JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE and GINBEY [2023] WASAT 113
MEMBER	**:**	JUDGE K GLANCY, DEPUTY PRESIDENT MS P LE MIERE, SENIOR MEMBER MR R POVEY, MEMBER
HEARD	**:**	9 MARCH 2023
DELIVERED	**:**	30 NOVEMBER 2023
FILE NO/S	**:**	VR 80 of 2022
BETWEEN	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE Applicant AND HOWARD JOHN GINBEY Respondent

Catchwords:

Vocational regulation – Legal practitioner – Allegations of professional misconduct – Whether the practitioner engaged in professional misconduct by failing to follow clients' instructions, by misappropriating estate funds into personal accounts, by failing to comply with Court orders, by invoicing and receiving payments from clients' for work not performed, by failing to operate a trust account, and by failing to deliver legal services diligently or at all – Findings of professional misconduct

Legislation:

Evidence Act 1906 (WA)
Interpretation Act 1984 (WA), s 37
Legal Profession Act 2008 (WA), Pt 13, s 3, s 205, s205(1), s214, s 214(1), s 215(2), s 216, s 216(1), s 220, s 220(1), s 223, s 224(1), s 224(2), s 226(1), s 226(1)(b), s 336, s 402, s 403, s 403(1)(a), s 403(1)(b), s 404, s 428, s 428(1), s 434(c), s 438,
s 438(1), s 438(2), s 439, s 440, s 441, s 442, s 448(1), s 448(2), s 449(1), s 449(2), s 482, s 520, s 520(1)(a), s 520(1)(d), s 520(5)
Legal Profession Conduct Rules 2010 (WA), r 6(1)(c), r 6(1)(9)(e), r 7(e), r 50, r 50(2), r 50(3)
Legal Profession Rules 2009 (WA), s 6
Legal Profession Uniform Law Application Act 2022 (WA), s 6, s 260(a), s 313, s 313(2), s 421
Non-Contentious Probate Rules 1967 (WA), r 37
State Administrative Tribunal Act 2004 (WA), s 87(2)
Trustees Act 1962 (WA), s 63

Result:

Practitioner found to have engaged in professional misconduct

Category: B

Representation:

Counsel:

Applicant	:	CR Bailey
Respondent	:	No appearance

Solicitors:

Applicant	:	Legal Services and Complaints Committee
Respondent	:	N/A

Cases referred to in decision(s):

Briginshaw v Briginshaw (1938) 60 CLR 336
Ginbey v Commonwealth Bank of Australia [2021] WASCA 116
Goldsmith v Legal Services Complaints Committee [2023] WASCA 136

Jones v Dunkel (1959) 101 CLR 298
Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115; 21 WAR 56
Legal Practitioners Complaints Committee v De Alwis [2006] WASCA 198
Legal Profession Complaints Committee and Lee-Steere [2010] WASAT 189
Legal Services and Complaints Committee and Lourey [No 2] [2023] WASAT 77
Legal Services Complaints Committee and Goldsmith [2022] WASAT 43 (S)
New South Wales Bar Association v Meakes [2006] NSWCA 340
re H A O'Donnell [1895] 12 WN (NSW) 42
Re Simersall (1992) 35 FCR 584

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction and Outcome

1 This disciplinary proceeding against Howard John Ginbey (**Practitioner**) was referred to the State Administrative Tribunal (**Tribunal**) by application dated 8 September 2022 for determination pursuant to s 428 of the *Legal Profession Act 2008* (WA) (**LP Act)**.

2 Several allegations were made about the Practitioner's conduct. The overarching allegation is that the Practitioner engaged in professional misconduct within the meaning of s 403 and s 438 of the LP Act and in a way that meets both limbs of the common law test of professional misconduct, in the course of acting in three separate matters. Nine Grounds, or separate allegations, were set out in Annexure A to the application (the **Allegations**). Ground 8 was abandoned at the hearing.[1]

3 The Legal Services and Complaints Committee (**Applicant**) seeks the following orders:

1. A finding that the Practitioner engaged in professional misconduct pursuant to s 438(1) of the LP Act;

2. Consequential orders pursuant to s 438(2) of the LP Act; and

3. An order that the Practitioner pay the Applicant's costs pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**).

4 For reasons which we set out below, we have found that the facts underpinning each Ground have been proved to the requisite standard and we find that the Practitioner's conduct in each case is to be characterised as professional misconduct.

5 As a consequence of those findings, we propose to make the orders set out in [282].

Amendment of the Applicant's grounds

6 On 15 November 2023 (sometime after the hearing was concluded), we granted the Applicant leave to amend the Grounds upon which it alleges that the Practitioner engaged in professional misconduct.

[1] ts 6, 9 March 2023 and Applicant's submissions dated 2 March 2023, para 121.

We appreciate that that was an unusual step to take, but we determined it was appropriate in circumstances where:

(a) the Practitioner has taken no part in the proceedings;

(b) the Practitioner had been served, by leaving the documents at his residential address, with notice of the proposed amendment and, separately, personally served with notice at the hearing at which the leave to amend was to be determined; and

(c) the amendments were sought merely to clarify the basis upon which the Applicant submits that the conduct of the Practitioner amounted to professional misconduct – i.e. that they rely on the definition in the LP Act and on particular limbs of the ***Kyle v Legal Practitioners' Complaints Committee***[2] test and, in our view, no prejudice was occasioned to the Practitioner by the amendments because the Applicant's case did not change at all.

7 We made an order which, regrettably, only granted the Applicant leave to amend the Grounds of its application when we clearly intended to allow it to amend both the Grounds and the Contentions in accordance with its Minute of Proposed Amended Annexure A filed 11 September 2023. When that was brought to our attention by the Applicant on 22 November 2023, we made an order revoking the order we made on 15 November 2023 and substituting an order granting the Applicant leave to amend its application on the terms set out in its Minute of Proposed Amended Annexure A dated 11 September 2023 as was always our intention.

Jurisdiction of the Tribunal and applicable law

8 This matter commenced when the Legal Profession Complaints Committee (**LPCC**) received three separate complaints about the Practitioner's conduct as a legal practitioner. As the complaints were being investigated, other matters that were not the subject of the three complaints were identified and investigations into those matters were commenced at the LPCC's own initiative.[3] Then, on a date prior to 1 July 2022, the LPCC resolved to refer allegations about the Practitioner's conduct to the Tribunal under s 428(1) of the LP Act.

[2] ***Kyle v Legal Practitioners' Complaints Committee*** [1999] WASCA 115; 21 WAR 56 (***Kyle***).
[3] The LPCC may investigate, on its own initiative, the conduct of an Australian legal practitioner if the LPCC has reasonable cause to suspect that the Practitioner has been guilty of unsatisfactory professional conduct or professional misconduct: s 421(1) of the LP Act.

9 The application was ultimately lodged with the Tribunal on 8 September 2022.

10 On 1 July 2022, the LP Act was repealed by s 260(a) of the *Legal Profession Uniform Law Application Act 2022* (WA) (**Application Act**), which also, by s 6, provides that the Legal Profession Uniform Law (WA)[4] (**Uniform Law**) applies as a law of Western Australia on and from 1 July 2022.

11 The timing of the referral and the commencement of the Application Act means that we need to determine whether the application is to be resolved under the LP Act or the Application Act.

12 The Applicant submits that the matter is to be determined under the LP Act. The Applicant submits that there are two alternative basis upon which we could reach that conclusion. The first is that s 37 of the *Interpretation Act 1984* (WA) (**Interpretation Act**) applies with the result that the LP Act continues to apply to the proceeding. The second is that s 313 of the Application Act applies with the same result. The Applicant contends that they are alternatives and that both cannot apply. The Applicant contends that the Tribunal may not need to resolve upon which basis the matter proceeds under the LP Act because they both have the same result.

13 Section 37 of the Interpretation Act provides as follows:

> **37. General savings on repeal**
>
> (1) Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears-
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect;
>
> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under the enactment;
>
> (c) affect any right, interest, title, power or privilege created, acquired accrued, established or exercisable or any status or capacity existing prior to the repeal;
>
> (d) affect any duty, obligation, liability, or burden of proof imposed, created, or incurred prior to the repeal;

[4] The Uniform Law is identified in s 6 of the Application Act.

(e) subject to section 11 of the Criminal Code and section 10 of the Sentencing Act 1995, affect any penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against that enactment;

(f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligations, liability, burden of proof, penalty or forfeiture

and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made.

(2) The inclusion in the repealing provisions of an enactment of any express saving with respect to the repeals effected thereby shall not be taken to prejudice the operations of this section with respect to those repeals.

14 Section 313 of the Application Act provides as follows:

313. Investigations not finalised before commencement day to be dealt with under old Act

(1) This section applies to any of the following matters under the old Act that were not completed before commencement day —

(a) a complaint or inquiry being dealt with by the Complaints Committee under the old Act because of section 621 of that Act;

(b) a complaint being dealt with by the Complaints Committee under Part 13 of the old Act;

(c) an investigation by the Complaints Committee under section 421 of the old Act.

(2) Unless the local regulations provide that another person is to deal with the matter, the Legal Services and Complaints Committee may deal with the matter under the provisions of the old Act dealing with the matter, including provisions necessary to give effect to those provisions, as if —

(a) those provisions had not been repealed; and

(b) a reference to the Complaints Committee in those provisions were a reference to the Legal Services and Complaints Committee.

(3) If the local regulations provide that another person is to deal with the matter —

(a) the person must have regard to the steps taken by the Complaints Committee before the person deals with the matter; and

(b) the person must deal with the matter in accordance with the procedure prescribed by the local regulations.

15 The Applicant submits that even though the LPCC had resolved to refer the matter before the commencement of the Application Act, because it had not done so before July 2022, they may still be regarded as having been investigating the matter under s 421 of the Application Act until 8 September 2022, the date on which the application was made to the Tribunal. It submits that it would then follow that the matter is to be dealt with under the provisions of the LP Act in accordance with s 313(2) of the Application Act.

16 We do not accept that submission for two reasons. First, in our view, the LPCC is to be regarded as having finalised its investigation into a complaint when it resolves to refer and then refers the matter to the Tribunal. The precise formulation of the allegations is not, having regard to the natural meaning of the word investigation, part of the investigation but is the outcome of the investigation and part of the legal process that occurs upon referral of the complaint to the Tribunal. Second, if the Applicant's construction were adopted, the investigation would not be concluded until such time as the Tribunal's hearing was concluded because the allegations can be amended with leave of the Tribunal at any stage in the proceeding.

17 In our view, s 37 of the Interpretation Act is the provision which operates to preserve the operation of the LP Act in respect of this proceeding. Because we have found that s 313 of the Application Act does not apply, the Application Act says nothing about how matters commenced in the Tribunal before 1 July 2022 are to be resolved. The result of that is that s 37 of the Interpretation Act then applies.[5] That is because there is nothing in the Application Act from which we could discern an intention that s 37 would not apply.

18 We note that in ***Legal Services and Complaints Committee and Goldsmith***[6] a matter which concerned conduct which had been

[5] *Legal Profession Uniform Law Application Act Commencement Proclamation 2022* (WA) cl.2 Western Australia, *Western Australian Government Gazette*, No 94, 30 June 2022, 3921.
[6] ***Legal Services Complaints Committee and Goldsmith*** [2022] WASAT 43 (S).

referred to the Tribunal before 1 July 2022, the Tribunal held that the LP Act continued to apply to those proceedings. The facts of that matter were not exactly the same as this case. In that case, the conduct had been referred to the Tribunal and findings as to liability had been made by the Tribunal before 1 July 2022, leaving only penalty and costs to be determined after 1 July 2022. Nevertheless, it is a case where the Tribunal analysed the Application Act and found:

(a) there was nothing in the Application Act which gave rise to a 'contrary intention' for the purposes of s 37 of the Interpretation Act;

(b) those proceedings dealt with an inchoate liability of Mr Goldsmith which arose under the terms of the LP Act; and

(c) by reason of s 37, the referral must continue to be dealt with pursuant to the terms of the LP Act, including questions of penalty, costs and compensation.

19 While not directly on point, we find that the analysis in that case provides support for our conclusion in relation to the operation of s 37 of the Interpretation Act in this case.[7]

20 Section 438(1) of the LP Act provides that the Tribunal has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct. Section 438(2) provides that if, after it has completed a hearing in relation to a referral under Part 13, the Tribunal is satisfied that the Practitioner is guilty of misconduct, the Tribunal may –

> (a) make and transmit a report on the finding to the Supreme Court (full bench); or
>
> (b) make any one or more of the orders specified in ss 439, 440 and 441 of the LP Act.

21 It is not presently necessary to set out the orders which can be made pursuant to s 439, s 440 and s 441 of the LP Act because we are, in these reasons, only dealing with the liability aspect of the proceeding. A further hearing will be held in relation to penalty in the event that we

[7] We note that in ***Goldsmith v Legal Services Complaints Committee*** [2023] WASCA 136, the Court of Appeal set aside the Tribunal orders and remitted the matter for determination by a differently constituted Tribunal. The reasons for doing so do not touch upon the Tribunal's findings in relation to the applicable law.

find that the Practitioner is guilty of unsatisfactory professional conduct or professional misconduct.

22 While the effect of the Application Act is that Applicant in this matter is the Legal Services and Complaints Committee (**LSCC**),[8] where we refer to things which were, as a matter of fact, done by the LPCC before the Application Act commenced, we will refer to it as the LPCC, and where we refer to provisions of the LP Act we will do so in the present tense for the sake of convenience.

Onus and standard of proof

23 As the Tribunal recently restated in ***Legal Profession Complaints Committee and Goldsmith***, the procedure in disciplinary proceedings is in substance, adversarial. Accordingly, it is 'appropriate to apply rules relating to the standard of proof that would apply to the proof of matters in civil proceedings'.[9] That is, the LSCC has the onus of proving the allegations against the Practitioner to the civil standard (i.e. on the balance of probabilities).

24 Further, as the allegations against the Practitioner are serious, the Tribunal must have regard to the nature and consequences of the facts sought to be established, the seriousness of the allegations made against the Practitioner, the inherent unlikelihood of an experienced Practitioner behaving in the manner alleged and the gravity of the consequences that might flow from a finding of professional misconduct in determining whether that standard as been met.[10]

25 In these reasons, when we express ourselves to be satisfied, and make a finding, we do so on the balance of probabilities and on the basis of evidence which we regard as clear and cogent, having regard to what was said in ***Briginshaw v Briginshaw***.[11]

Meaning of 'professional misconduct'

26 The expression 'professional misconduct' is defined in s 403 of the LP Act as follows:

> (1) For the purposes of this Act –

[8] Section 269 of the Application Act provides that the LPCC continues as the LSCC under the Application Act.
[9] ***Legal Profession Complaints Committee and Goldsmith*** [2022] WASAT 43 at [30].
[10] ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 (***Briginshaw***).
[11] ***Briginshaw***.

> ***professional misconduct*** includes -
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the Practitioner is not a fit and proper person to engage in legal practice.
>
> (2) For the purposes of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the Practitioner were an applicant for admission or for the grant or renewal of a local practising certificate.

27 It is apparent from its terms that the definition is inclusive rather than exhaustive.

28 The expression 'unsatisfactory professional conduct', used in paragraph (a) of the definition of professional misconduct is set out in s 402 of the LP Act. It is defined as follows:

> For the purposes of this Act –
>
> ***unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

29 Again, the definition is expressed to be inclusive rather than exhaustive. That is, the case is reinforced by the terms of s 404 of the LP Act, which identifies particular conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct. Those examples are said to be given 'without limiting s 402 or s 403'. The matters identified in that section are:

> (a) conduct consisting of a contravention of the LP Act or previous Act of that kind;
>
> (b) charging excessive legal costs in connection with the practice of the law;

(c) conduct in respect of which there is a conviction for –

(i) a serious offence;

(ii) a tax offence;

(iii) an offence involving dishonesty;

(d) conduct of an Australian legal practitioner as or in becoming an insolvent under administration;

(e) conduct of an Australian legal practitioner in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;

(f) conduct of an Australian legal practitioner consisting of a failure to comply with an order of the Complaints Committee, or the State Administrative Tribunal or Supreme Court exercising jurisdiction under this Act or an order of a corresponding disciplinary body made under a corresponding law (including but not limited to a failure to pay wholly or partly a fine imposed under this Act, a previous Act or a corresponding law);

(g) conduct of an Australian legal practitioner in failing to comply with a compensation order made under this Act or a corresponding law.

30 The position in Western Australia is that the two limbs of the common law test of professional misconduct, which were identified in ***Kyle***,[12] but with reference to 'unprofessional conduct' (which we now call professional misconduct), still apply as separate bases for a finding of professional misconduct. That position was recently explained in detail by the Tribunal in ***Legal Services and Complaints Committee and Lourey [No 2]***.[13] We adopt that reasoning without repeating it.

31 Section 442 of the LP Act permits the Tribunal to make a finding that a Practitioner has engaged in unsatisfactory professional conduct even though the referral to it alleged professional misconduct.

The hearing and the consequence of the absence of the Practitioner

32 The Practitioner took no part in the hearing. In fact, he took no part in the proceeding at all.

[12] ***Kyle*** at [61].
[13] ***Legal Services and Complaints Committee and Lourey [No 2]*** [2023] WASAT 77, see particularly [219] – [234] (Pritchard P, Jackson DP, Povey OM).

33 We proceeded in the Practitioner's absence after satisfying ourselves that he had been personally served with the application[14] and with the witness statements, the Applicant's Book of Documents and the orders made by the President on 16 December 2022 listing the application for hearing.[15]

34 The Applicant submitted that although the Tribunal is not bound by the rules of evidence,[16] we should nevertheless apply the rule in ***Jones v Dunkel***,[17] with the result that, where evidence or explanation which would assist the Practitioner is purely within his knowledge, his failure to give that evidence would lead us to conclude that the evidence would not have assisted his case in resisting a finding of professional misconduct. The Applicant pointed out that such an approach in disciplinary proceedings was expressly approved by New South Wales Court of Appeal in ***New South Wales Bar Association v Meakes*** [2006] NSWCA 340.[18]

35 We accept the Applicant's submission that the rule of evidence in ***Jones v Dunkel*** applies so that where the Practitioner failed to give evidence of matters uniquely within his own knowledge, we may draw inferences against him.

The evidence, the witnesses and credibility

36 The following witnesses gave oral evidence in the proceeding on behalf of the Applicant:

1. Narelle Helen Pierce;
2. Mary Anne Tennent; and
3. Mr MC.

37 The oral evidence given by Ms Pierce and Ms Tennent, supplemented the evidence contained in their witness statements which were admitted into evidence as exhibits.[19]

[14] Affidavit of Stephen John Walker sworn 31 October 2022.
[15] Affidavit of Mr Hassan dated 2 March 2023.
[16] SAT Act, s 32(2).
[17] ***Jones v Dunkel*** (1959) 101 CLR 298.
[18] ***New South Wales Bar Association v Meakes*** [2006] NSWCA 340 at [70] – [78].
[19] Exhibit 1, Witness Statement of Narelle Helen Pierce dated 23 February 2023 and Exhibit 3 Witness Statement of Mary Anne Tennent dated 23 February 2023.

38 The Applicant also tendered various documents which were admitted into evidence as exhibits.

39 Given that the Practitioner did not participate in the proceeding, the evidence of the witnesses called by the Applicant (and the contents of the tendered witness statements) was unchallenged.

40 Ms Pierce is a solicitor employed in the office of the Public Trustee. Her witness statement[20] set out her evidence about the Public Trustee's attempts to communicate with the Practitioner in relation to the N-N matter and what the Public Trustee did in relation to that matter after he was appointed plenary administrator of Mrs N-N's estate, including making a complaint about the Practitioner's conduct to the LPCC and instructing external solicitors to prepare and lodge the Survivorship Applications with Landgate in relation to Mrs N-N's properties. She produced copies of various documents which became exhibits in the proceeding. She gave oral evidence that the statement that she made to the Practitioner at their meeting on 12 February 2018 that Mrs N-N was in dire financial circumstances was correct.[21] We accept her evidence.

41 Ms Tennent is a paralegal at the Legal Practice Board of Western Australia and until 16 January 2023 worked in the investigations team dealing with investigations and proceedings being conducted by the LSCC.[22] Her evidence consisted largely of producing various documents relied upon by the Applicant in the proceeding which were held by the Board. For example, the Practitioner's applications for practising certificates and communication which the LSCC had with the Practitioner in the course of its investigations. She also gave oral evidence that the applications for practising certificates had been granted by the Board, that she had recently attended the Supreme Court to examine the Court's file concerning the estate of the late Mrs P and gave evidence about what she had seen on that file. Ms Tennent also gave evidence that she had inspected the Practitioner's file related to the C matter and about what she found on that file. We accept her evidence.

42 Mr WC was one of two brothers who engaged the Practitioner to deal with their father's affairs following his death. We found Mr C to be an honest witness who had a good recollection of events. He did not exaggerate his evidence. It was consistent with the documentary evidence. In Mr C's case, although he was not a reluctant witness as

[20] Exhibit 1.
[21] ts 9, 9 March 2023.
[22] Exhibit 3, para 1.

such, he appeared to us to be very disappointed to be in a position where he was having to give evidence about the conduct of the Practitioner who, he said, his family and other friends had regarded as a friend and, we infer from his evidence, a trusted adviser for many years. In his evidence, Mr C said:[23]

> I don't know what happened. This was a very nice bloke. We used to go out for lunch. It wasn't just myself. There was other friends who used him for in business for many, many years, and he was a hardworking, studious bloke. None of us can work this out. We don't know. After all this period of time, well, sorry, I don't know …

43 In determining the application, the Tribunal is not required to apply the *Evidence Act 1906* (WA) and is not bound by the rules of evidence.[24] We have admitted into evidence as proof of their contents, copies of various documents. We have also had regard to evidence which in other jurisdictions might be inadmissible as hearsay. As the Practitioner did not participate in the hearing, there was of course no objection taken to us doing so and no submissions made as to the weight we should give to that evidence. Nevertheless, we have considered that issue for ourselves and have not given the evidence any less weight than we otherwise would have for that reason.

The allegations

44 In its application dated 8 September 2022, the Applicant set out nine grounds on which it relies to establish that the Practitioner engaged in professional misconduct.

45 At the hearing on 9 March 2023, the Applicant abandoned Ground 8 on the basis that it was duplicitous with at least one of the other grounds.[25]

46 The application arises from three separate complaints made by the Practitioner's former clients.

47 Grounds 1 – 3 concern actions of the Practitioner in relation to his client Mrs N-N. Grounds 4 – 6 relates to clients Mr WC and Mr GC, brothers who instructed the Practitioner in respect of their late father's estate. Grounds 7 and 9 relate to the Practitioner's conduct in respect of the estate of the late Mrs P.

[23] ts 28 – 29, 9 March, 2023.
[24] SAT Act, s 32(2).
[25] ts 6, 9 March 2023.

48 We have set out the specifics of each Ground where we make findings in relation to it.

The Practitioner

49 We are satisfied of and make the following general findings of fact in relation to the Practitioner.

50 The Practitioner has held a practising certificate since 1981.[26]

51 The Practitioner has no disciplinary record.[27]

52 The Practitioner has practiced as a sole practitioner under the name Ginbey & Co since 1991.[28]

53 At all material times up until 30 June 2019, the Practitioner held an unrestricted practicing certificate.[29]

54 On 9 July 2013, the Practitioner informed the Board that he had closed his trust account with effect from 3 July 2013.[30] We find that he did so.[31]

55 On 7 August 2018, the Practitioner sent an email to the Board in which he informed the Board he had been winding down his practice and considered it 'for all intents, closed'.[32]

56 For the purposes of obtaining his practising certificate for the years ending 30 June 2018 and 30 June 2019 the Practitioner advised the Board of the following matters:[33]

1. that he was practising as a sole practitioner under the name Ginbey & Co (the **Firm**);

2. that his residential address was [XXXX], Kalamunda 6076 (**Residential Address**);

3. the street address of Ginbey & Co was 12 Duro Place, West Perth, 6005 (the **Firm's Address**);

[26] Exhibit 2.48, Applicant's Bundle of Documents (**ABD**) pages 143 – 145.
[27] Applicant's submissions dated 2 March 2023, para 27.
[28] Exhibit 2.48, ABD pages 143 – 145.
[29] Exhibit 3, para 4 and ts 12, 9 March 2023.
[30] Exhibit 2.03, ABD page 9.
[31] Exhibit 2.03, ABD pages 9 – 20.
[32] Exhibit 2.46, ABD pages 140 – 141, particularly ABD page 140.
[33] Exhibit 2.29, ABD page 77. Exhibit 2.43, ABD page 123.

4. the PO Box address for Ginbey & Co being PO Box 1462, West Perth, 6872 (the **Firm's PO Box**); and

5. his business email address was [XXXXXX] (the **Firm's email address**).

57 At no time during the years ending 30 June 2018 and 30 June 2019 did the Practitioner notify the Board of any change to any of those contact details.[34]

58 On 12 December 2019, the Board appointed a manager to the Firm pursuant to s 482 of the LP Act.[35]

The relevant provisions of the LP Act and the Rules

59 The allegations against the Practitioner concern contraventions of the LP Act and the *Legal Profession Conduct Rules 2010* (WA) (**Rules**). It is, therefore, convenient to set out next the relevant provisions of the LP Act and the Rules.

60 The terms 'transit money' and 'trust money' are defined in s 205 of the LP Act as follows:

> ***transit money*** means money received by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice.
>
> ***trust money*** means money entrusted to the law practice in the course of or in connection with the provision of legal services by the practice, and includes -
>
> (a) money received by the practice on account of legal costs in advance of providing the services; and
>
> (b) controlled money received by the practice; and
>
> (c) transit money received by the practice; and
>
> (d) money received by the practice that is the subject of a power, exercisable by the practice or an associate of the practice, to deal with the money for or on behalf of another person.

[34] Exhibit 3, para 5.
[35] Exhibit 2.71, ABD page 207.

61 Section 214(1) of the LP Act provides as follows:

> **214. Maintenance of general trust account**
>
> (1) A law practice that receives trust money to which this Part applies must maintain a general trust account in this jurisdiction.
>
> Penalty: a fine of $10 000.

62 Section 215(2) of the LP Act provides:

> **215. Certain trust money to be deposited in general trust account**
>
> (2) Subject to s 222, as soon as practicable after receiving trust money, a law practice must deposit the money in a general trust account of the practice unless –
>
> (a) The practise has a written direction by an appropriate person to deal with it otherwise then by depositing it in the account; or
>
> (b) the money is controlled money; or
>
> (c) the money is transit money; or
>
> (d) the money is the subject of a power given to the practise or an associate of the practise to deal with the money for or on behalf of another person.
>
> Penalty: a fine of $10 000.

63 The expression 'appropriate person' used s 215(2) is defined in s 215(1) to mean a person legally entitled to give the law practise concerned directions in respect of dealings with the trust money.

64 Section 216(1) of the LP Act provides that a law practice must:

> **216. Holding, disbursing and accounting for trust money**
>
> (1) A law practice must –
>
> (a) hold trust money deposited in a general trust account of the practice exclusively for the person on whose behalf it is received; and
>
> (b) disburse the trust money only in accordance with a direction given by the person.
>
> Penalty: a fine of $5 000.

65 Section 220 of the LP Act is concerned with transit money. Subsection 220(1) provides as follow:

220. Transit money

(1) Subject to section 222, a law practice that has received transit money must pay or deliver the money as required by the instructions relating to the money –

(a) within the period (if any) specified in the instructions; or

(b) subject to paragraph (a), as soon as practicable after it is received.

(2) The law practice must account for the money as required by the regulations.

Penalty: a fine of $10 000.

66 Section 223 of the LP Act provides as follows:

223. Protection of trust money

(1) Money standing to the credit of a trust account maintained by a law practice is not available for the payment of debts of the practice or any of its associates.

(2) Money standing to the credit of a trust account maintained by a law practice is not liable to be attached or taken in execution for satisfying a judgment against the practice of any of its associates.

(3) This section does not apply to money to which the law practice or associate is entitled.

67 Section 224(1) of the LP Act is concerned with intermixing of money. It provides that a law practice must not, otherwise than as permitted by subsection (2), mix trust money with other money. The penalty for breaching s 224(1) is a fine of $10,000. Subsection 224(2) provides that mixing of trust money with other money is permitted to the extent only that it is authorised by the Board and in accordance with any conditions imposed by the Board in relation to the authorisation.

68 Section 226(1) of the LP Act provides:

226. Deficiency in trust account

(1) An Australian legal practitioner commits an offence if the Practitioner, without reasonable excuse, causes –

(a) a deficiency in any trust account or trust ledger; or

(b) a failure to pay or deliver any trust money.

Penalty: a fine of $25 000.

69 Section 226(3) provides that in subsection (1) the word 'cause' includes 'to be responsible for' and the word 'deficiency' in a trust account or trust account ledger includes the non-inclusion or exclusion of the whole or any part of an amount that is required to be included in the account.

70 Section 520 of the LP Act provides:

520. Requirement in relation to complaint investigation

(1) For the purpose of carrying out a complaint investigation in relation to an Australian lawyer, an investigator may, by notice or summons served on the lawyer, require the lawyer to do any one or more of the following -

(a) to produce, at a specified time and at a specified place, any specified document (or a copy of the document);

(b) to produce, at a specified time and at a specified place, any specified document (or a copy of the document);

(c) to provide written information on or before a specified date;

(d) to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner.

71 Rule 50 of the Rules provides as follows:

50. Dealing with regulatory authority

(1) In this rule –

regulatory authority means a local regulatory authority and an interstate regulatory authority.

(2) A practitioner must be open and candid in his or her dealings with the regulatory authority.

(3) A practitioner who is requested a regulatory authority to provide comments or information in relation to the Practitioner's conduct or professional behaviour must -

(a) respond to the request within a reasonable time and in any event within 14 days (for such extended time as the regulatory authority may allow); and

(b) provide in writing a full and accurate account of his or her conduct in relation to the matters covered by the request.

Grounds 1 – 3: the N-N matter

72 Grounds 1 – 3 concern the Practitioner's actions in matter where he received instructions from Mrs N-N and in his dealings with the LPCC in relation to that matter.

Ground 1

The allegation

73 By Ground 1 the Applicant alleges that the Practitioner engaged in professional misconduct within the meaning of s 403(1)(a) and (b) and s 438 of the LP Act which conduct would also be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence and/or fell short to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence in the course of acting for Mrs N-N and, later, the Public Trustee (at a time when the Public Trustee was her plenary administrator) by:

1. receiving from Mrs N-N the sum of $37,704.14 (**DVA money**) which was transit money and trust money in circumstances where he operated no trust account and in doing so he contravened s 214 of the LP Act;

2. receiving the DVA money into an overdraft account which was at the time in debit, and in doing so he contravened s 223 and s 224(1) of the LP Act;

3. failing to pay the DVA money to the Department of Veterans' Affairs as instructed by his client as soon as practicable after it was received, or at all, and in doing so he contravened s 220(1) of the LP Act; and

4. after the instructions to pay the DVA money to the Department of Veterans' Affairs were revoked by the Public Trustee and repayment was demanded by the Public Trustee on 11 October 2017, failing to repay the funds to the Public Trustee until around

29 March 2018, in contravention of s 216(1) and s 226(1) of the LP Act.

Findings of fact

74 We are satisfied on the evidence and make the following findings of fact in respect of Ground 1.

75 Mr N-N died on 24 October 2012.[36] In or about June 2014, the Practitioner began acting for his widow, Mrs N-N, in relation to Mr N-N's estate.

76 From the Practitioner's invoices dated 30 June 2014[37] and his letter to Mrs N-N dated 15 July 2014,[38] we find that the scope of his instructions included:

1. acting for Mrs N-N in relation to debts owed by her and her late husband to the Department of Veterans' Affairs; and

2. preparing and lodging Survivorship Applications for her in relation to properties in Midland and Bickley.

77 In his letter dated 15 July 2014,[39] the Practitioner informed Mrs N-N that the amount claimed by the Department of Veterans' Affairs was $37,704.14. He asked her to remit that sum and said:

> Upon receipt of your funds I will then arrange to have the monies paid to the Department of Veterans' Affairs.

78 In that letter, the Practitioner gave Mrs N-N the details for the account into which the funds were to be transferred. It was described as the 'Ginbey & Co General Account conducted at the ANZ Bank, Allendale Square, Perth' with the Account No. 'BSB XXX XXX Account No. XXXX XXXXX' (the **Firm's General Account**).[40]

79 The Firm's General Account was a business overdraft account. This is seen from statement no. 627[41] which described the account as 'Business Classic Statement with Business Overdraft Facility'.

[36] Exhibit 2.36, ABD page 102 and Exhibit 2.37 ABD pages 99 – 108, specifically page 107.
[37] Exhibit 2.04, ABD pages 21 – 24 and Exhibit 2.05, ABD pages 23 – 24.
[38] Exhibit 2.06, ABD pages 25 – 26.
[39] Exhibit 2.06, ABD pages 25 – 26.
[40] Exhibit 2.06, ABD pages 25 – 26.
[41] Exhibit 2.07, ABD page 28.

80 In his letter of 15 July 2014, the Practitioner did not inform Mrs N-N that the account into which he sought her to transfer the requested funds was his Firm's General Account or that it as an overdraft account.[42]

81 From Mrs N-N's bank records and the Firm's General Account statement no. 627, we find that between 31 July 2014 and 4 August 2014, Mrs N-N transferred the $37,704.14 to the Firm's General Account. She did so in three tranches. A sum of $15,000 was transferred on 31 July 2014, a further sum of $15,000 was transferred on 4 August 2014 and a final sum of $7,704.14 was also transferred on 4 August 2014.[43] The bank statement for the Firm's General Account show the first tranche being received into the account on 1 August 2014 and the second two on 4 August 2014.[44]

82 The Firm's General Account was in debit at the time Mrs N-N transferred the money to that account.[45]

83 On 28 January 2016, the Tribunal appointed the Public Trustee as plenary administrator of Mrs N-N's estate.[46]

84 As part of its administration of Mrs N-N's estate the Public Trustee communicated with the Department of Veterans' Affairs and was informed by the Department, in letters dated 3 November 2016[47] and two further letters dated 24 March 2017,[48] that it had waived its claim to the $37,704.14.

85 On 11 October 2017, the Public Trustee wrote to the Practitioner informing him that the Department of Veterans' Affairs had waived its claim to the money and demanding the $37,704.14 transferred to him by Mrs N-N be repaid.[49]

86 The letter from the Public Trustee to the Practitioner dated 11 October 2017 was personally served upon him.[50]

[42] Exhibit 2.06, ABD pages 25 – 25.
[43] Exhibit 2.08, ABD pages 29.
[44] Exhibit 2.07, ABD page 28.
[45] Exhibit 2.07, ABD page 28.
[46] A copy of the Tribunal's orders appointing the Public Trustee as plenary administrator is an attachment to the affidavit of service of David Mackay sworn 16 August 2022, Exhibit 2.74, ABD pages 213 – 216 specifically page 216.
[47] Exhibit 2.16, ABD page 52.
[48] Exhibit 2.27, ABD pages 74 – 76.
[49] Exhibit 2.74, ABD pages 214 – 215.
[50] Exhibit 2.74, ABD pages 213.

87 The Public Trustee made a complaint about the conduct of the Practitioner to the LPCC on 21 December 2017.[51]

88 On 12 February 2018, Ms Narelle Peirce, of the Public Trust Office, met with the Practitioner about this matter. Her file note which was attached to her witness statement[52] records that the Practitioner informed her that he was unaware that the Department of Veterans' Affairs had waived the debt until he was informed of that fact at the meeting. We accept the contents of that contemporaneous file note and find that this was what the Practitioner said at that meeting.

89 At no time before 27 March 2018, did the Practitioner transfer the sum of $37,704.14, or any money to the Department of Veterans' Affairs on Mrs N-N's behalf. We make that finding based on the inference we draw from the following combination of facts:

1. That the bank statement for the Firm's General Account for the period 31 July 2014 to 29 August 2014 shows no funds being transferred to the Department of Veterans' Affairs;[53]

2. That the Department of Veterans' Affairs informed the Public Trustee that it had waived its claim to the funds;[54]

3. The inference we draw, in reliance on the rule in ***Jones v Dunkel*** that if the Practitioner had transferred all or any part of the sum to the Department of Veterans' Affairs before that time he would have made that known to the LPCC in his response to its inquiries and would have given evidence to that effect;

4. That on 27 March 2018, the Practitioner repaid the sum of $37,704.14 to the Public Trustee as administrator of the estate of Mrs N-N.[55] He would have been unlikely to have done so if any part of that sum had been paid to the Department of Veterans' Affairs at an earlier time; and

5. That on 31 August 2018, the Practitioner explained to the LPCC that he had not actioned the demand for the repayment of the

[51] Exhibit 1, para 6 and Exhibit 2.35, ABD page 98.
[52] Exhibit 1, para 7 and Exhibit 2.39, ABD page113.
[53] Exhibit 2, ABD page 28.
[54] Findings at [84] and [85].
[55] Exhibit 1, para 8.

money before 27 March 2018 because he was 'away from his practice until January 2018'.[56]

90 The money paid into the Firm's General Account by Mrs N-N was transit money as that term is defined in s 205(1) of the LP Act. This is because it was received by the Practitioner's law practice subject to instructions that it be paid to a third party, being the Department of Veterans' Affairs.

91 The transit money was also trust money for the purposes of the LP Act: s 205(1) LP Act.

Characterisation of the conduct

92 As we have set out above, s 220(1) of the LP Act requires that a law practice that receives transit money pay or deliver the money as required by the client's instructions within the period specified in the instructions or as soon as reasonably practicable after it is received.

93 In this case, we have found that $15,000 of the total transit money of $37,704.14 was received by the Practitioner on 1 August 2014 and the remainder, by 4 August 2014. At that time the Practitioner had instructions to transfer it to the Department of Veterans' Affairs in repayment of a debt owed by Mrs N-N's late husband. It was never so transferred by the Practitioner and was only returned to Mrs N-N on 27 March 2018.

94 The Practitioner has offered no explanation to the LPCC the Tribunal for his failure to transfer the transit money in accordance with his instructions.

95 In the absence of any explanation for the failure to transfer the transit money, we find that failing to transfer the transit money at all constitutes a failure to transfer it as soon as reasonably practicable after its receipt, particularly in light of the Practitioner's communication to his client that he would arrange to have the monies paid to the Department 'upon receipt of [the] funds'.[57] We find that the Practitioner's failure in this regard amounts to a breach of s 220(1) of the LP Act.

96 Further, it follows from the fact that we have found that the money was deposited into the Firm's General Account rather than into a trust

[56] Exhibit 2.48, ABD pages 143 – 145.
[57] Exhibit 2.06, ABD page 25.

account that we also find that the Practitioner breached s 224(1) of the LP Act by intermixing the transit money with other money.

97 By contravening those provisions of the LP Act the Practitioner has committed an act which is capable of constituting unsatisfactory professional conduct or professional misconduct: s 404 LP Act.

98 When the Public Trustee informed the Practitioner, by letter dated 11 October 2017, that the Department of Veterans' Affairs had waived the debt and thus demanded repayment of the money, the sum of $37,704.14 ceased to be transit money because it was no longer to be transferred from the client via the Practitioner to a third party. Rather, from that point on, it was merely trust money held by the Practitioner on behalf of his client within the meaning of s 205(1) of the LP Act. That trust money was not repaid until 27 March 2018, some six months after the Public Trustee's letter of demand had been personally served on the Practitioner and after the Public Trustee had made a complaint to the LPCC about his conduct.

99 Trust money held by a practitioner belongs to the client who is entitled to call for it and have it repaid to them at any time. Section 216 of the LP Act provides that trust money is to be deposited into a general trust account of the practice exclusively for the person on whose behalf it was received and provides that it must be disbursed only in accordance with the direction of the client. The Practitioner did neither of those things in that the money was not paid into a trust account but into his Firm's General Account thereby reducing the Firm's overdraft. For those reasons we find that the Practitioner was in breach of s 216(1) of the LP Act.

100 Section 226(1)(b) provides that an Australian legal Practitioner commits an offence if they fail to pay or deliver any trust money. The funds were not returned when demanded by Mrs N-N's administrator. Accordingly, we are satisfied that the Practitioner was in breach of s 226(1)(b) of the LP Act.

101 While we are not making a finding that the Practitioner committed an offence in this case, the seriousness with which the Practitioner's conduct can be viewed is seen from the maximum penalty provided for each breach: In the case of s 216(1), a fine of $5,000 in the case of an offence under s 220, a fine of $10,000, in the case of an offence under s 224(1) a fine of $10,000 and in the case of an offence under s 226(1)(b), a fine of $25,000.

102 The Practitioner has not offered any explanation for his failure to pay the money to the Department of Veterans' Affairs in accordance with his client's instructions.

103 As we have found at [88], on 12 February 2018, the Practitioner told Ms Peirce that he was not aware that the Department of Veterans' Affairs had waived the debt until being informed of the waiver at the meeting with officers of the Public Trust Office on that day. Given that the Practitioner had acknowledged that he had received the letter from the Public Trustee dated 11 October 2017, which had been personally served on him, the only way he could not have known of the waiver was if he did not open and read the correspondence which he had received. In any event, even if he genuinely did not know that the debt had been waived, that fact would not greatly assist the Practitioner's position because it does not explain why it had not been transferred by him to the Department of Veterans' Affairs in a timely manner as he had been instructed to do.

104 His explanation for not actioning the Public Trustee's demand for repayment until he did was that he was 'away from his practice'.[58]

105 The Applicant says that we can infer that the real reason he did not transfer the money in accordance with his instructions or return it when its return was demanded was because he was experiencing financial difficulties at the time.

106 On 22 October 2019, the Supreme Court of Western Australia had made orders requiring the Practitioner to give vacant possession of two of his properties to the Commonwealth Bank and had ordered that he pay the bank's debt in full, with interests and costs. In its decision,[59] the Court of Appeal sets out that the bank had obtained an order for the payment of an amount it claimed it was owed pursuant to an agreement (Loan Agreement) which had been entered into in 2009 between the bank, and the Practitioner and his wife. The bank had claimed that Mr and Mrs Ginbey (**the Ginbeys**) secured the amount borrowed under the Loan Agreement by granting to the bank a first registered mortgage over each of the Properties (**Mortgage**).

[58] Exhibit 2.48, ABD page 144.
[59] ***Ginbey v Commonwealth Bank of Australia*** [2021] WASCA 116 in which the Court of Appeal dismissed Mr Ginbey's appeal by which he sought to have those orders set aside.

107 The Applicant says that we can find from that case that the Practitioner was under financial stress at the time he was dealing with Mrs N-N's matter.

108 We accept that, at the time the money was paid to the Practitioner by Mrs N-N, the Practitioner's General Account was in debit. From that alone, we would not be prepared to infer that the Practitioner was experiencing financial difficulties. The orders made by the Supreme Court were made following a summary judgment application. The Practitioner applied to have that judgment set aside. The Court of Appeal refused his appeal. Because the orders were made following a summary judgment application, we do not know when the Ginbeys ceased making the required loan repayments. The Court of Appeal decision refers to the fact that the Practitioner asserted that the loan agreement had been varied, but that he had claimed to be unable to locate the records he had kept which would have established his defence.

109 While we cannot be precise as to when the Ginbeys began experiencing financial difficulties, we do, however find that, given that in 2014 his General Account was in debit and that in 2019 he was in default on his loan agreement with the Commonwealth Bank, it is reasonable to infer that over the time when the Practitioner had received and neither transferred to the Department of Veterans' Affairs or returned to Mrs N-N the $37,704.14 he was experiencing some financial difficulty.

110 We accept the Applicant's submission that this was not a minor breach of the Practitioner's obligations. The Practitioner had received a significant sum as transit money and did not pay it to the Department of Veterans' Affairs in accordance with his instructions or return it to the client for several years. The funds had been co-mingled with his business funds and were dissipated in paying the Firm's debts in that Mrs N-N's money reduced the overdraft on the Practitioner's General Account.

111 The Applicant submits that, in determining the seriousness of the conduct we should have regard to the fact that the client, Mrs N-N, was particularly vulnerable and self-evidently had a sufficient lack of mental capacity as to justify the appointment of the Public Trustee as her plenary administrator. The Applicant also submits that the evidence establishes that Mrs N-N was 'in dire financial circumstances' and had 'very limited income'.[60]

[60] ts 9 and 53, 9 March 2023.

112 From the contents of Ms Pierce's file note made on 12 February 2018, and her oral evidence on the issue to which we earlier referred, we find that, at that time, she considered that Mrs N-N was in 'dire financial circumstances' and that she told the Practitioner at their meeting that although Mrs N-N had property, she had very limited income and was in need of funds.[61] We have no reason to question Ms Pierce's characterisation of Mrs N-N's financial position at that time. Accordingly, we are satisfied and find that, as at 12 February 2018, Mrs N-N had property but lacked income and was in need of funds.

113 It must also be the case that the Public Trustee was appointed plenary administrator of Mrs N-N's estate because the Tribunal found that she lacked the capacity to make reasonable judgments in respect of matters related to all of her estate because of a mental disability and that she was in need of an administrator.[62] A person who lacks capacity to make reasonable judgments in relation to their estate by reason of mental disability and who is in need of an administrator of their estate is self-evidently, vulnerable to financial exploitation and abuse.

114 While those were the facts in relation to Mrs N-N at the time the administration order was made, we do not make any finding that the Practitioner knew that Mrs N-N lacked capacity, or that he was aware of her financial position or vulnerability before he was informed by Ms Pierce of the appointment of the administrator and of her dire financial position. That he had that knowledge has not been established by the Applicant to the requisite standard.

115 Whether he knew of her vulnerability or whether he was experiencing financial difficulty or not, the fact of the matter is that the Practitioner had the benefit of his client's money for a period of four years. At no time was he entitled to it. Whether he was aware of the specific provisions of the LP Act or the Rules that governed his conduct, he was aware that the funds were transferred to him for a specific purpose, that he did not give effect to that purpose and that the funds were not his.

116 The prohibition on the co-mingling of trust funds with other funds is intended to protect client funds. His actions brought about precisely

[61] Exhibit 1, para 7 and Exhibit 2.39, ABD page 113.
[62] An administrator can only be appointed where the Tribunal is satisfied of matters set out in s 64 of the *Guardianship and Administration Act 1990* (WA).

the problem which the relevant provisions of the LP Act were designed to prevent.

117 The Practitioner's retention, for his own benefit, of money that was not his persisted over four years. In our view, the conduct, the subject of Ground 1, was very serious and we find that it is readily characterised as professional misconduct within the meanings of s 403(1)(a) and s 403(1)(b) of the LP Act and is conduct that would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence and which fell short, to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence.

Ground 2

The allegation

118 In Ground 2 the Applicant alleges that from around 30 June 2014, the Practitioner engaged in professional misconduct within the meaning of s 403(1)(a), s 403(1)(b) and s 438 of the LP Act, which conduct would also be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence and/or fell short, to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence by:

1. invoicing and accepting payment from the client of the costs of preparing and lodging two Survivorship Applications, which to the Practitioner's knowledge was work he had not performed;

2. alternatively to Ground 2.1, requesting and receiving from Mrs N-N into an overdraft account which was at the time in debit, the sum of $2,021 which was at least in part 'trust money' within the meaning of s 205(1) of the LP Act in circumstances where the Practitioner operated no trust account, in contravention of s 214(1), s 215(2), s 216(1) and s 223 of the LP Act;

3. failing to account to the Public Trustee for the sum paid in relation to the work which was not performed; and

4. failing to lodge the Survivorship Applications diligently or at all.

Findings of fact

119 We are satisfied of and make the following findings of fact in relation to Ground 2.

120 On 30 June 2014, the Practitioner issued to Mrs N-N an invoice for the sum of $1,298.50.[63] In the heading of the invoice, the Practitioner identified that the amount invoiced was for work done in connection with dealing with the Department of Veterans' Affairs and the Survivorship Application for the Bickley property. The invoice itself stated:

> To our professional costs of and incidental to receiving instruction to act for you in this matter including telephone attendance upon [redacted], taking instructions to prepare a fresh Survivorship Application with supporting Statutory Declaration; arranging search of the Midland land at Landgate, reviewing search; drawing and engrossing Survivorship Application; checking on draft Survivorship Application; finalising the Survivorship Application; drawing Statutory Declaration; reviewing draft of Statutory Declaration; finalising Statutory Declaration; drawing and engrossing letter to you to accompany the Survivorship Application and Statutory Declaration with instructions on signing both documents; follow up email letters to [redacted]; attendance upon [redacted]; reviewing documents signed by you and delivered by us to [redacted]; meeting you for identification purposes; completing Verification of Identification documentation; reviewing mortgage prepared by the Australian Government Solicitor to be registered over [XXXX] Bickley; telephone attendance upon the Australian Government Solicitor regarding payout of claim; reporting to you; liaising with the Australian Government Solicitor regarding joint lodging of documents at Landgate; attending at Landgate lodging documents; reporting to you; attending at Landgate filing Survivorship Application for registration; uplifting Duplicate Certificate of Title; forwarding Duplicate Certificate of title to you following registration of the Survivorship Application: all care an attention in the matter including all necessary telephone attendances, attendances, correspondence and photocopying herein.

121 The invoice did specifically identify the value of the work allegedly done in dealing with the Department of Veterans' Affairs matter or the work allegedly done in connection with the Survivorship Application.

122 The invoice also identified that the amount charged included the following matters:

1. a $160 Landgate fee;
2. a $20 photocopying fee;
3. a $16 facsimile fee;
4. a $30 fee for postage and petties.

[63] Exhibit 2.04, ABD pages 21 – 22.

123 The invoice indicated that the sum charged was payable on receipt and provided bank details for payment. The bank account into which the invoice said the payment should be made was the Firm's General Account.

124 On 30 June 2014, the Practitioner also issued Mrs N-N a second, separate invoice for $722.50.[64] The heading to that invoice indicated it was in connection with the Survivorship Application for her property in Midland. That invoice stated as follows:

> To our professional costs of and incidental to receiving instructions to act for you in this matter including telephone attendance upon [redacted]: email letters to [redacted]: reviewing papers provided by [redacted]: providing comments to [redacted]: taking instructions to prepare a fresh Survivorship Application with supporting Statutory Declaration: arranging search of the Midland land at Landgate: reviewing search: drawing and engrossing Survivorship Application: checking on draft Survivorship Application: finalising the Survivorship Application: drawing Statutory Declaration: reviewing drat of Statutory Declaration: finalising the Statutory Declaration: drawing and engrossing letter to you to accompany Survivorship Application and Statutory Declaration with instructions on signing both documents: follow up email to [redacted] attendance upon [redacted]: reviewing documents signed by you and delivered to us by [redacted] meeting you for identification purposes: completing Verification of Identification documentation: attending at Landgate filing Survivorship Application for registration: reporting to you: uplifting Duplicate Certificate of Title: forwarding the Duplicate Certificate of Title to you following registration of the Survivorship Application: all care and attention in the matter including all necessary telephone attendances, attendances, correspondence and photocopying herein.

125 The invoice was expressed to include the following disbursements:

1. a $160 Landgate fee;

2. a $20 fee for photocopying;

3. a fee for postage and petties of $20.

126 As with the first invoice, this invoice as expressed to be payable upon receipt and provided bank details for payment. The bank account into which the invoice said the payment should be made was the Firm's General Account.

[64] Exhibit 2.5, ABD pages 23 – 24.

127 Mrs N-N transferred the sum of $2,021 into the Firm's General Account on 31 July 2014.[65]

128 In her witness statement, Ms Pierce stated that she had checked the records of the Public Trustee and could confirm that: [66]

> As Mr Ginbey had not done so, the Public Trustee's Office instructed external solicitors to prepare and lodge Survivorship Applications with Landgate in relation to Mrs N-N's properties at … Bickley and … Midland.

129 The two Landgate Application by Survivor applications (**Survivorship Applications**) completed on instructions from the Public Trustee were dated 21 December 2017.[67]

130 On the basis of Ms Pierce's evidence and the completed Survivorship Applications we find that the Practitioner did not complete, and therefore did not lodge, a Survivorship Application in respect of either the Bickley property or the Midland property. The Applicant accepts, however, that some part of the amount paid in relation to the Survivorship Application for the Bickley property may have been expended for the purpose for which it was paid. That portion being a sum which was said to be work dealing with the Australian Government Solicitor. Therefore, it accepts that we should find that a material portion of the work that the invoice charged for was inappropriately charged. On the basis of the facts, we so find.

131 On 11 October 2017, the Public Trustee wrote to the Practitioner as plenary administrator of Mrs N-N's estate and made a demand for repayment of the sums received by him in connection with the two Survivorship Applications.[68] On 14 October 2017, that letter was served personally upon the Practitioner.[69]

132 The Practitioner has never repaid the any part of the $2,021. We make that finding of fact as the only reasonable inference to be drawn from the following circumstances:

1. Ms Pierce's evidence, which we accept, that she had checked the records of the Public Trustee and confirmed that the Public Trustee never received repayments of any part of the other

[65] Exhibit 2.07, ABD page 28 and Exhibit 2.08 ABD page 29.
[66] Exhibit 1, para 10.
[67] Exhibit 2.36, ABD pages 99 – 103 and Exhibit 2.37, ABD pages 104 – 108.
[68] Exhibit 2.32, ABD pages 93 – 94.
[69] Exhibit 2.74, ABD page 214 – 216.

amounts demanded in her letter of 11 October 2017, being the amounts of $1,298.50 and $722.50;[70]

2. the absence of any assertion by the Practitioner in his correspondence with the LPCC matter that he had paid back any portion of those funds; and

3. the inference we draw to that effect from the application of the rule in ***Jones v Dunkel*** in relation to the issue. Had the Practitioner paid back any portion of those funds, he would have given evidence of that fact.

133 On the basis of the facts, as we have found them, we find that the Applicant has made out its allegations that:

1. the Practitioner invoiced the client for work which he did not perform and must have known he did not perform; and

2. failed to lodge the Survivorship Applications diligently or at all.

134 The Applicant's alternate case was that the invoice was a clumsy way of requesting funds on trust and that he did so when not operating a trust account in breach of various provisions of the LP Act. The Applicant submitted that that alternate case is no longer advanced because the Practitioner has not ever indicated to the LPCC or in evidence that the invoices could be seen in that light. We accept that submission.

135 The Applicant alleges that the Practitioner failed to account to the Public Trustee for the $2,021 which was paid but not used for the purpose for which it was paid.

136 Given that in Ground 2.2, the Applicant no longer advances as the alternative to Ground 2.1 that the invoices should be construed as a request for trust funds and the payment as a payment of trust funds, Ground 2.3 cannot succeed. A duty to account is a duty which arises in relation to trust funds. In this case, as it is no longer said that the funds are trust funds, there can have been no failure to account for them even though the Practitioner had no entitlement to retain those funds.

[70] Exhibit 1, para 9.

Characterisation of the conduct

137 As a result of those findings, we find that the Practitioner's conduct, by failing to prepare and lodge Survivorship Applications in over 3 years can be nothing less than a failure to be diligent in the provision of legal services, amounted to a breach of the following professional obligations:

1. the duty set out in rule 6(1)(c) of the Rules to deliver legal services competently and diligently; and

2. the duty in rule 7(e) of the Rules to perform the work required on behalf of the client diligently.

138 We also find that the Practitioner's failure to return the money to his client in circumstances where he knew he had not performed the work for which the money was paid is, in our view a serious act of dishonesty.

139 In our view, no conduct rule is required in order for practitioners to understand that lying to a client about having performed work which was not performed, charging for it, receiving the money as payment for the work and subsequently retaining those funds even after a specific demand was made for its return were all acts of dishonesty.

140 Honesty is a touchstone of our legal system and the honesty of practitioners to the court and to clients is essential to the administration of justice and to the maintenance of the public's confidence in the profession.

141 In our view, the Practitioner's conduct meets both limbs of the test of professional misconduct which were identified in ***Kyle***[71] in that it was both:

1. conduct that would reasonably be regarded as disgraceful and dishonourable to practitioners of good repute and competence (***Kyle*** limb 1).

2. conduct which fell short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competence (***Kyle*** limb 2); and

142 We also find that the conduct meets the definition of professional misconduct set out in s 403(1)(a) and s 403(1)(b) of the LP Act.

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[71] ***Kyle*** at [61] (Parker J with Ipp J and Steytler J agreeing).

Ground 3

The allegation

143 By Ground 3, the Applicant alleges that from around 12 October 2018, the Practitioner engaged in professional misconduct within the meaning of s 403(1)(a), s 403(1)(b) and s 438 of the LP Act, which conduct would also be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and/or fell short, to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence by:

1. failing to respond to communications and requests for information from the LPCC in connection with the N-N matter in breach of r 50 of the Rules; and

2. failing to comply with the summons issued by the LPCC pursuant to ss 520(1)(a) and (d) of the LP Act in respect of the N-N matter by the date for compliance, or at all, in breach of s 520(5) of the LP Act and r 50 of the Rules.

Findings of fact

144 As we have found at [87], on 21 December 2017 the Public Trustee made a complaint to the LPCC about the Practitioner's conduct.

145 As a result, the LPCC endeavoured to make contact with the Practitioner to investigate that complaint.

146 On 4 October 2018, the following documents were personally served on the Practitioner:[72]

1. a letter from the LPCC to the Practitioner dated 27 September 2018 regarding the N-N matter;[73] and

2. a letter form the LPCC to the Practitioner dated 27 September 2018 regarding the C matter;[74] and

3. a summons relating to the N-N matter dated 27 September 2018 which was issued pursuant to ss 530(1)(a) and (d) of the LP Act.[75]

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[72] Exhibit 2.59, ABD pages 176 – 192.
[73] Exhibit 2.59, ABD pages 177 – 182.
[74] Exhibit 2.59, ABD pages 183 – 188.
[75] Exhibit 2.59, ABD pages 189 – 192.

147 In her witness statement, Ms Tennent stated, and we find, that the Practitioner did not respond to the letter of 27 September 2018 or comply with the summons.[76]

148 The LPCC made further endeavours to correspond with the Practitioner about the complaint and the Practitioner's conduct in relation to this matter. That involved sending copies of the following letters both to the Practitioner's Residential Address and to the Firm's email address:

1. a letter dated 18 October 2018 in which the LPCC requested that the Practitioner comply with the summons;[77]

2. a letter of 24 October 2018 requesting that the Practitioner comply with the summons;[78] and

3. a letter dated 7 January 2019 requiring the Practitioner to provide the LPCC with submissions in response to its investigation.[79]

149 Ms Tennent's evidence, which we accept, was the Practitioner did not comply with the summons or respond to any of the correspondence we so find.[80]

150 The Practitioner's Residential Address and the Firm's email address were addresses which the Practitioner had supplied on his application for renewal of his practising certificate. Each of the letters were sent while the Practitioner held a current practising certificate.

Characterisation

151 As the Applicant identified in its submissions, the failure to comply with the summons was a breach of s 520(5) of the LP Act.

152 Further, his conduct also amounted to a breach of r 6(1)(e) of the Rules which imposes a professional duty upon practitioners to comply with the Rules and the law.

153 It also constituted a breach of rules 50(2) and (3) of the Rules, which required the Practitioner to be open and candid in his dealing with the regulatory authority, to respond to the request for information about his practice within a reasonable time and in any event within 14 days (subject

[76] Exhibit 3, paras 7 and 9.
[77] Exhibit 2.52, ABD pages 164 – 165.
[78] Exhibit 2.55, ABD pages 169 – 170.
[79] Exhibit 2.63, ABD pages 197 – 198.
[80] Exhibit 3, paras 7 and 9.

to any extension permitted by the regulatory authority), and to provide in writing a full and accurate account of his conduct in relation to the matters covered by the request. His behaviour, in failing to respond, self-evidently met none of those obligations.

154 Had there been any reasonable excuse for his non-compliance the Practitioner would have given evidence of it. We infer from his failure to do so that there was no reasonable excuse.

155 As the Tribunal stated in ***Legal Professional Complaints Committee and Lee-Steere***,[81] the reputation of the profession depends to a large extent upon the power and the ability of the regulatory authority to regulate effectively the activities of legal practitioners. The Tribunal said that in order to ensure that the regulatory authority can achieve that purpose, practitioners are obligated to cooperate with the reasonable requests of their regulatory body to the fullest extent and held that the duty owed to the Board and to the Committee 'in a measure not less than the duty owed by a practitioner to his or her client and to a Court or Tribunal'.[82]

156 In that case the Tribunal found that the conduct of the Practitioner, who had failed to answer requests for information over a period of more than two years, flew in the face of the legislative intent and precluded the regulatory authority from executing its statutory functions and was viewed in a most serious light.

157 We adopt those statements which apply equally in this case and we find that the Practitioner's conduct was a serious failure to comply with his professional obligations. His conduct has the capacity to bring the profession into disrepute and does not constitute a standard of practice which members of the public and his colleagues of good repute and competence can reasonably expect of a member of the legal profession.

158 We find that the Practitioner's conduct:

1. fell short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competence; and

2. was of a kind which would be regarded as by disgraceful or dishonourable by practitioners of good repute and competence.

[81] ***Legal Profession Complaints Committee and Lee-Steere*** [2010] WASAT 189 at [22] – [27] (***Lee-Steere***).
[82] ***Lee-Steere*** at [23].

159 We also find that the Practitioner's conduct meets the statutory definitions of professional misconduct set out in s 403(1)(a) and s 403(1)(b) of the LP Act.

<u>Grounds 4 and 5 – the C matter</u>

160 Grounds 4 and 5 concern the Practitioner's dealing with the estate of the late Mr MC on instructions from Mr WC and Mr GC.

Ground 4 – the allegation

161 The allegation in Grounds 4 is that, from around 20 December 2016, the Practitioner engaged in professional misconduct within the meaning of s 403(1)(a), s 403 (1)(b) and s 438 of the LP Act, which conduct would also be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence and/or fell short, to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence, in the course of acting for Mr WC and Mr GC (the **Clients**) by:

1. requesting and receiving from or on behalf of the clients into an overdraft account which was at the time in debit, the sum $4,360 which was 'trust money' within the meaning of s 205(1) of the LP Act in circumstances where the Practitioner operated no trust account, in contravention of s 214(1) and s 215(2) and s 216(1) of the LP Act;[83]

2. failing to account to the clients for the sum of $4,360.[84]

Ground 5 – The allegation

162 The allegation in Ground 5, is that from around 1 December 2016 the Practitioner engaged in professional misconduct within the meaning of s 403(1)(a) and s 438 of the LP Act which conduct fell short, to a substantial degree, of the standards observed or approved by the members of the profession of good repute and competence in the C matter, by failing to deliver legal services diligently or at all in circumstances where the Practitioner had already accepted payment for those services as set out in Ground 4.

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[83] The Grounds set out in the annexure to the application also alleged that this amounted to breach of s 216(1) of the LP Act but the Applicant at the hearing the Applicant informed the Tribunal that it no longer relied upon s 216 of the LP Act. See ts 70, 9 March 2023.

[84] The grounds set out in the Annexure to the application included a ground 4.2, alleging professional misconduct for invoicing the clients in circumstances where work to the value invoiced had not been performed, but that was discontinued at the hearing. See ts 67 – 68, 9 March 2023.

Grounds 4 and 5 – Findings of fact

163 We are satisfied and make the following findings of fact in relation to Grounds 4 and 5.

164 Mr MC died on 15 September 2016.[85]

165 His sons, Mr WC and Mr GC, were the named executors of their father's estate in his Last Will and Testament of 3 September 2003.[86]

166 Mr WC and Mr GC engaged the Practitioner to assist with legal matters and decided to engage him to deal with their fathers' estate.[87]

167 By letter dated 1 December 2016,[88] the Practitioner wrote to Messrs W and GC confirming his instructions. From that letter we find that the Practitioner was engaged by Mr WC and Mr GC to do the following:

1. to act as the executor of their father's estate;

2. to obtain a grant of probate; and

3. to administer the estate.

168 Although the instructions were to obtain a grant of probate, in fact what was required was the obtaining of letters of administration. Nothing turns on the distinction.

169 Mr WC's evidence was, and we find, that Practitioner did not indicate either to him or his brother that he would have any difficulty in carrying out their instructions. In his evidence, Mr WC was asked 'did Mr Ginbey indicate to you that he would have any difficulties in carrying out those instructions?'[89] His answer was:

> Not at all. Can I add there, as I said, Howard was our solicitor both in – in – for business and – and private, And he was always very, very efficient. A very personable man. We put him down as a – as a colleague. So no. To answer your question, not at all.

170 Mr WC's evidence was, and we find, that because of the relationship his family had with the Practitioner and the trust they had in him, they

[85] Exhibit 2.76, ABD pages 218 – 219.
[86] Exhibit 2.01, ABD pages 1 – 5.
[87] ts 20 – 21, 9 March 2023 and Exhibit 2.20, ABD pages 58 – 59.
[88] Exhibit 2.20, ABD pages 58 - 59.
[89] ts 21, 9 March 2023.

asked him to nominate a price for the completion of the works which they would pay in full at the beginning of the engagement. In relation to this, Mr WC's evidence was as follows:[90]

> We paid it in full with this. Again, Howard, because of his relationship with us – I don't normally do it, but because there was a trust, I told Howard Don't muck around until the end of the job". I said "Work out a price, you know, and we will pay you in full at the beginning of the job". So that's what that was about, and we paid him in full. I went halves with my brother Graeme, which, again, you have the documentation. The bank accounts show that it was a fifty-fifty deal between two brothers.

171 On 20 December 2016, the Practitioner issued to Mr WC and Mr GC an invoice for the sum of $4,360 inclusive of GST.[91] The invoice was expressed to be 'for funds on account of estimated costs'. Those costs included a sum of $510 which was said to be an estimate of disbursements identified as $450 for the Supreme Court filing fee, $35 for photocopying and $25 for postages and petties. The bank details for payment were for the Firm's General Account.[92] The invoice made no mention of the Firm's General Account being an overdraft account.

172 The following payments were made on behalf of Mr WC & Mr GC into the Firm's General Account:

1. a payment of $2,180 made on 13 January 2017 identified as a transfer from CC with the notation 'AC Will';[93]

2. a payment of $1,500 on 16 January 2017 identified as a transfer from GC with the notation 'AC';[94] and

3. a payment of $680 on 17 January 2017 identified as a transfer from GC again with the notation 'AC'.[95]

173 From WC's evidence we find that he is married to CC and that she made the payment of $2,180 on 13 January 2017 on his behalf.[96]

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[90] ts 23, 9 March 2023.
[91] Exhibit 2.23, ABD page 69.
[92] The invoice does not expressly say that, but the BSB and Account number are those of the Firm's Business Account.
[93] Exhibit 2.25, ABD pages 71 – 21 and Exhibit 2.23, ABD page 69.
[94] Exhibit 2.25, ABD pages 71 – 72 and Exhibit 2.24, ABD page 70.
[95] Exhibit 2.25, ABD pages 71 – 72.
[96] Evidence of Mr WC ts 23- 24, 9 March 2023.

174 The Firm's General Account was in debit at the time each of those payments were made.[97]

175 The Practitioner had closed his trust account in 2013 and at the time the request for payment was made he did not operate a trust account.[98]

176 Messrs W and GC each signed a Renunciation of Probate document and returned it to the Practitioner.[99]

177 On 10 May 2018, Mr WC sent an email to the Practitioner requesting that the Practitioner provide him with an update on his dealing with his father's estate.[100] His evidence about why he did so was as follows:[101]

> … but the time was starting to go, and we hadn't heard from Howard, so that's what this was about, was, you know, contacting him. We also had tried Howard. We had his personal mobile numbers, you know, numbers of faxes – emails, I should say, which we had been trying to get, and there had been no – he disappeared off the face of the earth. So that's what that is about, and as it clearly states there too, dad, dad had a small, small – it was a small amount of money in the account and, of course, fees and things disappearing, and we just wanted to get this thing, you know, on the go and to find out where he stood, stood, with probate. So, sorry, mate.

178 Mr WC never received a response to that email.[102]

179 At some time prior to 6 August 2018, the Practitioner sent a handwritten note to Mr WC in which he said, relevantly, 'I have your Dad's documents ready to either be collected from my office or sent to you'.[103]

180 On 6 August 2018, Mr WC wrote a letter to the Practitioner responding to the handwritten note, which he referred to in his evidence as having sent to the Practitioner as a 'please explain' because the letter from the Practitioner was very vague.[104] Mr C's letter stated, among other things:[105]

[97] Exhibit 2.25, ABD pages 71 – 72.
[98] Exhibit 2.48, ABD pages 143 – 145.
[99] Exhibit 2.72, ABD page 210; Exhibit 2.76, ABD pages 218 – 219; ts 13 and 25, 9 March 2023.
[100] Exhibit 2.42; ABD page 121.
[101] ts 24, 9 March 2023.
[102] ts 24, 9 March 2023.
[103] Exhibit 2.75; ABD page 217.
[104] ts 25, 9 March 2023.
[105] Exhibit 2.45; ABD page 139.

> You have NOT advised us whether you have been successful with probate and finalising his will.

181 Mr WC sent that letter to the Practitioner by email.[106]

182 Ultimately, Mr WC and his wife obtained the Grant of Probate themselves.[107] From that evidence, we find that the Practitioner did not perform the legal work for which he had been engaged by Mr WC and Mr GC diligently or at all.

183 On 12 December 2019, a manager was appointed to the Practitioner's firm following which the Applicant obtained a copy of the Practitioner's file relating to this matter.[108] Ms Tennent's evidence was, and we so find, that she inspected the file[109] and that the following documents were on it:

1. the original Renunciation of Probate signed by Mr WC and Mr GC;[110]

2. a draft affidavit of the Practitioner with a handwritten notion of the date of 22 November 2016 in the top right-hand corner;[111] and

3. draft statement of assets and liabilities relating to the C matter.[112]

184 The draft affidavit was not complete. Upon examination it appears to us to be something akin to a pro forma into which the Practitioner has added some relevant details.

185 Given Ms Tennent gave evidence of what she did identify on the Practitioner's C file, we find that there was no other record of other work performed on the file.[113]

186 From the evidence of Ms Tennent as to the contents of the file, and the evidence of Mr WC, we find it reasonable to infer and find that the Practitioner did not invoice either Mr WC nor GC for services actually rendered.[114]

[106] ts 25, 9 March 2023.
[107] ts 26, 9 March 2023.
[108] ts 3, 13 March 2023.
[109] ts 12 – 13, 9 March 2023.
[110] Ms Tennent referred to this in her evidence as a 'reminition' of probate. See ts 13, 9 March 2023.
[111] Exhibit 2.17; ABD pages 53 – 55. It is a draft on an affidavit for the proposed application for letters of administration.
[112] Exhibit 4 and ts 14 – 15, 9 March 2023.
[113] ts 13 – 19, 9 March, 2023.
[114] ts 13 – 19, 9 March 2023.

187 On 5 July 2018, the LPCC wrote to the Practitioner suggesting that he consider refunding the funds to the clients.[115]

188 On 31 August 2018, the Practitioner replied to that suggestion saying:[116]

> There is no reason why I will not do that.

189 No money was ever refunded.[117]

190 The Practitioner's invoice of 20 December 2016 must be regarded as a request for funds on account of an estimate of costs and disbursements for work still to be performed rather than an invoice for payment for work already performed. Accordingly, we find that the money paid to the Practitioner was trust funds as that term is defined in s 205 of the LP Act.

191 Ground 4.3 is an allegation that the Practitioner failed to account for the funds received. At the hearing we raised our concerns about this Ground with the Applicant. Our concerns arose because, while Mr C's letter was a request for an update on progress, he did not specifically ask for information about the funds paid in anticipation of the work being performed had been spent. And nor had the LPCC asked the Practitioner to explain whether the funds had been expended and for what purposes. The Applicant initially said that although no specific request for an account for the funds had been made, the requirement to account for the funds would have crystalised in this case by 6 August 2016, when the client was expressing concerns about the fact that the work had not apparently been done. The Applicant says that if the Practitioner had ever had a belief that he was entitled to retain the funds, it must have ceased to exist or ceased to be able to be reasonably held when the client raised concerns about whether any work had been performed.[118] The Applicant subsequently stated the failing to account for the funds was the failure to repay the funds.[119] The Applicant said:[120]

> I'm happy just to…proceed at least in this context on the basis that it's a failure to repay, and we don't need to overcomplicate things.

[115] Exhibit 2.44, ABD pages 135 – 138.
[116] Exhibit 2.48, ABD pages 143 – 145, particularly page 145.
[117] ts 28, 9 March 2023.
[118] ts 73 – 74, 9 March 2023.
[119] ts 74, 9 March 2023.
[120] ts 75, 9 March 2023.

192 As we have found, the Practitioner did complete some work in relation to the C matter but, given that Mr WC had to complete the application for the grant of Probate and administer the estate himself, in the end that work was of absolutely no benefit to the Practitioner's clients.

193 Most commonly, when one refers to a failure to account for trust funds it is a reference to the failure to keep proper accounts and receipts and to explain to the beneficial owner of funds what they have been used for. We therefore had some doubt about whether, the failure to repay trust funds constitutes a failure to account for the funds.

194 We have come to the view that a failure to account encompasses not only a failure to explain to the client the use to which money had been put by a practitioner (via the rendering of invoices and the keeping of and production of receipt upon request) but also the obligation to restore to the client any trust property wrongfully taken from them, or funds no longer required for the purpose for which they were paid into trust.

195 The duty to account is a necessary incident of a trustee's personal obligation to hold and deal with trust property for the beneficiary.[121] In paying monies on trust the client has entrusted the Practitioner to treat his client's money in all respects as their money and to use their money for their purposes and no other. Trust funds are to be disbursed only in accordance with the client's directions. An obligation to repay to the client funds paid in advance in anticipation of work being performed in circumstances where, either the work is completed and funds remain unexpended, or where the retainer comes to an end and funds remain, must be regarded as a fundamental part of that duty to account for trust funds, for otherwise what is the point? The requirement that the funds be paid into a trust account and the obligation to keep proper records and receipts are a necessary consequence of that primary duty. So too is the prohibition of the intermixing of trust money with other money.

196 In this case, very little work was done by the Practitioner despite the Clients advancing to him money for the work which was to have been done on their instructions in relation to their late father's estate. In retaining those funds we are satisfied and find, that the Practitioner failed to account to them for that money.

[121] ***Re Simersall*** (1992) 35 FCR 584 at [589] per Gummow J.

Characterisation of the conduct

197 As we have already identified, s 214(1) of the LP Act provides that a law practice which receives trust money must maintain a trust account. The Practitioner's conduct in receiving trust money but not maintaining a trust account constituted a breach of s 214(1) of the LP Act.

198 Section 215(2) of the LP Act requires that, subject to some exceptions which do not apply in this case, as soon as practicable after receiving trust money the law practice is to deposit it into a trust account. When the money was paid into the Firm's General Account, the Practitioner did not have a trust account. The Practitioner did not deposit the C's money into a trust account as soon as practicable after receiving the funds or ever. Accordingly, the Practitioner's conduct constituted a breach of s 215(2) of the LP Act.

199 Section 224(1) of the LP Act prohibits the mixing of trust money with other money. By causing the funds to be deposited into the Firm's General Account, the Practitioner permitted the mixing of the trust money with other money and in so doing breached s 224(1) of the LP Act.

200 The Applicant also submitted that we might find that the Practitioner had breached s 223 of the LP Act in that the funds were applied to the practice's debt.[122] As we have set out above, at [66], s 223 provides:

1. Money standing to the credit of a trust account maintained by a law practice is not available for the payment of debts of the practice or any of its associates.

2. Money standing to the credit of a trust account maintained by a law practice is not liable to be attached or taken in execution for satisfying a judgment against the practice of any of its associates.

3. This section does not apply to money to which the law practice or associate is entitled.

201 The Applicant acknowledged in its written submissions that it was possible that the section did not apply because the funds were never in fact standing to the credit of a trust account, but says that the mischief which the section was designed to prevent clearly arose in that the client's funds were applied to draw down the Firm's debts. Be that as it may, in

[122] The submission was not pressed with any degree of conviction by the Applicant in its oral submissions.

our view, given the money was not ever placed (as it should have been) in the Practitioner's trust account, it cannot be said to have been monies standing to the credit of the trust account (although it should have been) and therefore we do not find that the Practitioner's conduct constitutes a breach of s 223 of the LP Act.

202 In retaining the trust money, the Practitioner failed to account to the client for it as he was required to do.

203 The Practitioner's conduct, in having money paid to him by his client for work which he agreed to undertake and then mixing the money with other money and finally, retaining the money while not completing the work even after returning the client's documents (essentially an acknowledgement that his retainer was at an end) and then after being specifically asked by the LPCC to consider refunding it, was egregious.

204 As the Full Bench of the Supreme Court stated in the ***Legal Practitioners Complaints Committee v De Alwis***[123] about the failure to pay money into a trust account:

> Conduct of this kind is serious and has often been treated as such by the courts. One example is the case of *In re A Practitioner* (1982) 30 SASR 27. A practitioner failed to pay cheques into a trust account and instead disbursed the proceeds for profit. An equivalent sum was ultimately paid by the Practitioner into the trust account and no loss or delay was suffered by the client. When called upon to explain the irregularities, the Practitioner at first gave a misleading and untrue explanation. The Court ordered that he be struck off the roll of practitioners. King CJ said (at 31) that, despite the fact that the Practitioner always intended to pay the money back, his conduct was:
>
>> … an affront to the sanctity of the Practitioner's Trust Account and this Court has a duty to vindicate the inviolability of the trust imposed upon a practitioner to treat his clients' money in all respects as their money and to use their money for their purposes and no other. The public can feel confidence in legal practitioners and their handling of their money only if they know that there is involved no element of judgment on the part of the Practitioner, and that their money must remain in his Trust Account until it is disbursed in accordance with their direction; because no matter how good the intentions of a practitioner might be, no matter how confident he might be that the money can be made good, whenever a client's money is deliberately used for a purpose other than the purpose for which the client entrusted it to the Practitioner, there is an act of dishonesty on the part of the

[123] ***Legal Practitioners Complaints Committee v De Alwis*** [2006] WASCA 198 at [1067].

> Practitioner and one which exposes the client to some element of risk as to his money.

205 In that case the Court also referred uncritically to statements made in ***re H A O'Donnell*** [124] by the Chief Justice[125] who said:

> Solicitors have been warned over and over again that their clients' moneys should not be mixed with their own, but should be placed in a trust account; under no circumstances whatsoever should a solicitor pay the money of his client into his own banking account. If it is discovered that solicitors mix the money of their clients with their own, that fact alone, apart from any defalcation, should render them liable to punishment, even though the next day they might be in a position to draw a cheque for the money.

and by Simpson J[126] at [43]:

> [It must be] thoroughly understood by the public and the profession that an attorney who receives money of his client and misappropriates it should not be allowed to remain a single hour the member of an honourable profession, no matter what the amount may be."

206 We find that the conduct which we have found the Practitioner engaged in in Ground 4 satisfies both limbs of the ***Kyle*** test of professional misconduct in that it:

1. fell short, substantially of the standard of professional conduct observed by members of the legal professional of good repute and competence; and

2. would be regarded as disgraceful or dishonourable to practitioners of good repute and competence.

207 We also find that it is conduct which can be characterised as professional misconduct in that it meets the definitions of professional misconduct in s 403(1)(a) and s 403(1)(b) of the LP Act.

208 In relation to Ground 5, we find the conduct of the Practitioner in not performing the service he was engaged to provide either diligently or at all is serious, but not as serious as his failings in relation to the trust funds.

209 We nevertheless find it amounted to professional misconduct as defined in s 403(1)(a) of the LP Act and as described in the second limb

[124] ***re H A O'Donnell*** [1895] 12 WN (NSW) 42 at [42] (***re H A O'Donnell***).
[125] ***re H A O'Donnell*** at [42].
[126] ***re H A O'Donnell*** at [43].

of the common law test identified in ***Kyle***. It was not alleged, and we do not find it to be conduct that would be regarded as disgraceful or dishonourable to practitioners of good repute and competence or conduct that would justify a finding that the Practitioner is not a fit and proper person to engage in legal practice.

Ground 6

The allegation

210 By Ground 6 the Applicant alleges:

> From around 12 July 2018, the Practitioner engaged in professional misconduct within the meaning of s 403(1)(a) and (b) and s 438 of the LP Act, which conduct would also be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence and/or fell short, to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence, by:
>
> 1. Failing to respond to communications and requests for information from the LPCC in connection with the C matter, in breach of r 50 of the Rules; and
>
> 2. Failing to comply with a summons issued by the LPCC pursuant to s 520(1)(a) and s 520(1)(d) of the LP Act in respect of the C matter by the date for compliance or at all, in breach of s 520(5) of the LP Act and r 50 of the Rules.

Findings of fact

211 We are satisfied of and make the following findings of fact in relation to Ground 6.

212 On 5 July 2018, after receipt of a complaint about the Practitioner's conduct the LPCC sent an email to the Practitioner[127] at the Firm's email address, which he had provided on his application for a practising certificate for that year, in which the LPCC requested copies of the following documents:

1. The Practitioner's client file for the C matter; and

2. The Firm's General Account statement for January 2017.

[127] Exhibit 2.44, ABD page 135.

The email requested that the documents be provided within 7 days.

213 The documents requested by the LPCC on 5 July 2018 were never provided to the LPCC.[128]

214 In an email dated 31 August 2018,[129] the Practitioner corresponded with the LPCC about the C matter, among others. We find that although the Practitioner did not, in his correspondence, refer to the C matter by name, parts of that correspondence was about the C matter. We have done so because the comments (which we set out below) are consistent with evidence which was given by Mr C and with the note in which the Practitioner informed them that their father's documents were available for collection and because it was a response to complaints which the LPCC had received, including the complaint about the Practitioner's conduct in the C matter. As such, we regard it as the only reasonable inference to be drawn from those matters. The Practitioner's statements to the LPCC about the C matter were:[130]

> I also say that in all the circumstances of me taking on the matter, I informed the party that I would not be available for possible long periods of time and it was on that basis with the party acknowledging that I would be unavailable he and his brother were happy to allow me to assist them.

and

> I have written to the party who requested that I act as Executor and Trustee of his and his brother's Late Father's Estate. I have been in contact with the part who is well known to me as we have been acquaintances for many years, I have informed him that I am happy to deliver his Late Father's Will to him. I have written to him asking him to contact me and I will provide the Will to him personally or by registered mail. There was never any intention on my part not to do so. I believe that I may not have provided the party with my changed contact details and this may have resulted in his inability to contact me. When I have delivered the Will and whatever documents relating to his father that I may have, I will inform the Complaints Officer of my actions. She has asked me to forgo fees. I am considering that request and given the relationship between the party and his brother and me, there is no reason why I will not do that.

215 In the correspondence of 31 August 2018, the Practitioner also explained generally that he had decided in 2015 that he wanted to

[128] Exhibit 3, para 10.
[129] Exhibit 2.48, ABD pages 148 – 145.
[130] Exhibit 2.48, ABD pages 143 – 145.

downsize his practice and move to retirement. He said that from 2015 his priorities had changed for a number of reasons including that he and his wife had health issues and that he was significantly engaged in assisting a family member with protracted litigation in which that family member was involved.

216 He also wrote, that he had continued to take on some non-litigious work for friends and old clients but had been upfront in telling them that he would not be working five days per week, would not be available to them '24/7' and that he planned to be away from Perth frequently and that their matter would be dealt with over an extended period and that he would not be able to help them if they were not prepared to work with him on his terms.

217 On 4 October 2018, the Practitioner was personally served with the following documents:[131]

1. a letter from the LPCC dated 27 September 2018, notifying the Practitioner that the LPCC was investigating his conduct in relation to the N-N matter; and

2. a letter from the the LPCC dated 27 September 2018, notifying the Practitioner that the LPCC was investigating his conduct in relation to the C matter;

3. a summons issued on 27 September 2018, pursuant to s 520(1)(a) and s 520(1)(d) of the LP Act in relation to the N-N matter; and

4. a summons issued on 27 September 2018, pursuant to s 520(1)(a) and s 520(1)(d) of the LP Act in relation to the C matter.

218 The summons of 27 September 2018, concerning the C matter provided as follows:[132]

> (1) Produce your entire original client files and/or documents in connection with you acting for Mr WC and Mr GC in relation to the administration of the late father's estate and all things incidental thereto, having been initially instructed in that matter in or about October 2016 (Matter), including;

[131] Exhibit 2.59, ABD pages 176 – 192. The documents served are at ABD pages 183 – 188 and 191 – 192 respectively.
[132] Exhibit 2.50, ABD pages 152 – 153.

(a) all court or tribunal documents (including any probate documents) and documents prepared for lodgement or filing with any agency (including drafts);

(b) all correspondence and communications (including email communications);

(c) all internal correspondence, email communications, file notes (including notes of attendances and oral communications), memoranda, reports, advice, draft documents, file opening documentation and administrative information;

(d) all costs disclosure, costs agreements and retainers (and all documents recording any costs disclosures and retainers);

(e) all bills, invoices and records relating to payment of invoices;

(f) accounting information and records (including all complete bank account statements showing monies received by you or your practice in connection with the Matter, trust account receipts and any other receipts for money received, trust account statements and debtors statements;

(g) all time recording records or other documents recording work in progress or work done; and

(h) all documents (including draft documents) which may be held in electronic form only.

(2) Without limiting any other requirement as set out in paragraph 1 above, produce, by delivering in person to the office of the Legal Profession Complaints Committee, the original will executed by Messrs C and C's late father the subject of the Matter.

(3) Without limiting any other requirement of the summons, produce to the law complaints office at the Office of the Legal Profession Complaints Committee, Level VI, 111 St George's Terrace, Perth WA 6000, a USB, disc or similar electronic storage media or device containing the true original electronic version of all documents referred to in paragraph 1(a), above.

219 The summons was not complied with by the Practitioner within the time provided. We find this to have been the case because, by letters dated 18 October 2018 and 24 October 2018, which were sent by post to the Practitioner's Residential Address and to the Firm's email address, the

LPCC twice asked the Practitioner to comply with the summons of 27 September 2018.[133]

220 A letter dated 7 January 2019, from the LPCC to the Practitioner,[134] was sent to his Firm's PO Box and to the Firm's email address, (which he had supplied on his application for renewal of his practising certificate). That letter said as follows:

> I refer to the Committee's correspondence to you in relation to the above matters, particularly of 27 September 2018 and 24 October 2018 (copies ***enclosed***).
>
> The committee has not heard from you in response to its correspondence to you concerning the above investigation. I have made attempts to contact you by telephone on your mobile and home telephone numbers held by the Legal Practice Board, most recently today, but have not received any response to any of my telephone calls despite leaving messages requesting that you contact me.
>
> I note that your submissions in respect of the issues concerning your non-compliance with the Committee's document summons dated 27 September 2018 are outstanding.
>
> It is intended that the above matters be referred to the Committee for determination at an upcoming meeting. You are now required to make submissions in respect of the substantive issues concerning Mr C's complaint the Committee's conduct investigation, which issues are outlined in the Committee's letter to you of 27 September 2018 (**Notification Letter**).
>
> With your submissions, you are reminded that:
>
> - you must be open and candid in your dealings with the Committee; rule 50 (2) of the *Legal Profession Conduct Rules 2010* (WA) (**Rules**); and
> - you must provide a full and accurate account of your conduct; rule 50 (3) of the Rules.
>
> Your submissions are required by **5 PM on Tuesday, 22 January 2019**.
>
> I again note Mr C's further concerns as to depositing a cheque made out to his late father and insuring real property the title of which currently remains in his late father's name, which was brought to your attention by the Notification Letter.

[133] Exhibits 2.53, ABD pages 169 – 170 and Exhibit 2.56, ABD pages 171 – 172 respectively.
[134] Exhibit 2.63, ABD pages 197 – 198.

221 The Practitioner did not comply with the Committee's letters or the summons of 27 September 2018.[135]

Characterisation of the conduct

222 Just as we have found in relation to Ground 3, the Practitioner's conduct, on the facts as we have found them in the failure to comply with the summons was a breach of s 520(5) of the LP Act. The penalty for doing so is a fine of $5,000.

223 His conduct also amounted to a breach of Rule 6(1)(e) of the Rules, which imposes a professional duty upon practitioners to comply with the law.

224 It also constituted a breach of Rules 50(2) and (3) of the Rules which required the Practitioner to be open and candid in his dealing with the regulatory authority, to respond to the request for information about his practice within a reasonable time and in any event within 14 days (subject to any extension permitted by the regulatory authority), and to provide in writing a full and accurate account of his conduct in relation to the matters covered by the request. His behaviour, in failing to respond, self-evidently met none of those obligations.

225 Given that the Practitioner has not raised any defence of reasonable excuse, we infer and find that he had no reasonable excuse for his non-compliance.

226 We adopt without repeating the statements made at [155] about the importance of legal practitioners complying with the reasonable requests of their regulatory bodies and the seriousness with which failure to do so is regarded.

227 The conduct, the subject of Ground 6, which we have found to be established by the Applicant constitutes professional misconduct in both senses referred to in ***Kyle*** and is conduct which meets the definition of professional misconduct in s 403(1)(a) and s 403(1)(b) of the LP Act.

Grounds 7 and 9 – the Estate of Mrs P

228 Grounds 7 and 9 concern the Practitioner's conduct in a matter referred to as Mrs P's Estate.

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[135] Exhibit 3, paras 11 and 12.

Ground 7 – the allegation

229 By Ground 7 the Applicant alleged:

> Between around 26 September 2016 to January 2021, the Practitioner engaged in professional misconduct within the meaning of ss 403(1)(a) and (b) and s 438 of the LP act, which conduct would also be reasonable regarded as disgraceful or dishonourable to practitioners of good repute and competence and/or fell short, to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence, in the course of acting as executor of the estate of the late Mrs P (**Estate of Mrs P**) by:
>
> 1. misappropriating from the Estate of Mrs P approximately $83,741.22 (**Estate Funds**) into his personal bank account between 26 September and 28 November 2016;
>
> 2. withdrawing or extending the estate funds from his personal bank account for a purpose unconnected with the administration of the Estate of Mrs P; and
>
> 3. failing to repay the Estate of Mrs P the Beneficiaries until around January 2021.

Ground 7 – findings of fact

230 We are satisfied of, and find, the following facts in relation to Grounds 7 and 9.

231 Mrs P died on 11 April 2016.[136]

232 By her Will, which was executed on 10 October 2012, Mrs P appointed the Practitioner as her executor. After some specific bequests, she left the residue of her estate to her three children (the **Beneficiaries**) as tenants-in-common in equal shares.[137]

233 On 8 August 2016, the Practitioner filed an application for a grant of probate in the Supreme Court.[138] He provided his Firm's address with that application.

234 Probate was granted to the Practitioner on 31 August 2016.[139]

[136] Exhibit 2.11, ABD page 42.
[137] Exhibit 2.03, ABD pages 6 – 8.
[138] Exhibit 2.10, ABD pages 33 – 41.
[139] Exhibit 2.11, ABD page 42.

235 The application for probate was accompanied by a Statement of Assets and Liabilities which showed that the Estate of Mrs P comprised primarily:[140]

1. cash in bank accounts in the sum of $42,830.77; and
2. a refundable accommodation deposit of $49, 010.00.

236 In fact, the sum of $48,259.85, being the refundable accommodation deposit, had been paid into one of Mrs P's bank accounts in April 2016[141] and the Statement of Assets and Liabilities was incorrect in that that amount was not reflected in the cash at the bank.

237 The bank accounts of the Estate of Mrs P were controlled by the Practitioner as executor of the Estate of Mrs P between 26 September 2016 and 28 November 2016. The bank accounts of the Estate of Mrs P at that time were:

1. A P&N term deposit account no. XXXXXXXXX (**Account 1**) totalling $32,967.48;[142]
2. A P&N savings account no. XXXXXXXXX (**Account 2**) totalling $50,705.62;[143] and
3. A P&N member's share account (**Account 3**) totalling $10.[144]

238 On 20 September 2016, the Practitioner wrote a letter addressed to 'to whom it may concern' but which, given its contents, we find to have been addressed to the P&N Bank.[145] In that letter, he provided instructions in relation to the Estate of Mrs P's bank accounts. He instructed the recipient of the letter to:

1. transfer the entire sum from Account 3 into Account 2;
2. then transfer the full amount from Account 2 into BSB XXX XXX Account XXXX XXXXX in favour of HJ Gibney (**Personal Bank Account**); and

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[140] Exhibit 2.11, ABD pages 38 – 39.
[141] Exhibit 2.09, ABD page 32 which actually shows the sum of $48,259.85 being directed to her account on 22 April 2016 from the aged care facility.
[142] Exhibit 2.66, ABD page 202.
[143] Exhibit 2.9, ABD page 32.
[144] Exhibit 2.69, ABD page 205.
[145] Exhibit 2.12, ABD page 43.

3. transfer the full amount from Account 1 to P&N Membership as a 3-month term deposit in the name of the Estate of the Mrs P on the date of maturity; which was 29 September 2016 (**New Term Deposit Account**).

239 The Practitioner also completed a Membership Request Form[146] and a Term Deposit Application/Rollover Instructions Form[147] to give effect to those instructions.

240 On 28 October 2016, the Practitioner competed a P&N Bank Term Deposit Early Redemption Form[148] in which he instructed the bank to:

1. transfer from the New Term Deposit Account the sum of $13,000 into his Personal Bank Account; and

2. transfer the balance of the money in the New Term Deposit Account (being $20,012.35) into another term deposit account in the name of the Estate of Mrs P (**Second Term Deposit Account**).

241 By application dated 28 November 2016, the Practitioner then provided instructions to the P&N Bank to transfer the entire sum remaining ($20,037.85) in the Second Term Deposit Account to his Personal Bank Account.[149]

242 Each of the instructions provided by the Practitioner to the P&N Bank were carried out and the Practitioner received the funds into his Personal Bank Account.[150]

243 Between 26 September 2016 and 28 November 2016, the Practitioner misappropriated from the Estate of Mrs P's bank accounts a total of $83,741.22 (Estate Funds) into his Personal Bank Account.

244 By 19 December 2016, the Practitioner's Personal Bank Account was in debit.[151]

245 In around January 2021, some four years later, the Practitioner made restitution of the funds to the Beneficiaries of the Estate of Mrs P.

[146] Exhibit 2.13, ABD pages 44 – 49.
[147] Exhibit 2.14, ABD page 50.
[148] Exhibit 2.15, ABD page 51.
[149] Exhibit 2.19, ABD page 57.
[150] Exhibit 2.22, ABD pages 63 – 68 and Exhibit 2.18, ABD page 56. There is some difference in the amounts identified in [236] as being Mrs P's bank accounts and the amount the Practitioner received from those accounts. That difference is referable to early withdrawal for fees and interest.
[151] Exhibit 2.26, ABD page 73.

On 11 January 2021 Mr GP, one of the Beneficiaries (on behalf of himself and the other two Beneficiaries) wrote to the LPCC informing it they had recently met with the Practitioner and the issues between them had been resolved to their satisfaction because the distribution of the Estate of Mrs P had been paid in full in accordance with their mother's Will. He sought to withdraw his complaint about the Practitioner.[152]

246 Before the distribution had occurred, the following actions had been taken in relation to the Estate of Mrs P and the complaint made about the Practitioner's conduct in relation to his dealing with the Estate of Mrs P:

1. the Supreme Court had issued notices for the passing of accounts;[153]

2. the Beneficiaries of the Estate of Mrs P had made a complaint about the Practitioner's conduct to the LPCC;[154]

3. the LPCC had resolved to refer the Practitioner to the Tribunal pursuant to s 428(1) of the LP Act in relation to his conduct in dealing with the Estate of Mrs P;[155]

4. a statutory Manager had been appointed to the Firm.[156]

247 That the Practitioner had applied the Estate Funds for his own use and benefit is the only reasonable inference available in circumstances where:

1. the Practitioner has offered no other explanation for the transferring of the funds into his Personal Bank Account;

2. his Personal Bank Account was in debit by 19 December 2016;

3. he did not comply with the Supreme Court orders for passing of the accounts,

4. the only evidence that he incurred any costs in relation to the Estate of Mrs P is contained in an email of 1 December 2016 addressed to the Beneficiaries in which he indicated that he had

[152] Exhibit 2.73, ABD page 212.
[153] Exhibit 2.60, ABD page 193 and Exhibit 2.61, ABD page 194.
[154] Affidavit of Abdifitah Hassan sworn 2 March 2013 at para 17.
[155] Exhibit 2.70, ABD page 206.
[156] Exhibit 2.71, ABD pages 207 – 209.

expended from his own funds an amount of $839 on behalf of the Estate of Mrs P prior to the Grant of Probate;[157]

5. the Statement of Assets and Liabilities disclosed that the only debts owned by the Estate of Mrs P totalled $17,470.58;[158]

6. there is no documentary evidence that the Practitioner used the Estate Funds to pay any debts of the Estate of Mrs P or to make any disbursement to the Beneficiaries of the Estate of Mrs P before January 2021.

248 The Applicant has submitted that we might find that the Practitioner intended to permanently deprive the Beneficiaries of the Estate of Mrs P of the Estate Funds. In circumstances where the Practitioner has not offered any explanation for his conduct and had the benefit of the Estate Funds for over four years that finding would appear to be open. However, given that a sum equal to the value of the Estate Funds was ultimately distributed in accordance with the terms of Mrs P's Will, we decline to make such a finding. We do not know what was in his mind and we do not think that a permanent intention to retain the money is the only reasonable inference open on the evidence.

Ground 7 – characterisation of the conduct

249 We have found the allegation in Ground 7 proven to the relevant standard. We have no difficulty in describing that conduct as professional misconduct. Even if the Practitioner had transferred the money to himself and used it for his own purposes with a genuine intention that he would at some stage, distribute the funds of the Estate of Mrs P in accordance with the late Mrs P's Will, he was not entitled to take and use the funds at all. Doing so was a gross breach of his obligations as the executor of her estate and a breach of his obligations to the Beneficiaries and of the trust reposed in him as executor by the late Mrs P before her death. His conduct was of a kind which had the potential to bring the professional into disrepute. In our view, it is conduct which clearly meets the definition of professional misconduct:

1. in s 403(1)(a) of the LP Act;

2. in s 403(1)(b) of the LP Act;

[157] Exhibit 2.21, ABD pages 60 – 61.
[158] Exhibit 2.10, ABD page 41.

3. the first limb of the common law test set out in ***Kyle*** (ie. it would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence); and

4. the second limb of the common law test set out in ***Kyle*** (ie. it is conduct which fell short to a substantial degree of the standards observed by members of the profession of good repute and competence).

Ground 9 – the allegation

250 By Ground 9, the Applicant alleges that between around 4 January 2019 to 9 April 2019, the Practitioner engaged in professional misconduct within the meaning of sections 403(1)(a) and (b) and s 438 of the LP Act, which conduct would also be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence and/or fell short, to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence, in the course of acting as executor of the Estate of Mrs P by:

1. failing to comply with orders of the Supreme Court of Western Australia (**Supreme Court**) dated 3 December 2018 and 15 February 2019 which required him to pass the accounts of the Estate of Mrs P;

2. Further, or alternatively to (1), the extent the Practitioner was not aware of the orders dated 3 December 2018 and 15 February 2019:

   (a) failing to check correspondence sent to his practice address, which remained the current address provided to the Supreme Court and the Legal Practice Board;

   (b) failing to update his address with the Supreme Court, to the extent there had been a change; and

   (c) failing to update his address with the Legal Practice Board, to the extent there had been a change, as required by s 6 of the *Legal Profession Rules 2009* (WA),

thereby avoiding his responsibilities as executor and solicitor in circumstances where he continued to hold a practising certificate and where the administration of the Estate of Mrs P was ongoing.

Ground 9 – findings of fact

251 We are satisfied of, and make the following findings of fact, in relation to the allegation in Ground 9.

252 Between April 2017 and April 2018, the Practitioner and the Beneficiaries of the Estate of Mrs P had communications about the quality of the care which Mrs P had received at the aged care facility where she had lived prior to her death and about the care received from a doctor who was involved in her medical care prior to her death. The possibility of either or both having been negligent seems to have arisen in a coroner's report into her death dated 24 April 2017. In his email to the Beneficiaries of 18 December 2017,[159] the Practitioner said:

> The current position regarding my administration of your Mum's Estate is that I am pursuing a claim by me as the Executor of your Mum's Estate against Juniper Balcatta and seeking an apology and assurances from that organisation that the mistreatment of your Mum in that facility will not be repeated.

253 He described the care by the aged care home as 'grossly negligent' and the care provided by the doctor as amounting to 'grossly unprofessional conduct'. He also advised the Beneficiaries in that email that if he could not achieve a result for the estate by 31 January 2018, he would then complete the administration of the Estate of Mrs P.

254 In an email to one of the Beneficiaries dated 16 April 2018,[160] the Practitioner confirmed what he referred to as a decision which he had reached with the Beneficiaries not to pursue a negligence claim against the aged care facility or the relevant doctor. He also said that he had lodged a notice pursuant to s 63 of the *Trustees Act 1962* (WA) and stated that unless he received notice of a claim against the Estate of Mrs P he could start to 'wind up the administration'.[161]

255 On 20 August 2018, the Beneficiaries, through their solicitors, wrote to the Practitioner.[162] In the correspondence they noted that it had been two years since probate had been granted and they requested that they be provided with a current statement of assets and liabilities and with an update in relation to the administration of the estate by close of business on 31 August 2018.

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[159] Exhibit 2.34, ABD pages 96 – 97.
[160] Exhibit 2.41, ABD pages 115 – 120.
[161] Exhibit 2.41, ABD page 115.
[162] Exhibit 2.47, ABD page 142.

256 On 26 October 2018, the Practitioner wrote to the Beneficiaries' solicitors explaining that he there were serious and compelling grounds to instigate a medical negligence claim and said, among other things:[163]

> ... I informed the Family of my proposed actions as the Executor and I received the unanimous support from the children of the Late Mrs P to proceed with a claim for damages against the Late Mrs P's doctor and a separate claim against [the residential aged care facility].
>
> Those discussions took place in July 2018.
>
> As milestones are reached I will inform the beneficiaries under the Late Mrs P's Will.

257 No statement of assets and liabilities was provided and, while other things were said in that letter and it referred to earlier correspondence, (which is not in evidence before us) the Practitioner did not assert he had already provided the statement of assets and liabilities.

258 On 1 November 2018, the Registrar of the Supreme Court wrote to the Practitioner at his Firm's Address, which had been provided, informing him that the Court had received a request that he be directed to pass accounts of the Estate of Mrs P. The Registrar requested that he provide 'all necessary informing regarding the estate to Avon Legal in the next 14 days', failing which the Practitioner would be ordered to pass accounts.[164]

259 On 3 December 2018, the Supreme Court issued a notice to pass accounts in accordance with rule 37 of the *Non-Contentious Probate Rules 1967* (WA).[165] That notice was addressed to the Firm's Address. From the fact that the Practitioner was ordered to pass accounts we infer and find that the Practitioner did not comply with the Registrar's request of 1 November 2018.

260 The notice of 3 December 2018 required the Practitioner to:

> 1. lodge the accounts of the Estate of Mrs P with the court, verified by affidavit and supporting vouchers on or before 4 January 2019;
>
> 2. serve a copy of the accounts on all beneficiaries by 11 January 2019 and to then file affidavits of service; and
>
> 3. attend the court to have the accounts passed on 12 February 2019.

[163] Exhibit 2.57, ABD pages 173 – 174.
[164] Exhibit 2.58, ABD page 175.
[165] Exhibit 2.60, ABD page 193.

261 On 14 December 2018, an amended notice to pass accounts as issued by the Supreme Court.[166] The amended notice was addressed to the Firm's address. It required the Estate of Mrs P's accounts, verified by affidavit together with supporting vouchers to be lodged at the Court by 12 March 2019. It also required that the accounts and supporting vouchers be served on the Beneficiaries of the Estate of Mrs P by 19 March 2019 and provided that the appointment to have the accounts passed was to be held on 9 April 2019.

262 On 28 March 2019, after the date for compliance with the amended notice but before the appointment at which the accounts were to be passed, the Associate to Registrar Carey informed Avon Legal that no accounts in respect of the Estate of Mrs P had been filed and that, at some unspecified time earlier than 28 March 2019, after receiving information from Avon Legal, the Court had sent the amended notice to a PO Box which was said to be an alternative address for the Practitioner.[167] The letter does not indicate what that address was and we do not have in evidence a copy of the email from Avon Legal advising of the alternative address.

263 From the evidence of Ms Tennent as to what she identified on the Supreme Court file and the Practitioner's file,[168] at no time did the Practitioner comply with the order of the Supreme Court dated 3 December 2018 and 15 February 2019, which required him to pass the accounts of the Estate of Mrs P.

Ground 9 – characterisation of conduct

264 We have found that the Practitioner failed to comply with the orders of the Supreme Court to pass the accounts of the Estate of Mrs P.

265 He has failed to provide any explanation for failing to do so to the LPCC or to the Tribunal.

266 While two possibilities occur to us we cannot prefer one inference over the other, each being a realistic possibility in all of the circumstances as we have found them.

267 The first is that, being aware of the orders, he did not pass the accounts in order to avoid the fact that he had transferred the funds of the

[166] Exhibit 2.61, ABD page 194.
[167] Exhibit 2.65, ABD page 201.
[168] ts 12 – 13, 9 March 2023.

Estate of Mrs P to his own bank account and then dissipated them becoming known.

268 If that be the explanation, the failure to comply with the notices of the Supreme Court was a blatant disregard for the Court's authority. That disregard, in our view, would meet the definitions of professional misconduct as described in both limbs of the common law test as articulated in ***Kyle*** and, in our view, it would also amount to professional misconduct in the senses in which that definition is used in s 403(1)(a) and s 403(1)(b) of the LP Act.

269 The second possibility is that the Practitioner was unaware of the notices because he had ceased to monitor the avenues of contact he provided to the court when he applied for the grant of Probate and which he had provided to the LPCC at the time he renewed his practising certificate for the relevant year. Rule 6 of *Legal Profession Rules 2009* (WA), which applied at the time, required a local legal practitioner to notify the Legal Practice Board immediately of any change in the information given to the Practitioner's most recent application for a practicing certificate.

270 If that be the case, while it is less serious conduct then the disregarding of court orders, it is still serious conduct which shows a disregard of the duties and standards of practitioners, particularly ones who have not completed all of the matters in respect of which they have been instructed, as the Practitioner was in this case. Even if the Practitioner had explained to the Beneficiaries that he was not going to work full-time and would be away from his practice for significant periods (to which we have referred at [216]) it would not excuse the Practitioner's failure to ensure that he monitored those addresses because the failure to do so resulted in him avoiding his professional responsibilities at a time when he held a practising certificate and the administration of the Estate of Mrs P was ongoing.

271 While we cannot prefer one reason over the other, in our view, a failure of this kind, also amounts to professional misconduct in the way that term is used in s 403(1)(a) and s 403(1)(b) of the LP Act and in the senses used in limbs 1 and 2 of the ***Kyle*** test.

<u>Application by Mr C for compensation</u>

272 During his evidence before us, Mr C stated that a solicitor from the LPCC had provided him with a letter where she had referred to the possibility of the Tribunal making an order under s 448(2)(a) of the

LP Act, that the Practitioner compensate him for the $4,500 which he and his brother had lost in their dealings with the Practitioner in relation to their father's estate.

273 When asked by counsel for the Applicant whether he was asking for compensation and how much he was asking for, Mr C referred both to repayment and to compensation saying:[169]

> Whatever can be given to us, whether that's half, the full amount. I've never been a greedy person. I've never been in this situation ever, and I, you know – we're honest people, but right now, if that comes out of Howards' purse, yes, let it be so.

274 Section 448(1) of the LP Act provides that a compensation order is an order made to compensate a person (the aggrieved person) for loss suffered because of conduct of an Australian legal practitioner that is the subject of complaint by that person or is investigated by the LPCC of its own initiative.

275 Section 449(1) of the LP Act provides that, a compensation order cannot be made unless either the LPCC or the Tribunal is satisfied that the aggrieved person has suffered a loss because of the conduct of the Australian legal practitioner and that it is in the interests of justice that the order be made.

276 Section 449(2) provides that, a compensation order is not to be made in respect of any loss for which the aggrieved person has or is entitled to receive compensation under an order that has been made by a court or if the aggrieved person has received or is entitled to receive compensation from the Guarantee Fund or from a fidelity fund of any jurisdiction, where a claim for payment from the fund has been made or determined.

277 The Guarantee Fund referred to in s 449(2) is defined in s 3 of the LP Act as the Solicitor's Guarantee Fund established under s 336 of the LP Act.

[169] ts 27, 9 March 2023.

278 Section 448(2) provides that a compensation order consists of is one or more of the following:

> …
>
> (a) an order that the Practitioner cannot recover or must repay the whole or a specified part of the amount charged to the aggrieved person by the Practitioner in respect of specified legal services;
>
> (b) an order discharging a lien possessed by the Practitioner in respect of a specified document or class of documents;
>
> (c) an order that the Practitioner pay to the aggrieved person, by way of monetary compensation for the loss, a specified amount.

279 The request for compensation or repayment of the funds paid to the Practitioner by the C family is understandable and Mr C's request that, '[we are] able to just be refunded of what we've paid to the man'[170] was a modest request reasonably made.

280 However, with some considerable regret we find that we are unable to make any such order at this time. While Mr WC has asked for an order that the Practitioner repay the amount paid, we have found that his brother paid nearly half of the sum sought and, while it might seem reasonable to assume that Mr GC would also like to have the amount paid by him to the Practitioner refunded, we are not prepared to proceed on the basis of that assumption and without any indication from Mr GC that he has authorised his brother to make the application on his behalf. Further, we have no evidence from Mr WC that no order has been made by a court requiring repayment of the money and no information about whether Mr WC and Mr GC would be entitled to recover the money from the Guarantee Fund or a fidelity fund and whether a claim against such a fund has been made by them.

281 In the circumstances, we consider the appropriate way to proceed with Mr WC's request for repayment is to make an order giving him 10 days from the making of orders consequent upon the publication of these reasons for decision in which to inform the Tribunal as to whether he and his brother wish to proceed with a request for repayment. We would also order that, in the event that they do, they file an affidavit dealing with the issues which we are required to consider under s 448 and s 449 of the LP Act, including whether it is in the public interest that compensation order be made.

[170] ts 29, 9 March 2023.

Proposed orders

282 Given the findings set out in these reasons for decision we propose making the following orders:

1. The Tribunal finds that in relation to the N-N matter, the Practitioner is guilty of professional misconduct within the meaning of s 403(1)(a) and s 403(1)(b) of the *Legal Profession Act 2008* (WA) and which conduct:

   (a) would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence; and

   (b) fell short to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence,

   in the course of acting for Mrs N-N and later the Public Trustee (at a time when the Public Trustee was Mrs N-N's administrator) by:

   i. receiving from Mrs N-N the sum of $37,704.14 which was transit money and trust money in circumstances where he operated no trust account;

   ii. receiving the sum of $37,704.14 into an overdraft account which at the time was in debit;

   iii. failing to pay the $37,704.14 to the Department of Veterans' Affairs as instructed by his client as soon as practicable after it was received, or at all;

   iv. failing to repay the funds to the Public Trustee after the Public Trustee had revoked the instructions to pay the money to the Department of Veterans' Affairs and demanded repayment of the money;

   v. invoicing and accepting payment from Mrs N-N of the costs of preparing and lodging two Survivorship Applications, which to the Practitioner's knowledge was work he had not performed;

vi. failing to lodge the Survivorship Applications diligently or at all;

vii. failing to respond to communications and requests for information from the Legal Profession Complaints Committee in connection with the N-N matter;

viii. failing to comply with a summons issued by the Legal Profession Complaints Committee pursuant to s 520(1)(a) and s 520(1)(d) of the LP Act in respect of the N-N matter by the date for compliance, or at all.

2. The Tribunal finds that in relation to the C matter, the Practitioner is guilty of professional misconduct within the meaning of s 403(1)(a) and s 403(1)(b) of the *Legal Profession Act 2008* (WA) and which conduct:

(a) would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence; and

(b) fell short to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence;

in the course of acting for Mr WC and Mr GC (**Clients**) by:

i. requesting and receiving from or on behalf of the Clients into an overdraft account which was at the time in debit, sum of $4,360 which was trust money within the meaning of s 205(1) of the LP Act in circumstances where the Practitioner operated no trust account;

ii. failing to account to the Clients for the sum of $4,360;

iii. failing to respond to communications and requests for information from Legal Profession Complaints Committee in connection with the C matter, and

iv. failing to comply with a summons issued by the Legal Profession Complaints Committee pursuant to s 520(1)(a) and s 520(1)(d) of the LP Act in respect of the C matter by the date for compliance or at all.

3. The Tribunal finds that in relation to the C matter, the Practitioner is guilty of professional misconduct within the meaning of s 403(1)(a) of the *Legal Profession Act 2008* (WA) and which conduct fell short to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence in the course of acting for the Clients by failing to deliver legal services diligently or at all.

4. The Tribunal finds that in relation to the P matter, the Practitioner is guilty of professional misconduct within the meaning of s 403(1)(a) and s 403(1)(b) and s 438 of the *Legal Profession Act 2008* (WA) and which conduct:

(a) would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence; and

(b) fell short to a substantial degree, of the standards observed or approved by members of the profession of good repute and competence

in the course of acting as executor of the Estate of the late Mrs P (**Estate of P**) by:

i. misappropriating from the Estate of P approximately $83,741.22 (**Estate Funds**) into his personal bank account between 26 September 2016 and 28 November 2016;

ii. withdrawing or expending the Estate Funds which he had misappropriated into his personal bank account for a purpose unconnected with the administration of the Estate of P;

iii. failing to account to the beneficiaries of the Estate of P until around January 2021; and

iv. A. failing to comply with orders of the Supreme Court of Western Australia dated 3 December 2018 and 15 February 2019 which required him to pass the accounts of the Estate of P or, alternatively;

B. if the Practitioner was not aware of the orders dated 3 December 2018 and 15 February 2019, avoiding his responsibilities as executor and solicitor in circumstances where he continued to hold a practising certificate and where the administration of the Estate of P was ongoing by:

(i) failing to check correspondence sent to his Firm's address, which remained the current address provided to the Supreme Court and to the Legal Practice Board;

(ii) failing to update his address with the Court or the Legal Practice Board, to the extent there had been a change.

Orders

The Tribunal orders:

1. The Applicant is to serve the Respondent with a copy of the reasons for decision and these orders within 7 days.

2. By 13 December 2023, the parties are to inform the Tribunal whether they wish to be heard in relation to the orders which the Tribunal proposes to make as a consequence of the findings set out in the reasons for decision (**Proposed Orders**).

3. If either party wishes to be heard in relation to the Proposed Orders, they are to file submissions in relation to the Proposed Orders by 18 December 2023 and the matter will be listed for a directions hearing on 21 December 2023.

4. By 19 January 2024, the Respondent is to file with the Tribunal and provide to the Applicant copies of any affidavit, witness statement or other material upon which he wishes to rely in the determination of the questions of penalty.

5. By 16 February 2024, the Applicant is to file with the Tribunal and provide to the Respondent any affidavit, witness statement or other material and submissions upon which it proposes to rely in the determination of the questions of penalty and costs.

6. By 1 March 2024, the Respondent is to file in the Tribunal and provide to the Applicant any material and submission upon which he intends to rely in the determination of the question of costs.

7. Subject to further order of the Tribunal, the issues of penalty and costs is to be determined on the papers unless by 8 March 2024 either party informs the Tribunal that they consider an oral hearing in relation to penalty and/or costs should be held.

8. If Mr WC and/or Mr GC wish to proceed with an application for compensation under s 448 of the *Legal Profession Act 2008* (WA), they are to file an application with the Tribunal by 19 January 2024 and must file in the Tribunal and serve on the Respondent the application and any affidavit or affidavits addressing the issues to which the Tribunal must have regard under s 448 and s 449 of the *Legal Profession Act 2008* (WA), together with any written submission on which it intends to rely.

9. If a compensation application is made, the Respondent has until 9 February 2024 to file in the Tribunal and provide to the applicant(s) for compensation any responsive material or submissions.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS
Associate to Judge Glancy

30 NOVEMBER 2023