258.8-19.

207. As to his current condition, in Dr Maxwell's opinion, the Practitioner is well-managed, not displaying any signs of major depression or anxiety and showing no fear of stress. She stands by the opinions in her previous reports.

208. She concludes that the Practitioner's experiences combined with his psychotherapeutic management and appropriate use of medication have led to him having a much better understanding of his illness and an ability to deal with stress. He is now able to deal with even major stress without a recurrence of the depression and anxiety that crippled him in 2010/2011.

***Dr Michael Clarke***[170]

209. Dr Clarke provided a report dated 11 May 2017.

210. The Practitioner attended Dr Clarke for the purposes of the preparation of a medico-legal report.

211. Dr Clarke obtained a medical degree from the University of Adelaide in 1983 and Fellowship of the Royal Australian and New Zealand College of Psychiatrists in 1993. He has worked as a Psychiatrist both in public and private sectors.

212. Dr Clarke was also provided with the transcript of the hearing in this matter on 1 and 2 March 2017 as well an extensive set of documents, all of which are listed on page 1 of his Report dated 11 May 2017.[171] The Tribunal notes that the same observation made about Dr Maxwell not having the advantage of seeing the Practitioner giving evidence and making observations of the Practitioner also applies to Dr Clarke, although Dr Clarke did have the advantage of seeing the Practitioner for the specific purpose of a medico- legal psychiatric examination and report.

213. After reciting the history of the matter, on page 4 of the report Dr Clarke observes that the Practitioner says that he was successful in having the judgment set aside.[172] Although Dr Clarke is mistaken in his description of what occurred, that mistake is minor[173]and it is

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[170] Ex P15, tab 3.
[171] ,Ex P 15 tab 3, p1, tab 2 -Iles Selley letter to Dr Clarke 4 April 2017 pp2,3;
[172] Ex P15, tab 3, p4.
[173] T252.3-34.

apparent from the Report that it does not affect Dr Clarke's opinion.

214. In Dr Clarke's opinion[174], the Practitioner was suffering from a major depressive disorder during the period November 2009 to April 2011 with the likelihood of him suffering significant depression over the years prior to that time. His condition was likely to have fluctuated and worsened for the latter part of 2009 and into 2011. The history of stress together with the loss of pleasure in activities, lethargy, decreased motivation, sleep disturbance and vomiting in the morning is consistent with the Practitioner suffering from significant depression and anxiety in response to his work situation.[175]

215. In Dr Clarke's view, it is likely that the Practitioner's condition would have affected his capacity to deal with all aspects of his position, including his management of files of other clients. Dr Clarke observes that it is quite possible that the Practitioner's problems manifested themselves more profoundly with the Kristo file and it is likely that when the Practitioner struck problems with that file, his depression made it more difficult for him to overcome them. He considers that what is likely to have happened is that the Practitioner avoided dealing with that file and concentrated on other work which he found more manageable. As he avoided dealing with it, he became more anxious about it and the problem seemed insurmountable, the potential repercussions added to the stress surrounding the file such that his depression made it more difficult for him to cope with his anxieties about the file and deal with it.[176]

216. Dr Clarke's opinion is that the Practitioner remains vulnerable to significant stress but is likely to cope with it much better than he did when working at Westside.[177]

217. As to his current mental state, Dr Clarke is of the view that it is not such as to prevent him from discharging his duties as a legal practitioner and sees no reason why he could not resume work as a legal practitioner, although he considers the Practitioner would remain vulnerable to particularly stressful situations in the future[178]. In particular, he is likely to find that similarly stressful and difficult work situations as occurred in 2010 and

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[174] Ex P15, Tab 3, pp7-10.
[175] Ex P15, tab 3, p8.
[176] Ex P15, tab 3, p8-9.
[177] Ex P15, tab 3, p9.
[178] Ex P15, tab 3, p9-10.

2011 could cause a deterioration of his mental state. Having said that, he considers that the Practitioner, through the insight he has gained, would be far more aware of the possible consequences of him not appropriately dealing with situations that may arise and there is little chance of similar problems occurring. Appropriate supervision in the workplace would be an additional safeguard to ensure that further problems do not arise.

218. Dr Clarke is a little more cautious about the Practitioner's prognosis than Dr Maxwell in relation to him being vulnerable to stress in the future, however he is of the opinion that the Practitioner is now likely to better manage stress he may face.[179]

*Insight*

219. On page 4 of the report, Dr Clarke records the following:

> "He said that he was successful in having the judgment set aside and it was only afterwards that he had a concept of what he had done. When asked what it was that he realised that he had done, Mr Thompson said that he was not able to answer that question."

That answer is of concern to the Tribunal as it indicates to the Tribunal a lack of insight on the part of the Practitioner.

220. Further, Dr Clarke does not believe that the Practitioner's subsequent actions can be entirely explained in terms of the depression he was experiencing at the time. In Dr Clarke's view[180]:

> "Mr Thompson described the situation reaching a point which was so serious that he had no choice but to take some action. This would appear sufficient motivation to overcome his avoidance but then an additional motivation to save face arose.
>
> I do not believe that Mr Thompson's subsequent actions can be entirely explained in terms of the depression he was experiencing at the time.
>
> He was strongly motivated to not appear to have failed with the file and any

[179] Report, p9
[180] Ex P15, tab 3, p9.

> implications for his professional reputation. While Mr Thompson was not open about his actions relating to the falsifying of documents but (sic) he acknowledged that that is what occurred. His depression probably clouded his judgement and although his motivation was to deceive, he can now see that his actions made matters worse and were obvious to his colleagues looking at the file. It could be suggested that at some level, Mr Thompson allowed himself to be found out which resulted in the situation coming to a head."

221. The Tribunal accepts that the Practitioner was suffering from depression, nonetheless Dr Clarke's opinion that there was a degree of knowledge as to what the Practitioner was doing in falsifying the documents and that his motivation was to deceive, albeit with his judgment being clouded is a matter of great concern to the Tribunal. As the Tribunal has noted, this is not a case of an involuntary or unintentional act or series of acts.

222. Notwithstanding the Practitioner's judgment may have been clouded, the Tribunal considers it significant that in Dr Clarke's opinion, there was a degree of knowledge on the part of the Practitioner as to what he was doing in falsifying the documents and that his motivation was to deceive. Those actions carried out with a degree of knowledge and the motivation to deceive, is inconsistent with the qualities and character expected and required of legal practitioners.

***Report of Megan Jones - Psychologist***

223. Ms Jones provided one report dated 20 January 2016[181]. The Practitioner attended on her on three occasions. On the first occasion, namely 5 April 2011, he presented consistently with the referral for depression exacerbated by extreme work stress.

***Dr Rammal***

224. Dr Rammal produced one report dated 19 January 2016[182].

225. Dr Rammal first saw the Practitioner on 5 September 2013 for the purpose of obtaining a repeat prescription of anti-depressants. On 21 October 2013, a Mental Health Care Plan

[181] Ex C1, p21.
[182] Ex P5.

was prepared and a referral made to a Psychologist at PyschMed. Since Dr Rammal did not see the Practitioner until 5 September 2013, he was not able to express any opinion as to the Practitioner's condition during the period November 2009 to April 2011.

226. As to his general prognosis, Dr Rammal indicates that that is beyond the scope of his expertise.

**Conclusion on Medical Evidence**

227. It is clear from the medical evidence that the Practitioner was suffering from severe depression at the time he saw Dr Maxwell. It is likely, and the Tribunal finds, that he was suffering from a major depressive disorder from mid-2010 and thereafter. The discovery of the fabrication of the file and his failure to deal with the file competently has exacerbated the Practitioner's depression.

228. There are two aspects of Dr Clarke's report which are of particular concern to the Tribunal. The first is at page 9 of Dr Clarke's report, referred to above, that there was a degree of knowledge on the part of the Practitioner as to what he was doing in falsifying documents and that he had an intention to deceive, albeit as a result of clouded judgment. Nonetheless, it is apparent from Dr Clarke's report that his actions cannot be entirely explained in terms of the depression the Practitioner was experiencing at the time.[183]

229. The second matter[184] is the vulnerability of the Practitioner to stress. In paragraph 12.2 on page 10 of his report, Dr Clarke observes:

> "I consider that Mr Thompson would remain vulnerable to particularly stressful work situations in the future. ... he is likely to find similarly stressful and difficult work situations could cause a deterioration of his mental state in the future. However, I also consider it likely that Mr Thompson through the insight he has gained, would be far more aware of the possible consequences of him not appropriately dealing with situations that may arise. His ongoing treatment is likely to reduce the emotional impact that such situation could have on him and

[183] Ex P15, tab 3, p9.
[184] Ex P15, tab 3, p10.

> would be more likely to seek help as well as address the situation in the workplace. I therefore consider that there is little chance of similar problems occurring. Appropriate supervision in the workplace would be an additional safeguard to assure that further problems do not arise."

230. Dr Clarke continues on p10 that he is:

> "... a little more cautious about Mr Thompson's prognosis with regards to him being vulnerable to stress in the future. However, as stated above, I consider that Mr Thompson is now likely to better manage stress he may face".

231. The law is a stressful profession and the Kristo matter was relatively straightforward. It is clear to the Tribunal that there is a risk that a similar problem might arise, although the Tribunal also accepts that risk has been significantly diminished by the Practitioner's awareness of his depression. As noted, Dr Clarke opines that appropriate supervision would be an additional safeguard to ensure that further problems do not arise.

232. Although one cannot divorce the extremely serious nature of what occurred from the medical evidence in that it provides somewhat of an explanation, it is not an excuse, particularly in circumstances where the role of the Tribunal is to protect the public.

**Consideration**

233. In this matter, the question as to whether the Practitioner is a fit and proper person to practise is complicated because of the fact of his depression and whether or not the Practitioner's actions were brought about because of his depression. In particular, the issue is whether his underlying character is such that he should be allowed to continue to practise albeit under such conditions as the Tribunal is able to impose which will adequately protect the public, or whether or not the Tribunal recommends that disciplinary proceedings be commenced in the Supreme Court.

234. In *Legal Profession Conduct Commissioner v Semaan*[185], the Full Court of the Supreme Court of South Australia considered an application by the LPCC for an order that the name of the practitioner be struck off the Roll of Legal Practitioners. The practitioner did

[185] [2017] SASCFC 19.

not oppose the order.

235. That was a matter which involved offences of dishonesty (specifically, the forgery of academic transcripts) and also, depressive episodes.

236. The history of the onset of that practitioner's depression in that matter was consistent with a major depressive disorder. A psychiatric report opined that the practitioner's major depressive disorder was not severe enough to prevent the practitioner from knowing both the nature and quality of his actions, nor was the nature of his illness sufficient to render him unable to control his actions and conduct. Although the depression may have motivated him to act in the manner he did, it did not render him impaired in the way in which he did it. There was also some uncertainty about how much the practitioner's depression affected his day to day functioning.[186]

237. In *Semaan*, the practitioner agreed that there was nothing in the medical evidence which suggested any of his underlying psychological issues were the cause of the offending conduct.[187]

238. The Tribunal deals with each of the Counts below.

*Counts 1 and 2*

239. The Tribunal has found the charge of unprofessional conduct proven. The conduct in misleading the Court on 14 October 2010 and 25 January 2011 is unprofessional conduct.[188] The Courts rely on legal practitioners being honest in their dealings with them.

240. In *Kyle v Legal Practitioners Complaints Committee*[189], the Court of Appeal of the Supreme Court of Western Australia considered the conduct of a legal practitioner who had misled the Court. Parker J observed [190]:

> "The duty of counsel not to mislead the Court in any respect must be observed

[186] Supra at [12].
[187] Supra at [15].
[188] *Re a Practitioner* (1982) 30 SASR 27, 31 per King CJ.
[189] (1999) WAR 56 at [6].
[190] Ibid at [66].

without regard to the interests of the counsel or those whom the counsel represents. No instructions of a client, no degree of concern for the client's interests, can override the duty which counsel owes to the Court in this respect. At heart, the justification for this duty, and the reason for its fundamental importance in the due administration of justice, is that an unswerving and unwavering observance of it by counsel is essential to maintain and justify the confidence which every Court rightly and necessarily puts in all counsel who appear before it."

241. In *Vogt v Legal Practitioners Complaints Committee*[191], the Court of Appeal of the Supreme Court of Western Australia observed:

> "For a practitioner, in the course of his or her practice, intentionally to mislead anyone is a serious breach of the practitioner's professional duty. ... We would respectfully adopt what was said in this respect by the Queensland Court of Appeal in *Counsel of the Queensland Law Society Inc v Wright*[192], a case involving a solicitor who (among other things) misled a Court in relation to an affidavit relied upon to resist a summary judgment application and as for the availability of a witness. The Court said:
>
> 'A practitioner's duty to the Court arises out of a practitioner's special relationship with the Court; it overrides the duties owed by a practitioner to clients or others ... The lawyer's duty to the Court includes candour, honesty and fairness ... The effective administration of the justice system and public confidence in it substantially depends on the honesty and reliability of practitioners' submissions to the Court. This duty of candour and fairness is quintessential to the lawyer's role as officer of the Court; the Court and the public expect and rely upon it, no matter how new or inexperienced the practitioner. Breaches such as this are hard to detect and once established to the requisite standard are deserving of condign punishment, not only as a deterrent, but also to

[191] [2001] WASCA 202 at [61].
[192] [2001] QCA 58.

reassure the public that such conduct on the part of lawyers will not be tolerated. (Footnotes omitted)'..."

242. The conduct the subject of Counts 1 and 2 was driven by the Practitioner's failure to attend to Mr Kristo's file. The Practitioner attributed the blame to his client when it was he who was responsible.

243. The Tribunal considers that by itself, the conduct the subject of Counts 1 and 2 is such as to reveal that the Practitioner is not a fit and proper person to practise and is sufficient to warrant a recommendation that disciplinary proceedings be commenced in the Supreme Court.

*Counts 3 and 4 - Drafting, swearing and witnessing misleading affidavits*

244. The conduct of drafting, swearing and witnessing misleading affidavits is serious and amounts to unprofessional conduct. In drafting, swearing and witnessing the affidavits, the Practitioner sought to blame his client to cover his own failure in the knowledge that what was being deposed was untrue.

245. In *Legal Profession Conduct Commissioner v Semman*, when discussing the forging of documents by the practitioner, the Court observed that the practitioner's conduct was fundamentally inconsistent with the duties and professional responsibilities of legal practitioners which included:

- filing documents in court;
- making discovery in litigation;
- accessing court files;
- taking oaths and affirmations;
- certifying documents;
- adducing testimonial and documentary evidence in court; and

- making submissions to courts.[193]

246. Preparing, swearing and witnessing affidavits which are known to contain false material is clearly an abrogation of the duties and professional responsibilities of legal practitioners. Those affidavits were, of course, for use in an application to set aside default judgment and by extension were intended to mislead the Court in order to obtain the orders that were to be sought.

247. The same observations made above as to a legal practitioner's relationship with the Court apply with equal force.

248. The Tribunal considers that by itself the conduct the subject of Counts 3 and 4 is such as to reveal that the Practitioner is not a fit and proper person to practise and is sufficient to warrant a recommendation that disciplinary proceedings be commenced in the Supreme Court.

*Count 5*

249. Unprofessional conduct is always serious. The act of falsifying documents and recreating the client file falls at the extreme end of unprofessional conduct.

250. In *Legal Profession Conduct Commissioner v Semaan*, the Court observed whilst commenting on legal professional privilege, that[194]:

> "...the legal profession maintains high ethical standards which ensure that lawyers conduct themselves honestly before the courts, between themselves and with third parties, even whilst advancing their client's interests, and even though their instructions are inscrutable. Forgery and fraudulent misrepresentation are the antithesis of these ethical standards. ..."

251. In this matter, the Tribunal has noted Dr Clarke's opinion that the Practitioner's judgment was clouded but that the Practitioner's conduct (falsifying and recreating the file) cannot be fully explained by the Practitioner's depression and that the motivation was to deceive. There is no doubt that this is not a case where the conduct in question was involuntary or

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[193] Supra at [17].
[194] Supra at [18].

other than premeditated.

252. The Tribunal considers that by itself, the conduct of the Practitioner is such as to reveal that the Practitioner is not a fit and proper person to practise and is sufficient to warrant a recommendation that disciplinary proceedings be commenced in the Supreme Court.

**Other Factors**

253. The Tribunal is conscious of the Self-Report Letter for which the Practitioner must receive credit, although, as has been demonstrated, it was less complete than it ought to have been.

254. The lack of any mention in that letter of the conduct the subject of Counts 1-4 demonstrates a lack of insight on the part of the Practitioner.

255. The Tribunal is also conscious of the youth and inexperience of the Practitioner, the fact he did not receive support from his superiors while working at Westside, the fact that he was suffering from depression which slowly elevated over the period of time he was running the Kristo file and the fact that he has now already been out of the profession for over six years.

256. Nonetheless, the Practitioner's inexperience and youth and his depression do not excuse the fundamental breakdown in his ethics which allowed him not only to mislead the Court, but which also led him to falsify documents.

257. The Tribunal has had regard to the character evidence from Messrs Fuss and Vonow and his wife, Ms Thompson. There were no references from colleagues in the profession but in fairness he only practised for approximately two years. The Practitioner has removed himself from the Profession[195] and has found employment elsewhere. He has endured life-changing events, including the suicide of his brother in 2013. He says he is a different person. He would like to go back to practising law.[196]

258. The Practitioner was left to work in a stressful environment with inadequate support from

[195] T89.7-11.
[196] T89.34-94.16.

senior colleagues. He had a history of depression which developed into a major depressive disorder as the difficult position in which he found himself steadily deteriorated. Nonetheless, his depression is not an excuse for the Practitioner's actions.

259. The actions the subject of Counts 1-5 were premeditated.

260. Dr Clarke did not consider that the Practitioner's major depressive disorder was such that he did not know or appreciate the seriousness of his actions.

261. As to the question of whether the Practitioner is now fit to practise, there seems little doubt that the Practitioner appreciates the errors of his ways. The Tribunal takes into account the opinion of Dr Maxwell and Dr Clarke as to the Practitioner's current mental state, his prognosis and his potential vulnerability to stress. However, such is the seriousness of the unprofessional conduct that the Tribunal does not consider it has sufficient power to adequately protect the public.

**Decision and Costs**

262. In all the circumstances, the Tribunal's decision is that the only appropriate step is for the Tribunal to act under Section 82(6)(v) and recommend that disciplinary proceedings be commenced against the Practitioner in the Supreme Court.

263. The Tribunal will hear the parties on the question of costs

DATED 12 October 2017

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| ..... | ..... | ..... |
| **S P O'Sullivan QC** | **F Camatta** | **S Lilburn** |
| Presiding Member | Member | Member |

# Annexure 1

| | | Response |
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| 1. | The Practitioner engaged in unprofessional conduct in that on 14 October 2010, he provided false and misleading information to Master Blumberg in the District Court when seeking permission to bring an application to set aside the default judgment obtained on 16 August 2010 in action 1841 of 2009 *Motor Accident Commission v Marko Kristo.* The practitioner provided false and misleading information by: | Admits. |
| | A. Stating that the defendant, Mr Kristo, had not received certain correspondence from himself, when the practitioner knew such correspondence did not exist; | The Practitioner says that a letter to Mr Kristo dated on or around 30 June 2010 did exist and was sent to Mr Kristo on or around 30 June 2010, but otherwise admits the allegations contained in paragraph 1A. |
| | B. Failing to tell the Court that it was his fault and not the defendant's fault that default judgment had been obtained in the proceedings. | Admits. |
| | **Particulars** | |
| | 1.1 At all relevant times the practitioner was employed at Westside Community Lawyers. | |
| | 1.2 Between November 2009 and 15 March 2011 the practitioner acted for a defendant Mr Marko Kristo ("the defendant") who was being sued in District Court Action 1841 of 2009 *Motor Accident Commission v Marko Kristo* ("the proceedings"). | |
| | 1.3 The plaintiff in the proceedings sued the defendant for alleged breach of a policy of insurance and sought from him recovery of monies it had paid pursuant to | |

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| | Compulsory Third Party motor vehicle accident claims. | |
| | 1.4 On 30 June 2010 Master Norman made an order that the defendant file and serve a defence by 21 July 2010. | |
| | 1.5 The practitioner did not file a defence on behalf of the defendant by 21 July 2010. | |
| | 1.6 By letter dated 22 July 2010, Minter Ellison, the solicitors for the plaintiff, wrote to the practitioner and, *inter alia,* requested that the practitioner file and serve the defence within seven days, by close of business on 29 July 2010. | |
| | 1.7 By letter dated 4 August 2010, Minter Ellison wrote to the practitioner and requested that the practitioner file and serve the defence within seven days, by close of business on 11 August 2011, or they would seek their client's instructions to apply for default judgment. | |
| | 1.8 On 16 August 2010 the plaintiff in the proceedings obtained default judgment against the defendant in the sum of $793,782.91 plus costs to be taxed and interest, by reason of the defendant's failure to file a defence. | |
| | 1.9 Minter Ellison served the order for default judgment on the practitioner by letter dated 17 August 2010 emailed to the practitioner. | |
| | 1.10 On 26 August 2010 Minter Ellison issued a Summons for Examination of a judgment debtor against the defendant. Minter Ellison personally served the defendant with the Examination Summons on 8 September 2010. | |
| | 1.11 The Examination Summons was scheduled for hearing on 14 October 2010 before Master Blumberg. | |
| | 1.12 The practitioner, on behalf of the defendant, appeared before Master Blumberg on 14 October 2010 and sought | |

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| | permission to bring an application to set aside the default judgment obtained by the plaintiff on 16 August 2010. | |
| | 1.13 The practitioner proffered to the Court as a basis for permitting an application to be made, that the defendant had not received correspondence from himself, when the practitioner knew that he had not sent any correspondence to the defendant after 30 June 2010 when Master Norman ad ordered that a defence be filed. | |
| | 1.14 The practitioner's explanation to the Court to the effect that the defendant had not received correspondence from the practitioner suggested that the defendant's non-receipt of such correspondence had prevented the filing of a defence. | |
| | 1.15 The practitioner failed to tell the Court that the failure to file the defence was his fault and not the fault of the defendant. | |
| | 1.16 On 14 October 2010 Master Blumberg made an order permitting the defendant if so advised to issue an application to set aside the default judgment specially returnable to the next directions hearing listed in the matter on 25 January 2011. | |
| 2. | The Practitioner engaged in unprofessional conduct in that on 25 January 2011, when he attended before Master Blumberg to seek an extension of time within which to comply with orders made in the proceedings on 14 October 2010, he provided to the Court false and misleading information by: | Admits. |
| | A. Telling the Court that to date the defendant had not been able to provide instructions or arrange for an affidavit in support of such an application to be drafted, when the practitioner had made no attempt to obtain instructions from the defendant on the issue. | Admits. |

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| | **Particulars** | |
| | 2.1 The particulars at paragraphs 1.1 to 1.16 inclusive are repeated. | |
| | 2.2 On 25 January 2011 the practitioner, on behalf of the defendant, appeared in the proceedings before Master Blumberg in the District Court. | |
| | 2.3 The practitioner sought an extension of time within which to comply with orders made on 14 October 2010. | |
| | 2.4 The practitioner informed the Court that although the defendant had indicated that he wished to apply for the judgment to be set aside he had not yet been able to provide instructions or arrange for an affidavit of merits to be drafted. | |
| | 2.5 As at 25 January 2011 the practitioner had not contacted the defendant since the last Court appearance on 14 October 2010 for the purpose of seeking his instructions in relation to the application. | |
| | 2.6 On 25 January 2011 Master Blumberg made an order granting the defendant an exte4nsion of time until 15 February 2011 to comply with the order made on 14 October 2010. | |
| 3. | The Practitioner engaged in unprofessional conduct in that on 15 February 2011 he affirmed and caused to be filed an affidavit in the proceedings when he knew, or ought to have known, that it contained false and misleading information and that the court would or may rely upon it. | Admits. |
| | **Particulars** | |
| | 3.1 The particulars at paragraphs 1.1 to 1.16 inclusive are repeated. | Admits. |
| | 3.2 The particulars at paragraphs 2.2 to 2.6 inclusive are | Admits. |

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| | repeated. | |
| | 3.3 On a date between 25 January 2011 and 15 February 2011, the practitioner prepared an application to set aside default judgment and supporting affidavits of himself and the defendant for the purpose of the proceedings. | Admits. |
| | 3.4 The practitioner's affidavit deposed, *inter alia, -* | |
| | 3.4.1 At paragraph 8: *"At the directions hearing of 30 June 2010, Master Norman ordered that:-*<br><br>*a) The defendant file and serve a defenced within 21 days;*<br><br>*b) Discovery to be made within 28 days;*<br><br>*c) Matter listed for a settlement conference in September 2010."* | Admits. |
| | 3.4.2 At paragraph 9: *"A defence was not filed within the time limits stipulated by Master Norman."* | Admits. |
| | 3.4.3 At paragraph 10: *"I sought instructions from the Defendant, but was unable to contact him."* As at 15 February 2011 the practitioner knew that he had not contacted the defendant to seek instructions for this purpose. | The Practitioner admits that paragraph 10 of his affidavit affirmed 15 February 2011 was misleading but says that he contacted Mr Kristo by telephone on 30 June 2010 and that he wrote to Mr Kristo by letter dated on or around 30 June 2010. |
| | 3.4.4 At paragraph 16: *"I am now instructed to make the within application"*. As at 15 February 2011 the practitioner knew that he had not contacted the defendant to seek instructions for this purpose. | The Practitioner admits that paragraph 16 of his affidavit affirmed 15 February 2011 was misleading but says that on 12 October 2010 he was instructed by Mr Kristo to make an application to seek to set aside the default judgment against Mr Kristo. |

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| | 3.4.5 At paragraph 23: *"In the circumstances I am instructed to apply pursuant to Rule 230 of the District Court Rules to set aside the judgment signed on 16 August 2010".* As at 15 February 2011 the practitioner knew that he had not contacted the defendant to seek instructions for this purpose. | The Practitioner admits that paragraph 23 of his affidavit affirmed 15 February 2011 was misleading but says that on 12 October 2010 he was instructed by Mr Kristo to make an application to seek to set aside the default judgment against Mr Kristo. |
| | 3.4.6 At paragraph 11: *"The plaintiff's solicitors advised by letter dated 4 August 2010 that they would seek default judgment if a defence was not filed by 11 August 2010".* The practitioner failed to depose to his earlier receipt of the letter from the plaintiff's solicitors dated 22 July 2010 reminding him that the defence was now late and that the defendant was in default of Master Norman's orders, and requesting a defence be filed and served within a further 7 days. | Admits. |
| | 3.5 The practitioner's affidavit further deposed - | Admits. |
| | 3.5.1 At paragraph 13: *"On 14 October 2010 the matter proceeded to Examinations Summons before Master Blumberg".* | |
| | 3.5.2 At paragraph 14: *"The Court was informed that the defendant would be making an application to set aside the default judgment. The matter was adjourned to 25 January 2011".* | |
| | 3.5.3 At paragraph 15: *"At the directions hearing of 25 January 2011, Master Blumberg extended the time to file an application to set aside the default judgment to 15 February 2011".* | |
| | 3.5.4 The practitioner affirmed and signed his Affidavit before a Commissioner for taking Affidavits in the Supreme Court of South Australia on 15 February 2011 and caused it to be filed on the | |

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| | same day. | |
| 4. | The Practitioner engaged in unprofessional conduct in that on a date between 25 January 2011 and 15 February 2011 inclusive, the practitioner prepared and on 15 February 2011 witnessed and caused to be filed an affidavit of the defendant knowing that it contained material that was false and misleading and that the court would or may rely upon it. | Admits. |
| | **Particulars** | |
| | 4.1 The particulars at paragraphs 1.1 to 1.16 inclusive are repeated. | Admits. |
| | 4.2 The particulars at paragraphs 2.3 to 2.6 inclusive are repeated. | Admits. |
| | 4.3 The particulars at paragraph 3.3 are repeated. | Admits. |
| | 4.4 Having prepared an affidavit of the defendant, the practitioner contacted him by telephone on 15 February 2011 and arranged to meet him. | Admits. |
| | 4.5 The practitioner and the defendant met at a 'BP' Service Station at Croydon on 15 February 2011. | Admits. |
| | 4.6 The affidavit the practitioner prepared for the defendant to swear contained statements which were false and misleading, and which the practitioner knew were false and misleading. | Admits. |
| | 4.7 The misleading nature of the affidavit is evident from: | Admits. |
| | 4.7.1 Paragraph 4 of the defendant's affidavit deposed *"I was informed by my solicitor that a defence was to be filed on 21 July 2010..."* | Admits. |
| | 4.7.2 As at 15 February 2011 the practitioner knew that he had not, at the relevant time, informed the defendant of the requirement to file a | The Practitioner admits that paragraph 4 of the affidavit of Mr Kristo sworn 15 February 2011 was misleading, but says that by letter dated on or around |

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| | | defence by 21 July 2010. | 30 June 2010, he informed Mr Kristo that a defence was due to be filed by 21 July 2010. |
| | 4.7.3 | Paragraph 4 of the defendant's affidavit further deposed *"...however I did not provide my solicitor with instructions in relation to the preparation and filing of a defence,..."* | Admits. |
| | 4.7.4 | Paragraph 5 of the defendant's affidavit deposed *"I failed to provide [sic] and default judgment was signed on 16 August 2010".* | Admits. |
| | 4.7.5 | As at 15 February 2011 the practitioner knew that he had not, prior to the signing of judgment, communicated with the defendant to seek such instructions as asserted in paragraphs 4 and 5 of the defendant's affidavit. | The Practitioner admits that paragraphs 4 and 5 of the affidavit of Mr Kristo sworn 15 February 2011 were misleading, but says that despite informing Mr Kristo that the defence was due to be filed by 21 July 2010 and that Mr Kristo would need to make an appointment so that the defence could be drafted and filed by the Practitioner, the Practitioner did not receive instructions from Mr Kristo as to that defence. |
| | 4.7.6 | Paragraph 6 of the defendant's affidavit deposed *"I received notice in September 201 that I was required to attend an Examination Summons on 14 October 2010. I informed my solicitor of same, but did not attend nor provide instructions in relation to the preparation of any application".* | Admits. |
| | 4.7.7 | As at 15 February 2011 the practitioner knew that he had not sought such instructions from the defendant prior to 14 October 2010. | The Practitioner says that he was instructed by Mr Kristo by telephone on 12 October 2010 to make an application to seek to set aside the |

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| | | | default judgment, but otherwise admits the allegations contained in paragraph 4.7.7. |
| | 4.7.8 | In paragraph 7 of his affidavit the defendant deposed *"The delay in time is due to my own oversight and lack of understanding and failure to respond to my solicitor's correspondence".* | Admits. |
| | 4.7.9 | As at 15 February 2011 the practitioner knew that this statement was false and misleading. The practitioner knew there had been no oversight by the defendant or failure by the defendant to respond to the practitioner's correspondence. The practitioner had not sent any correspondence to the defendant between 30 June 2010 and 15 February 2011. | Admits. |
| | 4.7.10 | Paragraph 8 of the defendant's Affidavit deposed *"I am intimidated by the legal process and have essentially ignored these proceedings".* As at 15 February 2011 the practitioner knew that the defendant had not ignored the proceedings and was not at fault. | The Practitioner admits that paragraph 8 of the affidavit of Mr Kristo sworn 15 February 2011 was misleading, but says that at the time he prepared the affidavit, he genuinely believed that Mr Kristo had "essentially ignored these proceedings" but he now understands that Mr Kristo had not ignored the proceedings, but had placed his trust in the Practitioner and that Mr Kristo was largely ignorant of the legal process. |
| | 4.7.11 | Paragraph 9 of the defendant's Affidavit deposed *"I now ... am in a position to provide prompt instructions to my solicitors to ensure these proceedings will go smoothly".* | Admits. |
| | 4.7.12 | As at 15 February 2011 the practitioner knew that the defendant had not previously failed to | Admits. |

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| | provide prompt instructions in relation to the proceedings. | |
| | 4.8 The statements contained in the defendant's Affidavit at sub-paragraphs 4.7.1 to 4.7.12 inclusive above were misleading in that they conveyed a false impression to the Court that the defendant was at fault, in circumstances where this was not the case. | Admits. |
| 5. | The Practitioner engaged in unprofessional conduct in that between 25 January 2011 and 15 March2011 the practitioner intentionally falsified the client file for the defendant maintained by him at Westside Community Lawyers by creating and inserting on the defendant's file, file copies of correspondence which had not been sent and file notes of attendances upon the defendant which were not genuine and contemporaneous, but had been created to give the misleading appearance that he had managed the file differently to how it had been managed. | Admits. |
| | **Particulars** | |
| | 5.1 The particulars at paragraphs 1.1 to 1.6 inclusive are repeated. | Admits. |
| | 5.2 The particulars at paragraphs 2.3 to 2.6 inclusive are repeated. | Admits. |
| | 5.3 The particulars at paragraph 3.3 are repeated. | Admits. |
| | 5.4 The particulars at paragraph 4.4 to 4.7 inclusive are repeated. | Admits. |
| | 5.5 On 28 February 2011 the Court made, *inter alia*, an order listing the application to set aside default judgment for special argument on 1 April 2011 and an order that the defendant file and serve an affidavit exhibiting a draft defence by 9 March 2011. The practitioner on 9 March 2011 filed an affidavit which annexed the | Admits. |

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| | defendant's proposed draft defence. | |
| | 5.6 On or about 11 March 2011 the practitioner reported to his employer that default judgment had been obtained in the proceedings. | Admits. |
| | 5.7 On or about 15 March 2011 the practitioner produced the file in respect of the proceedings to his employer. | Admits. |
| | 5.8 Between 25 January 2011 and prior to producing the defendant's file to his employer on 15 March 2011, the practitioner falsely created and inserted on the defendant's file copies of correspondence which he never sent to the defendant on the dates attributed or at all, namely: | The Practitioner denies that the letters dated 30 June 2010, 1 March 2011 and 9 March 2011 were never sent to Mr Kristo on or around those dates, but otherwise admits the allegations contained in paragraph 5.8. |
| | 5.8.1 Letter from the practitioner to the defendant dated 30 June 2010; | |
| | 5.8.2 Letter from the practitioner to the defendant dated 15 July 2010. | |
| | 5.8.3 Letter from the practitioner to the defendant dated 22 July 2010; | |
| | 5.8.4 Letter from the practitioner to the defendant dated 5 August 2010; | |
| | 5.8.5 Letter from the practitioner to the defendant dated 17 August 2010; | |
| | 5.8.6 Letter from the practitioner to the defendant dated 14 October 2010; | |
| | 5.8.7 Letter from the practitioner to the defendant dated 25 January 2011; | |
| | 5.8.8 Letter from the practitioner to the defendant dated 15 February 2011; | |
| | 5.8.9 Letter from the practitioner to the defendant | |

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| | dated 1 March 2011; | |
| | 5.8.10 Letter from the practitioner to the defendant dated 9 March 2011. | |
| | 5.9 Between 25 January 2011 and prior to producing the defendant's file to his employer on 15 March 2011, the practitioner falsely created and inserted on the file, notes of attendance on the defendant which were not genuine and contemporaneous: | The Practitioner denies that the file note in respect of a telephone discussion between Mr Kristo and the Practitioner on 12 October 2010 was not genuine, but otherwise admits the allegations contained in paragraph 5.9. |
| | 5.9.1 Telephone attendance note dated 22 July 2010; | |
| | 5.9.2 Telephone attendance note dated 12 October 2010; | |
| | 5.9.3 Telephone attendance note dated 14 January 2011. | |