LEGAL PRACTITIONERS
DISCIPLINARY TRIBUNAL
AT DARWIN

CITATION:	*Lewis v De Silva and Law Society NT (No. 2)* LPDT No. 2020-02855-SC
PARTIES:	**Lewis, Peter** **Appellant** **V** **David De Silva** **First Respondent** **V** **Law Society Northern Territory** **Second Respondent**
FILE NO:	**2020-02855-SC**
DELIVERED:	**16 September 2021**
HEARING DATE:	**17 June 2021**
DECISION OF:	**Acting Judge Oliver (Chair)** **Ms Palavra** **Mr Anand**
REPRESENTATION:	
APPLICANT:	**Self**
FIRST RESPONDENT:	**Mr O'Loughlin**
SECOND RESPONDENT:	**Mr T Liveris**

REASONS FOR DECISION

1. The Appellant[1] filed a Notice of Appeal from the decision of the Law Society made on 22 July 2020 dismissing complaints that he had made against the First Respondent.

2. There is a lengthy history to the complaints. There were initially 4 complaints made by the Appellant on 12 August 2015 to the Second Respondent ("the Law Society"). Two of these, Ground 3 and Ground 4, were summarily dismissed in 2016 pursuant to section 478(1)(c) of the *Legal Profession Act* ("the Act") as the complaints were made more than 3 years after the conduct complained of was alleged to have occurred.

3. Ground 3 of the complaint had asserted that the First Respondent did knowingly provide false and misleading information to a Costs Assessor appointed by the Law Society. Ground 4 had asserted that the First Respondent failed to provide effective supervision to employed solicitors and staff from late 2009 to 2013.

4. Section 506 of the *Legal Profession Act* provides for the jurisdiction of the Legal Practitioners Disciplinary Tribunal with respect to appeals from a decision of the Law Society. Section 506(1)(a) provides that an aggrieved person may appeal to the Disciplinary Tribunal against a decision of the Law Society to dismiss a complaint made about an Australian legal practitioner under section 498. The Appellant acknowledged in his Notice of Appeal that he is "an aggrieved person" under section 506(1).

5. The remaining two grounds of complaint that were considered by the Law Society were

    a) First, that the First Respondent provided false or misleading information to a Court and,
    b) That he failed to provide effective supervision to employed solicitors and staff since 2013.

6. It is the findings from these grounds of complaint and only these grounds that can be the subject of the appeal. At the hearing and in his submissions, the Appellant sought to resuscitate ground 3 with respect to the cost assessment. His questions on

[1] The Appellant incorrectly described himself in this Appeal as "the Applicant". That title is amended in this decision so that there is no confusion that this matter is an appeal and subject to the evidentiary constraints that therefore arise.

that issue were properly disallowed. There is no appeal available against a summary dismissal made pursuant to section 478(1)(c). To the extent that the Appellant's affidavit material and written submissions seek to resuscitate the complaints that were summarily dismissed, they are disregarded.

7. The Appellant has also sought, both at hearing and in written submissions, to introduce other allegations that fall outside the complaints considered by the Law Society. That is not permissible. Section 507 of the Act provides that an appeal to the Tribunal is by way of rehearing. In an appeal by way of rehearing, the Tribunal may receive some limited further evidence, both oral and documentary, provided that is confined to the grounds from which the decision of the Law Society is appealed, does not create unfairness to other parties or reframes the actual complaint or complaints.[2]

BACKGROUND & CONDUCT THE SUBJECT OF THE APPEAL

8. The lengthy background to the complaints is set out in the Law Society's Statement of Reasons. It is of relevance to note, that in addition to the current complaints, the Appellant has made other complaints, as were revealed by both affidavit and other evidence during the hearing. Amongst others, two against the First Respondent that were dismissed by the Law Society pursuant to section 478 in January 2017 and November 2018 and an appeal from a complaint that the Law Society dismissed against another employed solicitor of the firm, which was related to the conduct in question in this matter. That appeal was dismissed by the Tribunal in 2020.[3]

9. The Appellant was a client of the firm De Silva Hebron (the firm) in relation to a work health matter. The First Respondent was (and is) the principal of the firm. In August 2009, the firm ceased acting for the Appellant and a dispute arose.

10. In relation to the first ground of complaint, following failure by the Appellant to pay all invoices from the firm and an attempt at mediation, an application for a costs assessment was made under the *Legal Profession Act 2006* ("the Act"). In October 2010, the costs assessor issued a Certificate of Determination of Costs Assessment and in March 2011 she issued a Certificate of Determination of Costs of Costs Assessment determining the Applicants costs of the cost assessment were

[2] See *Godfrey v Law Society Northern Territory and Gray* 2020 -02640 -SC

[3] *Lewis v Ellis & Low Society* LPDT No. 4 of 2019.

to be paid by the Appellant given the majority of the costs and disbursements were allowed on assessment.[4]

11. In 2013, these two certificates were registered in the Local Court at Darwin and following that, in the Magistrates Court in South Australia for enforcement proceedings as the Appellant resides in South Australia. The false and misleading information that is the subject of the first complaint involves two errors. First, there were errors provided to those Courts as to the Appellant's address, including that his address was "unknown" when the firm had received his address for its records.

12. That error is not disputed. The First Respondent agrees that the Appellant sent an email on 23 July 2009 to the solicitor who had conduct of the matter, Mr Hope, advising he was changing addresses, moving from Tumby Bay to Hawker, and providing his new details. His email address remained the same. Although that communication has not been found in the firm's records it has always been conceded that it must have been received by the firm because part of his details were changed so that the record now stated a Post Box address in Hawker but failed to change the residential address from the street address where he had lived in Tumby Bay and substitute the Hawker street address which had also been provided in the email to Mr Hope.[5]

13. A screen shot of the Appellant's client contact details as held in the firm's electronic database has been received in evidence in these proceedings. It shows that the contact details were created in the database on 1 July 2008 and last modified as above on 5 August 2009.[6]

14. The second error with respect to the first ground of complaint is that there was an arithmetical error in the calculation of the fees that were said to be outstanding.

15. These initial allegations were distilled into three parts by the Law Society as

    1. The error as to Mr Lewis's address, including that it was unknown.
    2. The amount of money owing and that DS [the First Respondent] would have known this was wrong.
    3. Incorrect dates and interest amounts in the applications.

16. In December 2019, that is more than 4 years after the complaint was made, the Appellant wrote to the Law Society adding further conduct that was said to

[4] Appellant bundle of subpoenaed documents DS 12 at page 26
[5] Appeal Book prepared by the First Respondent ("the Appeal Book") at p63.
[6] Ibid at p764

constitute false or misleading information to a court, namely, that there had been an invalid registration of the Darwin Local Court orders in South Australia because of a failure to comply with the *Service and Execution of Process Act* 1992 (Cth) by not serving him with a Form 1 before registering the orders.

17. The second ground of the appeal regarding the allegation of a failure to provide effective supervision to employed solicitors and staff since 2013 was distilled by the Law Society to extend to 4 October 2016 following a phone call between the Appellant and the First Respondent in which the Appellant alleged the First Respondent had made various admissions.

18. The issue of effective supervision relates to the errors alleged in Ground 1. Specifically, the allegation was that the First Respondent failed to provide effective supervision to named solicitors and staff since 2013 being the supervision of Frost, Ellis, Sutton and general administrative staff. Ms Frost, who was then a graduate clerk at the firm and who, during her clerkship, had conduct of the debt recovery file against the Appellant, was subpoenaed by the Appellant to give evidence at the hearing.

CONSIDERATION OF GROUNDS OF COMPLAINT

Complaint 1

That the First Respondent knowingly provided false or misleading information to a Court

19. There has been no dispute by the First Respondent that errors were made. Errors were made in calculating and then stating the amount of fees outstanding in the Local Court and subsequent enforcement proceedings undertaken in the Magistrates Court in South Australia. A further error was made in the enforcement proceedings for the obtained judgment debt in South Australia arising from the error in the client contact database records such that when he could not be found by process servers at the Tumby Bay address his address was stated in the proceedings as "unknown".

20. However, the Appellant goes further than simply alleging that these errors were made. He has from the beginning alleged that the First Respondent knowingly

provided false or misleading information to a Court.[7] It is a most serious allegation and one that has been repeated in Courts in South Australia. In *Lewis v MP (NT) Pty Ltd*[8] the Appellant asserted that the incorrect residential address had been supplied for service of an investigation summons in South Australia so as to ensure the accumulation of interest on the judgment sum increasing it to enable the service of a Bankruptcy Notice on the Appellant. Judge Durrant, dismissed this and similar accusations of corrupt behaviour made against the Registrar and the Sheriff of the Magistrates Court including that they had acted in concert with the firm saying that "There was no legal or factual basis provided by Mr Lewis to support the scandalous accusations made."

21. The same motive is put forward in the Appellant's written submissions in these complaints including that members of the firm colluded with or were coerced by the First Respondent in his alleged deceit.

The error as to Mr Lewis's address, including that it was unknown

22. It is very clear on the material received by the Tribunal that an administrative error was made when the Appellant's contact details were updated in the firm's client records. Who made that error is not known. A subpoena was granted to the Appellant for Mr Hope who had conduct of Mr Lewis's matter to give evidence as to the errors made in the Appellant's client records.

23. Mr Hope had a very limited recollection of the matter in general which is unsurprising given the lapse of some 12 years since he received the email. He said that changing the client details was not something that he would personally have done and that he would have considered it to be on file and that the secretary would note the change of address.

24. The Appellant pointed Mr Hope to other communications[9] in his examination. Mr Hope said he could not provide any information about them and did not even know who his secretary was in 2009. He had no recollection of asking anyone to update the address from the email.

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[7] See Annexures FK1 (Complaint to the Law Society) and FK42 (Submissions to the Law Society) to the Affidavit of Fiona Kepert affirmed 11 November 2020.
[8] [2019] SADC 200 at [5] & [31]-[33].
[9] Appellant documents (6 Volumes) at H5 21 & H6 21-22. A letter from the lawyers acting for the defendant in the Appellant's work Health claim advising of an appointment for examination by a Psychiatrist and noting that the "worker" (the Appellant) had recently purchased a house in Hawker dated 20 July 2009 and faxes between the Appellant and Mr Hope presumably in response to that letter.

25. Mr Hope was further pointed to other emails and an attached psychiatric report from May and June 2009 each of which contained references to the move from Tumby Bay to Hawker. He was also shown the Notice of Ceasing to Act for the Appellant[10] signed by Mr Hope dated 7 August 2009 and filed in the Work Health Court in Darwin which gave the last known address for service as the Tumby Bay address notwithstanding that the new address in Hawker had earlier been provided in correspondence between them.

26. This was a clear error and one that Mr Hope should have been aware of given the previous communications to him about the change of residence. Mr Hope said in evidence that he could not explain that and that it might have been his error although he could not concede that as he just did not know. It is not an error however that can be attributed to the First Respondent.

27. Clearly an error was made by someone in the firm in failing to fully amend the change of address of the Appellant. However, there is no evidence that the First Respondent had any involvement with the mistake that was made in the address, indeed his evidence was that he had never accessed the Appellant's address on the Affinity system that was used by the firm and he has never personally used Affinity.

28. If the allegation were true that the First Respondent deliberately mislead the court here and in South Australia as to the Appellant's current residential address being unknown, it would mean that he planned this back in 2009 when the database was updated and the new residential address left off. The firm still acted for the Appellant at that time. There would be absolutely no purpose for him or anyone else to do that. It would require him to be prescient that a dispute as to unpaid fees would later arise. Alternatively, there would need to be evidence that the First Respondent or someone else on his instructions later removed the address from Affinity after the firm ceased to act for the Appellant. There is none. The printout from the database previously referred to, shows that it has not been updated since 5 August 2009.

29. It is also illogical to suggest that the First Respondent was responsible for the incorrect address remaining in the data base. He wanted to recover the outstanding fees from the Appellant. It would hardly assist that effort to deliberately have his staff and agents searching for the Appellant if he knew all along where he was. The suggestion by the Appellant that he was doing so to run up costs against the Appellant lacks any credible basis.

[10] Appellant documents at H11 pp 47 & 48.

30. We would adopt the words of Judge Durant in a related action brought by the Appellant in South Australia.

> "There was no legal or factual basis provided by Mr Lewis to support the scandalous accusations made."[11]

31. The Tribunal does not find the allegation that the change of address was deliberately omitted either by the First Respondent or at his direction is made out.

32. The other aspect to this complaint is that there was continued use of the Tumby Bay address and that when it was apparent that he was no longer there, his whereabouts in court documents were changed to "unknown" and this assertion was false and misleading.

33. In his Notice of Appeal, the Appellant says

> "It is alleged that Mr De Silva should have known that any address provided to a Court after a 4 year period (August 2009 to June 2013) of no contact with a former client must be checked, confirmed or researched before taking proceedings in a court. It is alleged that Mr De Silva failed to make or direct others to make those reasonable enquiries [as to his current address] that a reasonable member of the public would expect of an experienced and competent legal practitioner as to the applicant's current address and contact details before embarking on legal proceedings in the NT and SA and completing or authorising various documents to be presented to the Court."[12]

34. It is untrue that as a result of the error, there had been no contact with the Appellant by members of the firm during that period.

35. First, the documents that the Appellant attached to his second submissions[13]relate to an attempted mediation as to the outstanding costs. The Appellant wrote to the Statutory Supervisor on 19 August 2009 indicating he was willing to engage in a mediation. The Statutory Supervisor responded to both parties on 25 August 2009 indicating that if they wished to proceed, he would conduct a preliminary telephone conference with them. A mediation proceeded until the Statutory Supervisor wrote to both parties on 4 March 2010 using their email addresses, advising that he had received a copy of a letter to Mr Lewis from Mr De Silva

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[11] *Lewis v MP (NT) Pty Ltd* [2019] SADC 200 at [33] and in Appeal Book at [657] to [663].

[12] Notice of Appeal [4] at p6.

[13] Appellant Submissions filed 2 July 2021.

"indicating that the firm intends to file an application for an assessment of its bills under the *Legal Profession Act 2006*" and was no longer prepared to continue with the mediation. It is therefore not true that that there was no contact between Mr Lewis and Mr De Silva from August 2009 until June 2013 because the documents produced by Mr Lewis evidence that the mediation continued until March 2010. The documents that the Appellant has produced also evidence that he was made aware that a cost assessment would be undertaken.

36. Further, from the affidavit of Mariel Sutton made in 2015 it can be seen that Ms Eva Templin of the firm sent an email to the Appellant on 9 January 2013 to which she attached a copy of a letter of demand seeking payment of $2074.50 and enclosed the two costs assessment certificates. The letter was signed by the First Respondent and correctly addressed to the Hawker Post Office address.[14] The Appellant replied by email to Ms Templin on 13 January 2013 saying that he had not previously seen the Certificate of the Costs of the Cost assessment and suggesting that the amounts be written off and he be advised of that.[15]

37. Further in that affidavit, Ms Sutton said that on 9 March 2015[16]she telephoned a number for the Appellant that she had earlier obtained on 23 January 2015 after an internet search had located a profile for the Defendant on the Flinders Rangers Council website. She believed that the person she spoke to was the Appellant as he identified himself as such. She said,

> "I advised that we had orders against him in the sum of $3,051.77 which were sent to him by email on 9 January 2013. He said that he had never received those Orders and would not be paying the debt. I said that we would be pursuing the debt in South Australian Magistrates Court if he refused to pay to which he replied words to the effect of if we pursued the outstanding amount he would report the Plaintiff to the Attorney-General, the Northern Territory Law Society and the Northern Territory Media"[17]

38. Despite telling Ms Sutton that he had never received those orders it is clear that he had because in his email response to Ms Templin on 13 January 2013, referred to above, he said

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[14] Affidavit of Mariel Jessica Sutton sworn 30 June 2015 in Appeal Book at pp 115 – 141.
[15] Ibid at annexures MJS4 and MJS6
[16] This date was subsequently corrected by Ms. Sutton after reviewing firm records to 20 February 2015 – see [40] of these reasons.
[17] Ibid at p116 at [9].

> "I have not seen the Certificate of the Costs of the Cost assessment before I saw it in your attachment."

39. Ms Sutton also asked for his residential address so that she could provide him with a copy of the relevant documentation however he refused and stated that any mail could be sent to his PO Box [*as fully identified in the affidavit*].[18]

40. Ms Sutton then prepared a letter and both emailed it to the address she had found and also posted it to the PO Box that the Appellant had given her. She said that no reply was ever received.[19]

41. In her subsequent affidavit,[20]Ms Sutton noted that the date of 9 March 2015 that she had referred to in her earlier affidavit on which she said she spoke to the Appellant was incorrect. By reference to the WIP ledger, the telephone conversation had actually occurred earlier on 20 February 2015. The extract from the ledger shows a telephone call to Peter Lewis in February 2015.[21]

42. In his affidavit of 20 July 2015 to the Magistrates Court of South Australia with respect to the subsequent debt recovery proceedings the Appellant said that he was not aware of any court action by the plaintiff (the First Respondent's company) prior to 18 June 2015 because the plaintiff has been using an incorrect address for him in documents filed in the Court.[22] He went on to say

> "I could not respond to the plaintiff or the Courts because simply I did not known (sic) of the Actions taken by the plaintiff in the NT in 2013 and in SA in 2013, 2014, and in 2015 **prior to June 2015."**

43. As shown by the correspondence referred to above, this is demonstrably untrue.

44. Notwithstanding his allegation in his Notice of Appeal in this matter that he had no contact with the firm from August 2009 to June 2013 he then refers in his affidavit to the correspondence between Ms Templin and himself in January 2013 which has been mentioned above and in which Ms Templin clearly stated that she had instructions to register the debt and recover the full amount[23] and further says at

[18] Ibid at p133
[19] Ibid at p116 [12] – [14].
[20] Affidavit of Mariel Jessica Sutton sworn 5 August 2015 in Appeal Book at pp115-141.
[21] Appeal Book p202.
[22] Affidavit of Peter John Lewis affirmed 20 July 2015 at [5] in Appeal Book at p143
[23] Ibid at [42] and [43] and see Affidavit of Mariel Sutton at Footnote 17 at attachment MJS4.

[75] that as a result of the phone call he contacted the Attorney General's office in Darwin by phone and sent a letter to the Editor of the NT News.

45. Further, in that affidavit, the Appellant also referred to a phone call "on or about 20 February 2015" from "[a] person who identified herself as an employee of De Silva Hebron". He says he did not remember all of the details of the discussion but that he did remember that the woman did not mention that any Court action had commenced but she did say the firm served some document on the wrong person.[24] Then, in the following paragraph he says that he subsequently remembered that the woman was Mariel Sutton.

46. In his affidavit filed in these proceedings the Appellant says

> "On this lack of knowledge of the court proceedings before mid-2015, I wish to state categorically that in Ms Sutton's affidavit dated 30 June 2015 (Attachment "PJLD 1") where she states she informed me of proceedings in a phone call earlier in 2015 is a fabrication by Ms Sutton...All I knew was the Cost Assessment (**which I thought were the judgments referred to** (emphasis added)) had been done in the NT in 2010..."[25]

47. In our view, it must have been clear to the Appellant that the First Respondent had now obtained a judgment against him and was seeking to enforce the order. Not only does he acknowledge the phone call advising of this in the passage referred to above but he received the letter that is attached to his own affidavit as PJL D2[26] from the First Respondent to him dated 9 March 2015. Amongst other references, it says

> "The certificate of assessment is able to be enforced as a judgment. We have proceeded to register the judgment in South Australia and have engaged agents in that jurisdiction to execute upon the judgment."
>
> and
>
> "We note your threat to report us collecting upon the judgment debt to the Attorney General, to the Northern Territory Law Society and the NT media. How you choose to proceed is a matter for you and it matters not

[24] Ibid at [76].
[25] Affidavit of Peter John Lewis affirmed 12 November 2020 at [
[26] Appeal Book p 739.

to us if you determine to bring the matter to the attention of these persons/entities. We do note that you have previously embarked on this very course and at the end of the day, without joy as, we have judgment in our favour."

48. The Appellant cannot have been left in any doubt upon receipt of this letter that a judgment had been obtained for the debt and that it was now registered in a South Australian court as a judgment. The copy he has provided to the Tribunal is inscribed with his comments so it is clear he received it.

49. In our view the Appellant has in these proceedings attempted to obscure his knowledge of the debt recovery undertaken by the First Respondent's firm. He was well aware by early 2015 that they were seeking to recover both outstanding fees and the costs of the Cost assessment. He was aware that there were and had been court proceedings on foot both in the Northern Territory and South Australia.

The amount of money owing and that DS would have known this was wrong.

50. In October 2010 the fees owed by the Appellant to the firm that remained outstanding were assessed by a cost assessor. The relevant part of the costs assessment[27]shows these calculations:

Total costs & disbursements from invoices	$22,277.92
Total costs & disbursement disallowed	$ 2,209.00
Costs & Disbursements confirmed	$20,268.92
Total payments by respondent	$19,462.92
Therefore outstanding costs are	$ 606.00

51. There is an error at line 3 because $22,277.92 less $2209.00 is $20,**0**68.92. The error appears typographical because if the correct figure of $20,068.92 is used and $19,462.92 is deducted from it, the result is the correct amount of $606.00.

52. That correct amount of $606.00 owing was stated to the Appellant in the letter from the First Respondent dated 9 January 2013 previously referred to above, in which he demanded payment of that sum and advised that if payment was not received within 14 days proceedings to recover the debt would be issued. The letter

[27] Appeal Book pp129-130.

was correctly addressed to the defendant's Post Office Box in Hawker and was also emailed to him. It was received by him because as noted above, the Appellant responded to the Ms Templin the solicitor who had sent the email suggesting that the amount be written off.[28]

53. When proceedings were subsequently issued in the Local Court, one of the employees of the firm appears to have looked at the calculation of the Costs and Disbursements minus the Total Payment and thought that the outstanding costs had been wrongly calculated such that the outstanding costs should have been $806.00 without realising the error lay in the first two line items and that $606.00 was the correct amount owing.

54. Alternatively, as it is the case that the same error that costs and disbursements confirmed were $20,268.92 was repeated in the Certificate of Determination of Costs Assessment signed by the Cost Assessor[29] on the same day, that document may have influenced the calculation for the application to the Local Court. The fact that the First Respondent correctly referenced the amount in his letter of demand to the Appellant indicates that someone else made the error in the Court documents.

55. As a result, the application that was filed in the Local Court contained the incorrect amount of $806.00. The Appellant says that the error was obvious. We disagree. Most people would resort to a calculator to subtract $2,209.00 from $22,277.92 unless they were particularly skilled in mental arithmetic.

56. The Appellant references other calculations, including corrections that postdate the Local Court application of 11 June 2013 which he says shows that the First Respondent must have known the claim for $606.00 was incorrect.[30]

57. The First Respondent's evidence was that he did not personally undertake the application to the Local Court, that someone else would have done it and he would have just looked at the bottom line. There is nothing unusual about this assertion. The application involved a small amount of money. It is the type of matter typically undertaken by a graduate clerk as part of their training. Although the First Respondent had signed a letter in January 2013 demanding payment of the outstanding amount of $606 it is unlikely that he would have noticed the discrepancy when he signed the Application for Registration of an order in June 2013. As he said in his evidence before the Tribunal, he "signs off on hundreds of

[28] Appeal Book pp100-101.
[29] Appeal Book p124.
[30] Affidavit of Peter Lewis affirmed 12 November 2020 at [32] to [37].

letters a week and supervises 10 staff and has to have some degree of trust in them."

58. There is a difference between providing "false and misleading evidence" to a court and making an error in figures provided in an application. The allegation of "false and misleading evidence" carries an imputation that someone has deliberately given or produced evidence in a proceeding **knowing** that it is false and **intending** to mislead the court by that evidence. On the filing of the Costs Assessment Certificate the unpaid costs became an order of the Court by operation of section 345(6) of the *Legal Profession Act.* The error that had been made in the Certificate had not been appreciated by anyone. It was not "false and misleading evidence" but a simple arithmetical error[31] not appreciated by anyone at the time and which unfortunately carried through to further proceedings.

59. It was not an error personally made by the First Respondent and he cannot be found to have engaged in unprofessional conduct or professional misconduct for conduct that was not carried out by him or at his direction unless this was done with his knowledge or it was a result of more than mere negligence. That question is further considered below.

Incorrect dates and interest amounts in the applications

60. The Local Court Order (Claim No. 21329391) registering the judgment of the Costs Assessor contained an incorrect date. The order recorded the date of the costs determination as 17 March 2013 when the correct date was 17 March 2011. The error was obviously made by a member of the court staff as there was nothing in the application for registration made by the First Respondent that contained that error.[32]

61. The further error identified was the calculation of interest on the claim from 26 October 2010 that was added to the judgment and sent to South Australian agents with the request to register the judgments and issue an investigation summons[33]. There was an error in the calculation of the amount of interest ($28.02) payable because the interest runs from the date of the filing of the Certificate in a court of competent jurisdiction, not from the date of the Cost Assessment which appears to

[31] In *Lewis v MP (NT) Pty Ltd (No 2)* Judge Slattery of the South Australian District Court likewise described the error as an arithmetic error made by the Costs Assessor.
[32] Appeal Book pp1074-1075.
[33] Appeal Book pp1282-1284.

have been the date used. Once the certificate is filed the rate of any interest payable in relation to the amount of costs is the rate of interest in the Court.[34]

62. It had not been included on the original Court order possibly because the Registrar realised the error.

63. It appears to have been an error of the graduate clerk, Ms Frost, who drafted the letter and included that interest amount ($28.02). Although the letter was co-signed by the First Respondent, he would not necessarily have appreciated the error as it is not obvious on the face of the letter as to the date from when the interest claimed ran.

64. In the Statement of Reasons, the Law Society said

> "Council accepted that the error in calculating interest also fell within the tolerable range of human fallibility and did not amount to unsatisfactory professional conduct or professional misconduct. It is unfortunately a consequence of busy practices and human error that mistakes do occur."

65. We would agree. No workplace nor employee is perfect. People do make mistakes and other people may not recognise that a mistake has been made. This aspect of the complaint is dismissed.

Service and Execution of Process Act

66. The Appellant does not refer to this aspect of his original complaint to the Law Society in his Notice of Appeal to the Tribunal. Nor is it mentioned in his affidavit filed in these proceedings. He did however raise the issue in his first written submissions.

67. Strictly speaking, he cannot raise a decision that was not constituted as one of the grounds of his appeal and identified in the Notice of Appeal. It is not even clear whether he is reiterating the claim that he made in his complaint or seeking to raise a different issue regarding proof of service of the "2013 orders".

68. However, for completeness, his allegation in his original complaint that the *Service and Execution of Process Act 1992* (Cth) (commonly referred to as "SEPA") was not followed in 2013 because it failed to comply with section 15 and 16 is based on a lack of understanding as to the application of section 16 of SEPA.

[34] Section 345(6) *Legal Profession Act 2006.*

Section 16 applies to service of an **initiating** process as does Form 1 to which the Appellant has also referred. As defined in section 3, an initiating process means a process:

(a) by which a proceeding is commenced; or
(b) by reference to which a person becomes a party to a proceeding.

69. What was registered was a judgment. A judgment is not an initiating process.

70. In what appears to have been subsequent correspondence with the Law Society, the Appellant appears to have altered his reliance on the above provisions or perhaps added to them referring to what he said sections 105(5) and 106(1) provide.[35] There is nothing in either of those provisions that assist him. In fact, they show that his argument about what must be provided is incorrect.

71. There is no legal basis for the argument that the requirements of SEPA were not followed and this aspect of the complaint is dismissed.

Complaint 2

That the First Respondent failed to provide effective supervision to employed solicitors and staff since 2013

72. In his Notice of Appeal, the Appellant expanded this complaint to allege that the First Respondent failed to provide "adequate, appropriate, expected or otherwise effective supervision."[36] To the extent that these are all descriptors of what might be considered "effective supervision" there is no difficulty with that expansion.

73. However, in his reference to the "graduate clerks under his authority and to employed practitioners who he directed to participate to (sic) the various activities and proceedings related to the alleged debt recovery involving the applicant (sic) who was a former client and of the specific instructions made by the then client in 2008-09,"[37] his description "of the alleged conduct the subject of the Appeal" then goes on to describe various complaints about the conduct of the First Respondent that occurred in 2009-2011. To the extent that those matters fall under the first complaint above about providing false and misleading information to a court and

[35] Law Society decision at p20.
[36] Notice of Appeal at p6 paragraph [5].
[37] Ibid.

have not been dealt with in previous complaints to the Law Society,[38] there is no difficulty in them being considered, but they cannot be considered as part of this ground of the complaint which relates only to matters since 2013.

74. As referred to in [17] of this decision, the Law Society later extended the end date for this complaint it to 4 October 2016 as a result of a complaint about a telephone conversation in which the Appellant alleged that the Respondent had made admissions to him.

75. The Law Society identified the claimed lack of supervision as relating to the First Respondent's two graduate clerks Kate Frost and Mariel Sutton, a solicitor Cassandra Ellis and general administrative staff.

76. The lack of supervision was taken to relate to all of the errors that were made in the debt collection process, in particular the allegation that they provided false or misleading information to South Australian Courts and failed to check the files in possession of the law firm to confirm his address.[39] A separate appeal against Ms Ellis from a decision of the Law Society on a similar allegation was dismissed by a differently constituted Tribunal in 2020.[40] That decision fully sets out the very limited involvement of Ms Ellis in the debt recovery proceedings in 2014 against the Appellant in South Australia. All she did was to rectify the Court record as the wrong "Peter Lewis" had been served with a summons and amend the application to remove the address given and state it as unknown. As it was a simple matter, and Ms Ellis an experienced practitioner, it did not require supervision of her by anyone.

Supervision of Ms Sutton

77. The Appellant alleges that there was a lack of effective supervision of Ms Sutton as a Graduate Clerk. From the material he has filed he also now questions the supervision of Ms Sutton as to her application for admission as a legal practitioner, a matter that was not raised in his original complaint. He seeks to add this as evidence of a lack of proper supervision and has filed the Reasons for Judgment in relation to Ms Sutton's admission as evidence of his claim.[41] As the Appellant raised several allegations involving Ms Sutton and her supervision, the Tribunal

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[38] For example, the complaints against the First Respondent and against Mr. Hope which were dealt with in 2010-2012 that are referred to in the Appellant's affidavit.
[39] Law Society Statement of Reasons in Appeal Book at p30.
[40] *Lewis v Ellis and Law Society Northern Territory* LPDT No. 4 of 2019.
[41] *In the matter of an application by Mariel Jessica Sutton* [2016] NTSC 9.

was prepared to accept this further aspect of the allegation and the evidence that the Appellant says supports it.

78. The Appellant failed to reference the part of the decision of Justice Hiley in the matter that he says shows a lack of proper supervision by the First Respondent. Presumably, he is referring to passages in the decision at [63] to [66].[42] The Appellant alleges that

> "Ms Sutton went to her apparently trusted and experienced supervisor Mr De Silva. It was he who advised her she did not have to disclosure (sic) further details in her first affidavit to the Board about the Centrelink debt ...Her only saving was that Mr De Silva recognised it was his fault and he submitted an affidavit accepting responsibility."[43]

79. The two allegations misrepresent the findings of Justice Hiley in that decision. His Honour did not criticise Mr De Silva's supervision of Ms Sutton with respect to the content of her affidavits. Rather, he said

> "He did not make those suggestions in order to enable the Applicant to shift responsibility for not including more information in the First Affidavit. Rather he made his suggestions to illustrate the circumstances around her making the First Affidavit and to indicate that she had in fact sought the advice of more experienced practitioners to ensure that the affidavit satisfied the requirements for admission."

80. Further, the Appellant in his submission says, "What I find amiss is the [sic] Justice Hiley did not make adverse comment about Mr De Silva's initial advice to Ms Sutton not to disclose"[44] His Honour did not make any finding that the First Respondent had advised Ms Sutton not to disclose the Centrelink debt. That is simply untrue. His Honour noted

> "The Board's concern about the Applicant's apparent attempt to shift responsibility to Mr De Silva and Mr Orr, by stating that she had shown them drafts of her initial affidavit and that neither of them suggested any need to provide further detail about the Centrelink debt, was addressed by Mr De Silva in his affidavit of 8 December 2015. It was he, not the applicant, who suggested that she include those additional paragraphs."[45]

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[42] Ibid.
[43] Appellant's submission 7 May 2021 at [102].
[44] Appellant's submission 7 May 2021 at [102].
[45] *In the matter of an application by Mariel Jessica Sutton* [2016] NTSC 9 at [122]

81. His Honour in fact made a positive observation about the First Respondent both as an employer and, by inference, as a supervisor. In finding that he was satisfied that Ms Sutton was a fit and proper person to be admitted as a lawyer he said

> "I am particularly influenced in this regard by the views expressed by Mr De Silva in his affidavit. He has continued to employ her for some 18 months, notwithstanding the issues involved in this matter and the fact that during that time she has not been able to appear or act as a lawyer."[46]

82. At [107] of his May submissions the Appellant repeats his allegation that Ms Sutton made false statements about the content of the February 2015 phone call to him in her affidavit and the subsequent attempts to serve him. He has expanded his complaint about a failure of effective supervision to one alleging that the First Respondent "trained Ms Sutton how to put false and misleading information into a sworn affidavit."[47] Further, after referring to some passages from that affidavit he alleges

> "Again if anything Mr De Silva trained Ms Sutton how to lie in a sworn affidavit or at worse, he allowed her to state those things knowing they were false himself and allowed Ms Sutton to wear the consequences".

These are extraordinary allegations to make against both the First Respondent and Ms Sutton without any evidence that would support them. They are rejected.

Supervision of Ms Frost

83. A subpoena was granted to the Appellant for Ms Frost to give evidence in the proceeding. The subpoena was limited to evidence with respect to her supervision by the First Respondent on the Appellant's debt file between January 2013 and May 2014.

84. Ms Frost said that as a Graduate Clerk she relied on the First Respondent as her supervisor but also had access to all senior lawyers. She had no specific memory of the Appellant's debt collection file and did not remember his name. She was shown documents but had no recollection of them.

[46] Ibid at [130].
[47] Ibid at [107].

85. In his Submissions the Appellant says that Ms Frost testified that she was totally dependent on Mr De Silva for the period she worked in the law firm as a graduate clerk.[48] That misconstrues her answer which was that she would have gone to him to ask if something was right and ignores her evidence above that she had access to all senior lawyers in addition to his supervision.

86. She confirmed that a lot of her work had to be checked and said that Mr De Silva signed off on all of her work. Ms Frost said further that she was supervised on all files and would have discussed steps as they arose. She believed she was adequately supervised and did not consider any mistakes that may have been made as to the Appellant's address to have been a failure in her training.

87. In his submissions,[49] the Appellant points to what he calls the "smoking gun." It is a letter that Ms Frost drafted and the First Respondent corrected. Ms Frost had set out the entire calculations from the cost assessment as can be seen at [49] of these reasons. The First Respondent, amongst other minor corrections of her draft, removed the first two lines that referenced the total amount of costs and disbursements and on the second line, the amount of these disallowed. The letter was to agents in South Australia to take action on behalf of the firm. The allegation made by the Appellant is that they were removed so that the arithmetical error would not be discovered. With respect to Ms Frost, the Appellant then makes this allegation:

> "Under questioning Ms Frost said she did not see the error in 2013 and did not see it now. That can only be determined as a false statement under oath. Clearly Ms Frost saw it in 2013 and kept quiet. She knowingly participated in a deception."[50]

88. As has been noted earlier in these reasons the arithmetical error was not an obvious one and there is no reason to doubt the evidence of Ms Frost that she did not see it. We reject any allegation that Ms Frost was a participant in deceptive conduct in concert with the First Respondent.

89. Further in his submissions the Appellant says

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[48] Appellant's submission 7 May 2021 at [110].
[49] Ibid at [113].
[50] Ibid at [114].

> "Ms Frost is a very intelligent person and gave the impressions she wanted to get out of De Silva Hebron as quickly as possible with as little drama as was needed."[51]

90. However, the Appellant then went on to make various suggestions along the lines that Ms Frost left under a cloud. This is a contradictory proposition and was not the substance of her evidence or supported by any other evidence. What she actually said in relation to leaving was that she was tapped on the shoulder by a top tier firm and asked if she would like to go to them. That is a very different departure from what the Appellant asserts.

Adequacy of the supervision of the graduate clerks and others.

91. There is a distinction in legal training between knowledge of the law and the skills of legal writing, file management and skills associated with the practice of law. Some graduate clerks will have very good legal writing skills (which differ from general writing) whereas others will require assistance and guidance to develop them. That is part of the training expected to be given to a graduate clerk. In addition to any placement with a law firm, a graduate clerk is required to complete a Graduate Diploma of Legal Practice and they are therefore not entirely reliant on their supervision within a firm for their practical training.

92. In its Statement of Reasons, the Law Society referred to eighty (80) pages of correspondence provided to it by the First Respondent to demonstrate his supervision of staff, particularly the graduate clerks, in the Lewis matter. The Council was satisfied that there was evidence to support De Silva's account that he provided supervision to his staff.[52]There is an abundance of documents contained within the Appeal Book that show that the First Respondent was an active and diligent supervisor of his graduate clerks and others. He actively assisted their development by amending correspondence and other documents to improve their skills. It is what is expected from a practitioner fulfilling that role. The documents as a whole illustrate an active principal in relation to oversight, correction of documents, instruction, and guidance as to legal processes.

93. Accordingly, the Tribunal is not satisfied on the balance of probabilities that the First Respondent failed to provide effective supervision to employed solicitors and staff in the period in question. Staff and the graduate clerks may have made some data entry, documentary and calculation errors, often it seems relying on previous

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[51] Ibid at [110].

[52] Law Society Statement of Reasons in Appeal Book at p33.

file records but none of these resulted from a lack of appropriate or proper or effective supervision by the First Respondent or tasks he ought to have been personally attending to himself.

94. However, the Appellant has gone much further in this Appeal than in his original complaint by alleging not only that the two graduate clerks were not effectively supervised but alleging that both of them, by various actions, colluded with the First Respondent to deceive courts and others. There is absolutely no evidence to support that very serious accusation and is wholly rejected by the Tribunal.

Does the conduct of the First Respondent amount to either Unsatisfactory Professional Conduct or Professional Misconduct?

95. What remains to be considered is whether the errors as to Mr Lewis's address, including that it was unknown and the error as to the costs owing amount to unsatisfactory professional conduct or professional misconduct

96. The First Respondent admits that the errors alleged in the first complaint were made. He has never disputed that. However, the question for the Tribunal is whether those errors can be attributed to him and if so, whether his **conduct** associated with those errors amount to either professional misconduct or unsatisfactory professional conduct. There is a distinction between finding that certain actions or omissions of a practitioner have occurred and a finding of professional misconduct or unsatisfactory professional conduct. The Appellant does not appear to have appreciated that distinction as he says in his submissions

> "It is a fact Mr De Silva DID provide false or misleading information to a Court. He admitted it in cross examination. My complaint has been vindicated. The Law Society was wrong."[53]

97. The issue for the Tribunal to determine is whether the admitted conduct and/or omissions amounts to professional misconduct or unsatisfactory professional conduct. The Law Society found that although errors were made, they did not reach either of the levels required for disciplinary action to be taken. The process undertaken by the Law Society was correct by considering their findings on the conduct the subject of the complaint against the legal requirements for a finding of either professional misconduct or unsatisfactory professional conduct under the Act.

[53] Appellant's submission 2 July 2021 at [12] first bullet point.

98. Professional Misconduct is defined in section 465 of the Act as including:

> (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

99. Unsatisfactory Professional Conduct is defined in section 464 of the Act as including:

> "conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner"

100. The onus is on the Appellant to establish that the First Respondent's conduct amounted to professional misconduct or unsatisfactory professional conduct.

101. The standard of proof required is on the balance of probabilities to what is generally referred to as the *Briginshaw* standard. That standard provides that if a positive finding in respect of a person would produce grave or adverse consequences, the evidence to support such a finding should be clear, compelling and of high probative value.

> "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences."[54]

102. With respect to the outstanding matters from the first ground of the complaint, it is the case that errors were made in applications and other documents filed in court

[54] *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 362, per Dixon J.

proceedings. The errors have been identified earlier in these reasons. Essentially, they flowed from an initial error as to the lack of knowledge of the Appellant's current address flowing from a failure to fully update the client contact details in the firm's database in 2009 and the arithmetical error resulting from the Cost Assessment Certificate.

103. With respect to the issue of the "unknown address", the First Respondent's evidence is that he does not and has not accessed the database that contained that information. It is perfectly credible that inserting addresses in correspondence is a task often left to administrative staff or graduate clerks and once the initiating correspondence is on file, the address of the previous correspondence is likely to be resorted to for subsequent correspondence. There is nothing remarkable about this process and it is easy to see how a belief that the Appellant's address was unknown, after a process server found that he was no longer at the Tumby Bay address, would continue to be believed as the debt file progressed when the information about the change of address appears to have been on a separate file.

104. The error was not assisted by the significant period of time that had passed before the First Respondent sought to enforce the judgment debts. He had quite properly delayed doing so while complaints brought by the Appellant against him and others in the firm were on foot with the Law Society and while a mediation was attempted to resolve the matter.

105. In the Statement of Reasons, the Law Society said

> "The error arose from a failure to correctly update the DSH electronic system on 5 August 2019 (sic).[55] While this initial error may be categorised as an administrative mistake, the continued use of this address without recourse to other material held by the firm or without attempting to confirm the correct address with Lewis via other means goes beyond a mere administrative error."

106. Although we agree that it may have been more prudent to go back through the hard copy file records to see if there was a new residential address for the Appellant, it may not have been apparent to staff members in the initial stage of dealing with the matter that there was a discrepancy between a residential address recorded in Tumby Bay and a postal address recorded in Hawker unless they were familiar with towns in South Australia. It is accepted that there must have been some discrepancy in the electoral roll searches initially conducted as the Appellant has

[55] The date of 2019 is an error – the reference is clearly intended to be the relevant date of 2009.

produced evidence[56] that he was enrolled at the Hawker address in the relevant period

107. However, as already noted, the firm through Ms Sutton did try to confirm the correct address with the Appellant. The Appellant did not assist the address being corrected so that he could be served with the court applications. He refused to provide his residential address to Ms Sutton when she made contact with him in January 2015.

108. In our view, none of the errors as to the address can be personally attributed to the First Respondent. He quite reasonably relied on the information that his staff provided as to their attempts, and the attempts of the South Australian agents, to locate the Appellant's correct residential address. Such was the degree of those attempts to locate the Appellant that the wrongful service of an Investigation Summons on another Peter Lewis located in South Australia, was acknowledged by the firm.

109. In retrospect, the First Respondent might have personally searched the files to see if a residential address in Hawker had ever been provided or instructed a staff member to do that but there does not appear to have been anything that would have alerted him or any other staff member that the additional information had ever been provided to the firm once they started working only with the debt file.

110. With respect to the error as to costs referred to above, that error was not one personally made by the First Respondent. It resulted from a typographical error in the figures provided by the Cost Assessor that the graduate clerk and other staff members then used in court documents. The Appellant, in both his affidavit and submissions, frequently refers to the amount of $206 as being the amount outstanding and sought to be recovered thus questioning the First Respondent's motives in pursuing such a small amount. That is misleading because what was believed to be the total outstanding at the time that the recovery action was commenced was in total in excess of $2000 because it included the costs of the cost assessment.

111. As previously indicated in these reasons, the error in relation to the amount of the outstanding costs was a minor arithmetical error. It was one that might have been easily corrected by discussion and by the mediation between the parties. The First Respondent held off on enforcement while the early complaints against him and other firm members made in 2010 were dealt with by the Law Society.

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[56] Appellant's subpoena bundle K19 at page 53.

112. The First Respondent made numerous attempts to settle the dispute as to costs. He entered into mediation about the unpaid fees. In 2013, Ms Templin, on his instructions, wrote to the Appellant to give him notice that if the fees were not paid, they would take action to recover the fees. From 2015, the First Respondent made offers to settle the proceedings which were all rejected by the Appellant. The offers[57] were:

   i. A walk away offer in October 2015 via his South Australian agent.
   ii. In May 2018 an offer that if he paid the remaining judgment the charging order on his property would be removed.
   iii. In September 2018, November 2018 and March 2020 walk away offers via his new South Australian agent.

113. The Appellant also made offers[58] which the First Respondent rejected:

   i. In January 2017 that the First Respondent pay him compensation of $25,000.00.
   ii. In September 2019 to the South Australian agent for compensation of $15,000.00.
   iii. A walk away offer in March 2020 subject to a number of "caveats and conditions".

114. As earlier referred to in these reasons, the Appellant goes much further in his complaint and subsequent appeal than alleging simple error. He makes the assertion that the errors as to his address and the amount of fees outstanding were deliberate errors made by or directed by the First Respondent. That assertion is based on nothing more than supposition by the Appellant. It borders on the irrational to assert that the First Respondent spent years and expended money on payments to agents and others to run up costs to recover once they "found him'. If the First Respondent had been so intent on running up fees, then why would he have made a walkaway offer in October 2015?

115. The theme of the Appellant's complaints against the First Respondent is that he embarked on a vexatious action to "get me". If his purpose was, as the Appellant asserts, to "get him" there would be no reason for him to delay the enforcement action for the period he did. There would be no reason for him to make the settlement offers he did.

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[57] Affidavit of David De Silva sworn 13 November 2020 at pp 649-650 of the Appeal Book.
[58] Ibid at p650.

116. The evidence before the Tribunal reveals that across many related and some unrelated matters before Courts and in this Tribunal, the Appellant has levelled accusations of bias and corruption against a number of different legal practitioners, court staff and judicial officers.

117. Notably, in proceedings in South Australia in December 2019,[59] the Appellant sought the recusal of Judge Durrant, alleging that His Honour had prejudged the issue, was rude and bullying, did not know the law and had failed to accord him a fair hearing. The application was refused. He made accusations against the Registrar and Sheriff that they either negligently or deliberately or in concert with the law firm of the First Respondent, failed to serve or notify him of the investigation summons. He sought an order that South Australian police investigate the First Respondent's law firm. His Honour said that there was no factual or legal basis "to support the scandalous allegations made."

118. In these proceedings the Appellant brought an application that the Chair recuse herself on the grounds of actual bias alleging amongst other things, that evidential rulings had been made knowing that they were contrary to law including "covering up" for a witness providing "a false answer as the errors were blatantly obvious". The application was refused.[60]

119. The Appellant has been prolific in his complaints to the Law Society about legal practitioners in this jurisdiction. In his affidavit he listed 9 separate complaints that he has made to the Law Society including this complaint. He set out in some detail the content of each complaint all of which appear to flow from his Work Health matter.[61]

120. In his first submissions, the Appellant says that he has now lodged a new complaint about the First Respondent with the Law Society alleging a failure of duty by the First Respondent to correct the Local Court record.[62]

121. In addition to his substantive complaint against the First Respondent, the Appellant complains that the Law Society knowingly breached section 505 of the Act by taking almost 5 years to investigate his complaint. Section 505 provides that it is the duty of the Law Society to deal with complaints as efficiently and expeditiously as is practicable.

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[59] *Lewis v MP (NT) Pty Ltd* [2019] SADC 200 at p658 of the Appeal Book.
[60] *Lewis v De Silva and Law Society NT (No. 1)* LPDT No. 2020-02855-SC
[61] Affidavit of Peter Lewis affirmed 12 November 2020 in Appeal Book at pp 690-696.
[62] Appellant's submissions dated 7 May 2021 at [90].

122. In its submissions the Law Society accepted that there was delay in determining the Appellant's complaint. The delay is attributed by it to resourcing issues noting that it does not determine its own resourcing levels and that human resource issues that were outlined in its 2019/20 Annual Report impacted on a backlog of complaints. There is no evidence to support an assertion that the Law Society deliberately delayed their determination of the Appellant's complaint.

123. It should be noted that the Appellants complaints[63]as revealed by the evidence were not the only ones being dealt with by the Law Society over the five year period in question, some of which resulted in disciplinary applications or appeals including one being made to the Tribunal by the Appellant.

124. In summary, the Appellant's case before this Tribunal is that the First Respondent is guilty of either Professional Misconduct or alternatively Unsatisfactory Professional Conduct by deliberately misleading courts as to the amount of costs outstanding, removing documents from his file to cover up the "error" as to the Appellant's address and had graduate clerks and solicitors corruptly collude with him to put false documentation before a court and that the Law Society turned failed to accord any or sufficient weight to in determining the complaints that he made to them.

125. The assertions have no evidential basis and are rejected.

126. It is evident to this Tribunal that the Appellant had no intention on paying the firm the balance of any outstanding costs until the matter came to a head in 2015 when a Charge was registered over his real property in South Australia, despite the Appellant being on notice since late 2009, that the First Respondent considered the firm was owed outstanding costs and that enforcement proceedings would ensue if those costs were not paid. It is notable the Appellant as early as 2013 requested they ought to be written off. [64]The Appellant in his Closing Submission asserts:

> "...I was not short of money in 2009-10 and certainly not in 2013 when I asked Mr De Silva to write-off the alleged debts when he sent me the January 2013 letter of demand. The amounts were a pittance. Amounts I could easily afford to pay but my reasons for declining to pay were based on my view that this law firm was dodgy and who in their right mind

[63] The Law Society was not only dealing with this complaint but also during the same period dealing with the other complaints the Appellant made against the First Respondent and another practitioner.

[64] Affidavit of Fiona Kepert affirmed 20 November 2020 paragraph 13 at page 60.

would take legal proceedings for the $606 and $1468 claimed. Those amounts would have been taken over by the costs to (sic) recovery interstate and as I stated to Ms Sutton in February 2015 – "If the law firm brought any action to South Australia I would vigorously defend the action". Which I have done since June 2015."[65]

CONCLUSION

127. In its determination of the complaints, the Law Society noted that although the use of the incorrect address was unintentional the continued use of it was more than an administrative error and had significant consequences but that the practitioner's **own** conduct did not amount to professional misconduct. Although the Local Court applications had an error and the credit note had not been recognised, the failure by the First Respondent to recognise these fell within the tolerable range of human error.

128. The Tribunal, having earlier in this decision made factual findings about the circumstances around those errors, agrees with those assessments. The Tribunal is therefore not satisfied on the balance of probabilities that the First Respondent's own conduct in relation to the incorrect address amounted to unsatisfactory professional conduct nor is the Tribunal satisfied that the error in relation to the amount of costs claimed involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. The error would not justify a finding that the First Respondent is not a fit and proper person to engage in legal practice to amount to Professional Misconduct.

129. The errors did not amount to Unsatisfactory Professional Conduct. As previously observed, no practitioner is perfect and errors are sometimes made. These errors did not fall short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

130. The remaining question to be considered is whether there should be an award of costs to the First Respondent. Section 512 of the *Legal Profession Act* 2006 provides that the Disciplinary Tribunal may make an order as to costs of an appeal as it considers appropriate. These are appellant proceedings from a decision of the Law Society as a disciplinary body. They are proceedings that may give rise, if proven, to grave consequences for a legal practitioner. It is not unusual for a costs order to be made in this jurisdiction.

[65] Appellants Closing Submissions filed 7 May 2021 at [55]

131. The power to award costs is a discretionary power but it is not an arbitrary one.

> "A guiding principle by reference to which the discretion is to be exercised – indeed, "one of the most, if not the most, important" principle – is that the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party."[66]

132. That principle may be modified or displaced where the successful party has engaged in conduct in the litigation that would justify a different outcome.[67] There was nothing in the conduct of the respondent in this matter that delayed the proceedings or caused any unwarranted costs.

133. Public interest considerations may also displace the usual principle.[68] The Appellant in his submissions variously referred to the public interest in holding the legal practitioner to account and there is indeed a public interest in ensuring that the professional standards expected of legal practitioners are met. However, it is counter to the public interest for accusations of fraudulent and corrupt conduct to be levelled at a legal practitioner where there is no evidence to support such accusations. The consequence of such accusations is a cost to both the legal practitioner but also to the community which bears the costs of the Law Society investigation and the unsuccessful appeal.

134. The decision of the Law Society dismissing the complaints is affirmed.

135. The Appellant is to pay the costs of the First Respondent of and incidental to this Appeal with costs to be taxed in default of agreement.

Acting Judge Oliver (Chair)

Ms Palavra

Mr Anand

[66] *Northern Territory v Sangare* [2019] HCA 25 at [25].
[67] Ibid
[68] Ibid at [33]