QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Sheehan* [2025] QCAT 81
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **JUDITH ANNE SHEEHAN** (respondent)
APPLICATION NO/S:	OCR194-21
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	14 March 2025
HEARING DATES:	26 and 27 October 2023
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons KC, Judicial Member Assisted by: Ms Annette Bradfield, Practitioner Panel Member Mr Keith Revell, Lay Panel Member
ORDERS:	**1. The respondent is publicly reprimanded for her conduct specified in the discipline application;** **2. A local practising certificate is not to be granted to the respondent before 1 July 2025;** **3. No order is made in respect of the costs of the hearings on 28 February 2023 and 8 March 2023, or the costs of the vacated hearing and compulsory conference of 23 March 2023;** **4. The respondent is to pay 50% of any other costs of the applicant of and incidental to the discipline application, including any other reserved costs, to be taxed on the standard basis, as if the matter were conducted in the Supreme Court of Queensland.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – DISCIPLINARY PROCEEDINGS - where the respondent was employed as a legal practitioner director of an incorporated legal practice – where the respondent admitted to four disciplinary charges relating to failure to maintain appropriate management systems

and various trust accounting issues – whether the respondent caused a deficiency in a trust account or trust ledger account - whether the respondent is permanently unfit to practice – whether the respondent should be removed from local roll - whether respondent should be prohibited from applying for a practicing certificate

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – ORDERS – where the respondent was charged with six separate charges by the applicant, which alleged the respondent was guilty of professional misconduct and/or unsatisfactory professional conduct – where the respondent admitted to four of the charges – where the applicant withdrew one of the charges at a Tribunal hearing – where the respondent contested a charge that she caused a deficiency in the trust account or trust ledger account - where the Tribunal found the respondent had caused a deficiency in the trust account or trust ledger but not on the basis submitted by the applicant – where the respondent's conduct was characterised as professional misconduct – whether costs should be awarded to applicant – whether there are "exceptional circumstances" as referred to in s 462(1) of the *Legal Profession Act 2007* (Qld) in relation to the charge withdrawn and the contested charge

Legal Profession Act 2007 (Qld), s 259, s, 418, s 419, s 456, s 462

Legal Professional Regulation 2017 (Qld)

Adamson v Queensland Law Society Inc [1990] 1 Qd R 498

Attorney-General v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand [2018] QCA 66

Council of the Queensland Law Society Inc v Roche [2003] QCA 469

Legal Services Commissioner v Astley [2019] QCAT 274

Legal Services Commissioner v O'Reilly [2019] QCA 251

Legal Services Commissioner v Shand [2017] QCAT 159
Legat v Queensland Law Society Incorporated [2022] QCA 184

Pennisi v Legal Services Commissioner [2023] QCA 234

Re Mayes and the Legal Practitioners Act (1974) 1 NSWLR 19

Watts v Legal Services Commissioner [2016] QCA 224

APPEARANCES &
REPRESENTATION:

Applicant:	S A McLeod KC and C M Doyle, counsel instructed by the Legal Services Commission
Respondent:	B T Cohen, solicitor of Bartley Cohen

REASONS FOR DECISION

[1] The respondent was appointed as the legal practitioner director ("LP director") of Stenton & Moore Pty Ltd, an incorporated legal practice ("ILP"), on 30 August 2018. She resigned from that position on 19 December 2018. In that period, a number of irregularities occurred in relation to the legal practice, which have resulted in the bringing of this discipline application. It alleges that the respondent's conduct should be found to constitute professional misconduct or unsatisfactory professional conduct.

Respondent's professional background

[2] The respondent was admitted to legal practice in Queensland on 11 July 2011. She was then 62 years of age. In the years following admission, she sought employment, and worked and volunteered short-term with a variety of legal organisations. Although she lived in Toowoomba, she went wherever she could find work. The respondent held a local practising certificate in Western Australia from 1 July 2013 to 30 June 2014, but practised as an employed solicitor for a part only of this period, from 1 July 2013 to 30 August 2013. Prior to that, from 11 July 2011 to 30 June 2012, and from 10 August 2012 to 30 June 2013, she had held a restricted employee practising certificate in this State. From 1 July 2014 to 30 September 2014, she held an unrestricted employee practising certificate and held an unrestricted principal practising certificate in the periods from 1 October 2014 to 30 June 2016 and from 22 July 2016 to 26 June 2020.[1]

[3] The respondent established the firm Bartley Legal on 1 October 2014. This practice was conducted by an ILP, Bartley Legal Pty Ltd, the respondent being the LP director of this practice from 1 October 2014 to 30 June 2016, from 27 July 2016 to 30 June 2017, and from 7 July 2017 to 29 June 2020. The respondent's evidence was that Bartley Legal had a very modest client base, insufficient for her to make a living as a solicitor. The respondent continued to seek other employment, taking short-term positions with legal practices located in Strathpine, Maroochydore, Airlie Beach and Toowoomba. By 2018, the respondent was, as she described it, particularly keen to find permanent employment as a lawyer.

Respondent's initial contact with Stenton & Moore

[4] This ILP was registered as a company on 29 October 2013. Ms Nerise Moore was a director of the company from the date of its registration. Mr Graham Stenton was also a director of the company from that date, and apparently its LP director. He ceased to be a director on 25 May 2018. The practice of Stenton & Moore was conducted at Mudgeeraba on the Gold Coast.

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1 See Hearing Book p 277; p 136.

[5] Much of the account which follows is based upon contemporary documents, and unchallenged material from the respondent.

[6] On 29 August 2018, the respondent received a telephone call from Ms Jo Williams, a recruiter with an employment agency, "Legal Eagles". Ms Williams told the respondent that Ms Moore had not yet completed her practice management course, and that the firm needed somebody to act as its LP director for two or three months while Ms Moore was engaged in the acquisition of two other law firms, eventually to be amalgamated with Stenton & Moore. The respondent stated that because of her commitments with Bartley Legal, she would only be available part-time, and was told that this was not a problem. Ms Williams said that Stenton & Moore had been operating for around four years. The respondent concluded that the practice was well-established, successful and expanding. She hoped that the position as LP director might lead to a permanent part-time position as a legal practitioner with this practice.

[7] The respondent had not previously acted as an LP director, other than for her own practice. She was concerned about holding that position while maintaining her position with Bartley Legal (and no doubt, continuing to live in Toowoomba). She contacted the ethics department of the Queensland Law Society ("QLS") to ask about accepting the role with Stenton & Moore. She was told that it was not uncommon for an LP director to hold concurrent appointments, one remotely, and understood that technology was a consideration to enable that to occur.

[8] The same afternoon, the respondent received a telephone call from Ms Moore. She was given to understand that the position as LP director would require very little from her, because Ms Moore said that in the period of the appointment she would be busy procuring two other law firms, and would be unavailable to complete any client work.

[9] From the telephone call with Ms Williams, the respondent understood that Ms Moore was a solicitor, although she did not specifically enquire to confirm that. She also understood that Ms Moore was the only person in the practice who could engage in client work, after the departure of Mr Stenton.

[10] The respondent told Ms Moore that she was interested in the position, and they agreed to meet for lunch on 7 September 2018.

[11] On 29 August 2018, the respondent received an email from Ms Williams providing some information about Stenton & Moore. Ms Moore was said to be the owner; and she had recently purchased another two practices in Robina and Coolangatta which would be operated by Ms Moore from October. Ms Moore "has not completed her PMC so requires someone with a Principal Level Practicing [sic] Certificate to join the team in some capacity".

[12] On 30 August 2018, the respondent received an email from Ms Moore, who expressed the view that the respondent would "make a great fit with our office", and asked the respondent for her full name, place of birth, date of birth and address. The respondent provided these personal details by email on the same day, which also said that the respondent was looking forward to the proposed meeting, and "seeing if we can progress our working relationship".

[13] On 31 August 2018, the respondent received a telephone call from Ms Amy Bewley of the QLS. Ms Bewley said that the respondent had been registered as a director of Stenton & Moore, and asked the respondent to confirm that she was the firm's LP director. The respondent stated that she was taken by surprise by the call, because

she understood from the conversations with Ms Williams and Ms Moore that the details of her position were yet to be finalised. Nevertheless, she confirmed to Ms Bewley that she had been appointed as the LP director of the practice. She was hopeful that her appointment to this position was an indication that she had "all but secured the position". She hoped that this would lead to a permanent part-time role with the practice.

[14] Later the same day, the respondent received an email from Ms Bewley asking her to confirm whether Stenton & Moore had provided any legal services between 24 August and 30 August 2018. She forwarded this email to Ms Moore. Ms Moore then telephoned her and said that the only legal service that had been provided in that period was the filing and service of a document in the Supreme Court, necessary for limitations reasons. The respondent then sent an email in reply to Ms Bewley, later forwarded to Ms Moore. The email repeated the information about filing a document in the Supreme Court. It also stated that most clients had been advised that their action on matters would be resumed from 4 September 2018, and that the practice was "in transition" in the period to which Ms Bewley's enquiry related, and the clients were agreeable to their matters being postponed to 4 September 2018.

[15] Apart from an email confirming arrangements for the meeting on 7 September 2018, the respondent had no further contact from Ms Moore prior to that meeting. The meeting occurred at a restaurant. It was also attended by Ms Tracy Ferguson, Ms Moore's administrative assistant. At the meeting, the respondent told Ms Moore she was surprised that she had been appointed as the practice's LP director. Ms Moore stated that there must have been some confusion, possibly the result of the need to ensure that the firm had an LP director. The respondent gave evidence that, at this meeting, they discussed what she believed would be her prospective responsibilities as a temporary LP director of the practice. She said she considered these to be prospective, because she did not fully appreciate that her responsibilities commenced when she was registered as the practice's LP director.

[16] Nevertheless, the respondent spoke with Ms Moore about overseeing the practice's trust account, and supervising the practice's legal work. Ms Moore said there would be little or no trust account activity, and little or no legal services provided, during the period of the respondent's appointment; Ms Moore being preoccupied with the acquisition of two other legal practices. Ms Moore also said the trust account was administered with the assistance of an external accountant. The respondent assumed that the accountant would contact her if anything was required in relation to the trust account. Ms Moore also said that Mr Stephen Woodward, at that time the principal of Woodward Lawyers, would replace her as the LP director of Stenton & Moore in about two to three months, after the acquisition of his firm. Ms Moore also said she was open to the idea that the respondent might continue as a part-time employed solicitor thereafter. There was discussion about the sending of a contract to the respondent for the position, the respondent understanding that she would receive a formal offer for the position, and a proposed contract, shortly thereafter. This meeting also confirmed the respondent's impression that Ms Moore was a solicitor. Because the respondent was not clear on precisely when she would commence with the legal practice, she told Ms Moore she would be away on a pre-planned holiday from 14 September 2018 until 24 September 2018.

[17] In the days following this meeting, the respondent sent emails to Ms Moore and tried to contact her by telephone on a number of occasions, but did not receive any reply.

By 11 September 2018, the respondent was concerned about whether Ms Moore still wished her to take a position with the legal practice. The respondent emailed Ms Williams and asked whether Ms Moore was interested in providing a part-time position. She received a reply the same day that Ms Moore definitely wanted the respondent "to join her". Ms Moore had been unwell but would contact the respondent on the following day "to firm up a start date". At about this time, the respondent came to understand that Ms Moore had been in hospital, explaining the lack of communication from her. Ms Moore did not contact the respondent before she left on her holiday on 14 September.

[18] While the respondent was away on holidays, she attempted to contact Ms Moore and Ms Williams regularly. She was able to contact Ms Williams, but not Ms Moore, in this period.

[19] On 24 September 2018, Ms Moore sent the respondent an email stating that she hoped to send a draft contract that day and, if all was in order, she would be happy for the respondent to start the same week. A Supreme Court matter which had been on that day had been settled. The respondent took this to indicate that legal services were (generally) not being provided by the legal practice.

[20] The respondent then received an offer of another temporary position with a legal practice in Airlie Beach. She expressed interest in the position. She attempted to contact Ms Moore to find out what was happening. However, she spoke with Ms Ferguson, who said that Ms Moore was holidaying in Vietnam. The respondent then decided to accept the temporary position in Airlie Beach. On 4 October 2018, Ms Moore sent an email to the respondent, apparently from Vietnam. She indicated that there had been difficulties in communications, but promised to phone the same day. The respondent offered to telephone Ms Moore on the following Saturday.

[21] In the meantime, the respondent had further dealings with the practice at Airlie Beach, the respondent having considered that she had all but secured this position, by 4 October 2018. She expected to start in the position in the middle of October.

[22] On 8 October 2018, the respondent received a letter from the Legal Services Commissioner ("LSC"). The letter related to a complaint by Ms Jennifer May, about the conduct of Ms Moore. It is apparent from the letter that the complaint alleged that there had been an ongoing failure to account for trust money. It also stated that Ms Moore was not a legal practitioner, and could not be the trustee of a law practice trust account; and expressed the view that the respondent was the appropriate respondent to that complaint, rather than Ms Moore. The letter enclosed a copy of the complaint, and sought the respondent's co-operation.[2]

[23] The respondent gave evidence that she was shocked by this letter, never having previously received correspondence from the LSC. She assumed that the letter was addressed to her as the LP director of Stenton & Moore, as the LSC was not aware that her position in that role remained to be finalised. The respondent also gave evidence that she did not read the letter beyond seeing that it concerned a complaint to the LSC by Ms May. She assumed that it concerned events "before my time" on the basis that Stenton & Moore had, to her knowledge, not conducted any recent client

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2 See Hearing Book p 406.

dealings. Shortly after she received this letter, the respondent spoke by telephone with Ms Moore, in order to discuss it.

[24] In this call, Ms Moore said that the complaint concerned events when Mr Stenton was the LP director for the practice. Ms Moore said that Ms May was difficult to deal with, and that she and Mr Stenton would respond on behalf of the practice. She also assured the respondent that she had appropriate authorities for all trust account dealings with Ms May. The respondent asked Ms Moore whether she had an unrestricted practising certificate after 1 October 2018, to which Ms Moore replied, "After the 1st of October? So let's go backwards for a moment". Ms Moore then explained the practice's trust account safety measures, including the need for trust account authorities, requisition details and the like, and she said these had been in place from the time when Mr Stenton was the firm's LP director. The respondent accepted Ms Moore's explanation that Ms May was a difficult client, and that there was no real basis for her complaint. She also considered that the explanation accorded with her understanding that legal services were not being actively provided by the practice at this time.

[25] On 9 October 2018, the respondent received a formal offer of employment with the practice in Airlie Beach, which she accepted. That afternoon she sent an email to Ms Moore, attaching her review of the proposed contract, expressing the hope that Ms May's "vexatious" complaint had been resolved, and offering to assist with the letter from the LSC.

[26] On 10 October 2018, the respondent received an email from Ms Moore stating that there was a will that needed to be completed urgently and that after that she would attend to Ms May's complaint. The letter also stated that they would talk soon about the respondent's contract. The respondent replied by email, asking whether Ms Moore was to send through the will details. After some further email communications, Ms Moore said she would send them through the next morning. The instructions for the will were not provided to the respondent.

[27] The respondent then travelled to Airlie Beach. However, on 14 October 2018, she sent an email to Ms Moore asking about progress with the LSC response, stating that she would need to respond to the LSC before Wednesday of that week.

[28] On about 16 October 2018, the respondent received a further letter from the LSC, this time relating to a complaint from a Ms Barker. The complaint was that Ms Moore had failed to act with competence and diligence in relation to the conveyance for a property, having failed to secure the transfer of the title, more than six months after settlement of the transaction had occurred.[3] The letter stated that Ms Moore was neither "an Australian legal practitioner", an "Australian lawyer", nor a "law practice employee", as defined by the *Legal Profession Act 2007* (Qld) ("LP Act"). Again, the respondent gave evidence that she did not read the letter from the LSC. She telephoned Ms Moore shortly after she received the letter. Ms Moore said that the complaint concerned the period when Mr Stenton was the LP director; the matter had been resolved; and Ms Barker had indicated that she intended to withdraw the complaint.

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3 Hearing Book p 408.

[29] The respondent left the position she had taken at Airlie Beach, and returned to Toowoomba on 31 October 2018.

[30] On 5 November 2018, the respondent received an email from Ms Ferguson, enquiring about the respondent's contract. That resulted in the respondent speaking to Ms Ferguson by telephone. In the course of the conversation, Ms Ferguson said that she had only recently learned that Ms Moore was not a qualified solicitor, and that previously she had thought the contrary. The respondent was astounded to learn that Ms Moore was not a solicitor. She then telephoned Ms Moore and expressed surprise about that fact. Ms Moore admitted she was not a solicitor, and acted as though any misunderstanding was the respondent's fault. The respondent then accepted that the fault was hers, because she had not specifically asked about Ms Moore's status. However, she arranged to meet Ms Moore on 7 November 2018.

[31] They met on the Gold Coast on 7 November 2018 at the premises of Woodward Lawyers, and then went to the premises of Barbara Gill Conveyancing, the other practice which Ms Moore was apparently in the process of acquiring. Ms Moore stated that each of these practices had its own LP director. Ms Moore apparently indicated that Stenton & Moore was not conducting legal work at this time. There was also some discussion of a permanent part-time role for the respondent. The respondent formed the view that Ms Moore was overwhelmed and out of her depth, being occupied with the integration of the legal practices and their day to day operations, as well as dealing with the LSC letters and administrative matters with Stenton & Moore; and she would have been too busy to perform legal work. The respondent did not suspect that Ms Moore had been lying to her.

[32] The respondent gave evidence that, at about this time, she wrote to the LSC, providing an affidavit, in an attempt to apologise for the delayed responses to the complaints, and to explain her own involvement with the legal practice. From about the middle of November 2018, the respondent started asking Ms Moore when she would be replaced as the LP director of the legal practice. Ms Moore repeatedly assured her that Mr Woodward would take the position, though that did not occur.

[33] On 27 November 2018, Mr Edwards of the Legal Services Commission ("the Commission") sent an email to the respondent. Its primary purpose was to confirm that the LSC was still seeking a response to the complaint of Ms Barker. However it also included the following:[4]

> I would also point out that the whole situation at Stenton & Moore is of concern to the Commission. The complaints received to date seem to suggest that issues of supervision, unlawful practice and trust accounting need to be addressed. In addition other matters may be disclosed during the course of the investigations.

[34] Shortly after, the respondent forwarded the email to Ms Moore, together with a series of questions; including about progress in arranging for a replacement of LP director.[5] The respondent has since acknowledged that she did not attend to the matters raised by Mr Edwards.[6]

[35] On about 3 December 2018, the respondent received an email from Mr Bill Hourigan of the QLS who said that a relative of a client of Stenton & Moore's, a Mr Robert

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4 See Hearing Book p 454.
5 See Hearing Book p 455.
6 See Hearing Book p 416.

Quiggan, had complained about the practice, specifically about Ms Moore holding herself out as a solicitor. Shortly after, the respondent spoke with Ms Moore about the email from Mr Hourigan. A telephone conference was arranged between the respondent, Ms Moore and Mr Stenton. Mr Stenton appeared to have knowledge of the circumstances of the complaints, and the respondent asked him to provide statutory declarations to assist with responses to them.

[36] Shortly after this, Ms Judy Jorgensen conducted a trust account audit at Stenton & Moore, and also at Bartley Legal. Ms Jorgensen told the respondent that the trust account at Stenton & Moore was "a mess" and suggested that the respondent "get out" of Stenton & Moore. The respondent did not seek to inspect the trust account of Stenton & Moore, or to enquire as to problems with it. She expected Ms Jorgensen would report her findings. At some point (apparently in December 2018), the respondent contacted Mr Woodward, whom she understood, from Ms Moore, would replace her at the LP director for Stenton & Moore. He said that he did not intend to take on that role, and that he was about to retire. He also had been unaware that Ms Moore was not a solicitor. The respondent attempted to contact Ms Moore to tell her that she needed to appoint another person as the LP director of the practice before the respondent resigned. The respondent ultimately resigned from her position as LP director on 19 December 2018.

Subsequent events

[37] In February 2019, Mr Michael Drinkall, together with other officers of the QLS, was appointed a receiver of the law practice Stenton & Moore. The appointment was the consequence of the practice not having an LP director. Mr Drinkall concluded that Ms Moore had assumed practical responsibility for the financial records of the practice from about May 2018 until the receivership. The trust account of the practice was with the Commonwealth Bank of Australia ("CBA"). Ms Moore was a signatory to that account, and the CBA acted on documents signed by her alone. Immediately prior to the receivership, Mr Woodward was also a signatory for the account. There was no evidence that the respondent was ever a signatory for the account. It appeared to Mr Drinkall that Ms Moore was operating the law practice alone, and the respondent was not exercising any substantive supervision at any time.

[38] Mr Drinkall produced a report to the QLS under s 264 of the LP Act for the legal practice of Stenton & Moore. The report is dated 11 November 2019. There had been previous reviews of the practice on 12 December 2014 and 3 May 2018. The report recorded that, in addition to Mr Stenton and the respondent, Mr Blake Fraser was identified as an LP director for the practice for the period 1 June 2018 to 17 August 2018, but that appointment had been made without Mr Fraser's knowledge. The findings of the report will be discussed later. They were summarised in a report to the Professional Conduct Committee of the QLS dated 5 March 2020, recommending that consideration be given to referring the respondent's conduct to the applicant; and considering whether Ms Moore should be prohibited from working in a law practice again.

[39] Meanwhile, on 8 March 2019, Jackson J granted an injunction to restrain Ms Moore from engaging in legal practice or representing that she was entitled to engage in legal practice.[7]

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7 Hearing Book p 524.

[40] On 22 April 2020, Ms Moore pleaded guilty to a charge of engaging in legal practice when not entitled to do so, and was fined $5,000.00 and ordered to pay costs.[8]

[41] On 5 November 2021, Burns J ordered that Ms Moore be permanently disqualified from managing an ILP.[9] His Honour found that Ms Moore made two deceitful attempts to install someone as the LP director of the law practice, one being the appointment of Mr Fraser, and the other being the appointment of the respondent.[10] His Honour stated that the respondent took on the role of LP director "but she was duped into doing so".[11] The finding is based on a statement said to have been made by Ms Moore to the respondent. The material before this Tribunal records that the statements came from Ms Williams, but it is highly likely that they were based on misleading statements from Ms Moore. Ms Moore was a party to the proceedings before Burns J, although she did not appear at the hearing.

[42] In the meantime, in March 2020, the QLS called upon the respondent to show cause why her practising certificate should not be cancelled. She came to an arrangement to wind up her practice, surrender her practising certificate, and give an undertaking not to apply for a practising certificate again. It seems that these arrangements were carried out by the middle of 2020, at least in the sense that the respondent wound up her practice and surrendered her practising certificate.[12]

Mr Drinkall's findings

[43] It is apparent that the financial records of the law practice (including those required by statute) were poorly maintained from 1 May 2018. In the course of the receivership, the trust account was reconstructed from available source documents.[13] Enquiries were made, where possible, of clients, but these did not always yield relevant information. Nevertheless, the findings made by Mr Drinkall are not in issue. Of some relevance are the following:

(a) the law practice failed to maintain trust account records from 1 May 2018 in a number of respects, including in a way that at all times disclosed the true position in relation to trust money received for any person;

(b) trust account receipts were not issued after receipt of trust money from May 2018;

(c) trust account deposit forms were not completed for trust money deposited to the trust account from 1 May 2018;

(d) trust account cheque butts (cheques were issued manually) did not always contain the necessary information, being the identity of the payee, the name of the person on whose behalf the payment was made, a matter description (related to a ledger account), and the purpose of the payment;

8 Hearing Book p 355.
9 Hearing Book p 356.
10 *Legal Services Commissioner v Moore* [2021] QSC 280 at [7]–[9].
11 *Legal Services Commissioner v Moore* at [9].
12 Hearing Book pp 325–326.
13 Hearing Book p 278; these were to a significant extent incomplete.

(e) although the law practice was not approved by the QLS to perform electronic funds transfers ("EFTs"), five payments were made from the trust account by EFTs;

(f) the law practice did not maintain trust account receipts and payments cash books from 1 May 2018;

(g) the law practice did not maintain trust account ledgers from 1 May 2018;

(h) the law practice maintained a trust ledger account in the name "Stenton Moore Solicitors - General (171002)";

(i) the law practice did not prepare any monthly trust account reconciliations for the period from May 2018 to December 2018;

(j) monthly reconciliation statements were not reviewed and signed by a principal of the law practice;

(k) nine individual trust ledger accounts were overdrawn (the dates on which the accounts became overdrawn were from 21 May 2018 to 6 February 2019);

(l) six trust receipts could not be allocated to a client matter during the investigation;

(m) 15 trust payments could not be allocated to a client matter (totalling $144,444.39 – the payments occurred from 28 May 2018 to 7 February 2019);

(n) credit balances in the trust ledger listing exceeded the funds in the bank account by an amount of $433,690.03. This reflected two categories of difficulty. Of the discrepancy, $289,245.64 related to overdrawn trust ledger accounts in the trust ledger listing. $144,444.39 related to payments which could not be allocated to a client matter; and

(o) trust account statements were not issued to clients as soon as practicable after completion of each matter or as soon as practicable after 30 June of each year.

[44] The report also contains an analysis of some 11 transactions. In a number of cases[14] the report concluded that the law practice had misappropriated trust money. The first occasion on which this occurred was 15 January 2018,[15] and the last on 13 February 2019.[16]

Charges in discipline application

[45] All of the charges related to (or occurred within) the period between 30 August 2018 and 19 December 2018, when the respondent was the LP director of Stenton & Moore.

[46] Charge 1 alleged that the respondent engaged in professional misconduct or unsatisfactory professional misconduct because she failed to ensure the implementation and keeping of appropriate management systems. The charge alleged that, by s 117(3) of the LP Act, the respondent was required to implement and keep

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14 Referring to the numbered paragraphs of Mr Drinkall's report, transactions 15, 16, 20 and 24; and transaction 18 may also reflect a misappropriation of funds which should have been trust funds. Mr Drinkall's 2020 report adds transaction files 21 (Muscat) and 22 (Youssef) to the list: see Hearing Book p 280.

15 See Hearing Book p 290.

16 See Hearing Book p 293.

appropriate management systems to enable the provision of legal services by Stenton & Moore under the professional obligations of an Australian legal practitioner, and other obligations imposed by the LP Act. The respondent failed to implement or keep management systems to establish that Ms Moore was admitted to practise, or to supervise her work. The respondent failed to effectively supervise Ms Moore's conduct with respect to the law practice's trust account. She failed to ensure that the trust account was conducted in accordance with the LP Act and the *Legal Professional Regulation 2017* (Qld) ("LP Regulation"). She also failed to regularly monitor activity on the practice's trust account.

[47] The charge specifically alleged that, in the relevant period, five trust ledger accounts became deficient, the amount by which they were overdrawn being $245,699.78; five deposits were received into the trust account without a record of a matter against which they were to be designated because the law practice did not maintain a trust account receipt cash book or trust account ledgers; seven payments of trust money were made from the trust account which could not be attributed to any client matter because the law practice did not maintain a trust account payment cash book or trust account ledgers; and 11 cheques were drawn from the practice's general trust account which were not signed by the respondent, or by any person authorised to do so in her absence. These allegations are in substance admitted.

[48] Charge 2 alleged that the respondent engaged in professional misconduct or unsatisfactory professional misconduct because she caused a deficiency in the general trust account of the practice. The charge is based on some of the allegations made in relation to Charge 1. It is contentious.

[49] Charge 3 alleged that the respondent engaged in professional misconduct or unsatisfactory professional misconduct, because she failed to maintain the law practice's general trust account in the way prescribed by the LP Regulation. The charge relied on some of the allegations made in respect of Charge 1.

[50] Charge 4 was based upon two EFT trust withdrawals which occurred on 27 October 2018. It also alleged that the respondent's conduct amounted to professional misconduct or unsatisfactory professional misconduct.

[51] Charge 5 made a similar allegation, on the basis that the respondent failed to prepare monthly trust account reconciliations for the months of August through to and including November, in breach of regulation 44 of the LP Regulation.

[52] Charge 1A alleged that the respondent engaged in professional misconduct or unsatisfactory professional misconduct because she breached her obligation to be responsible for the management of the legal services provided in this jurisdiction, as required by s 117(2) of the LP Act. The charge relied entirely on the allegations made in support of Charge 1. It was withdrawn at the hearing.

Overview of respondent's conduct

[53] The respondent admitted the remaining charges, save for Charge 2. She has admitted the conduct attributed to her in the discipline application. It follows that the conduct alleged by the applicant has been established; and in particular that Charges 1, 3, 4 and 5 have been made out.

[54] It must be said that the respondent was in gross dereliction of her duty as the LP director of Stenton & Moore. That dereliction extended over a period approaching

four months. In that period, what might be described as irregularities, some of which were quite serious, occurred in the conduct of the practice. Throughout this period (and, indeed, for a substantially longer period) the law practice was in serious breach of its obligations in relation to maintaining its trust account, and the maintaining of relevant (and important) financial and accounting records and documents.

[55] The Tribunal respectfully adopts the finding of Burns J that the respondent was duped by Ms Moore. She was led to believe that Ms Moore was a solicitor, a conclusion that may well have been reinforced by the name of the practice, and the ILP. It is highly likely that, in the course of their interactions, Ms Moore deceptively presented herself to the respondent as a solicitor, without saying so. Ms Moore represented that the law practice would be virtually inactive in the provision of legal services (in the conversation of 29 August 2018, and by the very few occasions on which she identified specific legal services which were being provided), which does not appear to be true, though the material in relation to this is sparse. At their meeting on 7 September 2018, Ms Moore falsely stated that there would be little or no trust account activity during the period for which the respondent would be LP director. In their telephone conversation on about 8 October 2018, Ms Moore falsely stated the measures which she said were being taken in relation to the trust account. She also said that the law practice's trust account was administered with the assistance of an external accountant, Mr Christopher Sly. There is no evidence to suggest, and it seems highly unlikely, that Mr Sly played any role in the administration of the trust account while the respondent was the LP director for Stenton & Moore.

[56] Moreover, the respondent has expressed deep remorse and shame for what occurred in this period. At the hearing, her demeanour appeared to support that position.

[57] The respondent has referred to the uncertainties about her position with Stenton & Moore over the period from August 2018 onwards. That appears to be true in relation to her active involvement in the practice. There can, however, have been no uncertainty in her mind about the fact that she was the LP director for the practice. She confirmed this when she spoke to Ms Bewley from QLS on 31 August 2018. She was acting in that capacity when she responded to Ms Bewley by email the same day in relation to the provision of legal services.

[58] The respondent's reactions to the letters from the LSC of 8 October 2018 and 16 October 2018 can only be regarded as extraordinary. She knew that she received those letters as the LP director of Stenton & Moore.[17] Her explanation that she assumed that she received them in that capacity because the LSC was not aware that her position as LP director was still to be finalised was not challenged. Nevertheless, she had known from 31 August 2018 that she in fact held that position. The letters from the LSC could have only confirmed that to her.

[59] The respondent's evidence as to her limited reading of these letters was not challenged. The fact she did not read them does her no credit whatsoever. It must have been plain to her in each case that the LSC had sufficient concern about the conduct of the practice to warrant enquiries. It is difficult to understand how a practitioner in those circumstances, and holding the position of LP director of the practice, would not read the letters to ascertain how serious the complaints were, and

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[17] See Hearing Book p 317.

what action might be warranted in light of them. This is particularly so in the case of Ms May, as the letter enclosed her complaint.

[60] Ms Moore, during the telephone conversation of about 8 October 2018, claimed that she had appropriate authorities for all trust account dealings with Ms May.[18] It is also surprising the respondent did not ask to see these authorities, and other relevant trust account records.

[61] Section 247 of the LP Act requires a law practice that receives trust money (and has an office in Queensland)[19] to keep a general trust account in this jurisdiction. It is to be established and kept in the way prescribed by regulation. The definition of "general trust account" in s 237 of the LP Act makes it clear that this is a reference to an account with "an approved ADI" (commonly a bank). The respondent must have known, at least from her discussion with Ms Moore on 7 September 2018, that the law practice had such an account.

[62] Accordingly, the practice was required by s 44 of the LP Regulation to reconcile the trust records relating to the account at the end of each month. That is to be done by preparing a statement reconciling the balance in the general trust account as shown in the ADI records, with the balance of the practice's trust account cash books. The reconciliation is also to include a statement reconciling the balance of the trust ledger accounts (for each matter) with the balance of the practice's trust account cash books. The statements are to be prepared within 15 working days after the end of each month; reviewed by a principal of the law practice; and annotated in a way that evidences the completion of the principal's review. For an ILP, its principals are its LP directors.[20] As the LP director of her own practice, which was conducted by an ILP, the respondent must have been acutely aware of this obligation. It is also extraordinary, therefore, that the respondent failed to call for monthly reconciliations. Not surprisingly, the failure to carry out these reconciliations is the subject of one of the charges in the discipline application (Charge 5).

[63] The matters which have been referred to are the most serious aspects of the respondent's conduct. It should not be thought that other matters not specifically discussed (such as the failure to make further enquiries about the provision of legal services, or to investigate further the keeping of records in relation to the trust account) are not serious.

[64] Another matter of some concern is the relatively slow way in which the respondent extracted herself from Stenton & Moore.

[65] The applicant has submitted that the respondent's intention was to profit, and that she intended to "trade" or "rent out" or "sell" her unrestricted practising certificate in order to earn $80,000 per annum to be the LP director of Stenton & Moore, with very little required of her, and working only one day a week. The respondent contested this submission.

[66] In fact, the proposed contract envisaged a role which extended well beyond the performance of the duties of an LP director.[21] Any remuneration was for a role as an employed solicitor, including acting as LP director. As the respondent pointed out,

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18 See Hearing Book p 318.
19 See s 240.
20 See s 7(4) of the LP Act.
21 See Hearing Book pp 447–448.

the proposed contract with Stenton & Moore was for an annual remuneration at a rate of $80,000 per annum, but payment was to be pro rata per day. As a result, remuneration for working one day a week would have been $16,000 per annum. The applicant's submission, which was to the effect that the respondent accepted the position as LP director of Stenton & Moore in order to receive relatively generous remuneration for very little work, should be rejected.

[67] It should also be noted that the respondent did not receive any remuneration relating to her role as LP director at Stenton & Moore.[22]

[68] The applicant elsewhere submitted that the respondent permitted Ms Moore in effect to run the law practice and control the trust accounts. That submission is plainly correct.

[69] There has been no suggestion that the respondent was personally involved in any of Ms Moore's dishonest conduct. The material does not demonstrate any personal dishonesty by the respondent.

[70] The applicant submitted that the respondent was "so reckless in regards to knowing or even attempting to discharge her obligations as legal practitioner director of a law practice as to amount to a complete dereliction of her role"; and that she "clearly lacked any appreciation of the need for protection of the public in the delivery of legal services and the role of a legal practitioner director in achieving that objective".

[71] Given that the respondent was the LP director of the ILP which conducted her own practice, it is difficult to conclude that she did not know her obligations. Nor is it easy to conclude that she lacked any appreciation of the need for the protection of the public, and of the role of an LP director in providing that protection. Nevertheless, she disregarded her obligations as the LP director of Stenton & Moore and she failed to perform duties as the LP director which are designed to protect the public. As has been indicated, her dereliction of duty has been gross, and it may well be characterised as reckless.

[72] The applicant made a number of other submissions about the respondent, some of which are related to her character.[23] One of these (relating to remuneration) has been discussed. The submissions that the respondent "did nothing" after receipt of the letters from the LSC in October 2018, and after notice on 27 November 2018 that there were issues of supervision, unlawful practice and trust accounting are also not correct. While it is correct to say that her reactions were significantly inadequate, the respondent took some steps to have the letters from the LSC of October 2018 addressed by the legal practice. She had by mid-November been taking steps to secure her replacement as LP director of the law practice.[24]

Charge 2

[73] Charge 2 alleged that the respondent engaged in professional misconduct or unsatisfactory professional conduct because, in breach of s 259(1)(a) of the LP Act, she caused a deficiency in the general trust account of Stenton & Moore. In addition to matters which might be regarded as formal, the charge incorporated the allegation found in particular 1.10(a) that five trust ledger accounts became deficient, in breach

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22 See Hearing Book p 368.
23 See Hearing Book p 560.
24 See Hearing Book p 323, 350–351; see also pp 324–324.

of s 259(1) of the LP Act, while the respondent was the LP director of the practice. It also incorporated particular 1.11, which stated that contravention of the LP Act or of the LP Regulation is capable of constituting unsatisfactory professional conduct to professional misconduct, by virtue of s 420(1)(a) of the LP Act.

[74] In addition, particular 2.2A alleged that the respondent was the sole Australian legal practitioner employed by the practice. Particular 2.2 then alleged that the respondent "as the sole legal practitioner director of the Stenton & Moore Trust Account" had sole responsibility for that account, which was not admitted. Particular 2.3 alleged that to cause a general trust account deficiency includes being responsible for such a deficiency by virtue of s 259(3) of the LP Act. Particular 2.4 alleged that the respondent allowed Ms Moore full control of the practice's trust account, exercised no or no effective control of that trust account, exercised no or no effective control over Ms Moore's operation of the trust account, and neither implemented nor had in place any management system of the sort alleged in particulars 1.8(d), (e) and (f) of the discipline application, with the result that she was responsible for the deficiency. These relate to the implementation of management systems for the supervision of the trust account, and to ensure that it was operated in accordance with the LP Act and the LP Regulation. Particular 2.3 was admitted by the respondent. Specific allegations in particular 2.4 were admitted, but the respondent denied that she was responsible for the deficiency within the meaning of s 259 of the LP Act.

[75] During submissions it was explained that the charge was a charge that the amount held in the general trust account (with the CBA) was less than the sum of the credit balances in the trust ledger accounts, resulting in a deficiency in the general trust account; and the deficiency in the general trust account included the deficiencies in the trust ledger accounts alleged in particular 1.10(a). Those deficiencies resulted from payments from the general trust account, attributed to the five trust ledger accounts, which exceeded the credit balances in those accounts.

[76] It can be seen that the conduct of the respondent on which Charge 2 is based is in fact the same as the conduct of the respondent alleged in paragraph 1.8 of the discipline application, particularly in sub-paragraphs (d), (e) and (f). The allegations in these paragraphs are specifically incorporated in particular 2.4(d), but particulars 2.4(a)-(c) deal in substance with the same conduct.

[77] The concern of a discipline application is the conduct of a legal practitioner. The function of a discipline application is to seek a determination by the Tribunal whether an Australian legal practitioner has engaged in conduct alleged against the practitioner, and if so whether that conduct is unsatisfactory professional conduct or professional misconduct.[25] That is the essential precondition to the making of any orders under s 456. A consideration of the context in which the provisions relating to disciplinary proceedings are found confirms this view. They form part of Chapter 4 of the LP Act. Its application is identified entirely by reference to conduct.[26] The applicant's decision to commence a discipline application arises out of the investigation of a complaint or an investigation matter.[27] Each of these is based on the conduct of a practitioner (or some other relevant person).[28]

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25 See s 456(1) of the LP Act.
26 See ss 422–427.
27 See s 447 of the LP Act.
28 See ss 428 and 429 of the LP Act; see also s 435(1)(c) in relation an investigation matter.

[78] The respondent's conduct which is the subject of Charge 2 has already been determined by virtue of the acceptance of the respondent's admissions in relation to Charge 1. Whether it should be characterised as professional misconduct or unsatisfactory professional conduct, and the orders to be made, are matters dealt with elsewhere in these reasons. The new matter raised by Charge 2 is whether, by virtue of the extended meaning given to the term "cause" by s 259(3) of the LP Act, the respondent should be found to have caused deficiencies in trust ledger accounts. The Tribunal's concern about the utility, and indeed the relevance, of that question was raised with the parties.[29] It invited further submissions from them on the question whether the Tribunal should determine this Charge.

[79] The applicant contended that the Tribunal should decide the Charge. The fact that it involved a quasi-criminal provision was no reason not to deal with the Charge. Nor was the fact that there was overlap with Charge 1, there being an analogy with different causes of action based on the same facts. No submission was made to demonstrate the utility of this Charge, for deciding the outcome of the discipline application.

[80] The respondent's primary contention was that the Tribunal should determine Charge 2, by dismissing it. Alternatively, it was open to the Tribunal to decline to deal with Charge 2 on the basis that it involved the same conduct as is the subject of Charge 1. In those circumstances, the Tribunal considers it appropriate to deal with Charge 2.

[81] Section 259 of the LP Act is as follows:

> **259 Deficiency in trust account**
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> (1) An Australian legal practitioner must not, without reasonable excuse, cause—
>
> (a) a deficiency in any trust account or trust ledger account; or
>
> (b) a failure to pay or deliver any trust money.
>
> Maximum penalty—200 penalty units.
>
> (2) A reference in subsection (1) to an account includes a reference to an account of the practitioner or of the law practice of which the practitioner is an associate.
>
> (3) In this section—
>
> ***cause*** includes be responsible for.
>
> ***deficiency***, in a trust account or trust ledger account, includes the non-inclusion or exclusion of the whole or any part of an amount that is required to be included in the account.

[82] As has been mentioned, the deficiencies in the five trust ledger accounts are established by the evidence of Mr Drinkall.

[83] The issue in dispute in relation to Charge 2 was said to be the proper construction of s 259. In her written submissions, the applicant contended that s 259(3) should be given its natural and ordinary meaning. The natural and ordinary meaning of the

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29 See T1-10 to 1-11; see also T2-67 to 2-68; T2-72 to 2-73.

expression "responsible for" includes, by reference to a dictionary definition, a person who has control and authority over something or someone and the duty to take care of it. While the prohibition in s 259(1) is directed to Australian legal practitioners, the submissions point out that someone who is not such a practitioner may be the direct cause of the deficiency. It was submitted that the applicant's construction was supported by the way the words "responsible for" were used in ss 117(2) and 161(3). Of the latter section it was submitted that it contemplated that a principal might be responsible for a breach, when another person was the "direct wrongdoer". Reliance was also placed on s 260(1)(b) (imposing an obligation on a legal practitioner associate in certain circumstances to notify a "corresponding authority" if that authority is "responsible for the regulation of the accounts concerned"); s 328(7) (where, in considering a costs agreement, the Court may take into account the skill, labour and responsibility of certain lawyers "responsible for the matter"); and s 475, which provides protection for certain persons in relation to publication of disciplinary actions, including "a person responsible for" keeping a record about such an action, under a "corresponding law".

[84] It was then submitted that s 259 "contemplates the current scenario where Ms Moore might have been the direct cause of the deficiencies, but the respondent is responsible for Ms Moore's conduct". The prohibition in the section is not limited to someone who is the "direct cause" of the deficiency.

[85] It was submitted that certain authorities supported the applicant's construction of s 259. They were *Council of the Queensland Law Society Inc v Roche*;[30] *Legat v Queensland Law Society Incorporated*;[31] and *Legal Services Commissioner v Astley*.[32]

[86] It was then submitted that it should be found that the respondent caused the deficiencies, in substance because she failed to maintain oversight of the trust account, and Ms Moore's conduct in relation to it.

[87] The applicant's oral submissions substantially reproduced the written submissions, although it was also submitted that had the respondent maintained effective oversight of the trust account, at some point the earlier deficiencies might have been detected, and subsequent deficiencies might have been prevented.

[88] The respondent's written submissions pointed out that she did not know about the deficiencies. She was deceived into believing that few or no trust account transactions would occur while she was the LP director of the practice. Ms Moore was a fraudster who had been operating the trust account unlawfully, and for her own benefit, from at least May 2018. The trust ledger account deficiencies appear to be the result of fraud or other misconduct on the part of Ms Moore.

[89] Further the respondent submitted, the statutory provisions and the decisions referred to by the applicant do not provide support for her construction of s 259, which should be rejected. The section is an offence provision. It is the only provision in Division 2 of Part 3.3 of Chapter 3 of the LP Act which applies in terms to an Australian legal practitioner, the others applying to a law practice. Section 244 provides that an obligation imposed on a law practice by relevant provisions of the LP Act or the LP Regulation are also imposed on principals of the law practice (including the LP

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30 [2004] 2 Qd R 573, at [16].

31 [2022] QCA 184 at [119]-[120].

32 [2019] QCAT 274 at [58].

director of an ILP), but this section does not apply to s 259. This section does not impose an obligation on a law practice. What is required for its operation is "the presence of a causal relationship between the failure or deficiency and the relevant practitioner".[33] Causation makes it necessary to consider whether the existence of something is a necessary pre-condition to the existence of another thing; and if so, whether it is appropriate to attribute legal responsibility for it to the first thing (or the person whose conduct is involved), in the context of a particular legal norm. The applicant's construction ought not be accepted. It would have the consequence, in a large partnership, that all partners would be responsible for a deficiency, because they all have responsibility for the proper operation and supervision of the trust account. Moreover, the applicant's construction would have the result that a person who committed the offence created by s 259 would have a claim against the Fidelity Fund under Part 3.6 of the Act. The overall responsibility of the LP director of an ILP for the practice's trust account, in the general sense alleged by the applicant, does not show a sufficient causal relationship with a deficiency to warrant a finding that the director is responsible for the deficiency.

[90] It is convenient to commence with the applicant's construction argument. There is a difficulty with the natural and ordinary construction of the expression "responsible for", for which the applicant contended, based on a dictionary definition. It ignores the fact that the expression is to be applied in s 259(1), to the word "cause", which makes it an offence to cause a deficiency in a trust account or trust ledger account. The application of the definition thus makes it an offence for an Australian legal practitioner to be "responsible for a deficiency" in such an account. On the applicant's construction, the respondent would be responsible for the deficiencies if she had control and authority over them, and the care of them. It is highly unlikely that this reflects the intention of the legislature. How the application of this construction might lead to a finding adverse to the respondent was not explained. It is difficult to see.

[91] The reference to the use of the expression "responsible for" in other contexts is of limited assistance. The statutory provisions and cases cited by the applicant demonstrate that the expression can have different meanings in different contexts. For example, *Roche* was a case of overcharging. The disciplinary charge brought against the practitioner identified charges for fees made by the firm. The practitioner conceded that he was the person responsible for determining the charges to be made. In context, that appears to amount to a concession that the practitioner either authorised or directed the charging of amounts found to be excessive, even if he did not himself prepare or send the bills. He thus played a direct causative role in determining the amounts charged to clients. The manner in which the expression was used in that case would not support a finding that the respondent was responsible for the deficiencies alleged in the present case.

[92] The practitioner in *Legat* was the person who designed a scheme intended to enable the circumvention of statutory provisions introduced for the protection of members of the public. He advised a company (of which he was an officer, but not a director) on the formation and implementation of the scheme. He played a significant role in its implementation. He was found to be the person ultimately responsible for the design and implementation of the scheme. The finding refers to a direct causative role of the practitioner in relation to these matters. It is of no assistance to the applicant.

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33 See Hearing Book p 531

[93] In *Astley,* this Tribunal found that the applicant had ultimate responsibility for a discipline application, and for providing adequate supervision for an employed solicitor. The first finding reflected the fact that the applicant, as applicant, had control of the application. The second reflected a duty on the part of the applicant to provide supervision. Neither sense in which the expression "responsible for" is used in this case would lead to a finding that the respondent was responsible for the deficiencies.

[94] The expression may be used to reflect a duty directed to the matter for which the person is said to be responsible. Thus by s 117(2), an LP director is made responsible for the management of legal services provided by the ILP, thereby no doubt imposing a duty relating to the management of those services. Sections 260(1)(b) and 475 are of a similar character. The use of the expression in s 328(7) (referring to the skill, labour and responsibility displayed on the part of the lawyer "responsible for the matter") seems to reflect some active involvement in, and control of, the conduct of the matter. The use of the expression in these cases does not assist the applicant.

[95] The definition in s 259(3) may be designed to clarify the intent of the legislation that s 259(1) is not limited to cases where an Australian legal practitioner is a direct, or immediate, cause of the deficiency; and may well be intended to extend its operation to persons whose conduct has a sufficient causal connection with the deficiency, and where it is appropriate, in the context of the statutory prohibition, to attribute legal responsibility for the deficiency to the person. Neither consideration has been addressed by the applicant. Nor has the applicant identified an acceptable construction of s 259 which would lead to a finding that the respondent breached it. In those circumstances, the Tribunal does not consider it is in a position to find that the respondent caused the deficiency, on the bases discussed thus far.

[96] The allegation in particular 2.2 of the discipline application that the respondent was the sole LP director of the Stenton & Moore trust account is difficult to understand. There is also difficulty with the allegation that the respondent had sole responsibility for that account. It has not been shown that any arrangements were made with the bank which would authorise her to engage in transactions, such as to sign trust account cheques. It is clear (and is alleged by the applicant) that Ms Moore had full control of that account. That inevitably meant that Ms Moore had responsibility for the conduct of that account. It cannot be said that the respondent had sole responsibility for it.

[97] There is a matter, however, raised in the application, which warrants further consideration. Particular 2.4 alleges (and it is admitted) that the respondent had not implemented nor had in place management systems, including (by reference to particular 1.8(e)) management systems to ensure that the trust account was operated in accordance with the LP Act and the LP Regulation. The basis for that allegation is found in particular 1.10 and includes the fact that 11 cheques were drawn from the account, but not signed by a person permitted to do so under s 37(3) of the LP Regulation,[34] resulting in a breach of that regulation, admitted by the respondent. This is identified as a basis for the allegation that the respondent was responsible for the deficiency.

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34 See Particular 1.10(d).

[98] The only rational explanation for the deficiencies is that they were the result of the drawing of cheques on the general trust account. Indeed, those identified as numbers 1 to 4 in the table in particular 1.10(a) may be correlated with the cheques numbered 3, 5, 6, 7, 8 and 9 in the table in particular 1.10(d). The EFTs alleged in particular 4.5 are clearly unrelated to the deficiencies.

[99] The fifth deficiency relates to the Fleming matter. It too was a consequence of a cheque drawn on the trust account.[35] The authorised signatories on the general trust account were Ms Moore and Mr Stephen Woodward at the time when receivers were appointed in February 2019, each being entitled to sign individually. The overwhelming inference is that all of the relevant cheques were signed by Ms Moore, there being no suggestion that Mr Woodward, or any other person, had any involvement.

[100] By virtue of ss 28(1) and 37(3) of the LP Regulation it was an obligation that fell on the law practice that cheques be signed by a person of one of the classes identified in the latter section. That obligation fell on the respondent, by virtue of ss 244(1) and 7(4) of the LP Act. The respondent took no action to ensure that the obligation was complied with. When monies were withdrawn from the general trust account on the basis of cheques signed by Ms Moore, the respondent was in breach of s 37(3) of the LP Regulation. Those breaches resulted in the deficiencies in the trust ledger accounts, and thus in the general trust account. For that reason, the respondent could be found responsible for the deficiency.

[101] These considerations were not specifically raised at the hearing. The parties were subsequently invited to make further submissions. The applicant submitted that the signing of cheques by Ms Moore was in breach of s 37(3) of the LP Regulation; that the respondent was responsible for compliance with this provision; and that her failure to ensure compliance made her responsible for the deficiencies.

[102] The respondent submitted that this line of consideration lay outside the case pleaded against her. It depended upon particular 1.10(d) which was not one of the particulars invoked in relation to Charge 2. It is too late for the applicant to rely on a different case to that pleaded.

[103] As identified earlier, particular 2.4 relied upon the respondent's failure to implement management systems described in particulars 1.8(d), (e) and (f) as part of the basis for the allegation that the respondent was responsible for the deficiency. Particular 1.10 stated that these failures may be inferred from a number of matters, including the fact alleged in particular 1.10(d) that cheques were drawn on the trust account in breach of s 37(3). In those circumstances, it cannot be said that the breaches of s 37(3) did not form part of the case raised in the application in support of Charge 2. The respondent should be found responsible for the breaches of s 37(3) of the LP Regulation, and the resultant deficiency in the general trust account.

[104] Charge 2 is made out.

Characterisation of the respondent's conduct

[105] The LP Act contains the following provisions which relate to this question:

> **418 Meaning of unsatisfactory professional conduct**

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35 See Hearing Book p 290.

> Unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
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> **419 Meaning of professional misconduct**
>
> (1) Professional misconduct includes—
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
>
> (2) For 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 to the legal profession under this Act or for the grant or renewal of a local practising certificate.
>
> **420 Conduct capable of constituting unsatisfactory professional conduct or professional misconduct**
>
> (1) The following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct—
>
> (a) conduct consisting of a contravention of a relevant law, whether the conduct happened before or after the commencement of this section;
>
> *Note—*
>
> Under the *Acts Interpretation Act 1954*, section 7, and the *Statutory Instruments Act 1992*, section 7, a contravention in relation to this Act would include a contravention of a regulation or legal profession rules and a contravention in relation to a previous Act would include a contravention of a legal profession rule under the *Legal Profession Act 2004*.

[106] The definitions found in ss 418 and 419(1) are inclusive. The defined expressions (or similar expressions) were in common use before the LP Act was enacted. Accordingly, the common law tests for the assessment of such conduct remain relevant. In *Adamson v Queensland Law Society Inc*,[36] Thomas J said, with respect to professional misconduct:

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[36] (1990) 1 Qd R 498, 507 (citation omitted).

> The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.

[107] Such conduct has also been described as conduct that would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency (*Allinson* test).[37]

[108] Although suitability matters under the LP Act were not expressly referred to, some are plainly relevant. They include whether the person has contravened a law about trust money or trust accounts; and whether the person currently is unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner.[38]

[109] Significant and protracted failures to comply with statutory obligations, as identified in Charges 1, 3, 4 and 5, are sufficient comfortably to satisfy the Tribunal that the respondent's conduct involved a substantial and consistent failure to reach or keep a reasonable standard of competence and diligence. Her conduct is therefore to be characterised as professional misconduct, pursuant to the definition found in s 419(a) of the LP Act.

[110] The nature and extent of the respondent's contraventions of laws relating to trust money and trust accounts gives rise to a suitability matter under s 9 of the LP Act. Her conduct demonstrates that, at least at the time when she was the LP director of Stenton & Moore, she was not a fit and proper person to engage in legal practice, by reason of her disregard of her statutory obligations as the LP director for the practice.

[111] In *Re Mayes and the Legal Practitioners Act*,[39] Mr Mayes had been in partnership with another practitioner. The latter had the responsibility for managing the trust account, and this was done at another office of the firm. The other practitioner, however, had misappropriated clients' funds over a period of some years. There was no suggestion of personal dishonesty on the part of Mr Mayes. He had however had some warning that there may have been an irregularity in relation to the trust accounts. The majority (Reynolds and Hutley JJA) said, with respect to, the practitioner's failures to carry out obligations relating to the supervision of the trust account and trust funds:[40]

> The overall disregard of the obligations to the Law Society of a solicitor, those obligations being laid down for the protection of the general public who deal with solicitors is in this case in our opinion so gross as to amount to professional misconduct at common law.

[112] The solicitor's conduct was correctly characterised as "reckless carelessness".[41]

[113] It is apparent from *Mayes* that, even apart from statutory definition, gross negligence or recklessness might amount to professional misconduct.[42] Under the general law,

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37 See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; and the discussion in Dal Pont, *Lawyers' Professional Responsibility* (LawBook Co, 7th ed, 2021) [23.90].

38 See ss 9(1)(l) and (o).

39 [1974] 1 NSWLR 19 ("*Mayes*").

40 *Mayes* at 26.

41 *Mayes* at 27.

42 See the discussion in Dal Pont at [23.90], in particular at pp 115 and 116.

as well as by reference to s 419(1) of the LP Act, the respondent's conduct should be classified as professional misconduct.

Proposed orders

[114] The applicant contended that an order should be made recommending that the respondent's name be removed from the local roll. She contended that the respondent's character was so "indelibly marked" by her conduct that she could not be regarded as a fit and proper person to remain upon the local roll, a reference to *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor*; *Legal Services Commissioner v Shand*.[43] The submission referred to the respondent's recklessness in failing to discharge her obligations as LP director of Stenton & Moore, amounting to a complete dereliction of the role. It was submitted that she clearly lacked any appreciation of the need for the protection of the public in relation to that role; she treated the position of LP director simply as an employed position, enabling her to earn income; and she facilitated the very acts of dishonesty perpetrated by Ms Moore.

[115] Moreover, it was submitted that the respondent has offered no evidence of rehabilitation, so that the probabilities are that she is permanently unfit to practice. The need to maintain proper professional standards in which the community may have confidence means that the Tribunal cannot now endorse the respondent as a person fit to engage in legal practice.

[116] In supplementary submissions dated 2 May 2023, the applicant submitted that general deterrence in this case is critical. Reference was made to instances of similar conduct by other practitioners. Specific deterrence of the respondent engaging in similar conduct in the future was also relied upon. A number of other matters are raised, some of which have already been dealt with.[44]

[117] The respondent contested the order sought by the applicant. She submitted that the applicant's submissions were redolent of an attempt to punish the respondent; and in some sense, to punish her for Ms Moore's conduct, not her own. The respondent's conduct bears no resemblance to the conduct of Mr Shand. The respondent submitted that the applicant's submissions misstate the evidence in important respects. Reliance was also placed on her age, her expressions of regret and remorse, her decision to retire from practise and her offer of an undertaking to the QLS not to seek renewal of her practising certificate. Reference was also made to her co-operation in these proceedings.

[118] A useful starting point for the identification of relevant principles is *Watts v Legal Services Commissioner*.[45] In that case, the practitioner made payments from his trust account on six occasions, totalling $191,930.85, when he was not authorised to do so. Two of the occasions involved the issue of false receipts. In respect of one of the occasions, he subsequently became entitled to the payment; and in respect of the others, he in time restored the funds to the trust account. Gotterson JA (with whom the other members of the court, McMurdo P and Morrison JA agreed) considered that the conduct demonstrated that, at the time at which it occurred, the practitioner was

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43 [2018] QCA 66 at [57] ("*Shand*").

44 Applicant's Submissions of 2 May 2023, pp 16–18.

45 [2016] QCA 224 ("*Watts*").

unfit to practise.[46] However, his Honour accepted a proposition enunciated in a number of decisions of the New South Wales Court of Appeal, including *Prothonotary of the Supreme Court of NSW v P,*[47] that an order striking the name of a practitioner from the roll should only be made where the probability is that the practitioner is permanently unfit for practise.[48] As a result, when the Court of Appeal came to re-exercise the discretion of this Tribunal, in the light of certain medical evidence, an order for a public reprimand and some conditions, were substituted for an order relating to the removal of the practitioner's name from the roll.

[119] Factually, *Shand* was a very different case from *Watts* and from the present case. There are, however, important passages in it from the judgment of McMurdo JA:

> [52] The discretion conferred by s 456 is a broad one and, as noted by the Tribunal, not subject to any express constraint. It is to be exercised for the purposes which are established by the authorities. It is well established that the purpose is not to punish the respondent, but to protect the public.
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> [53] The protection of the public, of course, is a purpose also served by an order which affects an existing or future practising certificate. By an order affecting a practising certificate, the public is immediately protected from the risks to which those who would encounter an unfit person would be exposed.
>
> [54] However the removal of the name of an unfit practitioner from the Roll serves the interests of the public in more extensive ways. In *Attorney-General v Bax*, Pincus JA said that the remedies of suspension or striking off are for the protection of the public and of the profession's standing and that further, there is also a deterrent element. And in *De Pardo v Legal Practitioners Complaints Committee*, French J (as he then was and with whom the other members of the Full Federal Court agreed) said that:
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>> "[The protection of the public] extends beyond protection against further default by the particular practitioner to protection against similar defaults by other practitioners."
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> [55] The reference by Pincus JA in *Bax* to the protection of the profession's standing is important. The community needs to have confidence that only fit and proper persons are able to practise as lawyers and if that standing, and thereby that confidence, is diminished, the effectiveness of the legal profession, in the service of clients, the courts, and the public is prejudiced. The Court's Roll of practitioners is an endorsement of the fitness of those who are enrolled.[49]

[120] These passages were relied upon by the applicant. In addition, the respondent relied on the following paragraph:

> [60] I do not accept the respondent's argument which challenges the finding of a present unfitness to practise. I accept that the respondent's offending should be understood as having occurred in the circumstances described by the sentencing judge. However, this was a

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46 *Watts* at [47].

47 [2003] NSWCA 320 ("*P*").

48 *Watts* at [33] and [46].

49 *Shand* at [52]-[55] [citations omitted].

> very serious offence, the nature of which undermined the integrity of executive government at a Ministerial level. It is difficult to imagine that a mature person, having studied and practised the law, could have failed to underestimate the seriousness of an offence of corruption involving a Minister of the Crown. It was an isolated offence, but nevertheless an unfitness to practise law was plainly demonstrated by this offence, when it was committed in 2002. The Tribunal had the substantial character references in the respondent's favour, which had been provided to the sentencing judge. But it must be said that the character of the respondent was also revealed by the offence, and that there had to be some persuasive evidence which showed that the position was now different.[50]

[121] It is worth noting that McMurdo JA expressly referred to *P*, and recognised that the propositions enunciated therein by Young CJ had been extensively followed in other cases in the Court of Appeal of this State.[51] Indeed, his Honour's conclusion in paragraph [60] is consistent with the application of the proposition from *P* adopted by Gotterson JA in *Watts*.

[122] The Tribunal as presently constituted attempted to apply the principles in *Watts* and in *Shand* when determining whether to recommend that a practitioner's name be permanently removed from the roll. In *Legal Services Commissioner v O'Reilly*,[52] the Tribunal considered whether the conduct the subject of the proceedings before it demonstrated that the practitioner's character was such that he was permanently unfit to practise as a solicitor.[53] It held that the applicant had not demonstrated that to be the case.[54]

[123] The Tribunal's decision in *O'Reilly* was the subject of an appeal to the Court of Appeal.[55] The Court was constituted by Gotterson, Philippides and McMurdo JJA. The primary contention of the appellant was that the Tribunal had failed to have regard to the wider purposes for the exercise of powers under s 456 of the LP Act, namely the preservation of the good standing of the legal profession and of the roll, as the Court's endorsement of those enrolled.[56] The Court of Appeal did not consider that an error had occurred, or that the Tribunal had acted under a misapprehension as to the decision in *Shand*, nor did it fail to have regard to the wider purposes of s 456 of the LP Act.

[124] It is important for the Tribunal in determining what orders to make under s 456 of the LP Act to bear in mind the protective nature of this jurisdiction. Related to that is the need to recognise that the roll of practitioners represents the endorsement of the fitness of those persons whose names appear on that roll; and accordingly, removal is warranted if someone is (probably permanently) unfit to remain in legal practise. The preservation of the good standing of the legal profession is also a matter of considerable importance, at least primarily because of the role of the profession in the administration of justice. Associated with these considerations is the need for general

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50 *Shand* at [60].
51 *Shand* at [31]–[32] citing *Prothonotary of the Supreme Court of New South Wales v P* [2003] NSWCA at [17].
52 [2019] QCAT 28 ("*O'Reilly*").
53 *O'Reilly* at [45].
54 *O'Reilly* at [50].
55 *Legal Services Commissioner v O'Reilly* [2019] QCA 251.
56 *O'Reilly* (QCA) at [25].

deterrence of other practitioners from engaging in similar conduct; and, often enough, the need for specific deterrence of the practitioner who is the subject of the proceedings, from engaging in similar conduct in the future. These considerations all have relevance in determining what orders are to be made. Nevertheless, if the question is whether a practitioner's name is to be removed from the roll, the authorities in this State endorse the view that the primary question is that identified in *Watts*.

[125] It might also be noted that the respondent's indication that she does not intend to return to practise is "not the end of the matter".[57] If the Tribunal is satisfied that the probability is that the practitioner is permanently unfit for practise, then the practitioner's name should usually be removed from the roll, notwithstanding such an indication.

[126] The respondent's conduct at the time when she was the LP director of Stenton & Moore clearly demonstrates that she was then not a fit and proper person to engage in legal practise. The question which remains is whether the Tribunal should be satisfied that the respondent is permanently unfit to practise.[58]

[127] This is not a case where the practitioner did not know the obligations which fell on her as the LP director for Stenton & Moore. She knew the obligations of such a director, because she conducted practice as the LP director of her own ILP. The explanation for her conduct appears to have been that she was deceived by Ms Moore into thinking that the practice was, in substance, not active; and that nothing was happening with respect to the trust account which would give rise to concern.

[128] It is not difficult to accept that the respondent experienced an enormous shock when the true position became apparent; nor that she is filled with shame and regret. These considerations are of relevance when considering whether the respondent is permanently unfit for practise. They bear on the question whether similar conduct might occur in the future, if the respondent returned to practise. Given also that there has been no other instance of misconduct, and in particular none as the LP director of her own practice, the Tribunal is not satisfied that she is permanently unfit to practise.

[129] There are, however, other considerations to be taken into account. Of particular importance is the need for general deterrence of such conduct, and the need to mark the seriousness of the respondent's failures. These considerations also go to the need to maintain the standards of the legal profession.

[130] Under s 456(2)(c), the Tribunal has power to order that a local practising certificate not be granted to a practitioner before the end of a stated period. The Tribunal considered that, subject to further submissions, such an order might be appropriate in the present case. The period would be the period ending 1 July 2025, effectively a period of about five years from the time that the respondent surrendered her practising certificate. The Tribunal also considered that the respondent should be publicly reprimanded. For practitioners generally, exclusion from practising for a period of 5 years would be a very significant deterrent. The Tribunal considered that the proposed orders would mark the seriousness of the respondent's misconduct.

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[57] *Shand* at [56].
[58] *Watts* at [46].

Further submissions

[131] The respondent sought the opportunity to make submissions about costs. The Tribunal considered it appropriate to give the parties the opportunity to make submissions about the form of the orders it proposed. Accordingly, the reasons substantially as they appear to this point were provided in draft to the parties. They have delivered submissions, both in relation to orders to be made under s 456 of the LP Act; and as to costs.

Further consideration of orders under s 456 of the LP Act

[132] The applicant submitted that it was appropriate to order that the respondent be publicly reprimanded. It was appropriate to order that the respondent be barred from obtaining a practising certificate for five years. Such an order would accomplish general and specific deterrence. The respondent should be ordered to complete a trust accounting course because her conduct involved trust accounting breaches; and if she were to return to practice, she may be involved in the operation of a trust account. The public would be better protected by such an order.

[133] The respondent submitted that a public reprimand was appropriate, but no other order should be made under s 456. Reference was made to earlier submissions of the respondent. It was also submitted that the respondent is not entitled to practise law; she does not intend to do so in the future; an order prohibiting the granting of a practising certificate was unnecessary and inappropriate; and such an order would serve no purpose except to punish the respondent, said to be antithetical to the purpose of orders to be made under s 456. A public reprimand would adequately mark the disgrace inherent in the respondent's misconduct.

[134] Of the earlier submissions referred to by the respondent, paragraphs 22 to 29 of those dated 16 June 2023 recounted events leading up to the cancellation of the respondent's practising certificate (including her compliance with conditions proposed by the QLS). They also contended that she was no longer entitled to practise law, and did not intend to apply for a practising certificate; there was (at best) an "entirely remote possibility" that she would seek to return to practise law; and the applicant's submission (at that time) that an order should be made recommending that the respondent's name be removed from the local roll was redolent of an attempt to punish her. The respondent submitted that these submissions may not have been considered by the Tribunal.

[135] The events discussed in paragraphs 22 to 29 were referred to in summary form in the Tribunal's recording of events subsequent to the respondent's early contact with Stenton & Moore. The fact that the respondent was (and is) no longer entitled to practise law is self-evident, and was recognised implicitly in the proposed order prohibiting the grant of a practising certificate. The draft reasons recorded the view that the fact that the respondent does not intend to return to practise is "not the end of the matter" when determining whether there should be a recommendation that her name be removed from the roll. Whatever the applicant's view about why orders should be made under s 456, the draft reasons indicated that the proposed order prohibiting the grant of a practising certificate was warranted by reference to the need for general deterrence, and the need to mark the seriousness of the respondent's misconduct.

[136] It follows that the Tribunal does not accept that the sole purpose of the proposed order relating to the grant of a practising certificate is to punish the respondent. Nor does

the Tribunal accept that the making of a punitive order is inevitably outside the scope of s 456. Such an order may be properly made for reasons relating to general or specific deterrence, and thus be protective of the public. The considerations referred to in the draft reasons warrant the making of the order. The seriousness of the respondent's delinquency should not be understated. To give proper weight to the need for general deterrence in respect of such conduct, and to reflect the need to maintain the standards of the legal profession, thereby maintaining public confidence in the legal profession, it is considered that the order is appropriate.

[137] The applicant sought to support the order by reference to the need for specific deterrence. The Tribunal does not consider that the respondent is permanently unfit for practice. These reasons record the effect on the respondent of learning what had happened while she was the LP director of Stenton & Moore. The Tribunal attributes little weight to the need for specific deterrence when making the order.

[138] The applicant pursued an order requiring the respondent to complete a trust accounting course. The draft reasons expressed the view that the respondent understood her obligations as an LP director. These include obligations in relation to the conduct of a trust account. The reasons also expressed the view that the respondent's conduct was a consequence of the deception of Ms Moore. That resulted in her disregard of her obligations as the LP director of Stenton & Moore; and her failure to perform duties as the LP director which are designed to protect the public. Mention has already been made of the likely effect of the experience with Stenton & Moore on the respondent. In the circumstances of this case, the Tribunal does not consider that an order requiring the respondent to complete a trust accounting course is appropriate.

Costs

[139] The applicant submitted that costs should be ordered against the respondent in respect of Charges 1, 2, 3, 4 and 5, unless exceptional circumstances were found to exist. As the applicant established "prescribed conduct" in respect of each of these Charges, there were no exceptional circumstances. The order should extend to reserved costs, save for the costs of the hearing scheduled to occur on 23 March 2023. Since Charge 1A was withdrawn at the trial, there should be no award of costs in relation to it. The costs awarded to the applicant should be reduced by no more than 10%.

[140] The respondent submitted that the applicant should not be awarded costs in relation to Charge 1A. Nor should the applicant be awarded costs for Charge 2. Exceptional circumstances exist in the way that the applicant conducted her pursuit of this charge, and the basis on which the Tribunal found it was made out. The applicant's submissions in support of Charge 2 were rejected, and the respondent's submissions about the proper construction of s 259 of the LP Act (on which Charge 2 was based) were accepted, as were her submissions on the evidence of causation which was relied upon by the applicant. The applicant thus lost on the battleground on which she chose to fight. Absent this battle, the hearing would have been much shorter, and the material much more confined. The applicant succeeded on Charge 2 on the basis of what was alleged in support of Charge 1. The contest about Charge 2 was unnecessary. The costs associated with it were wasted. The introduction of Charge 1A involved amendments, appearances, and hearings, resulting in unnecessary costs.[59]

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[59] The reference in footnote 6 of the respondent's submissions dated 13 May 2024 to paragraph 36(a) of her submissions dated 16 June 2023 must be a reference to paragraph 36(b) of the 2023 submissions.

The applicant made contentions about the respondent's employment with Stenton & Moore that were contrary to the evidence; and about the omission of material from evidence by the respondent, which were not supported by the evidence. The way in which the applicant advanced and maintained her case in relation to Charge 2, rejected by the Tribunal, and the amendment to add Charge 1A, abandoned at the hearing, are exceptional circumstances which call for the applicant being deprived of her costs relating to those charges. Either the respondent should be ordered to pay the applicant's costs of the discipline application, excluding those for Charges 1A and 2; or (preferably) the respondent should be ordered to pay a proportion of the applicant's costs of the discipline application (15% was submitted to be an appropriate proportion). No separate submission was made about reserved costs.

[141] The Tribunal's jurisdiction in respect of costs orders is identified in s 462 of the LP Act, which includes the following:

> **462 Costs**
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> (1) A disciplinary body must make an order requiring a person whom it has found to have engaged in prescribed conduct to pay costs, including costs of the commissioner and the complainant, unless the disciplinary body is satisfied exceptional circumstances exist.
>
> …
>
> (4) A disciplinary body may make an order requiring the commissioner to pay costs, but may do so only if it is satisfied that—
>
> (a) the Australian legal practitioner or law practice employee has not engaged in prescribed conduct; and
>
> (b) the body considers that special circumstances warrant the making of the order.
>
> …
>
> (8) In this section—
>
> ***engaged in prescribed conduct*** means engaged in unsatisfactory professional conduct or professional misconduct, or engaged in misconduct in relation to a relevant practice, as mentioned in section 456(1) or 458(1).

[142] In *Pennisi v Legal Services Commissioner*,[60] it was authoritatively determined that s 462 should be applied by reference to particular complaints, where a discipline application relates to more than one. Bowskill CJ (with whom Dalton JA and Kelly J agreed) said:

> [48] Then one turns to s 462, in relation to costs. The criterion in sub-s (1), for the mandatory rule requiring a practitioner to pay costs, is that the disciplinary body "has found [the practitioner] to have engaged in prescribed conduct". Read in the context of the surrounding provisions, that logically must mean "found to have engaged in prescribed conduct

[60] [2023] QCA 234.

> in relation to a [particular] complaint". The order contemplated by s 462(1) in those circumstances, is one requiring the practitioner "to pay costs, including costs of the commissioner and the complainant".
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> [49] When s 462(1) is read in that context, the argument that the focus should be upon the outcome in respect of individual complaints is supported by the reference to the costs of "the complainant". It could not have been intended that a practitioner would be required to pay the costs of a complainant in respect of a complaint which did not succeed, or which was withdrawn. The reference to "the complainant" in s 462(1) can only logically be a reference to the complainant in respect of any complaint forming part of the discipline application in respect of which the tribunal has found the practitioner has engaged in prescribed conduct. It follows, that the application of s 462(1), and the subsequent provisions, ought to be undertaken by reference to particular "complaints", where there is more than one the subject of the discipline application.
>
> [50] This construction is not inconsistent with the protective purpose of the provisions; and it provides more certainty than an attempt to quantify or define what might amount to "exceptional circumstances", when there has been mixed success in relation to multiple complaints brought within one discipline application before the tribunal. Some of the cases that have previously considered that question are discussed below, and demonstrate that this is an unsatisfactory process, in terms of where to draw the line. Policy considerations also support this construction, because it ought to encourage a practitioner to take responsibility for their misconduct where it is not contestable, and so reduce their costs liability (by avoiding the need for a hearing); it ought also encourage the Commissioner to consider whether contested charges have sufficient prospects of success to proceed with and, in any event, to conduct disciplinary hearings in a cost effective and efficient manner. Where a practitioner successfully contests a charge(s), the rationale for the practitioner to be required to bear all the costs of the entire proceeding is not apparent.

[143] In the present case, the charges were not framed by reference to separate complaints (nor by reference to separate investigation matters).[61] It is not possible to distinguish between the charges on this basis. The conduct which is the subject of Charge 2 is part of the conduct the subject of Charge 1. Neither party has submitted that the approach identified in *Pennisi* affects the outcome of the applicant's application for costs.

[144] The effect of the submissions of the parties appears to be that the starting point is that the applicant should have her costs, but that exceptional circumstances might warrant some adjustment. The applicant has accepted that the circumstances relating to Charge 1A warrant such an adjustment and so do the circumstances relating to the adjournment on 23 March 2023. The primary issue thus relates to Charge 2.

[145] The respondent is correct to contend that the applicant's submissions in relation to Charge 2 were rejected; and that the charge was not established on the basis relied upon by the applicant at the hearing (although the foundation for it was found in the

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[61] The letter to the respondent sent under s 437 of the LP Act identified a single investigation matter: see Hearing Book p 154.

discipline application). The question is whether that constitutes exceptional circumstances for the purposes of s 462(1); and if so, what order for costs should be made.

[146] The applicant made the following submissions in relation to deciding whether circumstances are exceptional:

> It is first necessary to understand what 'exceptional circumstances' means: what might constitute 'exceptional circumstances' is a matter of fact to be determined case by case and is not capable of definition. It requires a qualitative assessment of what in the circumstances justifies a departure from the rule in s 462(1) of the Act.
>
> Yet a sensible working definition was given by Lord Bingham of Cornhill CJ in *R v Kelly (Edward)* [2000 QB 198 at 208]*:*
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>> We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It described a circumstance which is such as to form an exception, which is out of the ordinary court, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.
>
> This definition was adopted by Fryberg J in *Legal Services Commissioner v Scott* (No [2009] LPT 9 at [19] and referred to with approval in *Pennisi v Legal Services Commissioner* [2023] QCA 234 at [57].

[147] In *Pennisi v Legal Services Commissioner*, Bowskill CJ said:[62]

> [57] What might constitute "exceptional circumstances" is a matter of fact, to be determined on a case by case basis, and not capable of definition. It requires a qualitative assessment, directing attention to what it is, about the circumstances of the case, which would justify departure from the rule articulated in s 462(1). The rule that, where a practitioner has been found to have engaged in "prescribed conduct", they must pay the costs of the proceeding, is justified by the fact that the Commissioner brings the proceeding in the public interest, to further the interests of the administration of justice and for the protection of consumers of services of the legal profession and the public generally. In order to displace that rule, something qualitatively "exceptional" is required.
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> …
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> [59] As to what might constitute "exceptional circumstances", in *Legal Services Commissioner v Doyle* [2021] QCAT 347 at [54]–[56], "extraordinary delay" in prosecuting the matter, which had a "devastating" impact on the practitioner, was said to amount to exceptional circumstances "justifying a refusal to further burden [the practitioner] with an order for costs".
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> [60] *Legal Services Commissioner v O'Connor (No 2)* [2006] LPT 002, a decision of Mullins J (as her Honour then was), provides another example. Although the practitioner was found guilty of unsatisfactory professional conduct, the fact that the charge which the practitioner ultimately had to meet at the hearing of the application was different both in the terms and the particulars of the charge and the gravity of the

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62 [2023] QCA 234 at [57]-[60] (citations omitted).

offence than the charge that was set out in the application that commenced this proceeding, which resulted in the Commissioner and the practitioner incurring costs that were wasted, was said to be sufficient to establish exceptional circumstances (at [19]). The mandatory rule having been displaced, the practitioner was ordered to pay two-thirds of the Commissioner's costs. The tribunal in that case noted (at [18]) that:

> "The Commissioner fulfils an important public role under the Act in investigating complaints, making decisions on whether to dismiss them or to commence proceedings before a disciplinary body in relation to the complaint and prosecuting such proceedings. It is a matter of fairness, however, to the practitioner who is the subject of the complaint that the Commissioner formulates the charge against the practitioner with precision and gives careful consideration to the matters raised by the practitioner in the practitioner's response that is usually provided to the Commissioner at an early stage of the investigation of the complaint."

[148] As indicated earlier, when determining a discipline application, the functions of the Tribunal, apparent from s 456 of the LP Act, are to find whether the respondent has engaged in the conduct alleged in the application, to determine whether that conduct (as found) amounts to professional misconduct or unsatisfactory professional conduct, and if so determined, to decide what orders should be made. The conduct alleged in Charge 2 is, in substance, the same as some of the conduct alleged in Charge 1. The nature of the respondent's conduct is fully identified by the allegations in Charge 1. The addition of Charge 2 did not assist in determining whether the respondent's conduct should be found to be professional misconduct or unsatisfactory professional conduct. Nor was it ever likely to. Nor was it likely to assist in determining what orders should be made. As the respondent submitted, the addition of Charge 2 was unnecessary.

[149] Yet Charge 2 has been the major source of contention, and has added substantially to the complexity of the proceedings. It has no doubt increased the costs of the proceedings for each party considerably. In addition, although the applicant succeeded on the charge, she did so on a different basis to that advanced at the hearing. These matters are considered, on a qualitative assessment, to constitute exceptional circumstances, sufficient to warrant a departure from the rule stated in s 462(1) of the LP Act.

[150] The respondent had relied on some other matters for a finding that the circumstances are exceptional for the purposes of s 462. One was the applicant's submissions to the effect that the respondent "rented out" her practising certificate, receiving substantial remuneration for very little work. These submissions were without foundation. The making of such submissions should be discouraged. However, they have little to do with the pursuit of Charge 2. They carry little weight in determining whether the circumstances are exceptional, so as to warrant a departure from the rule established by s 462(1).

[151] The applicant was critical of the fact that the respondent did not include certain correspondence in her material for this hearing. The Tribunal has not accepted that criticism. However, this is considered to be of no significance in determining whether there are exceptional circumstances.

[152] If exceptional circumstances are established then the Tribunal is not bound to order that the respondent pay the applicant's costs. Nevertheless, where a respondent has been found to engage in prescribed conduct, then the prima facie position remains that the respondent should pay costs, including the applicant's costs.[63] When exceptional circumstances are established, the question is whether some other order should be made for costs.

[153] It might be noted that, so far as Charge 2 is concerned, nearly all of the costs incurred are likely to be those related to the case advanced by the applicant. Indeed, the respondent had little to say on the question whether the charge, on the basis raised by the Tribunal, could be resisted.[64] It follows that nearly all of the costs incurred by both the applicant and the respondent in relation to Charge 2, were incurred in relation to the case on which the applicant did not succeed. That is a sufficient basis for determining that the applicant should not be awarded costs in respect of this charge. The lack of utility in proceeding with the Charge in the present application is an additional reason for that conclusion.

[154] While the applicant has accepted that she should not have her costs in relation to Charge 1A, she has submitted that only minimal costs were incurred for it, because it relied entirely on the allegations made in support of Charge 1. The Charge was the only amendment introduced by the amendment of 20 April 2023. On the applicant's account,[65] the application to amend was filed before the directions hearing on 28 February 2023. The directions hearing was adjourned to permit the respondent to consider the amendments. The costs were subsequently reserved, and the applicant was ordered to file and serve an affidavit explaining the reasons for the late application to amend.[66] The amendment was opposed at the directions hearing on 8 March 2023, resulting in the matter being sent to a compulsory conference on 23 March 2023, with the costs of that directions hearing reserved. An order was then made for the amendment of the discipline application to include Charge 1A. The respondent provided a response to the amended application, and the parties provided supplementary submissions, including submissions relating to this Charge. The history indicates that more than minimal costs were incurred in relation to Charge 1A. Moreover, the thrown away costs of the hearings on 28 February and 8 March 2023 appear to be the product of the application to introduce Charge 1A; as do the costs of the compulsory conference on 23 March 2023.

[155] It follows that the applicant should not be awarded costs for the hearings of 28 February and 8 March 2023, nor of the aborted hearing on 23 March 2023, nor the compulsory conference on the same day.

[156] The approach taken by both parties supports the making of an order in favour of the applicant, appropriately discounted. A discount should be allowed for the costs incurred in respect of Charges 1A and 2. The discount is not capable of precise calculation. It is considered that a discount of 50% reasonably reflects the costs of the applicant for the discipline application, save for those incurred in respect of Charges 1A and 2.

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63 Compare *Legal Services Commissioner v O'Connor (No 2)* [2006] LPT 002 at [20].

64 See respondent's submissions dated 29 January 2024.

65 See applicant's submissions of 7 May 2024 at pp 4-6.

66 Order dated 8 March 2023.

Orders

[157] The following orders will be made:

1. The respondent is publicly reprimanded for her conduct specified in the discipline application;
2. A local practising certificate is not to be granted to the respondent before 1 July 2025;
3. No order is made in respect of the costs of the hearings on 28 February 2023 and 8 March 2023, or the costs of the scheduled hearing and compulsory conference of 23 March 2023. The respondent is to pay 50% of any other costs of the applicant of and incidental to the discipline application, including any other reserved costs, to be taxed on the standard basis, as if the matter were conducted in the Supreme Court of Queensland.