LEGAL PRACTICE TRIBUNAL

CITATION:	*Legal Services Commissioner v Scott* [2009] LPT 7
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **GARRY WAYNE SCOTT** (respondent)
FILE NO:	3033 of 2007
PROCEEDING:	Discipline Application
ORIGINATING COURT:	Legal Practice Tribunal
DELIVERED ON:	27 March 2009
DELIVERED AT:	Brisbane
HEARING DATE:	18 – 20 August 2008
TRIBUNAL:	Fryberg J assisted by Mr M Woods and Dr M Steinberg
ORDER:	**The Tribunal orders that:** **1) the local practising certificate of Garry Wayne Scott be suspended for the period until 15 June 2009;** **2) Garry Wayne Scott undertake and complete a specifically designed course of further legal education under the supervision of Professor C Sampford, Director of the Institute for Ethics, Governance and Law, for nine weeks commencing on 6 April 2009;** **3) Garry Wayne Scott refrain from doing anything in connection with his engaging in legal practice until he has obtained a report from Professor Sampford describing his performance and rating it as at least satisfactory and delivered it to the Legal Services Commissioner.**
CATCHWORDS:	Profession and Trades – Lawyers – Complaints and Discipline – Professional misconduct and unsatisfactory conduct – Particular instances – Course of actions *Legal Profession Act* 2004 (Qld), s 276, s 280, s 429, s 431, s 597, s 614 *Legal Profession Act* 2007 (Qld) s 418, s 419, s 452, s 456, s

599, s 601, s 717, s 718, s719, s 746, s 752
Queensland Society Act 1952 (Qld), s 3B, s 6A

Adamson v Queensland Law Society Inc [1990] 1 Qd R 498 cited
Clough v Queensland Law Society Incorporated [2002] 1 Qd R 116; [2000] QCA 254 considered
Legal Practitioners Complaints Committee v Thorpe [2008] WASC 9 considered
Legal Services Commissioner v Cousins [2009] LPT 002 cited
Legal Services Commissioner v Madden (No 2) [2008] QCA 301 considered
Legal Services Commissioner v McLelland [2006] LPT 13 cited
Legal Services Commissioner v Podmore [2006] LPT 005 cited
Legal Services Commissioner v Voll [2008] QCA 293 cited
Legal Services Commissioner v Walters [2007] LPT 006 cited

COUNSEL: Applicant: B W Farr SC
Respondent: R S Ashton

SOLICITORS: Applicant: Deacons Lawyers
Respondent: Trilby Misso

[1] **FRYBERG J:** the respondent is a solicitor. He was admitted as such in 1995. By an application filed on 10 April 2007 and subsequently amended, the applicant seeks against him the following orders:

> "1. That the Respondent is guilty of unsatisfactory professional conduct and/or professional misconduct pursuant to section 280 of the [*Legal Profession] Act* [2004].
>
> 2. Such further or other orders or directions as may be just.
>
> 3. The Respondent pay the Applicant's costs of the application."[1]

[2] Four sets of particulars of charge were given in an amended application filed by leave on the third day of the hearing. It might be thought that those particulars represent four separate matters which should have been separately charged (and perhaps they were intended so to be read), but no issue of multiplicity has been raised and nothing turns on this. The particulars were:

> "**Misleading the Federal Court of Australia**
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> 1. In legal proceeding number QG177 of 1998 in the Federal Court of Australia (**FCA**) between Robert George Batten

[1] Amended Discipline Application filed by leave on 18 August 2008.

and others as Applicants and Container Terminal Management Services Limited and Others as Respondents (**Class Action**), the Practitioner failed to inform the FCA of material facts in respect of a 'Notice to Group Members' under section 33 of the FCA Act and thereby misled or potentially mislead the FCA.

Maintaining www.asglies.com website

2. The Practitioner misused privileged and/or confidential information belonging to his clients in the Class Action, by disclosing it to Tate without the authority of all of his clients.

Misleading the Queensland Law Society – www.asglies.com

3. The Practitioner encouraged Garry Moore and Tate to establish and maintain a website, www.asglies.com, to which the Practitioner intended to post, and in fact posted, material of an unprofessional character and/or encouraged Moore or Tate to post material of an unprofessional character.

Misuse of privileged and/or confidential information

4. During the course of inquiries by the Queensland Law Society Incorporated (**QLS**) in relation to complaints against him, the Practitioner provided QLS with information which was misleading."[2]

Thereupon, Mr Scott admitted the substance of the allegations in those particulars. The issues for the Tribunal are: is he guilty of professional misconduct or unsatisfactory professional conduct; and what order if any should the Tribunal make under s 456 of the *Legal Profession Act* 2007. Counsel agreed that the material relevant to the revised charge was contained in the affidavits of Mr Jarrett, Mr McTernan, Ms Small (with exhibits CSS-1 to CSS-13 only) and Ms Tate (with exhibits TT-1 to TT-53 and TT-55 to TT-74 only). Because exhibit TT-54 was referred to during counsel's addresses, I have had regard to it also to the extent that it is referred to in annexure 1 to exhibit 2 and in Mr Scott's affidavit.

[3] To address these issues it is necessary to consider Mr Scott's conduct in its context.

Background

[4] During the 1990s a major industrial dispute occurred on the waterfront in Melbourne between Patrick Stevedores ("Patricks", a large and powerful stevedoring company) and the Maritime Union of Australia. In the course of that dispute Patricks terminated the employment of its entire workforce and replaced it with non-union labour (including a number of former army personnel). Subsequent litigation resulted in a court ordering Patricks to reinstate its workforce. Patricks thereupon terminated the employment of the non-union workers. The workers claimed they were the victims of misrepresentations made to them by or on behalf

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2 Further Amended Discipline Application filed by leave on 20 August 2008.

of Patricks. Mr Paul McTernan was one of those workers. He lived at Buderim. Klooger Phillips Solicitors, of Maroochydore had done the conveyancing for the purchase of his home. Mr Scott was the litigation partner in that firm.

[5] Toward the end of 1998 Mr McTernan contacted a number of firms of solicitors on behalf of a group of the non-union workers to see whether they would be interested in acting for the group in a class-action against Patricks. Klooger Phillips was among those solicitors contacted. Mr Scott was "excited to be offered instructions and such an interesting and important case".[3] Although he had no experience in representative proceedings, he felt that with the assistance of counsel, he could manage such a case. He told Mr McTernan that Klooger Phillips were prepared to act on a no win - no fee basis. On 22 October 1998, he wrote to Mr McTernan:

> "As stated, we are prepared to offer our services on a 'No Win – No Fee' basis. The *Queensland Law Society Act* requires an agreement to be entered into with yourselves and this firm to this effect. Such agreement will be prepared and forwarded to you, as soon as possible. The agreement specifies the scale costs which this firm will be entitled to charge of all work carried out on your members' behalf.
>
> We do not charge a percentage fee for our legal fees.
>
> The matters which we require your members to contribute financially to, consist of all outlays incurred by us, together with assistance in general office over heads related solely to your case, such as my secretary's wages. As you can imagine, the work in proceeding with your members' claim, will be labour intensive and I need to ensure that the cash flow situation in this firm, is not severely diminished so as to unduly increase our overdraft. The regular payment by you of our outlays and over head expenses will alleviate this. Of course, we will itemise specific outlays to you. Your contribution to specific overheads concern with the running of this case, will be made by way of regular 'professional accounts' to you, on say, a monthly basis in the order of $1,000.00 to $2,000.00."[4]

[6] After meeting Mr Scott, nine members of Mr McTernan's group[5] entered into a client agreement with Klooger Phillips. The work to be performed was described as "Instituting Federal Court proceedings against Chris Corrigan, Patrick Stevedores and other associated parties."[6] The agreement did not refer to "No Win - No Fee", but it seems that was inadvertent. Costs (outlays) were to be paid as incurred. Mr Scott consulted counsel. He recommended the formation of a corporation as a vehicle for defining (and perhaps controlling) the members of the class on behalf of whom the proposed action was to be brought. Consequently Australasian Stevedores Guild Inc ("ASG") was incorporated under the *Associations Incorporation Act* 1981.[7] Mr McTernan became its first president and membership

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3 Affidavit of Gary Wayne Scott filed by leave on 20 August 2008, para 13.

4 Exhibit PJLM-1 to affidavit of Paul John Leigh McTernan filed 10 July 2008.

5 Messrs McTernan, Beith, Gott, Ashworth, McBride, Turner, Lawman, Caldow and Sinclair.

6 Exhibit PJLM-2 to affidavit of Paul John Leigh McTernan filed 10 July 2008.

7 It is common ground that ASG itself subsequently also became a client.

was a prerequisite for eligibility for membership of the class. It seems to have been intended that ASG would act as a vehicle for collecting money from members to fund outlays; at one point it had some 270 members. Two nominal applicants, Messrs Batten and Grahame, were selected, counsel drafted a statement of claim and on 21 December 1998 proceedings were commenced against 36 defendants on behalf of all persons who were recruited by certain of the respondents to be trained in stevedoring work and other waterfront related activities and who were members of ASG.[8] The respondents included numerous companies associated with Patricks, the National Farmers Federation and the Commonwealth of Australia.

[7] Unsurprisingly, conducting such litigation was extremely labour-intensive. To provide paralegal support Mr Scott, at Mr McTernan's suggestion, engaged the services of a firm called ASG Dynamic Solutions ("Dynamic Solutions") in February 1999. This firm was owned by Mr McTernan and his wife. It had started business in August 1997; the nature of its business was said to be providing security armed escort patrols, private investigations and paralegal services. Under the terms of engagement it was to render accounts on a strictly speculative basis for providing up to five paralegal assistants. To provide some such assistance Dynamic Solutions hired Ms Theresa Tate, wife of Mr Gary Moore, a member of ASG, again on a "No Win - No pay" basis.

[8] Also unsurprisingly, the litigation was hotly contested. Proceedings were delayed by applications for particulars and to strike out the statement of claim or part of it. Some respondents were dismissed from the proceedings by consent. Costs orders were made against the applicants. Divisions appeared within ASG. To shore up the position an attempt was made in 2000 to have all members of ASG sign a client agreement with Klooger Phillips. Some members were unwilling to make financial contributions or to make further contributions. Some demanded explanations of the financial affairs of ASG from its executive. Some were, perhaps in retaliation, expelled from ASG and were told by the executive of ASG that they had been removed from the class action. They included Mr Moore. At about the same time, July 2000, Dynamic Solutions told Ms Tate that her services were no longer required. She was falsely accused of spying for the respondents and threats of personal violence were made to her by some ASG members. The poisonous state of affairs is demonstrated in an e-mail which she sent to Mr Scott shortly after her dismissal:

> "If the threats of personal violence against me do not cease i.e.: 'this is going to be a bloodbath', 'we could throw her to the boys and see if they want to f**k her', 'you're minced meat now - and we'll get you for sinking us'. 'Watch out or I'll use your face for toilet paper' - and many more of like nature - I will have no alternative but to seek legal protection."[9]

[9] On the Commissioner's case (and I understand this to be common ground), Mr Moore ceased to be a client of Klooger Phillips at the same time. I have not been referred to any evidence which demonstrates precisely the period for which

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8 It was thought necessary to commence a further proceeding in 2000 because it emerged that there were really two groups of workers, one employed by Patricks and the other by companies associated with the National Farmers Federation. Nothing presently turns of this.

9 Exhibit TT-4 to affidavit of Theresa Tate filed 1 July 2008.

Mr Moore was a client. I shall assume in Mr Scott's favour that he was a client at all material times until July 2000.

[10] From at least mid-2000 ASG failed to pay Klooger Phillips the full amount of their outlays. From the latter part of that year Mr Scott made efforts to interest a litigation funder in the action and to obtain other solicitors to share the work. These efforts were unsuccessful. By September 2001 the position was becoming acute. Mr McTernan again approached a litigation funder and this time it expressed some interest in supporting the case. By then it was also apparent that Klooger Phillips lacked the resources to conduct the litigation through the trial stage. The position was discussed at a meeting between Mr Phillips and Mr Scott on the one hand and Mr McTernan, Mr Batten, Mr Gotts and Mr Sleiman (secretary of ASG) on the other. The solicitors told the clients that they could not continue to carry outlays (including counsels' fees) and reminded them that it had been agreed that outlays would be paid on an ongoing basis. They made particular reference to the need to prepare for a strike-out application by some respondents which had been set for hearing on 18 October 2001.

[11] The clients responded that they did not have the funds but that annual memberships of ASG were due by 1 December and that they would then be in a position to meet the outstanding outlays. The solicitors agreed to carry the outlays until that time. They subsequently wrote to Mr Sleiman:

> "We confirm the following agreements and understandings:-
>
> 1. the anticipated budget for the Barristers' fees for work completed to date and for work associated with the Hearing on the 18th October, 2001 will be in the order of $50,000.00;
>
> 2. ASG will pay the sum of $10,000.00 now and this firm will cover the balance of outstanding fees to date;
>
> 3. this firm will continue to act up to and including the Hearing on the 18th October, 2001;
>
> 4. the Executive Committee is taking steps to secure arrangements with a financial backer and will also approach other legal firms with a view to continuing the action through to Trial;
>
> 5. the Executive Committee intends to contact the media regarding the Commonwealth's Costs Order.
>
> This firm will:-
>
> 1. provide a letter of introduction and a summary of the action to date to be presented by the committee to other legal firms;
>
> 2. release all files to the legal firm selected by the committee to take over the action;

3. provide consultancy services to the legal firm taking over the action;

4. contact the Commonwealth Government Solicitor regarding the waiver of the Costs Order."[10]

This was clarified in another letter dated for October:

> "(b) …I can confirm that this firm will be in a position to continue acting on your behalf up to, but not after, 1 December 2001. We confirm that this agreement is on the basis of discussions which this firm had with the executive committee last year, and again recently. This is also due to the enormous resources which have been placed on this firm, including the outlays such as barrister's fees, which we have had to meet on your behalf, this being something which was never originally agreed to be provided by this firm."[11]

[12] Klooger Phillips' position was reiterated in a further letter dated 17 October:

> "This letter serves to confirm that this firm has no objection to you seeking the services of another law firm. We understand that this is being done on the basis that you are concerned as to the resources and ability of this firm to proceed to take this matter to trial. We also confirm that we will not maintain a lien over your files in our office and will agree to handing them over to any firm taking over conduct of the action. We also agree to continue to provide our services on a consultative basis to assist the new law firm.
>
> We confirm that we are willing to have further discussions with any law firms that you make approaches to."[12]

[13] To summarise the position as at 16 October: Mr Scott was aware that ASG was attempting to interest litigation funders in the case and that negotiations were continuing, with some prospect of success. He and his partner had decided that come what may, they would not continue to carry the action as they had been doing past 1 December 2001. He knew that Mr McTernan was attempting to interest other solicitors in taking over the action.

Misleading the Federal Court

[14] Representative proceedings in the Federal Court took place in accordance with the procedures set out in the *Federal Court of Australia Act* 1976, which relevantly provided:

> "33J **Right of group member to opt out**
>
> (1) The Court must fix a date before which a group member may opt out of a representative proceeding.

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10 Exhibit PJLM-16 to affidavit of Paul John Leigh McTernan filed 10 July 2008.

11 *Ibid*, exhibit PJLM-17.

12 *Ibid*, exhibit PJLM-18.

(2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed.
(3) The Court, on the application of a group member, the representative party or the respondent in the proceeding, may fix another date so as to extend the period during which a group member may opt out of the representative proceeding.
(4) Except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.

33X **Notice to be given of certain matters**

(1) Notice must be given to group members of the following matters in relation to a representative proceeding:
(a) the commencement of the proceeding and the right of the group members to opt out of the proceeding before a specified date, being the date fixed under subsection 33J(1);

33Y **Notices—ancillary provisions**

(1) This section is concerned with notices under section 33X.
(2) The form and content of a notice must be as approved by the Court."

[15] By mid-October 2001 the proceedings had been allocated a trial date in the first half of 2002. Anxious not to imperil that date, Mr Scott briefed counsel to draw and settle a notice under s 33X. Presumably counsel did so, for on 16 October 2001 Mr Scott filed an application to have 29 November 2001 fixed as the date by which a group member might opt out pursuant to s 33J. The application also sought approval of a notice to group members under s 33Y. The draft notice stated that Klooger Phillips would continue to act for the two applicants and for anyone else who had entered into a client agreement with them.

[16] At sometime between 19 and 26 October, while redrafting and preparing the final form of the notice, counsel became concerned that the procedure might be a waste of effort or might have to be repeated if additional solicitors came into the action or if the funding arrangements changed. He raised his concerns with Mr Scott. He said that he thought the opt out procedure should be delayed while the funding arrangements and the final makeup of the legal team were finalised. He did not suggest that any issue of candour was involved. He was not aware that Klooger Phillips intended to cease acting at the beginning of December in any event. Mr Scott said he would obtain instructions in relation to the matter. He spoke to Mr McTernan who instructed him to ensure that all attempts were made to maintain the March trial of the action. He told Mr Scott that the litigation funder had advised that he wanted the application to proceed so as to ensure the March trial date was not adjourned. Scott relayed these instructions to counsel and pointed out that there was no guarantee that any additional firms would be engaged to act. Counsel accepted the instructions.

[17] The matter came on for hearing on 26 October. A draft amended by hand to reflect agreement between the parties was placed before Kiefel J and approved by her. For

some reason it took until 21 November for a clean copy to be filed. In the meantime the notices were sent out. They gave until 30 November for group members to opt out of the proceedings. Only three people did so, two of them out of time.

[18] The matter came back before the court on 7 December. By then two things had happened which materially changed the situation. First, at some time, it seems in early November, the litigation funder agreed to support the proceedings. Second, on 4 December 2001 another firm of solicitors, Clewett Corser & Drummond, filed a notice of change of solicitors. From the evidence before me, the purpose of this ex parte hearing is unclear. The applicants informed the court of a further letter which they intended to send to group members, advising of the new developments and on 14 January applied for approval of the further letter. These events attracted a considerable amount of indignation from the respondents in the Federal Court proceedings and some tentative adverse comment from the judge. The evidence before me does not disclose whether any person who had previously sought to opt out changed his position, nor whether any person who had previously not opted out now chose to do so. Given that the proceedings were now to be funded, it seems most unlikely that any new opt out notices would have been received. Costs of the vigorously contested application were made costs in the cause.

[19] Most of the indignation revolved around the failure to disclose the imminence of the funding agreement. The Legal Services Commissioner has not charged Mr Scott with any impropriety in relation to that non-disclosure. Presumably that is because the negotiations which led to that agreement were conducted by Mr McTernan, leaving Mr Scott out of the loop. Mr Scott's conduct must be assessed solely in relation to presenting the Federal Court with a draft notice stating that Klooger Phillips would continue to act for those who had entered into a client agreement with them, when this was not what that firm intended would happen.

[20] The duty of the court was to approve the form and content of a notice. No authority was cited to me on the question of what considerations the court takes into account in fulfilling that duty, nor why the statute imposes the duty on the court. Plainly enough, however, the court would be unlikely to approve a notice which it knew to be misleading. The notice which Mr Scott put before the court and for which he obtained its approval was apt to mislead litigants to whom it was to be sent. The essence of Mr Scott's impropriety lay in his failure to reveal that fact. The proper course would have been to defer placing the notice before the court for approval until the position was clarified.

[21] It is not difficult to see what led to Mr Scott's actions. Mr McTernan was a difficult client. Mr Scott's affidavit was unchallenged:

> "22. Another matter which started to cause me difficulty at an early time was the "command" culture within the ASG Executive. A number of them, including Mr McTernan and Mr Turner had military backgrounds and their style of dealing with their fellow members and, indeed, with me, seemed very much in the nature of a small military elite which controlled information and director orders at the membership, and, at me…

> 23. Although my relationship with Mr McTernan and Mr Turner particularly became more and more uncomfortable, I did not realise the extent of their venom and of their exclusion of me from the flow of information and communication which is normally to be expected in a solicitor/client relationship until, after, I ceased acting in the class action, Mr McNamara provided copies of executive emails many of which appear in Ms Tate's material."[13]

[22] Some idea of the e-mails Mr Scott was describing can be gathered from the following examples:

> "From: Paul McTernan .<asginc@ozemail.com.au>
> To: Shane Turner
> Cc: Toni McRae; Peter McNamara; Geoff Lawman; Geoff Gotts; Bob Batten; ken caldow
> Sent: Tuesday, July 04, 2000 10:23 PM
> Subject: FW: Amended claim,
>
> Dear fellow Co- Ordinators,
> it is 9.50 pm Tuesday night i carn,t fucking sleep due to ab pains my probable, but when my wife recieves pressure phone calls when i am in bed and i receive this shit i do have problem, folks i will be out of action for 2 days, please Mr Gotts take care of this situation before i do or say something that i could regret at a latter date if i ring, **confront this fuckwit laywer of ours, after all these cockheads have lost! requesting me to contact garry scott asap**...
>
> ...
>
> "From: Geoff Gotts
> Sent: Wednesday, July 05, 2000 11:47 AM
> To: Paul Mcternan.; Shane Turner
> Cc: Toni McRae; Peter McNamara; Geoff Lawman; Bob Batten; ken caldow
> Subject: FW: Amended claim,
>
> Paul
>
> after our talk you will be pleased to know that i spoke agin with **our fucking twit (lawyer)** am today and reminded him that if he required anything he was to contact me…I **remined fuckwit** that it was not in his interest that you deteriorate any further…
>
> I was only to happy to **remind the asswipe** that whatever pressure he was under was his business, not mine…"[14]

Mr Scott was, as he now recognises, out of his depth in taking on litigation of such magnitude. He was also, I find, out of his depth in taking on clients of such a nature.

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13 Affidavit of Gary Wayne Scott filed by leave on 20 August 2008.

14 Exhibit TT-54 to affidavit of Theresa Tate filed 1 July 2008 (emphasis as appeared in exhibit).

[23] By October 2001 Mr McTernan and the others who had signed client agreements with Klooger Phillips had failed to reimburse the firm for its outlays, and owed it considerable amounts of money. After substantial delay the trial was approaching. If the opt-out procedure were not completed expeditiously, there was a real risk that the trial dates would be lost. Mr McTernan instructed Mr Scott to proceed with the application and not to wait until the position regarding representation became clear. Presumably he did so knowing the risk that the applicants would have to bear the cost of a further application and a further round of notices in the event that there was a change of solicitors. Doubtless the applicants did not wish the respondents to be made aware of how precarious was their position with regard to legal representation.

[24] I am satisfied that Mr Scott did not realise that an issue of candour arose and that he failed to appreciate that his conduct would mislead the Federal Court.

[25] There was little prospect that the representation that Klooger Phillips would continue to act for those who had signed client agreements with them would damage anyone in a way that could not be cured by an appropriate order for costs. I invited senior counsel for the Commissioner to demonstrate how harm might be suffered other than in fanciful circumstances. No such demonstration was forthcoming. That does not exculpate Mr Scott, but it does bear upon the seriousness of his conduct.

[26] Mr Scott now recognises the error of his ways:

> "42 … I appreciate now that there was the potential for the court to be misled or misinformed in the way that things proceeded and I realise and acknowledge that my duties to the court devolve upon me personally as an officer of the court and that I am not relieved of those duties merely by reason of what counsel might or might not advise. I can only say that I did not analyse the matter at the time as involving an issue of candour with the court and I certainly did not act with any intent to mislead the court."[15]

[27] On behalf of Mr Scott, Mr Ashton of counsel submitted that this first particular of the charge, whilst technically correct, was very unfair to Mr Scott. That submission was based on the proposition that Mr Scott had misled the court through counsel who, knowing that other solicitors were being sought, nonetheless accepted the instructions to put the opt-out statement before the court. There is a critical difference in the positions of the two lawyers. Counsel did not know that Klooger Phillips intended to cease acting at the beginning of December whether or not new solicitors were found. I reject the submission of unfairness.

Misuse of privileged and/or confidential information

[28] The Amended Discipline Application alleges that Mr Scott misused privileged and/or confidential information belonging to his clients in the class action by disclosing it to Ms Tate without the authority of all of his clients. It alleges, and he admits, that in early July 2002 he permitted Ms Tate to access files on his computer

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15 Affidavit of Gary Wayne Scott filed by leave on 20 August 2008.

knowing she was contemplating action against Mr and Mrs McTernan and Mr Turner. He also admits the further allegations that on 14 November 2002 he e-mailed his firm's complete trust account ledger for ASG to Ms Tate. The circumstances need some elaboration.

[29] Following the dispatch of amended notices relating to opting out, the actions were referred to mediation. As a result the parties reached agreement in February 2002. The terms of settlement are not in evidence, but they involve payment of $8 million by the defendants or some of them. It seems that the court had to approve not only the Klooger Phillips' costs but also those of Dynamic Solutions. Some 28 objections to the former were lodged, which Mr Scott thought were probably orchestrated by ASG or those involved in it. In that respect he was probably correct.

[30] By the time of the settlement, resignations and/or expulsions had reduced the number of members of ASG to fewer than 200. The settlement money went only to the remaining members.[16] Mr Moore and others were in contact with Mr Scott and the possibility of a further class-action on their behalf was discussed.

[31] Some idea of Mr Scott's state of mind in the first half of 2002 can be gained from a letter which he wrote on behalf of Klooger Phillips to Clewett Corser and Drummond on 22 April:

> "Before we go to further trouble and expense with respect to our application for costs against Batten and Grahame on the Notices of Motion against this firm for costs, we invite you to consider our earlier request that you provide us with an estimate of the costs which your clients are willing to pay in this regard.
>
> As stated to the Court on Friday, this firm agrees with the contents of the affidavit of Michael Jarrett and has previously prepared affidavit material which, in greater detail, demonstrates the conduct of certain members of the ASG executive committee and ASG Dynamic Solutions. This firm and the writer will be separately pursuing our legal rights in respect of the latter mentioned entities.
>
> For the record, we state our extreme concern at the false and potentially fraudulent information contained in the affidavit material handed up to the Court on both Thursday and Friday of last week. We reserve our rights in this regard and those rights of our clients who were formerly members of the Batten and Grahame representative groups and those who remain members of such groups.
>
> We will be proceeding with filing our own Notion of Motion should we not receive an appropriate response from you by 4.00 pm this afternoon." [17]

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16 The question whether the class was correctly defined by reference to membership when the action commenced or at some later date was not argued in the present proceedings.

17 Exhibit TT-11 to affidavit of Theresa Tate filed 1 July 2008.

[32] Ms Tate was concerned to be paid for the work she had done for Dynamic Solutions. Mr and Mrs McTernan were refusing to pay her. Her (Victorian) solicitor wrote to the Federal Court and to the solicitors for ASG notifying her claim. She spoke to Mr Scott in April or perhaps a little later in 2002. He told her that he believed Mr McTernan had misused ASG funds, suggested that he could conduct her claim for wages and unfair dismissal and asked her to assist him in obtaining his fees from the class-action and with any new class-action. He said that they should attempt to have Mr McTernan brought to justice for misuse of ASG funds. She deposed that as she had no funds to pursue what was owing to her, she agreed to allow Mr Scott to act for her and to work for him in lieu of fees. Near the end of May she had instructed Mr Scott to commence proceedings against the McTernans and Mr Turner.

[33] By mid-year Mr Scott had become emotionally involved in a campaign by Ms Tate and others to get some money for the excluded ASG former-members and to damage Mr McTernan and Mr Turner. He was also pursuing Klooger Phillips' fees, but the Commissioner does not allege that his conduct was motivated by this. Some of his e-mails were intemperate and silly. His animosity toward Mr McTernan and his colleagues was noticed by Kiefel J at a costs hearing on 7 June 2002. Her Honour observed that he would have been really well served had he sought representation in the proceedings; his appearance had not helped her and had not helped him. His application was unsuccessful and Klooger Phillips was ordered to pay ASG its costs of the application. He had not, however, completely lost professional perspective. When asked by Ms Tate for a copy of the ASG membership list for the purposes of a letter attacking Mr McTernan, he responded, "I may have allegations made against me by McT. & ors but not majority of members -- this means solicitor/client confidence not waived for them -- sorry I can't do better".[18] That might demonstrate a mistaken perception regarding corporate personality, but shows that he was aware of his duty of confidentiality toward his client.

[34] For various reasons Ms Tate decided not to send the letter. Mr Scott then suggested that she post it on the World Wide Web and send the members of ASG an e-mail directing them to it. She had a discussion with Mr Scott about establishing a website and posting the material on it. He told her he thought this was a good idea. As a result of that discussion she and Mr Moore established a website called www.asglies.com.

[35] In early July 2002, by arrangement with Mr Scott, Ms Tate flew to Queensland to copy information from his computer hard drive. In her mind the purpose of this activity was to provide material for the website and to put her in possession of material which might assist her action against Mr McTernan and Mr Turner. Mr Scott deposed that he did not regard the file as likely to be pertinent to her action. Rather, his mind was wholly occupied by the continued investigation and development of a case against Mr McTernan, Mr Turner and others of the ASG executive. Mr Scott seems to have exercised no control over what was copied, and she copied some 24,000 pages of material. At the time he saw nothing wrong with his conduct. He deposed:

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18 *Ibid*, Exhibit TT-32.

> "55. Although I did not think things through properly at the time, I had in my mind that what I was doing was in the interests of the class members and that Mr McTernan and Mr Turner were 'wrongdoers'. I in fact had the view and, as Ms Tate says, I expressed it, that this wrong doing, which I thought was criminal, meant that the ASG executive had forfeited rights to privilege/confidentiality."[19]

He now accepts that this view was wrong.

[36] He does not say when he came to that realisation, but it was obviously after he e-mailed the complete trust account ledger page of ASG to Ms Tate on 14 November 2002. Apparently the purpose of doing so was to enable her to assemble evidence against Mr McTernan. She subsequently posted the ledger on the website, but it is not now alleged that she was encouraged to do so by Mr Scott.

[37] To complete this part of the story: Mr Scott commenced proceedings on behalf of Ms Tate by a claim filed in the District Court on 24 July 2002. The statement of claim attached was poorly drawn, but sought essentially payment of moneys pursuant to an agreement, damages for defamation and damages for personal injuries on an unclear basis. Following the defendants' claim that Klooger Phillips had a conflict of interests, conduct of the action was transferred to another firm of solicitors in September 2002. The action was ultimately settled. There is no suggestion that the information provided to Ms Tate played any part in it.

Encouraging the website

[38] The third particular of the charge alleges that Mr Scott encouraged Mr Moore and Ms Tate to establish and maintain the website referred to above[20] intending it to contain material of an unprofessional character. Mr Scott admits that he encouraged the establishment of the website and that he encouraged the posting on it of certain material by his conduct in reviewing that material. He deposed, "... I accept now that some of the material which I reviewed contained statements which, insofar as associated with me, or insofar as their publication was encouraged by my review of them, amounted to my being unprofessional."[21]

[39] Exhibit 5 sets out the material which by agreement constituted the subject matter posted on the website with Mr Scott's encouragement. It contains 14 items, although two of them, items six and seven, are really one. Eight of the items criticised, insulted or degraded former clients; two disclosed particulars of financial records which were private and confidential to such clients; and four constituted republication of transcripts of proceedings in the Federal Court. The last of these allegedly took its unprofessional character from the fact that the transcripts were obtained on behalf of the clients and were therefore privileged and confidential to the clients (a doubtful proposition); and from the fact that the republication was in breach of copyright held by Auscript Pty Ltd. It seems to have been placed on the website between September and December 2002.

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19 Affidavit of Gary Wayne Scott filed by leave on 20 August 2008.

20 Paragraph [34].

21 Affidavit of Gary Wayne Scott filed by leave on 28 August 2008, para 58.

Misleading the Law Society

[40] The commissioner alleged:

> "(5) The Practitioner provided the following information to QLS:
>
> (a) in a letter dated 21 January 2003 to QLS:
> *"We also point out that a website entitled "asglies" was set up by Garry Moore and others in an effort to demonstrate alleged financial impropriety on the part of members of the ASG Inc Executive Committee including Shane Turner and Paul McTernan"*
>
> (b) in a letter dated 5 February 2003 to QLS:
> "*An Internet site called 'asglies' was created by Garry Moore and his wife, Therese Tate'*
>
> (c) in a letter dated 17 December 2004 to QLS attaching a document entitled 'Response to Complaint':
> - Paragraph 68
> *"I was aware of the website "asglies". I had no involvement in the set up of this site. I am aware of who set this site up. I am aware of the person responsible for its set-up and have already disclosed same in my letter to your John Tracey dated 5/2/03."*
> - Paragraph 69
> *"My professional position regarding the site is outlined in my letters of 5/2/03 to QLS and 4/12/02 to CCD."*
> - Paragraph 71
> *"I was not aware of what was to be published on the website as I had nothing to do with the publishing of it. I have been told by Tate and Moore of their general intentions with respect to the website."*
>
> (6) The information referred to in paragraph (5) above was misleading in that:
> (a) the Practitioner encouraged Tate and More to set up the www.asglies.com website;"[22]

[41] Mr Scott has admitted those paragraphs, although I confess that I am at a loss to understand how sub-paras (a) and (b) and the second dot point in sub-para (c) can be characterised as misleading. That is probably of no consequence, since the first and third dot points clearly do refer to misleading conduct.

[42] Mr Scott deposed that when he made his responses to the Law Society in 2003 and 2004 he was living in the Solomon Islands and tried to answer the enquiries from his recollection. He claimed that his recollection was that he was not involved in

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[22] Further Amended Discipline Application filed by leave on 28 August 2008.

setting up the website and that whatever material he saw was of a limited kind and only in the context of review and communication with Ms Tate early in the piece. He accepted that he should have been more careful and more candid.

The relevant law

[43] The Legal Practice Tribunal was established by s 429 of the *Legal Profession Act* 2004. When that Act was repealed with effect from 1 July 2007[23] the Tribunal continued in existence.[24] Its jurisdiction was and is to hear and decide discipline applications made to it.[25] When the present application was filed on 10 April 2007, the 2004 Act was still in force. The application was a discipline application made under s 276 of that Act. The 2007 Act contained a provision, s 452, which was substantially the same as s 276. Under the transitional provisions of the 2007 Act, the application continued to have effect according to its terms but must be taken to have been made under s 452.[26] It is therefore within the jurisdiction of the Tribunal.

[44] The application was in the approved form.[27] It sought orders that the respondent was guilty of unsatisfactory professional conduct and/or professional misconduct pursuant to s 280 of the 2004 Act. However the Tribunal was not empowered to make such an order under that section, nor is it empowered to do so under s 456, the corresponding section of the 2007 Act. Subsection (2) of those sections listed the orders the Tribunal was empowered to make. In each case the power exists only if the Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct. That does not invalidate the application, but it does focus attention on the question of what is meant by "unsatisfactory professional conduct" and "professional misconduct".

[45] The dictionary in sch 2 of the 2007 Act includes but does not define them. In each case it provides:

> "(a) for dealing with a complaint about conduct that happened before 1 July 2004—see chapter 9; or
> (b) otherwise—see section [418 or 419]."

Most of Mr Scott's impugned conduct occurred before 1 July 2004, but that described in para [40] above occurred after that date.

[46] No unusual difficulty arises in the latter case. Sections 418 and 419 provide, as far as is relevant:

> "**418 Meaning of unsatisfactory professional conduct**
>
> ***Unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner happening 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.

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23 *Legal Profession Act* 2007, s 752.

24 *Ibid*, s 599.

25 *Legal Profession Act* 2004, s 431; *Legal Profession Act* 2007, s 601.

26 2007 Act, ss 718(2), 746(1)(p), 717.

27 The form is set out in *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301 at [6].

> **419 Meaning of professional misconduct**
>
> (1) ***Professional misconduct*** includes—
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening 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."[28]

[47] However para (a) of the dictionary refers the reader to ch 9. I was unable to find any provision in ch 9 which could be regarded as directly relevant. I sought further submissions from counsel. Neither was able to supply a reference to any definitive provision. There appears to have been a hiccup in the drafting process.

[48] Does that mean one simply gives the words their meaning in everyday use? To do so would be to ignore the considerable body of case law that has grown up around them. In my judgment that would not be the correct approach to the problem. There is an alternative approach, a least in a case like the present where the application was commenced before the 2007 Act came into force. As noted above,[29] by reason of s 718(2)(a) of that Act, the application continues to "have effect according to its terms". Those terms included "unsatisfactory professional conduct" and "professional misconduct". Those terms must surely be interpreted to mean what they must have meant at the time the application was commenced. As used in an application commenced under the 2004 Act, they must have borne the meaning which that act prescribed for them in the circumstances of the application.

[49] The 2004 Act made special provision for the meaning of the terms in cases where a complaint was made after 1 July 2004 in relation to conduct that happened before that date:

> "**614 Basis of complaint mentioned in ss 256 or 613(2)**
>
> (1) This section applies to the following—
>
> (a) a complaint made after the commencement of this section in relation to conduct of an Australian lawyer or a law practice employee that happened before that commencement;
>
> (b) …
>
> (2) The complaint is to be dealt with under this Act …
>
> (3) For subsection (2), in relation to the conduct of an Australian lawyer who was a solicitor at the time the conduct happened, references in this Act to unsatisfactory professional conduct and professional misconduct are to be read as if they were defined as follows—

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28 *Legal Profession Act* 2007.

29 Paragraph[43].

> ***professional misconduct*** means professional misconduct or malpractice within the meaning of the Queensland Law Society Act.
> ***unsatisfactory professional conduct*** means unprofessional conduct or practice within the meaning of the Queensland Law Society Act."

I shall apply those definitions, although as will appear, they are not free from difficulty.

[50] Two cases which have been decided by the Court of Appeal are materially indistinguishable from the present case. In each the application was made while the 2004 Act was in force in respect, at least in part, of conduct before it commenced, and the hearing took place after the commencement of the 2007 Act. In *Legal Services Commissioner v Voll*[30] the court applied the definition of professional misconduct in s 419 of the 2007 Act. No consideration was given to why that section applied and the difficulty now under consideration was apparently not drawn to the court's attention. Four days later a differently constituted court gave judgment in *Legal Services Commissioner v Madden (No 2)*.[31] In that case the court applied s 614(4) of the 2004 Act, citing it as authority for the proposition, "The question whether [conduct occurring before 1 July 2004] amounted to professional misconduct is to be determined by reference to the standard applicable at the time".[32] The judgment of the court gave no reason for applying a section which on its face had been repealed; the subsection cited referred to barristers and seemingly had no application to Madden, who was a solicitor; and the proposition for which it was cited can only be described as elliptical when one has regard to the terms of the section.

[51] *Madden* is nonetheless the more authoritative of the two decisions. It is the later in time; it distinguishes between cases where the conduct in question occurred before 1 July 2004 and other cases; and it refers to s 614. It accords with the approach which I propose to take in the present case.

[52] One other case should be mentioned. *Legal Services Commissioner v Cousins*[33] involved a barrister. The case differs from the one before me in that the discipline application was filed after the commencement of the 2007 Act. It was therefore not a "previous application" within the meaning of s 717 and s 718 did not apply to it. Wilson J, sitting as the Tribunal, applied s 614 by invoking s 20 of the *Acts Interpretation Act* 1954. I can see difficulties with that approach, but it is unnecessary to refer to them in the present case.

[53] Section 614(3) calls up the terms "professional misconduct", "malpractice" and "unprofessional conduct and practice" with their meanings in the *Queensland Law Society Act* 1952.[34] Those terms were used in s 6A(a) of that Act, a provision which empowered the statutory committee of the Law Society to hear charges against

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30 [2008] QCA 293.

31 [2008] QCA 301.

32 *Ibid*, at [114].

33 [2009] LPT 002.

34 *Legal Profession Act* 2004, s 597.

solicitors. Unfortunately, neither "professional misconduct" nor "malpractice" was defined in that Act. "Unprofessional conduct and practice" was defined in this way:

> **"3B Meaning of *unprofessional conduct or practice***
>
> (1) A practitioner commits ***unprofessional conduct or* practice** if the practitioner, in relation to the practitioner's practice, is guilty of–
>
> (a) serious neglect or undue delay; or
>
> (b) the charging of excessive fees or costs; or
>
> (c) failure to maintain reasonable standards of competence or diligence; or
>
> (d) conduct described, under another Act, as unprofessional conduct or practice.
>
> (2) Subsection (1) does not, by implication, limit the type of conduct or practice that may be regarded as unprofessional for this Act."[35]

That definition is inclusive, not exclusive. None of the inclusions covers the present case.

[54] Case law in this country and elsewhere has dealt with all of these terms in the context of professional disciplinary proceedings, and these decisions have been applied in cases under s 6A(a) and more recently, under s 614 of the 2004 Act.[36] It is clear that at common law there is overlapping among the terms in the sense that the one type of conduct may warrant different appellations, depending upon the circumstances. The Court of Appeal has refrained from deciding the precise meaning to be attributed to the terms and the precise relationship between the concepts invoked by them.[37] I shall do likewise. One would hope that there will be few more cases forthcoming in regard to conduct before 1 July 2004. All of the powers contained in s 456(2) of the 2007 Act can be exercised if I am satisfied at the completion of the hearing of either form of conduct.

[55] Nonetheless I shall assign the conduct particularised to one or other of the categories stated in s 456(1). I do so simply because the categorisation does affect the level of stigma associated with the outcome of the proceedings, at least in the eyes of practitioners.[38] I shall do so on the basis that professional misconduct is more serious than unsatisfactory professional conduct. The test to be applied in determining whether conduct amounted to professional misconduct is "whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency".[39]

The nature of the misconduct

[56] I shall deal with the particulars of the charge as though each set constituted a separate charge.

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35 *Queensland Law Society Act* 1952.

36 *Legal Services Commissioner v Podmore* [2006] LPT 005; *Legal Services Commissioner v McLelland* [2006] LPT 13.

37 *Clough v Queensland Law Society Incorporated* [2000] QCA 254.

38 See Searles D "Professional Misconduct -- Unprofessional Conduct: Is There a Difference?" (1992) 22 *Queensland Law Society Journal* 239.

39 *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498 at p 507 (citations omitted).

[57] Stated baldly, misleading the Federal Court is a matter of great seriousness. In the present case, however, the misleading was indirect and inadvertent. Mr Scott failed to realise the importance which the court would attach to ensuring the complete accuracy of the document to be sent to members of the class. He acted on the instructions of his client and for the benefit of his client, not for any personal advancement. He was inexperienced in litigation of the type which he undertook and failed to realise that his firm lacked the resources to run such a large case. He acted through counsel, who did not refuse his instructions. It is true that counsel was unaware of Mr Scott's intention to cease acting even if no other solicitors could be found; but on the other hand, that intention was never put into effect (in the sense that other solicitors were found), and it may be that it would never have been put into effect. Nobody suffered any damage as a result of his conduct and the position was rectified promptly. Had it not occurred in the context of a failure to disclose the existence of litigation funding (an omission for which Mr Scott can not be held responsible), I doubt it would have occasioned much excitement. In my judgment it should be classified as unprofessional conduct.

[58] Permitting Ms Tate to copy the documents of other clients was a much more troubling example of misconduct. Mr Scott could not have left Law School without being aware of the importance of client confidentiality, and that importance was reflected directly in the Queensland Law Society's *Solicitor's Handbook*.[40] His breach was flagrant. In large part it came about because he became emotionally involved in a campaign by Mr Moore and others against alleged wrongdoing by Mr McTernan and others and because he failed to distinguish between Ms Tate and her partner Mr Moore. It was not done to assist Ms Tate in her litigation. When the documents were made available to Ms Tate in July 2002, Mr Moore as a former client would have been entitled to copies of most of them upon request. Counsel for the Commissioner identified only seven documents[41] among the 24,000 pages of documents as ones, to copies of which Mr Moore would not have been entitled. Even if there were others which have not been identified, most of the wrongdoing would have been cured had Mr Scott ensured that Ms Tate held an authority from Mr Moore to obtain the documents on his behalf. Making due allowance for those factors, I find that his conduct fell short to a substantial degree of the standard of professional conduct observed or approved by lawyers of good repute and competency. In my judgment Mr Scott's conduct constituted professional misconduct, but in the circumstances a less than usually serious example of it.

[59] It is difficult to assess the seriousness of Mr Scott's encouragement of the website run by Mr Moore and Ms Tate. I have the impression that Mr Scott is somewhat fortunate that the Commissioner was prepared to allow the matter to proceed on the basis that all Mr Scott did was encourage the establishment of the site and encourage its maintenance by reviewing some of the documents placed on it. What difference it would have made had he refused to conduct his reviews it is impossible to say. It seems clear that he allowed himself to become far too emotionally involved in the campaign against his former clients. The Commissioner has withdrawn any suggestion that he was motivated by financial considerations. Reviewing proposed postings to ensure their accuracy or even to ensure that they were not defamatory was not of itself a bad thing; quite the contrary. Views have

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40 Queensland Law Society Incorporated, *Solicitor's Handbook*, Brisbane, 2003, Clause 4.02

41 Exhibits CSS 15, 16, 18, 19, 21, 23 and 24 to the affidavit of Christine Small filed 28 July 2008.

differed over the years regarding the extent to which solicitors should become involved in promoting their clients positions by non-legal means, e.g. media briefings. However Mr Scott was not acting to promote the position of a client but rather as a self-appointed crusader on behalf of some former clients whom he felt had been wronged against other former clients who he felt were the wrongdoers. In a couple of cases the documents which he reviewed contained private and confidential financial details of the former clients, and Mr Scott proffers no excuse for permitting those details to be published. In the absence of any complaint from Auscript Pty Ltd I do not attribute much seriousness to publication of copyright transcripts of proceedings in open court.[42] Encouraging the publication of denigratory material was at best tacky. Mr Scott seems to have failed to appreciate that there are some things which, although not illegal and although done by others in the community, should not be done by a professional person. In my judgment Mr Scott's conduct amounted to unprofessional conduct.

[60] The Law Society was misled by Mr Scott's indifference, indeed his recklessness in responding to its queries. In the absence of evidence of precisely how the queries were phrased, it is difficult to assess the degree of fault which should be attributed to him. To say that he was aware of the website but had no involvement in its setting up was less than fully frank. To say that he was not aware of what was to be published on the website as he had nothing to do with the publishing of it was in the cases proved simply false, and I am satisfied that in that limited number of cases he knew it was false when he said it. On the other hand the cases proved reflected a small proportion of the documents published on the website and Mr Scott was writing to the Law Society from the Solomon Islands more than two years after the events. He plainly lacked an appreciation of the important role which the Society plays in regulating the solicitors' branch of the profession and of the critical importance of complete disclosure and honesty in all his dealings with it.[43] That is particularly the case when those dealings occur in the course of the investigation of a complaint regarding the conduct of a practitioner. Mr Scott's conduct occurred after 1 July 2004, so must be considered having regard to the 2007 Act. I am satisfied that his conduct in December 2004 demonstrated that he was not then a fit and proper person to engage in legal practice. In relation to these matters I have concluded that Mr Scott was guilty of professional misconduct.

Personal factors

[61] Mr Scott is now 38 years of age, married with two young children. He commenced his legal training in 1989 as an articled clerk and at the same time undertook a law degree at Queensland University of Technology. He converted that to a full-time course in 1991. He graduated in 1995 with second-class honours. He was admitted as a solicitor on 18 September 1995. After admission he worked for Klooger Phillips and Co. He ran the litigation side of the practice. He entered into a partnership arrangement shortly afterwards but this was terminated acrimoniously in 2003 after a dispute with his partner regarding fees paid in respect of the class-action. He then commenced practice on his own account and subsequently moved to the Solomon Islands where he was living and working when the present

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42 I assume that copyright existed in the transcripts; this was not strictly proved.

43 *Legal Services Commissioner v Walters* [2007] LPT 006.

charge was brought against him. He has since returned to Australia with his family and settled here.

[62] Unlike in a number of other cases it is not suggested that he suffered any psychiatric or psychological disability at the time of his conduct. No doubt he was under great stress throughout the litigation, not least because of his client's failure to pay the substantial outlays incurred by his firm. However life as a litigation solicitor is stressful. He could have sought the advice or assistance of a senior practitioner, but he did not do so. He probably had an exaggerated idea of his own abilities and lacked insight into the difficulties involved in running a class action as a result of his inexperience.

[63] Outside legal practice he has been involved in work in the interests of deaf people. Both his parents are profoundly deaf. He has served as a member of the Board of the Queensland Deaf Society and done legal work for the society and its members. He continued such work whilst in the Solomon Islands and also performed voluntary work with the Red Cross in Honiara.

[64] Counsel tendered on Mr Scott's behalf a reference written by Mr Scott Falvey, a partner in the firm McInnes Wilson and a former president of the Sunshine Coast District Law Association and councillor of the Law Society. Mr Falvey observed Mr Scott in practice over a period of 10 years. He wrote:

> "Throughout this ten year period I always found Garry to be a committed and passionate lawyer. He worked very hard to achieve the best outcome for his clients in personal injury actions. ... I knew that Garry generally acted on a speculative basis and in this regard knew that he was committed to creating opportunities for injured persons to seek legal advice and representation in circumstances where they may otherwise not have been able to.
>
> In all my professional dealings with Garry, he struck me as a lawyer committed to preparation, research and passionate advocacy. …
>
> Garry always presented as a practitioner who was mindful of his duties to the court and to the client. He was straight forward, honest and sincere in all of the dealings that I had with him. Although passionate and committed to the interests of his clients, he was a practitioner who I always trusted.
>
> During my tenure as president of the Sunshine Coast District Law Association, Garry was a person who was actively involved in the efforts of the Association. He supported our Association in its charitable fundraising as well as being involved in different forums of continuing legal education and professional development."[44]

Mr Falvey was aware of the charge against Mr Scott and was surprised that the latter would fail to recognise the sanctity of the duties owed to the court and his clients. Notwithstanding Mr Scott's conduct, he thought that he had a lot to offer the profession and the community in relation to the legal services he could provide.

[65] Mr Scott deposed without challenge:

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[44] Exhibit 4.

> "I respect the courts, the law and the profession and I know that my conduct in this matter has let them all down. And, of course, I have let myself and my family down. I am both ashamed and deeply regretful."[45]

I have no reason to doubt that statement. On the other hand he also deposed that he felt he was intimidated by Mr McTernan in particular and by some others on the executive of ASG. I see no evidence to corroborate that statement and a deal of evidence which tends to negate it.

Appropriate orders

[66] In *Legal Practitioners Complaints Committee v Thorpe*,[46] a Full Court of the Supreme Court of Western Australia wrote:

> "43 The aim of disciplinary proceedings is not that of punishing the practitioner. Rather, it is to protect the public and the reputation and standards of the legal profession: *Re Maraj (A Legal Practitioner)* (1995) 15 WAR 12, 24 (Malcolm CJ, with whom Kennedy & Franklyn JJ agreed); *Re A Barrister and Solicitor* (1979) 40 FLR 1, 24 - 25 (Blackburn CJ, Connor & Davies JJ). Where an order for removal from the roll is contemplated, the ultimate issue is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner of the Supreme Court upon whose roll his name presently appears: *Ziems v Prothonotary of the Supreme Court of NSW* [1957] HCA 46; (1957) 97 CLR 279, 297 - 298 (Kitto J); A *Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1; (2004) 216 CLR 253 [15] (Gleeson CJ, McHugh, Gummow, Kirby & Callinan JJ). A finding of professional misconduct does not necessarily require a conclusion of unfitness to practise and the question of fitness must be decided at the time of the hearing: *A Solicitor* [21]. Fitness to practise law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges: In *Re Davis* [1947] HCA 53; (1947) 75 CLR 409, 420 (Dixon J); *Ziems*, 287 (Fullagar J). Also, Malcolm CJ, in *Maraj* (25), has said that:
>
> > Integrity, reliability and an appropriate level of efficiency in the administration of money held on trust are all qualities which any reasonably experienced practitioner may be expected to demonstrate, in addition to being professionally competent in pursuing his or her clients' interests.
>
> 44 A prolonged period of unprofessional conduct may justify an order removing a practitioner from the roll even if aspects of that conduct, taken individually, would not justify such an order: *Legal Practitioners Conduct Board v Trueman* [2003] SASC 58 [13] (Doyle CJ, Duggan & Gray JJ agreeing); *Law Society v Murphy* [1999] SASC 83 [18] (Doyle CJ, Millhouse & Prior JJ agreeing).

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45 Affidavit of Gary Wayne Scott filed by leave on 28 August 2008, para 65.

46 [2008] WASC 9.

> 45 A practitioner's failure to understand the impropriety of his or her conduct may be an important factor in determining whether that practitioner should be permitted to remain on the roll: *Legal Practitioners Complaints Committee v Lashansky* [2007] WASC 211 [35]; *New South Wales Bar Association v Evatt* [1968] HCA 20; (1968) 117 CLR 177, 183 - 184; *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736, 740 - 741, 742 - 743 (Hope JA, Reynolds JA agreeing), 754 (Hutley JA).
>
> 46 An inability to keep a trust account adequately will not necessarily lead to a practitioner being struck off the roll. Examples of cases in which conduct of that kind did not result in a striking off are *Council of the Queensland Law Society Inc v Cummings; Ex parte Attorney-General of Queensland and Minister for Justice* [2004] QCA 138 and *Attorney-General and Minister for Justice (Qld) v Priddle* [2002] QCA 297. However, in Cummings the practitioner pleaded guilty to all allegations and cooperated with the investigation. He did not directly benefit from improper transfers of funds from his trust account to his general account and, it seems, the shortcomings complained of arose out of his failure to supervise and control his staff rather than from any personal dealings with the trust funds [14], [18], [24]. The lack of dishonesty was regarded as significant.
>
> 47 The lack of any dishonesty was also regarded as significant in *Priddle* [12]. The court in that case also regarded it as significant that the respondent's conduct arose 'from his difficulty in admitting to his relatives and the Society that his poor judgment was responsible for the loss of a substantial amount of trust money' [12]. In that case, too, the trust moneys were not used for the practitioner's own purposes and he did not profit from his behaviour. The court also mentioned that this had been the only lapse in the practitioner's legal career and that there were personal circumstances which helped provide some explanation for his 'grossly unsatisfactory conduct' [12], [13]."[47]

[67] Those examples are helpful when gaining a sense of how to approach the formulation of an appropriate order in the present case. Mr Scott appears to have been cooperative in relation to the proceedings against him. He did not initially admit all of the charges, but when those charges were substantially scaled down, promptly did so. My major concern is that he has not demonstrated a full appreciation of the importance of maintaining client confidentiality and co-operating fully, frankly and energetically with the Law Society. I do not think that concern can be addressed simply by a pecuniary penalty, although such a penalty is clearly warranted. In my judgment he should undertake and satisfactorily complete a short course of further legal education in relation to all aspects of his conduct described above, however classified, without the distraction of a legal practice. That should establish him as a fit and proper person to practise law. He should not practise until he has completed that course, obtained a report describing his performance and rating it as at least satisfactory and delivered it to the

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47 *Ibid* (citations omitted).

Commissioner. Such a report would take about one week after the completion of the course to prepare.

[68] Professor C Sampford, the Director of the Institute for Ethics, Governance and Law (a joint initiative of the UN University, Griffith University and QUT in association with the ANU) is prepared to provide a nine-week course of studies specifically designed to deal with the problems identified in Mr Scott's behaviour. It would involve:

- a supervised literature search for cases and references on the ethical issues raised by his behaviour;
- three separate essays on issues raised by his behaviour and the temptations and stresses of practice that may lead to ethical errors of the kind he made; and
- a general essay on his reflections on legal ethics.

During this course of study, he would attend supervision sessions as directed by Professor Sampford. The latter is prepared to commence such a course on 6 April 2009. Mr Scott should therefore apply to him forthwith.

[69] The course would cost approximately, but not more than, $10,000. Mr Scott should pay for it. I initially considered imposing a substantial pecuniary penalty on Mr Scott. I have decided, having regard to the fact that Mr Scott will be suspended from practice, that the cost of the course will constitute a sufficient financial burden to deter him from further transgression and safeguard the public interest.

Order

[70] The Tribunal orders:

1. the local practising certificate of Garry Wayne Scott be suspended for the period until 15 June 2009;
2. Garry Wayne Scott undertake and complete a specifically designed course of further legal education under the supervision of Professor C Sampford, Director of the Institute for Ethics, Governance and Law, for nine weeks commencing on 6 April 2009;
3. Garry Wayne Scott refrain from doing anything in connection with his engaging in legal practice until he has obtained a report from Professor Sampford describing his performance and rating it as at least satisfactory and delivered it to the Legal Services Commissioner.

[71] I shall hear the parties on the form of the order and costs.