Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Council of the Law Society of NSW v Alkhair [2022] NSWCATOD 111**
Hearing dates:	22 February 2021
Date of orders:	5 October 2022
Decision date:	05 October 2022
Jurisdiction:	Occupational Division
Before:	J Wakefield, Senior Member J Pheils, Senior Member P Foreman, General Member
Decision:	The Tribunal having found that Mr Alkhair is guilty of professional misconduct, orders that: (1) The Respondent is publicly reprimanded. (2) The Respondent to pay a fine of $4,000. (3) The Respondent must undertake further education in accordance with the following terms: (a) The Respondent must undertake, at his own expense, within six months from the date of the orders of the Tribunal (Time Period), an appropriate legal ethics course (the Course) as approved by the Director, Legal Regulation of the Law Society of NSW (the Director) and achieve a pass mark of not less than 50% (Pass Mark). (b) The Respondent shall, within seven (7) days of receipt of notification of the result of his participation in the Course, provide to the Director, the original of such notification. (c) Should the Respondent fail to achieve the Pass Mark in the Course, he should complete such further course (in which he may not have achieved the Pass Mark) as approved by the Director until such time as he achieves the Pass Mark in the Course within the Time Period. (d) Should the Respondent fail to achieve the Pass Mark in the Course within the Time Period, his Practising Certificate shall be suspended or if not then holding a

Current Practising Certificate, no further Practising Certificate is to be issued to him until such time as he achieves the Pass Mark in the Course.
(4) The Respondent is to pay the costs of the Applicant as agreed or assessed.
(5) Grant leave to the Complainant to approach the Registry within 14 days to list her claim for compensation for directions on a date to be fixed.

Catchwords:

PROFESSIONS AND TRADES - Legal Practitioner - application for disciplinary findings - *Legal Profession Uniform Law Australian Conduct Rules 2015* R 9 – Breach of Confidentiality – professional misconduct at common law and under Legal Professional Uniform Law (NSW) No 16a, s 297(1)(a) - nature of appropriate orders, quantum of fine considered.

Legislation Cited:

Civil and Administrative Tribunal Act 2003 (NSW)
Evidence Act 1995 (NSW)
Legal Profession Act 2004
Legal Profession Uniform Law 2014 (NSW)
Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

Cases Cited:

A Solicitor v Council of the Law Society of New South Wales (2004) 216 CLR 253; [2004] HCA 1

Allinson v General Council of Medical Education and Registration [1894] 1QB 750

Amalgamated Television Services Pty Limited v Marsden [2002] NSWCA 419

Australian Securities and Investments Commission v Elm Financial Services Pty Limited (2005) 55 ACSR 411; [2005] NSWSC 1020

Babcock & Brown DIF III Global v Babcock & Brown International Pty Limited [2015] VSC 433

Bechara v Legal Services Commissioner of New South Wales [2010] 79 NSWLR 763

Briginshaw v Briginshaw & Anor [1938] 60 CLR 336

Bronze Wing International Pty Ltd v SafeWork NSW [2017] NSWCA 41

Council of the New South Wales Bar Association v EFA (a pseudonym) [2021] NSWCA 339

Council of Law Society of NSW v Hunter [2021] NSWCATOD 22

Council of the Law Society of NSW v Kimm [2012] NSWATD 45

Council of the Law Society of NSW v Low [2020] NSWCATOD 142

Council of the Law Society of New South Wales v Renfrew [2019] NSWCATOD 63

Council of the Law Society of NSW v Spinak [2017] NSWCATOD 184

Council of the NSW Law Society v Vaughan [2015] NSWCATOD 156

Council of the Law Society of NSW v Weller [2017] NSWCATOD 38

Council of the NSW Bar Association v Breeze [2015] NSWCATOD 152

Council of the NSW Bar Association v Butland [2009] NSWADT 177

El-Cheikh v Miraki [2017] NSWSC 1765

El-Cheikh v Miraki [2020] NSWSC 1781

Green v AMP Life [2005] NSWSC 95

Kennedy v Council of Incorporated Law Institute of New South Wales (1939) 13 ALJR 563

Law Society of New South Wales v Foreman (1994) 34 NSWLR 408

Law Society of NSW v Moulton (1981) 2 NSWLR 736

Law Society of New South Wales v Shad [2002] NSWADT 236

Law Society of New South Wales v Walsh [1997] NSWCA 185

Law Society of NSW v Webb [2018] NSWCATOD 55

Law Society of Tasmania v Turner (2001) 11 TAS R 1; [2001] TASSC 129

Legal Practitioners Complaints Committee v Camp [2010] WASC 188

Legal Practitioners Complaints Committee v Trowell (2009) 62SR(WA)1

Legal Practitioners Complaints Committee v Walton [2006] WASC 213

	Legal Services Commission v Anderson [2015] NSWCATOD 56 Legal Services Commission v Livers [2017] NSWCATOD 117 at [138] Legal Service Commission v Searle [2016] NSWCATOD 23 Marshall v Prescott [2015] NSWCA 110 Nash v Timbercorp Finance Pty Limited (in liq) in the matter of the Bankrupt Estate of Nash [2019] FCA 957 Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd and others (1992) ALR 449 NSW Bar Association v Evatt (1968) 117 CLR 177 at 184 Prothonotary of the Supreme Court of New South Wales v Chapman (unreported CA (NSW)) 14 December 1992 Russo v Legal Services Commission [2016] NSWCA Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd [2008] NSWSC 1070 Victorian Legal Services Commission v Harriss (Legal Practice) (Corrected) [2020] VCAT 689
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Council of the Law Society of NSW (Applicant) Nawar Alkhair (Respondent)
Representation:	Counsel: P Maddigan (Applicant) Solicitors: Greg Walsh & Co (Respondent) Council of the Law Society of NSW (Applicant)
File Number(s):	2020/00140256
Publication restriction:	Nil

REASONS FOR DECISION

Introduction

1 By Application for Disciplinary Findings and Orders dated 7 May 2020 and filed on 11 May 2020 (**Application**), the Council of the Law Society of New South (**Council**) alleged that Mr Nawar Alkhair (**Respondent**) is guilty of professional misconduct in that he breached client confidentiality.

2 The Council sought the following orders:

(1) The Respondent be reprimanded.

(2) The Respondent pay a substantial fine.

(3) The Respondent undertake further education in accordance with the following terms:

(a) The Respondent must undertake, at his own expense, within six months from the date of the orders of the Tribunal (**Time Period**), an appropriate legal ethics course (**the Course**) as approved by the Director, Legal Regulation of the Law Society of NSW (**the Director**) and achieve a pass mark of not less than 50% (**Pass Mark**).

(b) The Respondent must, within seven (7) days of receipt of notification of the result of his participation in the Course, provide to the Director, the original of such notification.

(c) Should the Respondent fail to achieve the Pass Mark in the Course, he must complete such further course (in which he may not have achieved the Pass Mark) as approved by the Director until such time as he achieves the Pass Mark in the Course within the Time Period.

(d) Should the Respondent fail to achieve the Pass Mark in the Course within the Time Period, his Practising Certificate shall be suspended or if not then holding a Current Practising Certificate, no further Practising Certificate is to be issued to him until such time as he achieves the Pass Mark in the Course.

(4) The Respondent pay the costs of the Applicant as agreed or assessed.

(5) Any further or other order as the Tribunal deems fit.

3 By the Reply to Application for Disciplinary Proceedings dated 14 January 2021 (**Reply**) the Respondent admitted the Grounds for Application, that he breached client confidentiality and that he is guilty of professional misconduct. In the Reply the Respondent particularised the admissions he made by reference to the particulars of the Grounds for Application (**Particulars**) contained in the Application to which reference will be made as necessary in the course of these Reasons.

4 Having regard to the material contained in the Application and the Reply, the admitted evidence and the admissions made by the Respondent the questions for determination are, as the Council has submitted:

(1) Whether the alleged conduct is established.

(2) The characterisation of the conduct.

(3) Appropriate dispositive orders.

5 In light of the admissions made, the matter proceeded to determination of all questions in one hearing.

6 The Application noted that the Complainant, Mrs Sepideh Miraki (**Complainant or Mrs Miraki**), seeks compensation in the sum of $25,000 particulars of which are to be provided.

Relevant Statutory Provisions

7 Rule 9 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (**Conduct Rules**) provides that:

> 9. Confidentiality
>
> 9.1 A solicitor must not disclose any information which is confidential to the client and acquired by the solicitor during the client's engagement to any person who is not:
>
> 9.1.1 a solicitor who is a partner, principal, director or employee of the solicitor's law practice, or
>
> 9.1.2 a barrister or an employee of, or a person who was engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,
>
> **EXCEPT** as permitted in rule 9.2.
>
> 9.2 A solicitor may disclose information which is confidential to the client:
>
> 9.2.1 the client expressly or impliedly authorises disclosure,
>
> 9.2.2 the solicitor is permitted or is compelled by law to disclose,
>
> 9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations,
>
> 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence,
>
> 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person, or
>
> 9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

8 *Legal Profession Uniform Law 2014 (NSW)* (**Uniform Law**) provides that:

> **s. 296 Unsatisfactory professional conduct**
>
> For the purposes of this Law,
>
> "**unsatisfactory professional conduct**" includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.
>
> **s. 297 Professional misconduct**
>
> 1. For the purposes of this Law, "**professional misconduct**" includes-
>
> a. unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> b. conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice. ….

Applicable law and the standard of proof

Applicable law

9

The subject complaint was referred by the Office of the Legal Services Commissioner to the Council for assessment, investigation and determination under chapter 5 of the *Uniform Law* which is the law applicable for the determination of the Application.

Standard of proof

10 These proceedings are proceedings in exercise of a Division Function for the purposes of the *Uniform Law* concerning a question of professional misconduct. clause 20, schedule 5 of the *Civil and Administrative Tribunal Act 2003* (NSW) (**NCAT Act**) provides that the rules of evidence apply. The proceedings are thus governed by the operation of the *Evidence Act* 1995 (NSW) (**Evidence Act**).

11 Being civil proceedings s. 140 of the *Evidence Act* applies. Section 140 provides:

> **"140 Civil proceedings: standard of proof**
>
> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account-
>
> (a) the nature of the cause of action or defence, and
>
> (b) the nature of the subject-matter of the proceeding, and
>
> (c) the gravity of the matters alleged."

12 The test to be applied when taking into account matters under s. 140(2)(c) is that described in *Briginshaw v Briginshaw & Anor* [1938] 60 CLR 336; *Amalgamated Television Services Pty Limited v Marsden* [2002] NSWCA 419 at [61].

13 In considering whether the evidence established unsatisfactory professional conduct or professional misconduct we have accordingly had regard to s. 140 of the *Evidence Act*. When taking into account matters under section 140(2)(c), we have had regard to statement of Dixon J (as his Honour then was) in *Briginshaw* where his Honour said:

> "Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

14 This statement was approved by the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd and others* (1992) ALR 449 at 450 where the plurality said:

> " the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found.(*Rejfek v McElroy* (1965) 112 CLR, at 521). Statements to that effect should not, however, be understood is directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct."

15 The approach of the High Court in *Neat Holdings* was adopted by Leeming JA in *Bronze Wing International Pty Ltd v SafeWork NSW* [2017] NSWCA 41 at [126].

Evidence and Submissions before the Tribunal

16 The following affidavits were read by the parties and admitted into evidence without objection;

(1) Anthony James Lean, solicitor for the Council and the Director, Legal Regulation of the Law Society of NSW dated 7 May 2020 and Exhibit AJL-1.

(2) Respondent, 7 December 2020.

(3) Respondent, 8 February 2021.

17 At the hearing, the Respondent gave oral evidence and was cross-examined.

18 The judgment of Kunc J in El-Cheikh v Moraki (2020) NSW SC 1781 was tendered by the Respondent without objection.

19 The parties each filed written submissions to which they spoke.

Whether the alleged conduct is established

Admitted facts

20 By the Reply the Respondent admitted the following particulars of the Grounds relied on by the Council by reference to the numbering in the Application:

> 1(a) The Respondent was admitted as a solicitor on 13 February 2004.
>
> 2. The Respondent acted for Mr Navid Miraki and Mrs Miraki on the purchase of two properties:
>
> (a) In or around 2014 or 2015 – the purchase of 71 Warrigee Road, Warrigee (**Warrigee Property**); and
>
> (b) In 2016 – the purchase of 50/5 Gladstone Road, Castle Hill (**Castle Hill Property**).
>
> 3. Mrs Miraki entered into a loan agreement with Mr Omar El-Cheikh dated 12 October 2016 (**Loan Agreement**) pursuant to which:
>
> (a) Mrs Miraki borrowed $900,000 from Mr El-Cheikh.
>
> (b) the Castle Hill Property was offered as security; and
>
> (c) a caveat was lodged over the Castle Hill Property in favour of Mr El-Cheikh claiming an equitable and legal interest in the Castle Hill Property pursuant to the advance of loan funds of $900,000.
>
> 4. The Respondent acted for Mrs Miraki in connection with the Loan Agreement.
>
> 5. Mr Joseph Di Mauro of DSA Law acted for Mr El-Cheikh in connection with the Loan Agreement.
>
> 6. A dispute arose between Mrs Miraki and Mr El-Cheikh in relation to the Loan Agreement, and in or about May 2017, proceedings were commenced in the Supreme Court of NSW by Mr El-Cheikh and El-Cheikh Group Pty Limited (ACN 614 664 158) against Mrs Miraki and Iconic Constructions Australia Pty Limited (ACN 168 104 649) seeking recovery of the loan funds of $900,000 (**Supreme Court Proceedings**).
>
> 7. Mr El-Cheikh and El-Cheikh Group Pty Limited were represented by Mr Di Mauro in the Supreme Court Proceedings.
>
> 8. Mrs Miraki and Iconic Constructions Australia Pty Limited were represented by Mr Hanza Alameddine of Birchgrove Legal in the Supreme Court Proceedings.
>
> 9. On 4 December 2017 Mr Di Mauro telephoned the Respondent to discuss various communications between the Respondent and Mr El-Cheikh in connection with the purchase of the Castle Hill Property.

> 10. The conversation between Mr Di Mauro and the Respondent lasted for over an hour.
>
> 11. During the conversation on 4 December 2017, Mr Di Mauro asked the Respondent questions in relation to the following matters:
>
> (a) who was the Respondent's main point of contact and who was providing the Respondent with instructions at the time of the Loan Agreement;
>
> (b) whether or not Mr Miraki and/or Mrs Miraki ever denied receiving funds from Mr El-Cheikh under a Loan Agreement; and
>
> (c) whether Mr Miraki had ever indicated that he would attempt to repay the monies loaned under the Loan Agreement.
>
> 12. The Respondent answered Mr Di Mauro's questions in relation to the matters referred to in paragraph 11 above.

21 We have considered the evidence to which we have been referred concerning these facts which have been admitted by the Respondent in the Reply and find that each of the facts set out in the Particulars is established.

Further findings of fact

22 The Respondent did not reply to particular 1(b) which stated "1. The Respondent . . .

> (b) is a sole practitioner practicing under the name Conveyancing Plus Legal".

23 It is not clear whether this was an oversight. There was evidence from the Respondent that from 2013 he practiced under the name Conveyancing Plus Legal. There was no evidence to the contrary. We accept the Respondent's evidence and find the fact alleged in particular 1(b) to be established.

24 In relation to the answers he gave to questions of Mr Di Mauro in the conversation on 4 December 2017, the Respondent's evidence was set out in his affidavit dated 7 December 2020 at para [68] where he said:

> "In respect of these matters, I agree that I disclosed to Mr Di Mauro that:
>
> - Navid Miraki was the main point of contact throughout the conveyancing and loan transaction for the Castle Hill Property;
> - Neither Mr Miraki or Mrs Miraki ever denied receiving the funds from Omar El-Cheikh under a loan agreement;
> - Mr Miraki said that he wanted more time to repay the monies under the loan agreement."

25 There was exhibited to Mr Lean's affidavit a copy of an affidavit sworn on 7 December 2017 by Mr Alameddine in the Supreme Court Proceedings. Mr Alameddine gave evidence at paragraph [9] as to the content of a conversation with the Respondent on 6 December 2016 during which the Respondent said of his conversation with Mr Di Mauro on the 4 December 2017 words to the effect of:

> Me: "What did you speak about?"
>
> Mr Alkhair: "There were three main topics. First was who was my main point of contact and who was providing me with instructions at the time of loan transaction [sic]. Second was whether or not Sepideh or Navid Miraki ever denied receiving the funds by Mr El-Cheikh under the loan. Third was whether Mr Miraki ever indicated that he would attempt to repay the loan.
>
> I answered the questions he asked."

26 There was also exhibited to Mr Lean's affidavit an affidavit of Mr Di Mauro sworn 12 December 2017 in the Supreme Court Proceedings.

27 Mr Di Mauro said at paragraph [6] that he telephoned the Respondent on 4 December 2017 and said words to the effect of "I want to discuss a number of communications with you and Omar El-Cheikh during the purchase of the property at Castle Hill".

28 Mr Di Mauro's evidence at paragraph [9] was that he agreed with Mr Alameddine's summary of the conversation he [Mr Di Mauro] had with the Respondent on 4 December 2017 referred to above.

29 Mr Di Mauro gave the following further evidence in his affidavit:

> "10. I discussed with [the Respondent] conversations that he had with Mr El-Cheikh relating to the repayment of the Loan made by [Omar] to the Defendants. [The Respondent] confirmed the conversations and what was discussed between our client and himself.
>
> 11. I then asked [the Respondent] words to the effect of 'who would give you instructions during the transaction', as we were aware that he would often take instructions from Navid rather than Sepideh. He replied and advised that 'I was instructed by Sepideh but that she also told me that he could take instructions from Navid'".

30 Mr Di Mauro further gave evidence:

> "17. I asked [the Respondent] words to the effect of "were you ever told that Omar did not advance the money" to which he replied in the "no"[sic].
>
> 18. I asked [the Respondent] words to the effect of "was the loan ever questioned" to which he replied "no never throughout the whole period was the loan ever questioned"".

31 In his second affidavit of 8 February 2021, the Respondent gave evidence at paragraph [5] that he had read the affidavit of Mr Di Mauro dated 12 December 2017 and agreed with its contents, and in particular the matters referred to at paragraphs [6]-[20] of which paragraphs [6], [9], [10], [11], [17] and [18] referred to above form part. The Respondent also gave evidence at paragraph [6] of that affidavit, that he agreed with the contents of the affidavit of Mr Alameddine dated 7 December 2017, and in particular paragraph [9] referred to above.

32 We are satisfied on the basis of the Respondent's evidence to which reference has been made and find that the introductory statement of Mr Di Mauro and the statements alleged of the Respondent to Mr Di Mauro in the conversation on 4 December 2017 and, which he has admitted, were made in the terms set out in Mr Di Mauro's affidavit and referred to and summarised in the Application and the Respondent's evidence.

The Respondent's further evidence

33 The Respondent referred to further evidence relevant to and in support of submissions he wished to make in the proceedings.

34 The Respondent gave evidence that on 12 October 2016 he attended a conference at the home of Mr Miraki and Mrs Miraki. Also present was Omar El-Cheikh and his brother, Khalid El-Cheikh. Discussing the agreement with Mrs Miraki, the Respondent gave evidence that he raised with her the issue of instalments. He said that Mr El-Cheikh then said to him:

"There's not going to be any instalments. I need the money quickly."

35 Mr Miraki said:

"We've got five years to repay it…"

36 Mr El-Cheikh said:

"Don't [expletive deleted] me on this one, you know I have to repay the money."

37 Mr Miraki said, in effect:

"We will get it repaid quickly".

38 The Respondent then said words to the effect:

"The Loan Agreement says what it says and also provides for five years, so if you have some different agreement, it's got to be put in writing."

39 The Respondent gave evidence of further discussions with Mr El-Cheikh and his client in around December 2016. He was contacted by Mr El-Cheikh by telephone who said to him words to the effect:

"Navid told me you are organising repayment for the loan. I will talk to Navid and get back to you."

40 The Respondent called Mr Miraki and said to him words to the effect:

"Omar is calling me about the repayment of the loan."

41 Mr Miraki said words to the effect of:

"I'm trying to organise the funds. Can you try and delay him."

42 The Respondent gave evidence that he then rang Mr El-Cheikh back and said words to the effect:

"Navid is trying to organise funds. I will let you know when he's got the funds."

43 Mr El-Cheikh said:

"He better organise quickly. I need the money."

44 The Respondent spoke with Mr Miraki the following day. Mr Miraki said words to him to the effect of:

"I'm organising funds from overseas. There has been a delay."

45 The Respondent gave evidence that he received a further phone call from Omar El-Cheikh and said to him:

"I suggest you talk directly to Mr Miraki and organise the repayment from him."

46 The Respondent gave further evidence that he later acted on Mrs Miraki and Mr Miraki's behalf in respect of the sale of another property in which $200,000 was to become available. He said to Mr Miraki:

"Are we going to pay Omar from the $200,000."

47 Mr Miraki said to him:

"No, not yet. Hold him off."

48 We accept the Respondent's evidence and find that the conversations to which he referred occurred in the terms deposed to. There was no evidence to the contrary.

49 In his affidavits the Respondent referred to and exhibited correspondence and documents passing between the parties in the course of negotiating and documenting the transaction between the Mirakis and Mr El-Cheikh. We accept the Respondent's

evidence of the contents of the open correspondence and documents passing between the parties. It was not in dispute.

50 We consider the Respondent's submissions in respect to his further evidence below.

Whether the statements made by the Respondent were in breach of client confidentiality

Relevant legal principles

51 The Council submitted and we accept that rule 9.1 of the Conduct Rules does not define the type of information to which a duty of confidentiality attaches. Accordingly, rule 9.1 requires a judgment to be made as to whether information received in that context is truly confidential, in which case the duty of confidentiality will arise.

52 The Council submitted that within the context of a relationship between a legal practitioner and client, the concept is not to be construed narrowly. The Council referred us to the decision of Riordan J in *Babcock & Brown DIF III Global v Babcock & Brown International Pty Limited* [2015] VSC 433 where his Honour explained at [83]:

> "[83] In my opinion, communications (other than those about matters of common or public knowledge) between a client and a solicitor for the purposes of obtaining or giving legal advice would have the necessary ingredient of confidentiality against all persons unless by reason of implied direction or otherwise the solicitor was authorised to provide the confidential information to the third party."

53 Accordingly, unless a relevant exception applies, all communications by a client to a practitioner will prima facie be confidential.

54 However, as the Council submitted, information received in circumstances of confidence can lose its character as confidential once it has been released into the public domain: *Nash v Timbercorp Finance Pty Limited (in liq) in the matter of the Bankrupt Estate of Nash* [2019] FCA 957 at 77.

55 The Respondent took no issue with the Council's reference to the statement of principle in *Babcock.* He also referred us to the Tribunal's observation in *Legal Practitioners Complaints Committee v Trowell* (2009) 62SR(WA)1; [2009] WASAT42 at 366 at [366] that "*As a general rule information about a client's matter communicated to a legal practitioner in a professional capacity will be presumed to be confidential*".

56 As to relevant legal principles, the Respondent also referred us to the statement of Campbell J in *Green v AMP Life* [2005] NSWSC95 at [18] where his Honour said "*The notion of "disclosure" involves something becoming revealed which was previously hidden, or known which was not previously known. There can, it seems to me, be disclosure of a matter, even if not everything concerning that matter is disclosed*". The Respondent further referred us to the statement by Barrett J in *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSW CS1070 at [19] where his Honour said "*It is not possible to disclose "to a particular person something already known to or possessed by that person""*.

57 We have considered the evidence and the Parties' submissions by reference to these authorities.

Submissions and findings on the Respondent's state of knowledge

58 The Council referred us to the Respondent's evidence that at the time of the conversation with Mr Di Mauro he was aware of both of the Supreme Court Proceedings and that Mr Di Mauro acted for Mr El-Cheikh and E-Cheikh Group Pty Ltd in those proceedings.

59 Additionally, the Council submitted that the information was disclosed in the context of two competing narratives advanced by the parties in the Supreme Court Proceedings regarding the purchase of the Castle Hill Property under the Loan Agreement. On the one hand, Mr El-Cheikh contended in the proceedings that he advanced $450,000 in cash to Mrs Miraki under the Loan Agreement, which pursuant to the terms of that Agreement gave him a security interest in the Castle Hill Property and other assets. He also said that Mrs Miraki held the property as Trustee for a Unit Trust in which El-Cheikh Group had rights as a unitholder; *El-Cheikh v Miraki* [2020] NSWSC 1781 at [5]. In the proceedings Mrs Miraki contended that she held the Castle Hill Property for herself absolutely and that Mr El-Cheikh had not advanced the cash as alleged. Alternatively, if the Court found that Mr El-Cheikh had provided the cash, it was contended by Mrs Miraki that he had done so not pursuant to the Loan Agreement but rather, in accordance with their usual practice, Mr El-Cheikh had loaned the cash to Mr Miraki pursuant to an oral agreement between the two men: *El-Cheikh v Miraki* at [5] – [6].

60 The Respondent did not take issue in his written submissions with the competing narratives identified by the Council. In oral submissions it was said on his behalf that the Respondent did not appreciate the nuance of the contention being made by Mrs Maraki in the Supreme Court Proceedings that if the money had been advanced it was to Mr Miraki in the absence of a written loan agreement. The Respondent gave evidence at paragraph [63] of his affidavit of 7 December 2020, in which he stated:

> "[63] At the time I was contacted by Mr Di Mauro, my state of mind was that I was aware that Sepideh was denying the advance of monies by Omar El-Cheikh and that is why the Supreme Court Proceedings were on foot."

61 We accept this evidence and find that at the time of the conversation the Respondent was aware that Mrs Miraki was denying the advance of monies by Mr El-Cheikh in the Supreme Court Proceedings.

Admissions by the Respondent

62 In the Reply the Respondent admitted the breach of confidentiality alleged in the following terms in paragraph 13 of the particulars in the Application:

> "13. In answering Mr Di Mauro's questions, the Respondent breached the confidentiality to former clients Mr Miraki and Mrs Miraki:
>
> (a) the Respondent was aware that Mr Di Mauro acted for Mr El-Cheikh in the Supreme Court Proceedings;
>
> (b) the Respondent was aware the Supreme Court Proceedings concerned a dispute about the Loan Agreement;
>
> (c) Mr Di Mauro was not:

(i) a partner, principal, director or employee of the Respondent's law practice; or

(ii) a barrister or an employee of, or person otherwise engaged by the Respondent's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to Mr Miraki and Mrs Miraki.

(d) Information provided by the Respondent to Mr Di Mauro was confidential to Mr Miraki and Mrs Miraki in that it concerned communications between Mr Miraki and/or Mrs Miraki and the Respondent in relation to or in connection with the Loan Agreement.

(e) The communications between Mr Miraki and/or Mrs Miraki and the Respondent were of a kind that Mr Miraki and Mrs Miraki were entitled to expect to be kept confidential.

(f) The information provided by the Respondent to Mr Di Mauro was relevant to the subject matter of the Supreme Court Proceedings.

(g) The Respondent disclosed that the confidential information to Mr Di Mauro was without the consent of Mr Miraki and Mrs Miraki.

(h) The Respondent was not otherwise permitted to disclose the confidential information to Mr Di Mauro under any of the exceptions listed in rule 9.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015."

63 In determining whether the alleged conduct is established we must nevertheless be satisfied on the evidence that the statements which we have found were made disclosed information which was confidential to Mrs Miraki and that such disclosure was in breach of rule 9 and we turn to consider those questions applying the principles to which we have referred.

Question 1: Who was the Respondent's main point of contact and who was providing the Respondent with instructions at the time of the Loan Agreement?

64 The Respondent's evidence filed in the proceedings contained material not previously provided to the Council.

65 The Council accepted, on the basis of that evidence, that the source of the Respondent's instructions in relation to the Loan Agreement was not information that the Respondent held in confidence for his former clients at the time of the Respondent's conversation with Mr Di Mauro.

66 The Council accepted that the evidence established that it was common knowledge that the Respondent was acting for Mrs Miraki as the purchaser of the Castle Hill Property. There was in evidence an email from the Respondent to Mark Vitolo, the accountant for Mr El-Cheikh, that Mrs Miraki was the purchaser of the Castle Hill Property, albeit as a Trustee for the Gladstone Unit Trust. Additionally, there was evidence from the Respondent which was uncontradicted that he received instructions from both Mrs Miraki and Mr Miraki. Mr Miraki, Mrs Miraki and Mr El-Cheikh were at a meeting on 12 October 2016 during which the Respondent provided advice to Mrs Miraki and the Loan Agreement was executed. In or about December 2016 the Respondent was contacted by Mr El-Cheikh directly regarding the repayment of the Loan. He sought instructions from Mr Miraki and responded to Mr El-Cheikh on Mr Miraki's behalf in accordance with Mr Miraki's instructions.

67

The Council conceded that the conduct alleged in respect of the disclosure of the Respondent's source of instructions cannot be established. The Respondent noted the Council's Concession in respect of that aspect of the complaint and made no further submission.

68 We are satisfied on the basis of the evidence referred to us by the Council and the concession made and find that the statement by the Respondent to Mr Di Mauro of his source of instructions was not information which he held in confidence for his former client at time of the conversation and that such disclosure was not in breach of rule 9. Accordingly, we find that the complaint is not made out in respect of that statement.

Question 2: Whether Mr Miraki/Mrs Miraki denied receiving funds from Mr El-Cheikh under the Loan Agreement

69 The Council referred us to the concession made by the Respondent that at the time of the conversation he was aware that Mrs Miraki was denying the advance of monies by Mr El-Cheikh and that is why the Supreme Court Proceedings are on foot.

70 The Council submitted that the receipt of funds by Mrs Miraki pursuant to the Loan Agreement was a matter directly in issue in the Supreme Court Proceedings. It said that any statement made by Mrs Miraki and/or Mr Miraki to the Respondent regarding the receipt of monies from Mr El-Cheikh under the Loan Agreement or otherwise during the currency of retainer were communications of a kind that Mrs Miraki and Mr Miraki were entitled to expect would be kept confidential, and that none of the exceptions under rule 9.2 of the Conduct Rules applied. It submitted that by answering Mr Di Mauro's question, the Respondent breached client confidentiality.

71 In his Reply, in his evidence and in his submissions, while formally admitting the ground for application that he breached client confidentiality and that he was guilty of professional misconduct, the Respondent raised before the Tribunal effectively three submissions by reference to his further evidence. Firstly, he relied upon those matters as going to what he termed "*his honest belief and state of mind"* at the time of his communications with Mr Di Mauro.

72 The Respondent gave evidence in providing the response he did to Mr Di Mauro his state of mind was that he was simply stating what in reality was the obvious, and that both Mr Di Mauro and his client were frequently parties to the disclosure of the nature and effect of instructions provided by Mrs Miraki in respect of the conveyancing and loan transactions for the Castle Hill property. His evidence was that his state of mind was that the information raised between himself and Mr Di Mauro was already self-evident and referred to in electronic communications between the Respondent and Mr Di Mauro and their respective clients. He said that Mr El-Cheikh had spoken on multiple occasions directly to Mr Miraki about the repayment of funds the subject of the Loan Agreement. He said that he did not believe that he provided any additional information that Mr Di Mauro was not aware of or for that matter, his client.

73

The evidence and submissions going to the Respondent's "honest belief and state of mind" at the time of the statements to Mr Di Mauro do not directly address the questions of whether the communications were of confidential information and if so, whether such communications were in breach of an obligation of confidence. We have taken the evidence and submissions about the Respondent's state of mind at the time of the conversation into account when considering the appropriate dispositive orders.

74 The second submission made in respect of the Respondent's further evidence was whether any breach constituted by the statements was wilful. We have considered this submission in the context of the characterisation of the Respondent's conduct to which we shall turn below.

75 The third submission made in respect of the Respondent's further evidence was that whilst acknowledging his conduct in the reply, he "*put at issue to some extent*" whether the disclosure to Mr Di Mauro involved open or shared communications such that the Conduct Rules permitted the disclosure.

76 The non-confidentiality of the information or the express or implied authority to disclose it was not raised as a substantive formal response to the Application in the Reply by which the conduct was admitted.

77 We have considered these submissions by reference to the two principal issues that they raise being whether the statements concerned information that was not confidential by reason of prior disclosure or if they were confidential, they fell within the exception provided in rule 9.2 being the subject of authorisation by the client.

78 The Respondent submitted that on the face of instructions evidenced by the conversations with Mr Miraki it was implicit that there was no dispute by Mr Miraki that monies were owed to Mr El-Cheikh. He submitted that it was also implicit that the instructions the Respondent received in those circumstances would have been communicated by Mr El-Cheikh to Mr Di Mauro, his solicitor. It was further submitted that it was implicit in Mr Miraki providing instructions to the Respondent to delay the repayment of the loan that such confidential information had already been the subject of disclosure to Mr El-Cheikh.

79 The Respondent conceded that prior to the conversation on 4 December 2017 with Mr Di Mauro, the Respondent was no longer acting on the Mirakis' behalf and had not sought specific informed consent from their solicitor Mr Alameddine to make disclosure of the otherwise confidential information to Mr Di Mauro. He was also aware that the Supreme Court Proceedings arose in the context of Mr and Mrs Miraki denying the advance of monies by Mr El-Cheikh.

80 The Respondent referred to the contention by Mrs Miraki in the Supreme Court Proceedings either that Mr El-Cheikh had not advanced the cash at all or alternatively, if he had done so that it was pursuant to a Loan Agreement between Mr Miraki and Mr El-Cheikh as distinct from her. He submitted that the issue arose whether the implied consent provided by Mr Miraki to the Respondent was the sole purpose (at that time) to

delay payment of the loan to Mr El-Cheikh. We understood this to raise a question whether Mrs Miraki's contentions in the Supreme Court Proceeding were also a motivating purpose to delay the payment of the loan.

81 The Respondent referred us to the decision of the New South Wales Court of Appeal in *Marshall v Prescott* [2015] NSWCA 110 and the passage from the judgment of Beazley P with whom Macfarlan JA and Emmett JA agreed where her Honour observed at [52]:

> "[52] A party to whom the duty of confidence is owed may authorise disclosure for a particular purpose without waiving the obligation of confidentiality for all purposes. This was explained in *Smith Klein & French Laboratories (Aust) Ltd v Secretary Department Community Services and Health* [1989] SCA 384; (1981) 22 FCR 73 where Gummow J observed at 94 that:
>
> > "In many situations where the plaintiff establishes a case of disclosure of confidential information for the sole purpose being any use of it for any other purpose including disclosure to any other party will be a breach of confidence …""

82 The Respondent submitted that what had occurred was that a situation of "shared information" had arisen to the effect that monies had been advanced by Mr El-Cheikh under the Loan Agreement to enable the purchase of the property to be effected by Mrs Miraki.

83 The Respondent made reference to the decision of Kunc J in *El-Cheikh v Miraki* [2020] NSW SC 1781 at [164] where his Honour made a finding that Mr Miraki had forwarded to Mr El-Cheikh on 21 March 2017 a text message in which he stated:

> "Plus I am paying you $50K on top of your $450K which you put in settlement for me."

84 The Respondent submitted that although he was not aware of this evidence at the time he had the conversation with Mr Di Mauro, it is important in supporting this submission that the Respondent honestly believed in accordance with his then instructions and by virtue of the extensive exchange of communications between him and others including his client and Mr El-Cheikh, that there was no dispute as to the monies being paid by Mr El-Cheikh pursuant to the loan agreement.

85 Ultimately, the Court in *El-Cheikh v Miraki* made a finding that $430,000 of the $450,000 advanced by Mr El-Cheikh was applied to the purchase of the property by way of purchase of bank cheques that were handed over at settlement; at [165]. The Court found that at [162] the advance of $450,000 was not made by El-Cheikh pursuant to the Loan Agreement.

86 As the parties submitted, rule 9 of the Conduct Rules does not define the type of information to which the duty of confidentiality provided by rule 9 applies. Information about a client's matter communicated to a legal practitioner in a professional capacity will be presumed to be confidential; *Trowell* at [1]. Communications between solicitor and client for the purposes of obtaining or giving legal advice have the necessary ingredient of confidentiality against all persons unless by implied direction or otherwise the solicitor was authorised to provide the confidential information to a third party; *Badcock & Brown* at [83]. Information received in circumstances of confidence can lose its character as confidential once it has been released into the public domain; *Nash* at

[77]. Disclosure involves something becoming revealed which was previously hidden and such disclosure might occur even if not everything concerning the matter is disclosed. *Green* at [18]. It is not possible to disclose to a particular person something already known or possessed by that person. *Tim Barr Pty Ltd* at [19].

87 In considering whether the statements of the Respondent's instructions were confidential information or, if so, they had lost that quality by reason of them having previously being revealed to or otherwise being already known to or possessed by Mr Di Mauro it is necessary to consider the content of the information imparted in its precise terms.

88 The statements referred to in Mr Di Mauro's evidence in the Supreme Court Proceedings and confirmed by the Respondent were that when he was asked words to the effect "*Were you ever told that Omar did not advance the money?*" he replied "*No*". The Respondent was further asked "*Was the loan ever questioned?*". He responded "*No, never throughout the whole period was the loan ever questioned*". The questions were imprecise and the answers by reference to which of his clients he was referring were unqualified.

89 In our opinion the statements by the Respondent on their proper construction go further than the fact of the advance and matters passing between the parties in open correspondence or conversations during the negotiation and documentation of the transaction. On their face the statements comprise the Respondent's recollection of his instructions concerning whether he had ever been told by his clients that Mr El-Cheikh did not advance the money.

90 The list of authorities contained the judgment of McDougall J in *El-Cheikh v Miraki* [2017] NSWSC 1763. When making an order on the Mirakis' application restraining Mr Di Mauro from continuing to act in the Supreme Court Proceedings on behalf of the El-Cheikh interests, his Honour found that the questions asked by Mr Di Mauro went directly to a fundamental question of fact in issue in the proceedings; at [21]. his Honour said at [22] – [24];

> "[22] Depending upon the content of the answers that [the Respondent] gave, it could be thought that the defendants, in the course of the conveyancing transactions last year, have spoken and acted in a way that is directly in conflict with their factual case in the present litigation. Indeed, on Mr Di Mauro's account of what was said, it could certainly be inferred, that the evidence that they now give, or wish to give, is not consistent with what they said and did one year ago
>
> [23] In those circumstances, it seems to me, as I have said, that the communications go to the heart of the factual dispute.
>
> [24]… However, what seems to me to be crystal clear is that [the communications in question] were communications of a kind that the defendants were entitled to expect would be kept confidential. The client is entitled to expect that when his or her lawyer questions him about a transaction, seeking instructions on aspects of it, the responses that are given will be confidential unless the client otherwise authorises."

91 As the Respondent was aware the receipt of funds by Mrs Miraki pursuant to the Loan Agreement was a matter directly in issue in the Supreme Court Proceedings. In our opinion those circumstances gave rise to an obligation of confidence in respect of the

information which he disclosed to Mr Di Mauro. We respectfully agree with the finding of McDougall J for the reasons he gave. We find that the content of the Respondent's communication to Mr Di Mauro was confidential to his clients.

92 For the same reasons the Respondent's recollection of whether he had ever been instructed that the loan was being questioned was prima facie confidential to the clients. We were not directed to any evidence establishing that his instructions in respect of the advance of the money including whether the loan was ever questioned was in the public domain or already known or possessed by Mr Di Mauro or his client. We find that the information concerning his instructions disclosed in the conversation went further than the information which was contended by the Respondent to be in the public domain or otherwise known to Mr Di Mauro.

93 Having found that the information communicated by the Respondent in his statements to Mr Di Mauro was confidential to the client we turn to consider whether the prohibition on disclosure was subject to the exception of rule 9.2.1 by reason that the client expressly or impliedly authorised the disclosure.

94 The Respondent submitted that an issue arose whether the instructions from Mr Miraki to the Respondent gave rise to the inference that monies lent by Mr El-Cheikh under the Loan Agreement were not disputed by Mr Miraki and Mrs Miraki and was authorised to be the subject of a disclosure on 4 December 2017, its terms for all intent and purposes being the effect of the instructions from Mr Miraki to the Respondent.

95 We do not accept this submission. In the Respondent's evidence the conversations with Mr El-Cheikh and Mr Miraki pursuant to which the implied authority was said to arise took place around December 2016. This was well before the Supreme Court Proceedings were commenced in May 2017. The Respondent was aware that receipt of the funds under the Loan Agreement was denied in the Supreme Court Proceedings. He did not act for Mr Miraki or Mrs Miraki in the Supreme Court Proceedings. There was no evidence that the disclosure in its terms was authorised nor do we accept in the circumstances that it is reasonable to infer the clients' implied authority to release the information. The "shared information" the subject of correspondence and conversations had been overtaken by the Supreme Court Proceedings in which to the Respondent's knowledge the loan and/or advance were in issue. We find that the disclosure of the information concerning the Respondent's instructions in those circumstances was without their authority.

96 We are satisfied that the Respondent's instructions concerning the receipt of the funds and whether such receipt had been acknowledged by Mr and Mrs Miraki was confidential to them and that there was then no subsisting express or implied direction authorising the disclosure of the confidential information to the solicitor for the plaintiff in the proceedings. The information was confidential by reason that it had not previously been known to Mr Di Mauro or his client. The communication was not the subject of the exception in rule 9.2.1, there having been no express or implied authority for the disclosure.

97 It was not contended by the Respondent that any of the other exceptions under rule 9.2 of the Conduct Rules applied. There was no dispute that the confidential information was acquired in the course of the Respondent's engagement by the Mirakis and we find that it was. We are satisfied that, as the Respondent has admitted, the communication to Mr Di Mauro was a disclosure of information which was confidential to Mrs Miraki and acquired during the Respondent's engagement by the Mirakis and find that it was in breach of rule 9.1 of the Conduct Rules.

Question 3: Whether Mr Miraki indicated that he would attempt to repay the monies loaned under the Loan Agreement

98 The Council submitted that any indication from Mr Miraki to the Respondent that he would attempt to repay monies loaned by Mr El-Cheikh during the currency of the Respondent's retainer also went to the heart of the factual dispute between the parties in the Supreme Court Proceedings. It was submitted that this was also a communication of a kind that Mrs Miraki and Mr Miraki were entitled to expect would be kept confidential and that none of the exceptions under rule 9.2 of the Conduct Rules apply. It was submitted that by answering Di Mauro's question in relation to repayment of monies, the Respondent breached client confidentiality.

99 The Respondent relies upon the submissions made in respect of the previous disclosure. He relies upon the conversations he had with Mr Miraki in which instructions were obtained to communicate with Mr El-Cheikh and to delay him in the context of Mr Miraki organising funds from overseas. The Respondent concedes that he did not have specific consent to make the disclosure that he did to Mr Di Mauro. He submitted that his state of mind was that there was no dispute as to this information and in circumstances this had been shared with Mr El-Cheikh and implicitly Mr Di Mauro already.

100 Mr Di Mauro's evidence concerning the conversation contained in his affidavit of 12 December 2017 in the Supreme Court Proceedings was confirmed by the Respondent. The conversation with the Respondent on 4 December 2017 was in Mr Di Mauro's own terms in preparation for evidence in the Supreme Court Proceedings when he had cause to seek clarification as to a number of communications passing between his client and the Respondent in his office and the Respondent.

101 We find that the statement by the Respondent comprised a confirmation of his earlier instructions that Mr Miraki wanted more time to pay the monies under the loan agreement. That confirmation, as opposed to the pre-litigation discussions concerning payment, was not a matter of common or public knowledge between the Mirakis or otherwise know by Mr Di Mauro or his client. We are satisfied and find that the Respondent's instructions were confidential to the Mirakis in the context of the matters which were to the Respondent's knowledge in dispute in the Supreme Court Proceedings. It was information which the clients were entitled to expect would be kept confidential. For the reasons we have previously expressed, we find that the Respondent was not expressly or impliedly authorised to disclose that information to

Mr Di Mauro. It was not submitted that any of the other exceptions provided in rule 9.2 of the Conduct Rules apply. We find that the Respondent, as he has admitted, disclosed the information which was confidential to his clients and acquired by him during the clients' engagement in breach of rule 9.1 of the Conduct Rules.

Characterisation of the Respondent's conduct

General principles

102 The Council made submissions identifying the legal principles obtaining upon characterisation of statutory unsatisfactory professional conduct and professional misconduct with which the Respondent agreed and are uncontroversial.

103 "Unsatisfactory professional conduct" is defined in s. 296 of the *Legal Profession Uniform Law* (NSW) (**Uniform Law**) as including:

> "… conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer."

104 "Professional misconduct" is defined in s. 297(1) of the Uniform Law as including:

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

105 The Council did not rely on s. 297(1)(b). It was not contended that the Respondent is not a fit and proper person to engage in legal practice.

106 Additionally as the Tribunal noted in *Council of Law Society of NSW v Hunter [2021] NSWCATOD 22* [35], the Parliament in formulating its statutory definition of professional misconduct nevertheless intended to preserve the common law meaning of the term; *Legal Services Commission v Livers* [2017] NSWCATOD 117 at [138].

107 The Council submitted that a finding of professional misconduct may also be made in accordance with the common law test enunciated in *Allinson v General Council of Medical Education and Registration* [1894] 1QB 750 being "conduct in the pursuit of professional activities which would reasonably be regarded as disgraceful or dishonourable by professional colleagues of good repute and competency".

108 As the Tribunal noted in *Hunter* at [37] although the statutory phrase in *Allinson* was "infamous conduct in professional respect" and the proceedings concerned a member of medical profession, the test was later adapted and applied to the conduct of solicitors.

Submissions

109 The Council contended that the Respondent's conduct may amount to professional misconduct. Section 6 of the Uniform Law provides that the Conduct Rules fall within the definition of "Uniform Rules". A contravention of the Conduct Rules is capable of

constituting unsatisfactory professional conduct or professional misconduct; s. 298(b) of the Uniform Law.

110 The Council submitted that the duty of confidentiality owed by lawyers to their clients is fundamental to the public trust in the profession and the administration of justice. It submitted that the disclosure of confidential information has been described as "a cardinal sin for lawyers". We were referred in that regard to the decision of the Full Bench of the Supreme Court of Western Australia *Legal Practitioners Complaints Committee v Walton* [2006] WASC 213 at [21] per McKechnie J.

111 The Council submitted and we have found that the Respondent had breached the confidence of his former clients by disclosing confidential information to Mr Di Mauro who was acting for the plaintiff in proceedings brought against his former client, Mrs Miraki. At the time the information was disclosed the Respondent was aware of the Supreme Court Proceedings and that in the proceedings Mrs Miraki denied that monies were advanced by Mr El-Cheikh. The information disclosed was relevant to the matters in dispute in the Supreme Court Proceedings and was disclosed without the authority of the former clients. Council submitted and we have found that the Respondent was not permitted to disclose the confidential information under any of the exceptions of rule 9.2 of the Conduct Rules.

112 The Council further referred to paragraph [72] of the Respondent's Affidavit dated 7 December 2020, in which he gave the following evidence:

> "[72]. I in effect am saying that my state of mind was such that the information raised of my [sic] by Mr Di Mauro was already self-evident referred to in the electronic communications between myself and Di Mauro and [Mr and Mrs Miraki] and (Mr El-Cheikh). I do not believe that I provided any additional information that Di Mauro was not aware of or for that matter, his client."

113 The Council submitted that it was clear from paragraph 14 of Mr Di Mauro's affidavit in the associated proceedings before McDougall J, being proceeding in the Equity Division of the Supreme Court of NSW being 2017/156392 between the same parties, exhibited to Mr Lean's affidavit, that there were various communications to and from the Respondent to Mr Di Mauro and others following the settlement of the purchase of the Castle Hill property and prior to the commencement of the Supreme Court Proceedings. The Council noted that, other than the documents referred to in subparagraphs 14(a), (b), (c) and (n), none of the material is in evidence. Accordingly, while the Council accepts that the evidence demonstrates it was common knowledge that Mr Miraki was the Respondent's main point of contact and was providing instructions to the Respondent, it submitted that the evidence does not establish the information disclosed by the Respondent in response to Mr Di Mauro's second and third questions was self-evident.

114 The Respondent filed his second affidavit in these proceedings dated 8 February 2021 after service of the Council's outline of submissions. The Respondent annexed to his second affidavit with one exception the material which had previously been annexed to Mr Di Mauro's affidavit in the associated proceedings before McDougall J, being open

correspondence between the parties said to support his contention as to the information that was shared between the parties. The evidence did not include the statements of his instructions which we have found to be confidential.

115 The Respondent agreed with the Council's general submissions in relation to the statements of principle. In particular the Respondent agreed that the test for professional misconduct at common law is that set out in *Allinson* being "conduct in the pursuit of professional activities that would be regarded as disgraceful or dishonourable by professional colleagues of good repute and competency".

116 The Respondent further submitted it was a matter for the court or tribunal to determine the appropriateness of the behaviour of the legal practitioner; *Law Society of Tasmania v Turner* (2001) 11 TAS R 1; [2001] TASSC 129 [46] in which Crawford J said:

> "[46] The court may have regard to evidence of what some reputable practitioners might think, it remains the duty of the court to consider the appropriateness of the behaviour and a course of determination of not what only a reputable practitioner might think, but what a reputable and competent practitioner might reasonably think."

117 The Respondent also agreed in respect of the duty of confidentiality that the disclosure of confidential information was as the Council submitted fundamental to the public trust in the profession and the administration of justice and that disclosure of confidential information was "a cardinal sin for lawyers"; *Walton* at [21].

118 As to statements of general principle, in addition to the authorities referred to us by the parties we have had regard to the observation of Rich J in *Kennedy v Council of Incorporated Law Institute of New South Wales* (1939) 13 ALJR 563 at 563 that professional misconduct was conduct that amounted to "… a grave impropriety affecting (the practitioners) professionalism and character and was indicative of a failure either to understand or to practice the precepts of honesty or fair dealing in relation to the courts, his clients or the public …". We have also had regard to the decision of the NSW Court of Appeal in *Bechara v Legal Services Commissioner of New South Wales* [2010] 79 NSWLR 763; [2010] NSWCH 269 at [44] where the court noted that:

> "There are no fixed categories of professional conduct, much depends on whether the conduct falls outside the generally accepted standard(s) for common decency and common fairness."

119 In his submissions on the characterisation of his conduct, the Respondent confirmed that he was not disputing that he had disclosed confidential information to Mr Di Mauro who was then the solicitor acting for the plaintiff in the Supreme Court Proceedings against the Mirakis. It was also not disputed that the Respondent did not seek the consent of his clients to disclose the information that he did. The Respondent submitted that the issue which arose on his behalf was whether he disclosed such confidential information to Mr Di Mauro in circumstances where he was entirely authorised to do so under rule 9.2 of the Conduct Rules.

120

The Respondent identified a number of factors which were contended to be relevant as to whether there was any implied authority to disclose the confidential information to Mr Di Mauro. These included that the Mirakis were well aware that communications relating to otherwise confidential information between them and the Respondent were referred to in detail in a shared manner between the parties. They also included the fact that instructions between the Mirakis and the Respondent for the purpose of the property, the loan agreement, a mortgage, caveat and repayments of the loan were "expressly and impliedly" conducted in the presence of and between Mr El-Cheikh, Mr Di Mauro, Mr Bartello, the Mirakis and the Respondent. On 12 October 2016 relevant documentation was executed in the presence of the Mirakis and Mr El-Cheikh.

121 The relevant matters referred to by the Respondent also included that in December 2016 the Respondent was instructed to communicate with Mr El-Cheikh to delay his expectation of repayment of the money advanced pursuant to the Loan Agreement. It was submitted that communication was such that the Respondent in good faith and in accordance with his instructions contacted Mr El-Cheikh and disclosed the communications with Mr Miraki.

122 It was submitted that those instructions and communications were such that the Respondent was justified in having a belief or state of mind both that there was no denial that the funds had been received from Mr El-Cheikh under the Loan Agreement and later that Mr Miraki wanted more time to repay the money under the Loan Agreement. It was submitted that in such circumstances, having regard the shared communications, the Respondent was well entitled to believe honestly that Mr Di Mauro was aware of those matters.

123 The Respondent submitted that the factors relied upon reflect a state of mind on his part of an honest belief that Mr Di Mauro was aware of the subject information that was disclosed in the conversation of 4 December 2017.

124 The Respondent does concede that he lacked proper appreciation of the nuance of Mrs Miraki's case in the Supreme Court Proceedings that there were no monies advanced by Mr El-Cheikh towards the purchase of the property such as to give rise to him having an interest in that property.

125 Nevertheless the Respondent submitted that there was a large body of evidence that should comfortably satisfy the Tribunal that there were open and shared communications involving clearly otherwise confidential information of the Respondent's clients.

126 We have referred to the Respondent's submissions in the terms in which they were made. We have taken them to refer to the question of whether the disclosures were the subject of the clients' implied authority being an exception to rule 9.2. We do not accept these submissions. For the reasons we have expressed, we have found that the information disclosed in the Respondent's conversation with Mr Di Mauro went further than the open and shared information communicated during the course of the transaction and that its contents were not known to Mr Di Mauro. We have found that in

the circumstances, including the position taken by the Mirakis' in the Supreme Court Proceedings which post-dated the sharing of information during the course of and immediately after negotiating and documenting the transaction, no client authority for the disclosure could be implied.

127 The Respondent also submitted that the findings of Kunc J in the Supreme Court Proceedings to a large extent were consistent with the Respondent's state of mind as reflected in his communications with Mr Di Mauro. He submitted that these factors were important ones in reducing the Respondent's culpability. He also submitted that the disclosure by the Respondent to Mr Di Mauro had no detrimental impact upon the Supreme Court Proceedings.

128 We were directed to no authority supportive of the proposition that breach of an obligation of confidence by a solicitor is ameliorated by subsequent factual findings by a Court. As is the case when considering dispositive orders to which we will turn, the conduct should be considered at the time of its occurrence; *Law Society of NSW v Moulton* (1981) 2 NSWLR 736 at 739. Nor is it relevant that the client suffered no loss; *Moulton* at 739.

129 On the question of the characterisation of the Respondent's conduct, we were not directed to any authorities concerning disciplinary proceedings for breach of client confidentiality other than the statement to which we referred to in *Walton* at [21]. In that passage McKechnie J found that the circumstances of the breach of confidential information were made more serious because the confidential information about the former client was disclosed without his consent to the other parties in the litigation. This passage was subsequently referred to by the Full Bench of the Supreme Court of Western Australia in *Legal Practitioners Complaints Committee v Camp* [2010] WASC 188 (28 July 2010) (EM Heenan J, Blaxell J, Beech J) where the court expressed the view at [33] that "it is a serious act of professional misconduct for a lawyer to breach the duty of confidence to the client".

130 Consistently with these authorities and the general principles to which we have referred, in our view the conduct which has been established on the evidence and admitted by the Respondent is serious and goes beyond merely falling short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer within the meaning of s. 296 of the Uniform Law. The Respondent had ceased acting for his clients. He was aware that Supreme Court litigation had commenced between his former clients and the El-Cheikh parties. He was aware that Mrs Miraki raised dispute in the proceedings as to the alleged loan and/or advance of monies.

131 The conversation took place as the Respondent accepted in the circumstances set out in Mr Dr Mauro's Affidavit of 12 December 2017 at paragraph 6, where he said at the commencement of the conversation on 4 December 2017, words to the effect of:

> "I want to discuss a number of communications between you and Omar El-Cheikh during the purchase of the property at Castle Hill."

132 Notwithstanding those circumstances, the Respondent communicated openly with Mr Di Mauro, the solicitor for the El-Cheikh interests.

133 As to the second statement, we have found that the terms of the conversation indicate that the Respondent provided information to Mr Di Mauro of his own recollection of his instructions concerning the matters identified being information which he had acquired when acting for his former clients. We have found that this information was confidential. The information was not in the public domain nor did it arise from the open and shared communications which the Respondent said occurred. We have found that he did not have express or implied authority to disclose the information.

134 In relation to the third statement, the Respondent acknowledged in his evidence that he had disclosed to Mr Di Mauro, that Mr Miraki had informed him that he wanted more time to repay the monies under the loan agreement. We have found that the information comprised the Respondent's recollection of his instructions. This information was confidential. It was not in the public domain nor had the information previously been disclosed to Mr Di Mauro. The Respondent did not have authority to disclose it.

135 In oral submissions, Mr Walsh on behalf of the Respondent, submitted that in order to make a finding of unsatisfactory professional misconduct or professional misconduct the Tribunal has to be satisfied that any breach of rule 9 was wilful. This had not been raised in the Reply or in written submissions. Mr Walsh on that question referred us in general terms to the decision in *Carr v Council of The Law Society of New South Wales* [2020] NSWCA 276. Mr Maddigan, on behalf of the Council, submitted that no allegation had been made of a "wilful" breach just that there had been a breach.

136 The Court of Appeal in *Carr* considered among other things the elements of a claim that a solicitor had attempted to mislead another solicitor. The court found that an attempt to mislead entails an element of deliberate conduct: Per White JA at [2], Emmett AJA at [120]. As Emmett AJA said at [120], for the allegation to be made out it is necessary for the Tribunal to find that the solicitor actually intended to mislead [the solicitor].

137 We were not directed to any legislation or authority for the proposition that wilfulness is a necessary element of professional misconduct in respect of a breach of confidential information in particular or to all breaches of professional obligations more generally.

138 We have referred in the context of the common law test, to the observation of Rich J in *Kennedy* at 553 which contemplated "a failure to *understand* or to practice the precepts of honesty or fair dealing in relation to the court, [the practitioners], clients or the public" [emphasis added]. An act arising from a failure to understand would conceivably include an act which is not wilful.

139 Additionally, on the question of intention, the Tribunal in *Hunter* identified instances in the context of a solicitor's breach of undertaking where a finding of professional misconduct had been made without an express finding of deliberate action; *Law Society of NSW v Webb* [2018] NSWCATOD 55; *Council of the Law Society of NSW v*

Kimm [2012] NSW ATD 45. The Tribunal in *Hunter* also noted there were other cases of professional misconduct where professional conduct was found but there was no deliberate action or omission including Council of the Law Society of *NSW v Spinak* [2017] NSWCATOD 184 and *Law Society of NSW v Webb* [2018] NSWCATOD 55; see *Hunter* at [58].

140 These authorities recognise that an element of wilfulness or intention is not necessary to establish all breaches of professional obligation. Nor are we satisfied that the decision in *Carr* is authority for the proposition that wilfulness is a necessary element of any breach of rule 9.

141 No submissions were made by the parties as to whether the subject conduct had occurred in connection with the practice of law within the meaning of s 296 of the Uniform Law nor were we referred to any authorities on that question. The evidence establishes that the Respondent had been retained by and acted for the Mirakis on the underlying transaction. The information which he disclosed to Mr Di Mauro comprised instructions which he had received in the course of acting for the Mirakis. The disclosure was made in the context of Mr Di Mauro contacting the Respondent as the former solicitor for the Mirakis. We are satisfied and find that the disclosures by the Respondent occurred in connection with the practice of law.

142 We are satisfied in all the circumstances that the Respondent's conduct in disclosing confidential information in breach of rule 9.1 which occurred in connection with the practice of law fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. Accordingly, we find the breach of rule 9 in the circumstances referred to be unsatisfactory professional conduct within the meaning of s 296 of the Uniform Law.

143 We are further satisfied in all the circumstances of the breach of rule 9, which we have found to be serious, that, being unsatisfactory professional conduct, it involved a substantial failure to reach or maintain a reasonable standard of competence and diligence. We find that, as he has admitted, the Respondent is guilty of professional misconduct within the meaning of s. 297(1)(a) of the Uniform Law.

144 Both parties had submitted that the test for professional misconduct at common law was that set out in *Allinson* which they identified as "conduct in the pursuit of professional activities that would be regarded as disgraceful or dishonourable by professional colleagues of good repute and competency" Whilst our decision in these proceedings was reserved the Court of Appeal delivered its decision in *Council of the New South Wales Bar Association v EFA (a pseudonym)* [2021] NSWCA 339.

145 Upon a review of the authorities the court at [149] disagreed with any suggestion in earlier cases that there exists in the common law of NSW a category of professional misconduct which can be defined from the formula taken from *Allinson*, divorced from the "fit and proper person" concept. The court noted that in *A Solicitor v Council of the*

Law Society of New South Wales (2004) 216 CLR 253; [2004] HCA 1 the High Court had retained the "fit and proper person" test as the "critical criterion" in the exercise of the Jurisdiction derived from cl. X of the Charter Justice.

146 The court said at [150] – [151];

> "[150] It may be accepted that the *Allinson* formulation plays an important part in the application of the "critical criterion" of fitness. What it does not do is create, for NSW, a category of legal professional misconduct to be assessed otherwise than in accordance with the "fit and proper" test endorsed repeatedly over the years, most recently in the High Court in *A Solicitor*.
>
> [151] That the *Allinson* formulation has been adopted and used as a test against which "fitness" or "unfitness" for Legal Practice may be measured does not have the consequence that it constitutes a separate category of professional misconduct. The "critical criterion" remains, as stated in *A Solicitor* that of "fit and proper person", allow a finding of professional misconduct made in the application of that test does not necessarily entail removal from the roll of Legal Practitioners; *A Solicitor* [15]…"

147 The court found at [156] that:

> "There is in NSW no category of professional misconduct constituted by conduct that would reasonably be regarded (by professional peers) as "disgraceful or dishonourable"".

148 The court said at [157];

> "[157] that is not to say that the *Allinson* formulation is irrelevant; as can be seen from the cases discussed above, it has been treated as a useful test as to the determination of the fitness of a legal practitioner to remain on the roll. It does not, however, as the Council would have it create or constitute a category of professional misconduct independent of, and different from, that class of conduct contemplated at rendering the legal practitioner "not a fit and proper person" to remain on the roll of Legal Practitioners."

149 The court said at [160];

> "[160] "Professional misconduct" determined against the "Critical Criterion" of "a fit and proper person" is indistinguishable from "professional misconduct" as defined in s. 297 (1) (b) of the Uniform Law. There was therefore nothing to be achieved by the Tribunal approaching its determination on the basis that professional misconduct and common law is something different from professional misconduct as defined in s. 297 (1) (b)."

150 As the Court of Appeal found at [155] following the High Court's decision in *A Solicitor* the "concept of fitness" derived from the Charter of Justice is the benchmark by which legal professional conduct (in the inherent jurisdiction of the Supreme Court) is judged.

151 Although this was the law at the time of the subject conduct, the application and the hearing neither party made submissions in respect of "professional misconduct" at common law by reference to whether the Respondent was a fit and proper person. Nor was that criterion raised in the context of a finding under s. 297(1)(b) of the *Uniform Law*.

152 In those circumstances and notwithstanding the admission of professional misconduct made by the Respondent we are not satisfied that the Council has made out its claim that the Respondent is guilty of "professional misconduct" at common law.

Appropriate dispositive orders

153 The Council seeks the orders to which we have referred. The Respondent submitted that if the Tribunal was satisfied that he was guilty of professional misconduct or unsatisfactory professional conduct, then no issue was taken with the orders sought by

the Council.

154 The approach to be taken by the Tribunal when considering the making of orders which are effectively by consent was discussed in *Legal Service Commission v Searle* [2016] NSWCATOD 23 [at 21] by reference to the Administrative Decisions Tribunal's decision in the *Council of The NSW Bar Association v Butland* [2009] NSWADT 177; see also *Council of the Law Society of NSW v Low* [2020] NSWCATOD 142 at [69]. The Tribunal in *Butland* referred at [31] to the decision of Barrett J in *Australian Securities and Investments Commission v Elm Financial Services Pty Limited* (2005) 55 ACSR 411; [2005] NSWSC 1020 where his Honour said:

> "The parties have, in each case, agreed the duration of the disqualification. That, however, does not absolve the court of its duty to consider the appropriateness of the penalty in the light of the agreed facts and the surrounding circumstances."

155 Barrett J set out a number of principles which the Tribunal in *Butland* considered appropriate subject to necessary adjustments to take account of express statutory requirements under s 564 of the *Legal Profession Act* 2004 (**LPA**) (as it then was) and particularly the nature of the disciplinary powers being exercised by the Tribunal. The principles were considered to provide a useful guide for the exercise of the Tribunal's discretion in cases of consent orders; *Butland* at [33].

156 In *Butland* the Tribunal explained the relevant principles in the following terms:

> [29] Section 564(1) and (10) of the Legal Profession Act makes plain that the Tribunal has a discretion whether or not to make orders consented to in an instrument of consent under that section. The Tribunal does not act, nor should it be seen, as merely a 'rubber stamp' – see the comments of the Federal Court in a similar context in Australian Communications and *Media Authority v WE.NET.AU Pty Ltd* [2008] FCA 1530 at [8]. Nonetheless, the consent of the parties and the Legal Services Commissioner are matters that deserve significant weight.
>
> [30] These circumstances are similar to, and some guidance can be derived from, cases where Courts exercising regulatory or disciplinary powers are presented with joint submissions by the parties (often including the relevant regulator) as to the appropriate civil penalties and consent orders which they request the Court to make. These often occur in matters under the civil penalty regimes such as those established by the Trade Practices Act 1974 (Cth) or the Corporations Act 2001 (Cth) and involving, respectively, the Australian Competition and Consumer Commission or the Australian Securities and Investments Commission.
>
> [31] Barrett J set out the Supreme Court's approach to consent orders in regulatory matters (including orders in relation to disqualification from management) under the Corporations Act and related legislation in *Australian Securities and Investments Commission v Elm Financial Services Pty Ltd* (2005) 55 ACSR 411; [2005] NSWSC 1020, as follows:-
>
> > 9 The parties have, in each case, agreed the duration of the disqualification. That, however, does not absolve the court of its duty to consider the appropriateness of the penalty in the light of the agreed facts and the surrounding circumstances. This is made clear by the decisions of the Full Federal Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 and, more recently, *Minister for Industry Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; [2004] ATPR 41-993 (and see, in the present statutory context, *Australian Securities and Investments Commission v Vizard* [2004] FCAFC 72; (2005) 54 ACSR 395). In the Mobil Oil case (at [51]) the following propositions were seen as emerging from the reasoning in NW Frozen Foods:
> >
> > > (i) It is the responsibility of the Court to determine the appropriate penalty to be imposed under s 76 of the TP Act in respect of a contravention of the TP Act.

> (ii) Determining the quantum of a penalty is not an exact science. Within a permissible range, the courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another.
>
> (iii) There is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy. Accordingly, when the regulator and contravenor have reached agreement, they may present to the Court a statement of facts and opinions as to the effect of those facts, together with joint submissions as to the appropriate penalty to be imposed.
>
> (iv) The view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty. In particular, the views of the regulator on matters within its expertise (such as the ACCC's views as to the deterrent effect of a proposed penalty in a given market) will usually be given greater weight than its views on more "subjective" matters.
>
> (v) In determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case. Where the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so.
>
> (vi) Where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement. The question is whether that figure is, in the Court's view, appropriate in the circumstances of the case. In answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure. It will be appropriate if within the permissible range.

> 10 There has been some criticism of this approach as involving "platitudes": see per Weinberg J in *Australian Prudential Regulation Authority v Derstepanian* [2005] FCA 1121. And in Vizard (above), the court imposed a higher penalty than that agreed by the parties and sought by the regulator.
>
> 11 It is clear that the court is in no way constrained by the parties' agreement and that, having made the declaration of contravention, it must exercise its discretion as to penalty. In the present case, the factual background does not, to my mind, indicate that the respective periods of disqualification proposed by the parties are inadequate.

> [33] If the necessary adjustments to these principles are made to take into account the express statutory regime under s 564 of the Legal Profession Act and the particular nature of the disciplinary powers being exercised by the Tribunal, we believe they provide useful guidance as to the exercise of the Tribunal's discretion in cases such as the present.

157 As the Tribunal in *Low* noted at [69] the regime under s. 564(10) of the *LPA* is in identical terms to s. 144(10) of the *Uniform Law*. The approach in *Butland* has been followed by the Tribunal in subsequent cases including *Council of the NSW Bar Association v Breeze* [2015] NSWCATOD 152; Lowe at [69].

158 We have considered the proposed orders by reference to these principles. In particular, we have given significant weight to the view of the Council as to the proposed orders, whether the proposed orders are within the permissible range and that the orders are not opposed by the Respondent, there having been a finding of professional misconduct.

159 It is long established that the Tribunal's role when making dispositive orders is protective and in particular protecting clients and members of the public from harm that could be caused by dishonest, incompetent and/or non-diligent legal practitioners, rather than being punitive.

160

As the Council submitted, the relevant principles were discussed in *Council of the Law Society of New South Wales v Renfrew* [2019] NSWCATOD 63 at [92] citing Beazley JA (as her Honour then was) in *Law Society of New South Wales v Walsh* [1997] NSWCA 185. These include:

(1) the protection of the public, which is of paramount importance;

(2) the maintenance of the high standards of the profession;

(3) deterring not only the particular practitioner but others who may stray from the appropriate standards and serving as a reminder to the profession;

(4) the gravity of the conduct involved; and

(5) emphasising the unacceptability of the conduct involved.

161 In *Walsh* at [40] Beazley JA further said:

> "the Court's duty to protect the public is not confined to the protection of the public against further misconduct by the particular practitioner who is the subject of a disciplinary proceedings. It extends protecting the public from similar defaults by other practitioners. Thus, it is relevant to take into account the effect the order will have upon the understanding in the profession and amongst the public of the standard of behaviour required of solicitors.".

162 As the Council submitted, the Tribunal's disciplinary jurisdiction is also aimed at ensuring the maintenance of highest professional standards within the legal profession; *Council of the Law Society of NSW v Weller* [2017] NSWCATOD 38 at [40].

163 By reference to the authorities, the principles to be applied in determining appropriate orders include:

(1) that the Respondent's conduct should be considered at the time of its occurrence regardless of whether the solicitor appreciates the impropriety or not.

(2) that the fact that the client did not suffer any real loss as a result of the Respondent's conduct is of little if any relevance when determining any sanction to be imposed; *Moulton* at 739.

(3) that the Respondent's recognition of his or her misconduct is a relevant consideration; *Moulton* at 739; *NSW Bar Association v Evatt (1968)* 117 CLR 177 at 184.

164 Where the Tribunal finds a lawyer is guilty of unsatisfactory professional conduct or professional misconduct, it may make any orders that it thinks fit including orders under ss 299 and 302 of the *Uniform Law*.

> Section 299 provides as follows:
>
> (1) The designated local regulatory authority may, in relation to a disciplinary matter, find that the Respondent lawyer or a legal practitioner associate of the Respondent law practice has engaged in unsatisfactory professional conduct and may determine the disciplinary matter by making any of the following orders--
>
> > (a) an order cautioning the Respondent or a legal practitioner associate of the Respondent law practice;
> >
> > (b) an order reprimanding the Respondent or a legal practitioner associate of the Respondent law practice;

(c) an order requiring an apology from the Respondent or a legal practitioner associate of the Respondent law practice;

(d) an order requiring the Respondent or a legal practitioner associate of the Respondent law practice to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;

(e) an order requiring--

(i) the Respondent lawyer; or

(ii) the Respondent law practice to arrange for a legal practitioner associate of the law practice--

to undertake training, education or counselling or be supervised;

(f) an order requiring the Respondent or a legal practitioner associate of the Respondent law practice to pay a fine of a specified amount (not exceeding $25 000) to the fund referred to in section 456;

(g) an order recommending the imposition of a specified condition on the Australian practising certificate or Australian registration certificate of the Respondent lawyer or a legal practitioner associate of the Respondent law practice

Section 302 provides as follows:

(1) If, after it has completed a hearing under this Part into the conduct of a Respondent lawyer, the designated tribunal finds that the lawyer is guilty of unsatisfactory professional conduct or professional misconduct, the designated tribunal may make any orders that it thinks fit, including any of the orders that a local regulatory authority can make under section 299 in relation to a lawyer and any one or more of the following--

(a) an order that the lawyer do or refrain from doing something in connection with the practice of law;

(b) an order that the lawyer cease to accept instructions as a public notary in relation to notarial services;

(c) an order that the lawyer's practice be managed for a specified period in a specified way or subject to specified conditions;

(d) an order that the lawyer's practice be subject to periodic inspection by a specified person for a specified period;

(e) an order that the lawyer seek advice in relation to the management of the lawyer's practice from a specified person;

(f) an order recommending that the name of the lawyer be removed from a roll kept by a Supreme Court, a register of lawyers kept under jurisdictional legislation or the Australian Legal Profession Register;

(g) an order directing that a specified condition be imposed on the Australian practising certificate or Australian registration certificate of the lawyer;

(h) an order directing that the lawyer's Australian practising certificate or Australian registration certificate be suspended for a specified period or cancelled;

(i) an order directing that an Australian practising certificate or Australian registration certificate not be granted to the lawyer before the end of a specified period;

(j) an order that the lawyer not apply for an Australian practising certificate or Australian registration certificate before the end of a specified period;

(k) a compensation order against the lawyer in accordance with Part 5.5;

(l) an order that the lawyer pay a fine of a specified amount not exceeding $100,000 if the lawyer is found guilty of professional misconduct.

165 Relevantly the orders sought by Council fall within those contemplated by ss. 299 and 302 of the *Uniform Law* in light of the finding of professional misconduct which has been made.

Respondent's Submissions on Proposed Orders

166 The Respondent did not take issue with the relevant legal principles to be considered upon the making of dispositive orders to which the Council referred in its submissions.

167 The Respondent submitted generally and we have taken into account the following matters said to be relevant on his behalf in considering the protective orders sought:

(1) The Respondent has a good history in respect of professional conduct matters.

(2) That there were exceptional circumstances giving rise to a state of belief as to information provided by the Respondent to Mr Di Mauro that though the information was confidential, Mr Di Mauro was otherwise aware of it.

(3) The Respondent did not act in the Supreme Court Proceedings but referred the former client to another solicitor who was experienced in litigation.

(4) That the Respondent made a disclosure to Mr Alameddine about the communications.

(5) That the disciplinary proceedings are such that they in part have a deterrent effect involving the nature of the proceedings themselves including findings as to professional conduct which are public.

(6) That the Respondent acknowledged his conduct in his initial reply but has put at issue, “to some extent” [emphasis added], whether the disclosure to Mr Di Mauro involved open or shared communications such that the Professional Conduct Rules permitted the disclosure.

(7) That there was no real prejudice suffered by the former clients in the circumstances of the disclosure and that findings of the Supreme Court to a large extent supported the factual matrix which underscored the Respondent’s state of mind about the disclosures.

168 We accept that the Respondent has a good history in respect of professional conduct matters. The Council made no submission to the contrary. For the reasons previously expressed we do not accept that there were exceptional circumstances giving rise to a state of belief in relation to the information provided by the Respondent to Mr Di Mauro so that though the information was confidential, Mr Di Mauro was otherwise aware of it. We have found that the information went further than the shared communications between the parties. It was communicated at a time when the parties were in litigation and the subject matter of the transaction was to the Respondent’s knowledge in dispute. We are not satisfied that the objective circumstances gave a reasonable basis for the Respondent’s belief the subject of the submission.

169 We accept that the Respondent did not act in the Supreme Court Proceedings and referred his former client to another solicitor experienced in litigation. We also accept that the Respondent made a disclosure to Mr Alameddine, his former client’s new solicitor, about the communications with Mr Di Mauro. There is no evidence that the Respondent sought to conceal his communications with Mr Di Mauro.

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We also accept that disciplinary proceedings themselves have a deterrent effect being findings as to professional misconduct which are public. In our opinion, that of itself does not mitigate against the making of other orders within the power provided by ss 299 or 302 of the *Uniform Law* in appropriate circumstances.

171 We accept that the Respondent acknowledged his conduct in his initial reply and that is to his credit. For the reasons previously expressed, we have not accepted that the disclosures involved open or shared communications or that they were permitted by the Professional Conduct Rules.

172 The fact that there was said to be no prejudice suffered by the former clients is of no relevance when determining any sanction to be imposed; *Moulton* at [739]. Nor is it relevant that the ultimate findings of the court in *El-Cheikh v Miraki* supported the factual matrix which is said to have underscored the Respondent's state of mind about the disclosures. The Respondent's conduct is to be considered at the time of the occurrence whether any impropriety is appreciated by the solicitor at that time or not; *Moulton* at [739].

173 The Respondent also gave oral evidence and was cross-examined. His evidence was that the underlying transaction was complicated and that instructions were coming from a number of people. He said correspondence was, in his words "all over the place" and there were many cases open between the parties. He said it was not rare for Mr Di Mauro to call. At the hearing Mr Walsh, on behalf of the Respondent, further submitted that the Respondent saw his role in the transaction as a "coordinating one". However, there was no question in the proceedings that the Respondent acted other than solely for the Mirakis in the transaction. Accordingly he was subject to the legal and professional duties and obligations to which his retainer by the Mirakis gave rise including preserving client confidential information.

174 The Respondent gave evidence that he now accepts that it was inappropriate for him to speak to Mr Di Mauro and respond to his questions. He said that he was sorry that the situation had arisen and will take steps to ensure that it does not happen again. He said that if he found himself in a similar situation, he would seek advice from the Law Society on any ethical questions.

175 We accept the Respondent's evidence as truthful and find that he has an awareness and appreciation of his misconduct and that he is contrite and remorseful. We are satisfied that he is unlikely to breach the prohibition on disclosure of client confidential information in the future.

Submissions and Findings on Reprimand

176 Council submitted that the Tribunal should impose a reprimand to mark the Tribunal's disapproval of the Respondent's conduct and identifying professional standards, the establishment and maintenance of which protect the public; *Prothonotary of the Supreme Court of New South Wales v Chapman (unreported CA (NSW)) 14 December 1992* at p. 22 per Cripps JA.

177 The Respondent has made no submissions opposing the imposition of a reprimand. The Tribunal must nonetheless be satisfied that the making of an order will protect the public; *Chapman* at [22]. We are satisfied from his evidence that the Respondent is aware of his breach of the Conduct Rule. He has shown awareness, appreciation, remorse and contrition and has been frank throughout the disciplinary process. We are satisfied that he is unlikely to commit a similar breach of his professional obligations in the future and that the overriding purpose of the protection of the public does not require an order removing the Respondent from the roll.

178 However, in all the circumstances we find it appropriate to issue a reprimand. This will serve to protect the public by identifying the standards of professional conduct, particularly in relation to dealing with a client's confidential information and ensure they are maintained by other practitioners; *Walsh* at [40].

Submissions and Findings on Fine

179 Additionally the Council seeks that a substantial fine be imposed. The maximum fine that can be imposed under the Uniform Law following a finding of professional misconduct is $100,000; s 302(1)(l) Uniform Law.

180 The Council submitted that the seriousness with which the Tribunal views the Respondent's conduct will impact upon the quantum of the fine. It is submitted the purpose of a fine is to mark the Tribunal's disapproval of the Respondent's conduct; *Walsh* at [40] per Beazley JA; *Law Society of New South Wales v Shad* [2002] NSWADT 236 at [70].

181 The Council submitted that although the jurisdiction of the Tribunal in disciplinary matters is exercised to protect the public and not to punish the legal practitioner, the object of the protection of the public includes deterring the legal practitioner in question from repeating the misconduct and deterring other practitioners who might be tempted to fall short of the high standards required of them. An element of deterrence is an assurance to the public that serious lapses in the conduct of legal practitioners will not be passed over or likely put aside and will appropriately be dealt with; *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 470 per Giles AJA. See also *Legal Services Commission v Anderson* [2015] NSWCATOD 56 at [21] and *Council of the NSW Law Society v Vaughan* [2015] NSWCATOD 156 at [143]-[144]. The Council submitted that the imposition of a fine will convey to the legal profession and the community in general that such conduct is unacceptable; *Russo v Legal Services Commission* [2016] NSWCA 306 at [82]. See also *Hunter* at [69].

182 It is also important that the amount of any fine "mark out" to both the profession and the general public the seriousness of a practitioner's misconduct. This cannot be achieved by handing out a fine that is minimal or nominal; *Hunter* at [72].

183 The Respondent made no submissions opposing a fine. The Tribunal must nonetheless reach a conclusion having regard to the objective seriousness of the misconduct and the principles set out in *Walsh* and *Foreman* to determine whether the imposition of a

fine is an appropriate order and, if so, in what amount.

184 The Tribunal must also give consideration to matters put forward in mitigation by a practitioner guilty of misconduct when determining the appropriateness of and the amount of a fine. We have considered the submissions of the Respondent which are set out above and have taken these matters into account.

185 We are of the view that the gravity of the Respondent's conduct which we have identified warrants the imposition of a fine. This is for the purpose of expressing disapproval for the Respondent's conduct and general deterrence against practitioners engaging in similar conduct by making the profession and the general public aware of the seriousness of the misconduct.

186 The Tribunal was not referred by the parties to any authorities concerning the appropriate amount of a fine upon a finding of professional misconduct in circumstances of a breach of client confidentiality. In our opinion, some qualified guidance on that question might be taken from the decision of the Victorian Civil & Administrative Tribunal in *Victorian Legal Services Commission v Harriss (Legal Practice) (Corrected)* [2020] VCAT 689 (24 June 2020) which was determined under the Uniform Law. In that case, the Tribunal considered the quantum of a fine in circumstances where a solicitor had been found guilty of professional misconduct for a breach of a court order and subpoena conditions restricting access to documents produced on subpoena. The breach involved the creation of a verbatim copy of a subpoenaed document, the transcription of which was released to his client where the other party had agreed only to it being made available to the solicitor. The conduct resulted in a breach of the confidentiality of the subpoenaed documents. Mr Harriss had admitted the conduct and there were no previous disciplinary findings against him. The breach was found not to be intentional or dishonest. Mr Harriss conceded that the conduct comprised a substantial failure to reach or maintain a reasonable standard of competence and diligence amounting to professional misconduct under s. 297 of the Uniform Law. The parties jointly submitted that the Respondent should be reprimanded and fined $5,000 with order to pay costs. The Tribunal considered that the admitted breaches of the court order and subpoena conditions were serious matters and accepted that a fine of $5,000 was appropriate taking into account the nature of the conduct, the mitigating factors and the need for there to be a general deterrent for practitioners against engaging in such conduct.

187 We have taken into account that the Respondent has shown contrition for his actions and has a history of good professional conduct. His breaches of confidential information were not malicious or intentional, nor did he stand to obtain any benefit by making the disclosures. He has accepted responsibility for his actions. We do regard the misconduct, although it did not as in *Harriss* involve the breach of a court order, as serious for the reasons we have identified.

188 Having regard to all of these matters and the principles to which we have referred we determine that it is appropriate to impose a fine in the amount of $4,000.

Submissions and Findings on Training and Education

189 The Council further seeks an order pursuant to s. 299(1)(e) of the Uniform Law requiring the Respondent to undertake an appropriate legal ethics course within six months of the order of the Tribunal and subject to the conditions set out in the proposed Order 3 of the Application. In circumstances where the Council does not seek orders which would interfere with the Respondent's right to practice, the Council submitted that the proposed orders for further education are an appropriate manner in which to ensure the public is protected.

190 The Respondent has not opposed the orders sought by the Council that he undertakes a course of study in legal ethics.

191 At the time of making the disclosures of confidential information the Respondent failed to identify that there was a potential breach of his professional obligations to his client and take appropriate steps to avoid such a breach. In our opinion this demonstrates the need for further training. Such an order would also be consistent with the protective nature of the Tribunal's jurisdiction. The imposition of such an order will provide the public with confidence that the practitioner in question will receive training to mitigate the risk that he will make a future error. It will also communicate the message more broadly that the Tribunal will seek to correct the behaviour of practitioners who do not meet the professional standards required.

192 We will make the order in the terms proposed by the Council.

Submissions and Findings on Costs

193 As Council submitted, pursuant to clause 23(1) of schedule 5 of the *NCAT Act* where there has been a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the Tribunal is required to make orders that the practitioner pay costs including the costs of the Commissioner, a Council and a complainant unless the Tribunal is satisfied that exceptional circumstances exist. Where no exceptional circumstances have been alleged or established, it is appropriate that we make an order that the Respondent pay the Council's costs as agreed or assessed.

Orders

194 The Tribunal having found that Mr Alkhair is guilty of professional misconduct, orders that:

(1) The Respondent is publicly reprimanded.

(2) The Respondent to pay a fine of $4,000.

(3) The Respondent must undertake further education in accordance with the following terms:

(a)

The Respondent must undertake, at his own expense, within six months from the date of the orders of the Tribunal (Time Period), an appropriate legal ethics course (the Course) as approved by the Director, Legal Regulation of the Law Society of NSW (the Director) and achieve a pass mark of not less than 50% (Pass Mark).

(b) The Respondent shall, within seven (7) days of receipt of notification of the result of his participation in the Course, provide to the Director, the original of such notification.

(c) Should the Respondent fail to achieve the Pass Mark in the Course, he should complete such further course (in which he may not have achieved the Pass Mark) as approved by the Director until such time as he achieves the Pass Mark in the Course within the Time Period.

(d) Should the Respondent fail to achieve the Pass Mark in the Course within the Time Period, his Practising Certificate shall be suspended or if not then holding a Current Practising Certificate, no further Practising Certificate is to be issued to him until such time as he achieves the Pass Mark in the Course.

(4) The Respondent is to pay the costs of the Applicant as agreed or assessed.

(5) Grant leave to the Complainant to approach the Registry within 14 days to list her claim for compensation for directions on a date to be fixed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Decision last updated: 05 October 2022