

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

LEGAL PRACTICE LIST

VCAT REFERENCE NO. J51/2015

CATCHWORDS

Solicitor – professional misconduct – acting in motor vehicle case on behalf of taxi driver without that driver's authorisation – failing to obtain proper instructions – incompetent handling of Magistrates' Court proceedings – *Legal Profession Act 2004* s.4.4.3(1)

APPLICANT	Victorian Legal Services Commissioner
RESPONDENT	Mr Michael Anderson
WHERE HELD	Melbourne
BEFORE	Jonathan Smithers, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	22 July 2015
DATE OF ORDER	31 July 2015
CITATION	

FINDINGS

The Tribunal finds Mr Anderson guilty of three charges of professional misconduct, in that he:

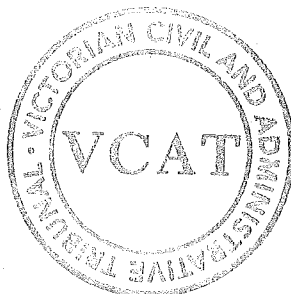
- 1 purported to act for a party, including filing a Defence, without any, or any proper instructions from that party to do so (charge of professional misconduct at common law, within the meaning of s 4.4.3(1) of the *Legal Profession Act 2004* (the Act))
- 2 purported to act for a party and to defend proceedings brought against that party without clarifying what, if any, his instructions were, without seeking full instructions as to the accident the subject of the proceedings, without advising as to the possible liability for costs to other parties, and without providing any advice as to the party's obligations under the *Civil Procedure Act 2010*, (charge of professional misconduct at common law, within the meaning of s 4.4.3(1) of the Act)

- 3 acted in a manner which involved a substantial and consistent failure to reach or maintain a reasonable standard of competence and diligence, by defending proceedings brought against that party without seeking full instructions as to the accident the subject of the proceedings, without seeking or obtaining the party's instructions to act, without advising as to the possible liability for costs to other parties, without providing any advice as to the party's obligations under the *Civil Procedure Act* 2010, without advising the party to obtain independent legal advice, and without withdrawing an admission wrongly made against that party's interests, seeking to have evidence to the contrary led without that admission having been withdrawn, issuing a subpoena to his own client and seeking to file a Notice of Discontinuance after the Court's decision had been handed down (charge of professional misconduct within the meaning of s 4.4.3(1)(a) of the Act).

ORDER

- 1 The name of the applicant is amended to Victorian Legal Services Commissioner.
- 2 Mr Anderson is reprimanded.
- 3 Mr Anderson is to pay a fine of \$20,000 to the Victorian Legal Services Board.
- 4 Within 12 months of the date of this decision, Mr Anderson is to undertake five units of continuing professional development, having application to the ethical issues arising in acting for clients in motor vehicle accident claims and debt collection matters, including issues arising from instructions being received on referral from a third party, and issues arising from the fact of his practice being wholly owned by another entity. This requirement is in addition to Mr Anderson's other CPD obligations.
- 5 Mr Anderson is to pay the applicant's costs in the agreed sum of \$8,000.

Jonathan Smithers
Senior Member



APPEARANCES:

For Applicant

Mr Tim Scotter of Counsel

For Respondent

Mr Malcolm Howell, solicitor

REASONS

BACKGROUND

- 1 Mr Michael Anderson is a solicitor with five and a half years post-admission experience. He is the sole principal having responsibility for the conduct of the practice of EC Legal Pty Ltd. That firm is wholly owned by eCollect.com.au Pty Ltd. His practice includes motor vehicle accident cases referred to him by the Metropolitan Taxi Club (the Club). I understand the Club provides insurance and assistance with responding to claims against taxi drivers for damage caused to other vehicles. I also understand many of the members of the Club are from the Horn of Africa area.
- 2 This disciplinary application by the VLSC arises out of Mr Anderson's acceptance of instructions referred to him by the Club to act on behalf of a taxi driver, Mr Aliye. Mr Aliye was a defendant in a Magistrates' Court claim for damages arising out of a motor vehicle collision. Throughout this matter, however, Mr Anderson corresponded with and took instructions from the Club, rather than his client, Mr Aliye. He did not obtain authorisation from Mr Aliye to act. Nor were proper instructions obtained. The case was very badly handled. As a result, Mr Aliye was found partially liable for damage caused to another vehicle, plus costs, even though he was not the driver, having previously sold the vehicle involved in the collision to another taxi driver, Mr Mohamed.
- 3 The car accident occurred on 25 October 2011. Mr Mohamed was the first defendant and Mr Aliye the second defendant to a claim brought by the driver of the other vehicle. The Statement of Claim alleged that the driver, Mr Mohamed, was acting as Mr Aliye's agent when the collision occurred (the agency allegation). This was in circumstances where Mr Aliye was still the registered owner of the vehicle. Both Mr Mohamed and Mr Aliye were members of the Club.
- 4 On the day of the accident, Mr Mohamed executed a form of authority (Authority) addressed to Brunswick Road Collision Centre to 'store, quote and repair vehicle'. This did not provide an indemnity to the taxi driver or owner, and in any event Mr Aliye had not signed it.
- 5 At no stage during the retainer did Mr Anderson:
 - seek or obtain instructions from Mr Aliye
 - seek full and proper details as to the accident or the ownership of the taxi
 - seek or obtain Mr Aliye's consent to his firm acting
 - give Mr Aliye any advice as to the risks associated with the proceedings, in particular, the possibility of costs being awarded against him

- give Mr Aliye any advice as to the obligations under the *Civil Procedure Act 2010*
 - advise Mr Aliye to obtain independent legal advice.
- 6 On 23 April 2012, Mr Anderson filed a Defence on behalf of both Mr Mohamed and Mr Aliye. This accepted the agency allegation. That concession was wrongly made. Mr Aliye told Mr Anderson at a mediation on 18 July 2012 that he had sold the taxi to Mr Mohamed, although the paperwork to register the transfer had not been completed, and so the vehicle remained registered in Mr Aliye's name.
 - 7 While he took some steps to ascertain more information about the sale of the vehicle, Mr Anderson did not at any stage amend the Defence to refute the agency allegation. On 18 February 2013, the week before the case came on to be heard, he wrote to the Club saying that the ownership of the taxi was not 100% clear. On 20 February 2013 he briefed counsel. His instructions to counsel included the statement:

There is a major issue over ownership, the vehicle may have been registered in the name of the second defendant however the first defendant was the operator of the vehicle and we deny agency – the first defendant is liable if we are at fault ...
 - 8 Prior to the hearing Mr Anderson issued a subpoena to Mr Aliye (even though Mr Aliye was his own client) to attend Court and give evidence. This was to enable him to tell the Court that he was not the owner, and Mr Mohamed was not his agent. However, the fact was that such evidence would have flown in the face of the acceptance in the pleading filed on behalf of Mr Aliye, that Mr Mohamed was acting as his agent when the collision occurred. As stated, the Defence was never amended, and the admission of the agency allegation was never withdrawn.
 - 9 At the hearing on 25 February 2013, Mr Anderson was not present, and Mr Aliye was not called. The case was heard and both Mr Mohamed and Mr Aliye were ordered to pay \$7,500 to the plaintiff, plus interest and costs, a total of \$15,757.53.
 - 10 Mr Anderson recognised his mistake in acting in a way which allowed this result to come about, and sought to have the plaintiff's application discontinued. This was a vain hope, given that the Magistrates' Court had already determined the matter.
 - 11 The Club initially refused to indemnify Mr Aliye. Mr Aliye was at one stage threatened with the loss of his home. However, ultimately it appears Mr Anderson facilitated payment of the judgment by the Club to the plaintiff. Mr Aliye has, however, been left with a Magistrates' Court judgment against his name, which ought not to have been entered.

THE CHARGES

- 12 The VLSC has brought three charges against Mr Anderson. These are set out in full as an appendix to this decision. In summary however, they relate to:

Charge 1 – Purporting to act for Mr Aliye, including filing a Defence, without any, or any proper instructions from Mr Aliye to do so. This is a charge of professional misconduct at common law, within the meaning of s 4.4.3(1) of the Act.

Charge 2 – Purporting to act for Mr Aliye and to defend the proceedings brought against him, without clarifying what, if any, his instructions were, without seeking full instructions as to the accident the subject of the proceedings, without advising as to the possible liability for costs to other parties, without providing any advice as to Mr Aliye's obligations under the *Civil Procedure Act 2010*. Again, this is a charge of professional misconduct at common law, within the meaning of s 4.4.3(1) of the Act.

This charge also included (as allegation (c)) that Mr Anderson acted without 'giving the complainant any advice as to the possible recovery and risks involved in issuing proceedings'. However Mr Aliye of course acted for the defendants, not the plaintiff. Although this matter was not discussed during the hearing, I have excluded this allegation from my consideration of Charge 2.¹

Charge 3 – Professional misconduct within the meaning of s 4.4.3(1)(a) of the Act in that Mr Anderson acted for Mr Aliye in a manner which involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. This comprised defending proceedings brought against Mr Aliye without seeking full instructions as to the accident the subject of the proceedings, without seeking or obtaining Mr Aliye's instructions to act, without advising as to the possible liability for costs to other parties, without providing any advice as to Mr Aliye's obligations under the *Civil Procedure Act 2010*, without advising Mr Aliye to obtain independent legal advice, without withdrawing an admission wrongly made against that party's interests, seeking to have evidence to the contrary led without that admission having been withdrawn, issuing a subpoena to his own client and seeking to file a Notice of Discontinuance after the Court's decision had been handed down.

- 13 Mr Anderson co-operated with the VLSC from the time the complaint was published to him. At the first directions hearing, he indicated he would plead guilty to Charges 1 and 2. He did so at the hearing, and in accordance with the admitted facts, I find those two charges proved. I find Mr Anderson's conduct would be regarded by practitioners of good repute as disgraceful or dishonourable. In relation to Charge 3, however, Mr

¹ The same particular was relied on in relation to charge 3 as well (paragraph 16(d) of the application for Order). In the same way, I have also excluded it from my consideration of Charge 3.

Anderson contended that the allegations relied upon should in fact form part of Charge 2.

- 14 This issue was raised by Mr Howell, for Mr Anderson, at the commencement of the final hearing. Mr Howell referred to the partial duplication between Charges 2 and 3 and submitted in the circumstances it would be unfair for Mr Anderson to face three charges, rather than two. Following discussion, I indicated that while the Tribunal is concerned with fairness, there is no basis here on which an order would be made to that effect. It is a matter for the regulatory agency to determine what charges it brings, and in any event, although there is overlap between Charges 2 and 3, there are also significant differences. The following matters were relied on in relation to Charge 3, but not Charge 2: issuing a subpoena to his own client, seeking to have counsel lead evidence denying agency when this had been accepted in the Defence, and seeking to have a Notice of Discontinuance filed after the Court had handed down its decision. The VLSC relied on these matters as comprising incompetent handling of the file, but not common law misconduct.
- 15 In making my ruling, I made it clear that the specification of some of the particulars in the VLSC's Application for Order as relating to both Charges 2 and 3 would have no effect on the (global) penalty imposed for the three charges – each particular aspect of Mr Anderson's conduct will only be counted once in determining penalty, regardless of the number of charges it relates to.
- 16 After this ruling was made, Mr Howell indicated that Mr Anderson accepted that his conduct the subject of Charge 3 constituted unsatisfactory professional conduct within the meaning of s 4.4.2 of the Act, but contended it did not amount to professional misconduct within the meaning of s 4.4.3(1)(a) of the Act. That is, that it was conduct which fell short of a standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner, but that this did not involve a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. The submission was that the main problem with Mr Anderson's handling of this matter was the admission of the agency allegation, and the failure to withdraw that admission. This was dealt with under Charge 2. What was left, in relation to Charge 3, was the issuing of a subpoena by Mr Anderson to his own client, and the attempt to file a Notice of Discontinuance after judgment had been entered.
- 17 Consistently with the ruling made during the hearing that Charge 3 would proceed, I do not accept that the matters relating to the acceptance of the agency allegation, and the failure to withdraw it, are to be excised from consideration in relation to Charge 3. I find that Mr Anderson's conduct the subject of Charge 3 involves both a substantial and a consistent failure to reach or maintain a reasonable standard of competence and diligence, and so comprises professional misconduct under s 4.4.3(1)(a). Even if the

aspects of Mr Anderson's conduct which are the basis of Charge 2 were excluded, however, I would still be inclined to make a finding of professional misconduct in relation to Charge 3. The subpoenaing of his own client, the misguided attempt to deny that Mr Mohamed was acting as Mr Aliye's agent through calling Mr Aliye in the face of an admission to that effect in the pleading, and the attempt to have the plaintiff's claim discontinued after judgment had been entered, are matters which are indicative of a matter which was handled incompetently, and to a substantial degree. They are a different order of magnitude to the kind of conduct which comprises mere unsatisfactory professional conduct.

- 18 Notwithstanding these findings, I note that the way in which the three charges in this case were drafted, with overlapping subcomponents and incorporating reference to multiple overlapping particulars, being paragraphs and sub paragraphs in the Application for Order, created some unnecessary complexity.

PENALTY

Relevant previous decisions

- 19 Although dating back to 1999 and 2000 respectively, the cases of *Legal Ombudsman v Battley*² and *Victorian Lawyer s RPA Limited v Hession*³ raised issues with some similarities to those in the present case.

Battley

- 20 In *Battley*, the complainant/'client', Ms Hosford, was the owner of a car which was damaged due to the fault of another driver (who had apparently failed to engage his handbrake properly when parking). Ms Hosford's car was taken to a crash repairer, who gave her a form to sign, which she did. This form purported to authorise a cost recovery service to negotiate settlement of her claim against the other driver, including, where necessary instructing a solicitor. However, no legal costs would be incurred without her prior knowledge.
- 21 Mr Battley, a solicitor, accepted instructions from the cost recovery service (on behalf of the repairer) to issue proceedings in Ms Hosford's name. Mr Battley first spoke to Ms Hosford six weeks after the proceedings commenced. She did not become aware of the proceedings until three months after issue, when a costs order for \$644 was made against her, in favour of the defendant. This was as a result of an adjournment arranged by Mr Battley. Ms Hosford eventually reluctantly paid the \$644. This was in the light of Mr Battley's warning that the defendant's solicitors could arrange for the Sheriff to enforce the order by seizing her property.
- 22 Ms Hosford's car was comprehensively insured through FAI Insurance. After the costs order was made, Mr Battley involved FAI. He did this on

² [1999] VPLT 6 (2 September 1999) – Full Legal Profession Tribunal chaired by Murdoch J.

³ [2000] VLPT 12 (1 August 2000) – Full Legal Profession Tribunal chaired by Murdoch J.

- the instructions of the cost recovery service, not Ms Hosford. Ultimately, \$3,035.67 was paid by FAI, and this was deposited in Mr Battley's trust account.
- 23 Ms Hosford's car was repaired and ultimately, Mr Battley reimbursed her for the \$644 costs she had paid, and also the \$1,049.50 he had wrongly taken out of trust, for his own costs.
- 24 Mr Battley was found guilty by the full Tribunal of the Legal Profession Tribunal of six charges of professional misconduct under the *Legal Practice Act* 1996. The key aspects of his impugned conduct were as follows: He purported to act for Ms Hosford and commenced proceedings in her name without instructions, and without advising her of the details, risks and benefits of litigation, including any possible costs awards against her and any possible prejudice to her rights under her FAI comprehensive insurance policy. He knew that the form she signed did not provide a proper basis for him to act. He knowingly made a false statement to opposing solicitors that the adjournment he sought was on Ms Hosford's instructions. He took costs and disbursements from his trust account without instructions, and without there being any legal basis for him to do so. He acted for the repairer and the cost recovery service on the one hand, while also acting for Ms Hosford on the other, despite there being a conflict of interest.
- 25 Although the decision on penalty was not produced, Mr Scotter said the VLSC's records indicated that Mr Battley was fined \$25,000.

Hession

- 26 In this case, a motorist disputed her insurer's conclusion that she was at fault in a car accident. She consulted a 'recovery service' which took up her case against her insurer. She signed a form of authority, but it was at best ambiguous. It did not authorise the commencement of legal action. Nevertheless, on referral from the recovery service, Mr Hession, a solicitor, commenced Magistrate Court proceedings on the motorist's behalf. However, he did not tell her he had done so until six weeks after issue, and shortly before the Court hearing. At this point, the motorist accepted that Mr Hession was acting for her.
- 27 The case was successful, and the motorist was awarded the full amount sought for repairs, \$1,341.78, plus costs. However, she only received \$408.72 after legal fees of \$1,171.00 were taken by Mr Hession and \$100.00 by the recovery service (said to have been discounted from \$350.00).
- 28 Mr Hession was found guilty of five counts of professional misconduct under the *Legal Practice Act* 1996. The first two charges were professional misconduct at common law: Charge 1 related to purporting to act and commence legal proceedings without instructions. Charge 2 related to acting without obtaining full instructions about the collision, and without advising his client as to the implications of litigation. This included the

likely damages awarded if successful, the implications in relation to her insurance position, and her potential liability for costs to the other party, and to Mr Hession. The third charge was in relation to partially overlapping matters, comprising a substantial or consistent failure to reach or maintain reasonable standards of competence and diligence. The fourth and fifth charges related to failure to provide costs disclosure.

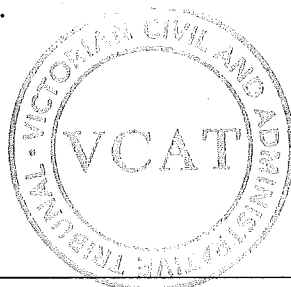
- 29 Mr Hession was fined \$15,000.

Analysis and findings

- 30 Mr Howell referred to the following matters in mitigation of penalty: Mr Anderson was fully co-operative with the LSC from the time the complaint was made. He accepted the factual allegations put against him. He pleaded guilty to Charges 1 and 2, and guilty to unsatisfactory professional conduct in relation to Charge 3, in the circumstances described above. He now readily accepts he made the errors he made. It was submitted he has now been given detailed advice about his obligations when acting for taxi drivers on referrals from the Club.
- 31 There are no previous disciplinary findings against Mr Anderson. Several character references were produced. A barrister, Mr Reuben Benkel described him as competent and conscientious in conducting motor vehicle accident cases, as well as being honest and reliable. A client, Mr Ludvick Bunderla, said he was honest, trustworthy and competent. There was also a reference from Mr Saneh Saad, Finance Director and shareholder of eCollect Pty Ltd, which owns EC Legal, expressing confidence in Mr Anderson.
- 32 In the circumstances of this case, specific deterrence is of some significance, but general deterrence is of greater significance. The conduct of some lawyers acting on referrals or instructions received from crash repairers and/or middlemen is a matter of concern to the community. When that conduct is found to be deficient, this reinforces a negative view of the profession, and undermines the reputation of the profession. The cases of *Battley* and *Hession* are examples of this.
- 33 There are a number of aspects of Mr Anderson's conduct which bear similarities to the conduct in *Battley* and/or *Hession*. In particular, Mr Anderson took instructions from the Club, and, unknown to Mr Aliye, commenced to act for him, including filing a Defence on his behalf (which in this case contained a wrongly made admission prejudicial to Mr Aliye). Mr Aliye was treated more like a pawn in the process, rather than as a client. He was subpoenaed by his lawyer to attend his own case. His individual interests, which conflicted with those of Mr Mohamed and the Club, were not properly considered until it was too late. Mr Aliye has suffered inconvenience, stress, loss of income, and he now has a judgment standing against his name.

- 34 While Mr Anderson was acting in the belief that Mr Aliye would be indemnified by the Club, if he had considered the form of the Authority (which was in any event signed by Mr Mohamed, but not Mr Aliye) it would have been obvious to him that he was not. It is to Mr Anderson's credit that he sought to rectify the consequences of the way in which he handled Mr Aliye's matter, with partial success.
- 35 However, Mr Anderson's disregard for the interests of his client renders his conduct very serious.
- 36 In contrast to *Battley*, Mr Anderson's conduct did not involve dishonesty, or trust account breaches in relation to the taking of fees. Nor was a failure to provide cost disclosure part of the case put against him. Also, Mr Anderson's relationship is with a taxi club, which Mr Aliye and Mr Mohamed were already members of, and in this case Mr Anderson was purporting to act for a defendant to proceedings already issued, rather than for a plaintiff as part of a scheme which blatantly undermined the interests of motorists. Had that been the case, a more severe penalty would have been imposed.
- 37 The conduct of practitioners in connection with carrying out civil litigation must now be considered in the context of the *Civil Procedure Act*. This requires certification in relation to understanding of the overarching obligations, and compliance with the proper basis obligation in relation to matters relied on in litigation. Mr Anderson did not provide Mr Aliye with advice as to his obligations as a litigant under the *Civil Procedure Act*.
- 38 Balancing the above matters, and in particular the need for general deterrence in relation to Mr Anderson's conduct in purporting to act for a client without being instructed, or obtaining information necessary for him to do so, to the client's detriment, I determine that he should be given a reprimand, and a fine of \$20,000.
- 39 Being the sole principal of a firm which is wholly owned by a debt collecting agency, and one which carries out work on referral from the Club puts Mr Anderson in a particularly challenging position in terms of ensuring he upholds his ethical duties to his clients (as well as to the Courts). It is appropriate that he undertake CPD over and above the normal requirements, which relates as specifically as possible to handling those challenges. I will make an order to that effect.
- 40 Finally, there being no exceptional circumstances, Mr Anderson is to pay the costs of the VLSC under cl 46D of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998*. The parties have agreed that these be quantified at \$8,000.


Jonathan Smithers
Senior Member



APPENDIX

CHARGE 1

Misconduct at Common Law by acting, issuing and maintaining the proceedings

You are guilty of professional misconduct within the meaning of s.4.4.3(1) of the Act, being professional misconduct at common law, in that you caused or allowed the Firm to:

- (a) purport to act for the complainant without any or any proper instructions to do so in the circumstances; and/or
- (b) file the defence, without any or any proper instructions to do so in the circumstances; and/or
- (c) continue to act in the proceedings without any or any proper instructions to do so

in circumstances where

- (d) the respondent had knowledge of the matters in (a) to (c) above, alternatively should have known the matters in (a) to (c) above; and/or
- (e) [the respondent] was the legal practitioner from the Firm responsible for defending and continuing the proceedings.

Particulars

The particulars relied upon are those set out in paragraphs 1 to 10, 13, 14, 16(a), 20(a), 21, 23, and 26 above.⁴

CHARGE 2

Misconduct at Common Law in acting without seeking instructions or advising

You are guilty of professional misconduct within the meaning of s.4.4.3(1) of the Act, being professional misconduct at common law, in that you caused or allowed the Firm to purport to act for the complainant and to defend the proceedings on behalf of the complainant, without:

- (a) clarifying what, if any, his instructions were, and/or
- (b) seeking full instructions as to the accident, the damage to his vehicle and his losses suffered; and/or
- (c) giving the complainant any advice as to the possible recovery and risks involved in issuing proceedings; and/or

⁴ The matters referred to in the paragraphs specified as Particulars for this charge, and the other two charges, are described to the extent necessary for the purposes of this decision in the narrative above, and in particular, in paragraph 12 of the decision.

- (d) giving the complainant any advice as to his possible liability for costs to other parties; and/or
- (e) giving the complainant any advice as to his obligations under the *Civil Procedure Act*.

Particulars

The particulars relied upon are those set out in paragraphs 1 to 6, 13, 14, 16(b) to (e), 17 and 20(b) to (c) above.

CHARGE 3

Substantial failure to reach or maintain competence

The Respondent is guilty of professional misconduct within the meaning of s.4.4.3(1)(a) of the Act in that the Respondent's conduct involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

Particulars

The particulars relied upon are those set out in paragraphs 1 to 6 and 13-16, 18 to 20, 22 to 24, 26, 30 and 31 above.