**LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

LPDT 5 OF 2018

BETWEEN:

**LAW SOCIETY NORTHERN TERRITORY**

Applicant

**VANESSA MARIE FARMER**

Respondent

## REASONS FOR DECISION

1. The Applicant Law Society (the Applicant) has brought disciplinary proceedings against Vanessa Marie Farmer (the Respondent) alleging two breaches of the *Legal Profession Act* 2006. The complaints are:

   Count One

   (a) That the Respondent breached section 247 of the *Legal Profession Act* 2006 by disbursing money held in the Withnalls Trust Account otherwise than in accordance with law and/or a direction given by the persons on whose behalf it was received or was being held; and

   (b) Further or alternatively, recklessly disbursed money held in the Withnalls Trust Account otherwise then in accordance with law and/or a direction given by the persons on whose behalf it was received or was being held.

   Count 2

   That the Respondent breached Order 2 of the Orders [of the Federal Circuit Court of Australia in the Federal Circuit Court proceeding made by consent at Darwin on 16 July 2013] when she failed or refused to comply with a written direction given pursuant to Order 2.

2. The Applicant says that the conduct alleged is jointly and or severally either unsatisfactory professional conduct or alternatively professional misconduct. The Respondent denies each of the alleged breaches.

**BACKGROUND**

3. The Respondent acted for the wife (the wife) of the Complainant Craig Chenhall, in this matter in family law proceedings. On 12 July 2013 the Respondent filed an application for her client in the Federal Circuit Court. The application sought urgent orders as the Complainant was about to complete the sale of the property that had been the matrimonial home, the title of which was in his name alone. On 16 July 2013 consent orders were made by the Federal Circuit Court with respect to the sale of the former matrimonial home as follows:

> BY CONSENT UNTIL FURTHER ORDER
>
> 1. That the parties authorise payment of the mortgage to Secure Funding Pty Ltd and the agent's commission and conveyancer's costs at settlement.
> 2. That the parties authorise any further nett proceeds to be paid to Withnalls Lawyers trust account and not be disbursed except by written instruction of both parties or by court order.

4. Other orders were included for the Respondent to file documents in response in the proceedings and a further adjournment date set. Although both the Applicant and the Respondent in these proceedings initially asserted that this order was made pursuant to Section 79 of the *Family Law Act*, at hearing they agreed that it was an order made under Section 80. The funds were the proceeds of the sale of a property the legal title for which was in the name of Mr Chenhall alone. It should have been obvious because of the further order as to the filing of documents by the Respondent, that these were not final orders pursuant to s79 of the *Family Law Act* that altered property interests as between the parties to the proceeds

from the sale of the matrimonial home but in essence were a preservation order to protect or quarantine the proceeds from that sale pending a final decision on the wife's application for a division of matrimonial property.

5. Net proceeds of $32,097.29 (the Trust funds) were subsequently deposited into the Withnalls Trust Account in accordance with Order 2 on 23 August 2013.

6. The family law proceedings also included applications for parenting orders for the parties two children. Correspondence continued between Withnalls who represented the wife with respect to both the property application and the application concerning the children[1] and the NT Legal Aid Commission which represented Mr Chenhall with respect only to the children. Mr Chenhall represented himself on the property matters and corresponded with Withnalls in that regard.

7. In October 2014 consent orders as to the children were filed and the Complainant moved to Melbourne with the children and the wife subsequently moved to Perth. In February 2015 the Complainant obtained a transfer of the proceedings from Darwin to Melbourne. By email dated 2 March 2015 the wife gave instructions to Withnalls *inter alia* that "Out of the property pool I want my legal fees paid and the remainder to go to Craig."[2] The effect of her proposal appears to be that she would not receive anything in settlement of their matrimonial property even though the Complainant had substantial superannuation from which she had previously sought a half share. She asked that her proposal be "put to Craig".

8. In her affidavits, the Respondent deposes that on or about 5 March 2015 Withnalls Lawyers[3] wrote to the Complainant setting out a proposal for settlement of the property issues. That letter is not annexed to her affidavit. It is

[1] The application regarding the children received Legal Aid funding
[2] Affidavit Vanessa Marie Farmer dated 3 June 2019 at annexure 9
[3] Not the Respondent personally but either an employed or associate lawyer

annexed to the affidavit of the Complainant.[4] The letter does not comply with the instructions as to a property settlement given by the client. The letter states that the offer of settlement being made is on instructions and proposes that "the joint funds held in Withnalls Trust Account be paid to the wife" and then in effect that each party retain whatever property they had, including superannuation. Clearly this was not in accordance with the written instruction. Her further instructions as to the children appear to have been properly put with some slight variation on the issue of child support. No explanation has been proffered by the Respondent as to why the instruction with respect to the property was not followed.

9. The Complainant responded on 15 March 2015 to the offer rejecting the proposed arrangement for the wife to have one of the children reside with her and proposing that with respect to property they both attend mediation in an attempt to resolve that issue[5].

10. On 16 March 2015 the proceedings were transferred to the Federal Circuit Court, Melbourne. The wife was represented by a lawyer from Withnalls Lawyers. The Respondent in her affidavit of 31 May 2019 says that on or about 23 March 2015 the wife ceased giving instructions. No correspondence from the wife to that effect has been produced. It is noted that in his letter of 15 March referred to above, the Complainant had asked for a response to his proposal for mediation by 23 March 2015. No response to that proposal has been produced by either the Respondent or the Complainant so it may be assumed that none was given.

11. In June 2015 neither party appeared in the Federal Circuit Court at Bendigo and an order was made that:

> "All extant applications are dismissed and the matter removed from the list of active cases."

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[4] Affidavit of Craig Anthony Chenhall dated 10 May 2019 Annexure CC10.
[5] *Ibid* at Annexure CC11

The Order further noted that:

"Pursuant to rule 16.05(2)(a) of the *Federal Circuit Court Rules 2001* (Cth), the court may vary or set aside a judgment or order made in the absence of a party."

12. This Order would not have affected the previous order that placed the monies from the sale of the former matrimonial home in trust "not (to) be disbursed except by written instruction of both parties or by court order."

**THE DIRECTION AND AUTHORISATION**

13. On 2 October 2015 the Complainant sent an email to the Respondent attaching a letter dated the same day said to be signed by himself and the wife that authorized the Respondent to pay all the proceeds held in the trust account to him.

14. The Respondent did not comply with that direction. The Respondent submits that because she knew of the history of the Complainant both having persuaded the client to give instructions which were against her own interests and of the Complainant having given written instructions to the law practice in the past passing them off as instructions of the client, she did not immediately act on that instruction but wrote to her former client because she had some doubt as to her instruction to release all of the trust monies to the Complainant.[6] In cross examination she said

"Yes, and basis of that is the language used, that she lived in Western Australia in Perth and he lived in Melbourne, how the circumstance could be that the husband and wife who didn't speak to each other joined together to write that correspondence, the nature of the correspondence and the basis that she had always agreed to pay our fees and had never had an issue with paying our fees from her monies, portion, share, entitlement, percentage in Withnall's lawyers

[6] Paragraph 23 Respondents Submissions. Letter at annexure VMF 10 of the respondent's affidavit of 31 May 2019.

trust account and this was the first and only time that she in that correspondence signed that document and told me or directed me to give him 100% of the funds and that had been contrary to her instructions and position to me since May 2013. That's the basis upon which I say purported".

15. Certainly, the Respondent may have been right to be suspicious of communications from the Complainant purporting to be from either the wife or a joint communication from them. For example, on 9 December 2013 he had sent an email to Withnalls stating that the wife wished to agree to 50% of the Trust funds to be released to him. Having received that correspondence, the wife's then lawyer from Withnalls wrote on the same day to the NT Legal Aid Commission advising of this correspondence and that she had since had contrary instructions from her client.

16. Correspondence to her former client was sent by the Respondent's office manager by short email on 16 October. The email makes no mention of the joint letter received from the Complainant or of the email sent by the Complainant alone authorising the disbursement of the monies in the trust account. It shortly asks her to contact them about outstanding fees of approximately $20,000.00, that the firm proposes to exercise a lien over "your portion" of the trust monies and that if necessary, the firm would issue legal proceedings."[7] If the Respondent was concerned as to whether the wife had signed the letter of joint authority or even knew of it or at the very least understood the consequence of her liability for outstanding fees should all of the funds be paid to the Complainant, it might be expected that this would be raised in the letter. It was not. She was simply told that fees were owing and that Withnalls would exercise a lien over the fees and if necessary, would take legal proceedings to recover them. It is doubtful that a lay person, particularly for one for whom English was not her first language[8], would understand the concept of a "lien" and in the absence as to the background, particularly if she was completely unaware of the correspondence sent by the

[7] Affidavit Vanessa Marie Farmer 3 June 2019 Annexure VMF 10
[8] Transcript p22

Complainant, might wonder why legal action was now being threatened to recover fees she owed such a long time after she had last heard from her lawyer.

17. The Respondent received an email from the wife's email address on 21 October 2015.

18. The Respondent submitted that the language of the email strongly suggests that it was written by the Complainant, not the client. The Tribunal agrees that it is possible that the wife wrote that email although the language used is wholly unlike that used by her in previous communications. The email[9] reads as follows:

> "In reply to the letter I received from Martina Hooper of your firm dated 16 October 2015, I confirm that I have never received an invoice or itemized account statement from your firm for any outstanding fees at all let alone those totalling approximately $20,000.
>
> I must say I am quite surprised that I would owe anything like this amount, as I was of the belief that you were representing me on a legal aid basis and this was covering the full cost of my representation.
>
> In any case, please forward me a detailed statement for the outstanding fees you claim are now owed and I will consider this and payment of any outstanding fees for which I may be liable.
>
> In the meantime, I confirm that I have voluntarily entered into a signed agreement with my former partner, Craig Chenhall, allowing him to retain the total amount of the funds presently being held in your trust account under the consent order.
>
> I believe this is fair, as he has full custody of our children and these funds will greatly assist in providing for our children's immediate and future needs.

[9] Affidavit Vanessa Marie Farmer 3 June 2019 Annexure VMF 11

As such, I confirm my part in the joint instruction issued by myself and Mr. Chenhall on 2 October 2015 authorising the disbursement of those funds to Mr. Chenhall's bank account.

This instruction still stands and therefore, I would appreciate it if you could arrange to have those funds immediately disbursed in the manner instruction (sic) by both parties concerned. Thank you."

19. Inferences may be drawn from that communication. First, that the email was sent by the wife but was written on her instructions by another person. If so, it is surprising that the Complainant was not copied into the email so that he would know that she was now being asked to pay legal fees given that the Complainant in his oral evidence asserted that she had told him that she didn't have to pay anything because it was covered by legal aid.[10] One might think that if she had thought that she did not owe any legal fees, as the Complainant asserted in his evidence that she had told him, she would alert him to that by copying him into her response.

20. Secondly, it might be inferred that the Complainant wrote the email sending it from the wife's email account at her request or as part of a joint agreement. Even so, the contents are not consistent with what each of them knew, that is that there was a costs agreement (the wife at least knew this) and both knew that in 2013 there was a substantial amount in legal costs already owed by her to Withnalls.[11] According to the Respondent's affidavit evidence, he came to know of that she owed legal costs only around 18 November 2015 when she told him this in a phone conversation. That she would not more immediately inform him of "her email" of 21 October earlier than mid-November that Withnalls were seeking legal costs of around $18000.00 would be surprising given his evidence that she had told him that legal aid had covered it and that the instruction to now remit the trust monies to him would leave her liable to a substantial debt.

[10] Transcript pp 26-28
[11] Transcript p24

21. If the wife had written (or had someone other than the Complainant had written the email for her), it is surprising that she did not mention it to him until almost a month later.

22. It would follow that if the email was written by both the Complainant and the wife that they might be colluding to avoid payment of her legal fees by providing the joint instructions to give all the trust funds to the Complainant.

23. For the Tribunal to be satisfied of any of those inferences it would have been necessary to hear from the wife. Neither party called her to give evidence although a limited attempt to speak to her was made by the Applicant through the Complainant. Although some suspicion attaches to the correspondence in question it is not sufficient for the Tribunal to reject the evidence of the Complainant that the authorisation and direction to pay all the Trust money to him was given jointly by them.

24. In any event, if the Respondent did not believe that the Direction to pay the money to the Complainant was authorised by both of them, she should not have paid **any** money to him. To do so in circumstances where she believed that the wife was not the co-author nor signatory to the direction was itself a breach of the Federal Circuit Court Order because she did not have a valid "written instruction from both of them" to disburse funds from the Trust.

**WHAT WAS THE STATUS OF THE FUNDS IN THE TRUST ACCOUNT AND COULD THE RESPONDENT EXERCISE A LIEN OVER THEM FOR HER COSTS?**

25. The Respondent says that she believed that money in the Trust account was jointly held meaning that the client was equally entitled to the funds and had joint control over them. This belief was further acknowledged by the Respondent in paragraph 7 of the Statement of Claim filed in the Local Court which stated that

"The plaintiff holds $16,097.74 in its trust account for the defendant jointly with her former husband following the sale of property during the family legal proceeding".

26. Again, in her affidavit of 31 May 2019 at paragraph 15 she stated, "I believed that the trust funds with joint funds belonging to both parties and was subject to the orders made by the FCCA on 16 July 2013".

27. Even if the funds were being held jointly **on trust for the parties** that did not give effect to an alteration in the legal ownership of those funds. The Federal Circuit Court Order did not alter legal title to property of the parties. The order simply sought to preserve the Complainant's property ($32,097.28) subject to joint instructions from the parties or an order of the Court (one exercising jurisdiction under the *Family Law Act* as further discussed in this decision).

28. As no order had been made by the Federal Circuit Court altering the legal interests of the parties in property that each of them might have, at best, the wife had a contingent interest in those funds to the extent that they could not be disbursed without her consent or a court order.

29. The Tribunal is satisfied that the trust funds were always the legal property of Mr Chenhall held subject to any subsequent agreement between them. For example, they might have agreed a division of those funds, in whatever proportion, between them (passing legal title in whatever proportion they agreed she should have to her) or as they agreed, the Complainant retaining his title to all the trust funds.

30. Consequently, the decision of the Respondent to divide the money 50/50 (or thereabouts) was without any legal basis.

31. That she was mistaken as to the funds being joint and therefore able to be severed so as to claim a lien over the wife's portion does not assist her. Such a mistake would be one of law which any family law practitioner would be expected to

know. Even if the mistake was one of fact, that would not assist the respondent. In the matter of *Victorian Legal Services Commissioner* v *Joseph* [2018] VCAT 864 the Victorian Civil and Administrative Tribunal found a charge of professional misconduct within the meaning of s297(1)(a) proven against a practitioner who had negligently advised his client that he was entitled to have his redundancy monies, that had been placed into a trust account on an order of the Federal Circuit Court, to be paid out only on an order of the court or with consent of the wife paid to him. He had a mistaken belief that his client was entitled to the monies because he had not properly read the order. The practitioner in that matter pleaded guilty to the charge and professional misconduct was found proven.

## THE LIEN ARGUMENT

### The Particular Lien or Fruits of the Action

32. As has already been said, the trust moneys were paid into Withnalls Trust account to preserve them while the parties resolved their respective entitlements under the family law proceedings. The 'particular lien' is designed to safeguard a solicitor's costs but, unlike the general lien, it arises over any personal property recovered or preserved, or any judgment obtained, for the client by the solicitor's exertions in litigation.[12] In *Jones v Law Society of NSW*[13] Hope J said "In the case of money recovered by a solicitor for his client, the solicitor has a particular lien which he may enforce by application to the court. If the money is in his hands the solicitor may retain his costs out of the recovered money and pay the balance to his client."

33. It may be argued that the moneys were "personal property ... preserved ... for the client by the solicitor's exertions in litigation" given that the trust funds were created following the Respondent's application on behalf of the wife to prevent

[12] Dal Pont, The Law of Costs Chapter 27 - paragraph 27.1.
[13] [1982] 2 NSWLR 1

the Complainant taking the monies left from the sale of the matrimonial home. However, even if that were accepted, it would not assist the Respondent as the lien attaches only to the cost of the proceedings in which the property or fund is recovered. In other words, it would, even if available, attach only to the costs associated with the initial application to preserve the remaining funds from the sale of the matrimonial property, not all of the work undertaken by the Respondent as set out in the Bill of Costs.

34. As is said in Dal Pont the term "lien" in this context is really a misnomer. A particular lien is "a solicitors claim or right to ask for the intervention of the court for his protection, when, having obtained judgement for his client, he finds there is a probability of the client depriving him off his costs".[14] The lien is not possessory but is the right to apply to the courts where there is a probability of the client depriving the solicitor of costs. The intervention of a court was required in order to enforce such a lien.

35. Significantly, a particular lien would extend only to the wife's funds or her interest in the funds. The wife's interest in the funds was only ever an inchoate and undefined interest, one contingent on the parties agreeing that she should have some or all of the monies or a court order to that effect.

36. Consequently, there are two problems with a claim of a particular lien. First, although it might be said that the monies were "preserved" by the Federal Circuit Court order that placed them in the trust fund, as has been said, that did not change the legal title to them and at all times they remained the property of the Complainant.

37. Secondly, although the Respondent says that she obtained an order of the Local Court thereby entitling her to the remaining funds, the Local Court was not the

[14] Dal Pont paragraph 27.3

venue for such an application. "To obtain the benefit of the particular lien, the solicitor must make an interlocutory application, **in the proceedings in which the client's monetary entitlements rise**, for a declaration both of the existence of the lien and for ancillary orders to facilitate the protection of the monies it's subject"[15] (emphasis added). So even if a particular lien had been available, the application had to be made to the Federal Circuit Court as that was the court that had made the retention order. If the Respondent believed that a particular lien could be obtained then she should have made application to the Federal Circuit Court for a declaration as to the existence of the lien and ancillary orders[16].

**Statutory (or "General" or Retaining") Lien**

38. Section 254(1)(a) of the *Legal Profession Act* is a statutory codification of what was known as the general or retaining lien. It provides:

> **Dealing with trust money - legal costs and unclaimed money**
>
> (1) A law practice may do any of the following, in relation to trust money held in a general trust account or controlled money account of the practice for a person:
>
> (a) exercise a lien, including a general retaining lien, for the amount of legal costs reasonably due and owing by the person to the practice;
>
> (b) withdraw money for payment to the practice's account for legal costs owing to the practice if the relevant procedures or requirements prescribed by this Act are complied with;
>
> (c) after deducting any legal costs properly owing to the practice, deal with the balance as an unclaimed amount under section 259
>
> (2) Subsection (1) applies despite any other provision of this Part but has effect subject to Part 3.3.

[15] Dal Pont paragraph 27.5
[16] Dal Pont paragraph 27.4

39. Although it is said in Dal Pont "It is a right to refuse to transfer to a claimant property to which that claimant would be entitled were it not for the existence of the lienors claim"[17] this needs to be understood in the context that the author is speaking of a claimant who is the client of the solicitor. As is said at [26.6] of that text

> "Yet, if the items in question are neither the solicitor's or the client's property, no retaining lien can attach to them arising out of the solicitor-client relationship. The solicitor must deliver up those items to their true owner, unless the solicitor has some valid security as against the true owner."

40. This lien is therefore of no assistance to the Respondent. The lien is possessory and can therefore only attach to a client's property.[18] It cannot attach to another's property or to joint property.

41. The flaw in the respondent's argument for a lien over the funds is that a lien for her professional fees could only apply against the property of the person who owed the fees. The property was never the wife's legal property so there was no property of hers that it could attach to. Even if she had some form of equitable interest in the funds, on her instruction that the Complainant was to have his monies (in accordance with the Federal Circuit Court Order) she no longer had any interest in those funds to which the lien could attach. As is said earlier in these reasons, the wife's interest in the funds was only ever an inchoate and undefined interest. Once she gave her consent to the release of the funds to the Complainant, she had no further interest in them.

**DID THE RESPONDENT ACT IN ACCORDANCE WITH THE ORDER OF THE FEDERAL CIRCUIT COURT IN OBTAINING THE COSTS ORDER FROM THE LOCAL COURT?**

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[17] Dal Pont 26.2
[18] Dal Pont 26.6

42. The Respondent argues that she acted in accordance with the Order of the Federal Circuit Court because she disbursed the funds in the Trust account in accordance with an order for her costs from the Local Court.

43. At the outset there is a flaw in this argument. First, she made two disbursements from the Trust fund. She released $16,000.00 to the Respondent on 5 November 2015, not in accordance with the written instructions of the parties (as required by the Federal Circuit Court Order) which had directed the disbursement of all of the funds to the Complainant) and then she had retained and finally disbursed the remaining funds in accordance with the debt recovery order of the Local Court she had obtained to her general account.

44. Leaving aside for the moment, the question of whether the Local Court was the correct venue for an application and the numerous errors in her application, the Federal Circuit Order provided two **alternative** means for the disbursement of funds from the Trust account. The context of the order and the venue in which it was made guides the interpretation of the order. These were family law property proceedings seeking a division of property as between the parties. Properly understood they would either be held in the Trust account pending the finalisation of the proceedings with an order made for their disbursement or absent that, disbursed on the joint instructions of the parties. It was not an and/or Order.

45. In any event, the Local Court was not the correct venue. The Order of the FCC required the order of a court exercising jurisdiction under the *Family Law Act.* Only a court exercising that jurisdiction could affect a change in property interests as between the parties. Unless and until such distribution was made the funds were the legal property of the Complainant. The Local Court was not exercising jurisdiction under the *Family Law Act* rather it was exercising a debt recovery jurisdiction. It was clearly insufficient to override the Direction or otherwise authorise the payment of funds.

46. Further, it is of concern that the statement of claim to the Local Court included the misleading assertion that "The Defendant's former Husband has provided his consent for the jointly held funds to be released from the Trust Account." While the Complainant had provided consent for the funds to be released, it was a direction to pay to him, not to the Respondent or her former client. The assertion was likely to mislead the court that the Complainant knew of and consented to the Local Court action for the Respondent to recover her costs from the Trust fund.

**MISTAKEN BELIEF**

47. The view of the Respondent that her former client was entitled to 50% of the funds in the Trust account or that they were joint funds somehow able to be dealt on a 50/50 basis was not a reasonable view of an experienced lawyer. Her evidence in both her affidavits and in oral cross examination are conflicting. Variously she asserts that the funds in the Trust were jointly held on behalf of Mr and Mrs Chenhall, or that she was entitled to divide the funds 50/50 or that she could claim a lien over slightly more than 50% of them. In the Tribunal's view, this points either to her having little proper understanding of proprietary interests, which would be surprising in a solicitor of her experience or that she was so intent on recovering her costs that she disregarded what was obvious from the nature of the Order that placed the Funds in her trust account or that she acted recklessly in relation to the seeking of her costs without giving full and proper consideration to the contents and the background of the Federal Circuit Court Order which she had personally obtained.

48. Even if the Tribunal accepts that she held a genuine belief that the instruction to release the funds to the Complainant was one that was not authorised by her former client or that there was collusion by the parties aimed at depriving her of her costs she should have refused to release any funds. Her resort to the Local Court for an order for costs (and noting all the flaws in that application) was not only the wrong application but the wrong venue to deal with the issues just mentioned. As a family law practitioner, she should be expected to know that the

proper venue was the Court that had made the Order and that she had recourse to that Court pursuant to s92 of the *Family Law Act*.

49. Even if she misunderstood the legal or equitable basis on which the funds were being held that is no defence.[19] If she made a mistake it was a mistake of law i.e. that the legal effect of the Federal Circuit Court order was to alter property rights as between the parties.

50. It is the view of the Tribunal that her actions were consistent with her interest in obtaining her costs not in protecting her former clients interests in the Trust money.

**CLAIM OF RIGHT**

51. Count One of the complaints before the Tribunal alleges conduct in contravention of section 247 of the *Legal Profession Act* 2006. The Tribunal sought submissions from the parties as to the standard of proof and defences that might apply when considering a breach of that provision given that the provision is expressed in terms creating a criminal offence. Having considered those submissions the Tribunal's view is that section 247 has two separate operations. First, a practitioner could be charged with an offence by Complaint before the Local Court. The time for laying that charge has well and truly expired. Section 52 of the *Local Court (Criminal Procedure) Act* requires that where no time is specially limited for making the complaint by the statute or law that creates the offence, the complaint is to be laid within 6 months from the time when the matter of the complaint arose. In this matter that would be when the $16,000 was disbursed to the Complainant rather than the full amount authorised by the party's direction.

52. Secondly, the conduct proscribed by section 247 can be the subject of a disciplinary complaint to the Tribunal. Section 466 provides conduct that is "capable of constituting unsatisfactory professional conduct or professional misconduct" ad *inter alia* this includes "conduct consisting of a contravention of this Act." The difference between criminal proceedings or disciplinary proceedings

[19] *Victorian Legal Services Commissioner* v *Joseph* [2018] VCAT 864

lies in the elements that must be proven and the standard of proof required. For disciplinary proceedings the Tribunal must be satisfied that the conduct the subject of the complaint is made out and then satisfied that the conduct is such as to amount to either unsatisfactory professional conduct of professional misconduct. In criminal proceedings there are generally two limbs that must be satisfied. A court must be satisfied beyond a reasonable doubt not just that the physical element[20] of the offence is made out, for example as in s247 by particular conduct, but also that the fault element[21] that is specified for an offence is proved beyond a reasonable doubt. However, offences may also be designated as either strict liability or absolute liability offences. The offences in s247 are designated as offences of strict liability.[22] This means that there is no fault element required for the physical element of the offence only that the conduct occurred. Depending on the nature of the offence some defences may be available.

53. These are not however criminal proceedings and defences that may still apply to an offence of strict liability have no application. There is simply the two-stage process here which is to consider whether the conduct is made out to the requisite standard and if so, whether it meets the definition for unsatisfactory professional conduct or professional misconduct.

**FINDINGS**

54. The standard of proof in these proceedings is the *Briginshaw* standard, namely the civil burden of proof on the balance of probabilities but with due regard to the seriousness of the allegations.

55. The Tribunal is so satisfied as to Count 1 that the Respondent breached section 247 of the *Legal Profession Act* 2006 by disbursing money held in the Withnalls Trust Account otherwise than in accordance with law and/or a direction given by

[20] Physical elements may be conduct or the result of conduct or a circumstance in which conduct, or a result of conduct, happens – see s43AE
[21] Criminal Code s43AH - Fault elements may be intention, knowledge, recklessness or negligence.
[22] S247(6)

the persons on whose behalf it was received or was being held. She refused to comply with the clear and valid direction of the parties to pay the monies held to the Complainant and her reasons for so doing do not excuse this conduct.

56. The Tribunal is further so satisfied that the disbursement was in the circumstances of the matter a reckless one. Even if it was accepted that she operated under a mistaken belief that the fund was divisible, that belief was not a reasonable one because she failed to properly consider the legal effect of the Order of the Federal Circuit Court or to reacquaint herself with its terms before acting in disobedience to it. If her suspicions had in fact been correct and the wife had not provided the authority to disburse the funds, her payment of $16,000 out of the Trust fund to the Complainant would have been an act contrary to her client's interests and contrary to the Federal Circuit Court Order.

57. The Tribunal is also satisfied as to Count 2 that the Respondent breached Order 2 of the Orders of the Federal Circuit Court of Australia in the Federal Circuit Court proceeding made by consent at Darwin on 16 July 2013 by failing and refusing to comply with a written direction given pursuant to that order. The Tribunal finds that the Respondent was not entitled to retain all or any of those funds against her professional costs as the property was not property that belonged to her former client and therefore no lien as claimed could attach to them.

58. The Tribunal is further satisfied that the breaches amount to professional misconduct within the meaning of section 465(1)(a) of the *Legal Profession Act* 2006 "professional misconduct" includes:

    (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;...

59. The respondents failure to appreciate the legal effect of the Order of the Federal Circuit Court (one which she had personally appeared on and obtained) and as a

consequence failed to appreciate that a lien could not attach to those funds was a substantial failure to reach a reasonable standard of competence.

60. Her retention of funds contrary to the direction of the complainant and the wife and therefore directly contrary to the Order of the Federal Circuit Court was likewise a substantial failure to reach a reasonable standard of competence.

61. It is fundamental to legal practice that a practitioner both understand the nature and meaning of order of a court and not act in contradiction to them.

62. In view of our finding that the Respondent is guilty of **Professional Misconduct** it will be necessary to hear the parties as to the disciplinary and ancillary orders that the Tribunal should make.

63. The Tribunal orders that the Applicant file written submissions by 20 September 2019 and the Respondent by 11 October 2019 with any response by the Applicant to be filed by 1 November 2019.

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|---|---|---|
| A/Judge Sue Oliver | Richard Giles | Heather King |
| Chair | Member | Member |
| 30.8.19 | 30.8.19 | 30-8-19. |