QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Clark* [2024] QCAT 506
PARTIES:	**LEGAL SERVICES COMMISSION** (applicant) **v** **PETER ELLIOT CLARK** (respondent)
APPLICATION NO/S:	OCR120-23
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	25 November 2024
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons KC, Judicial Member Assisted by: Ms Petrina Macpherson, Practitioner Panel Member Ms Julie Cork, Lay Panel Member
ORDERS:	**1. The Tribunal recommends that the name of the respondent Peter Elliott Clark be removed from the local roll;** **2. The respondent is to pay the costs of the applicant and the complainant Edward James Bell of and incidental to these proceedings, to be assessed on the standard basis as if these proceedings were conducted in the Supreme Court of Queensland.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT OR UNSATISFACTORY PROFESSIONAL CONDUCT – where the applicant alleged that the respondent failed to maintain a reasonable standard of competence and diligence for reason of delay to progress an appeal application – where the applicant also alleged that the respondent failed to deposit a sum of money into a trust account – where the applicant further alleged that the respondent failed to comply with a s 443 *Legal Profession Act 2007* (Qld) notice – whether the conduct constituted unsatisfactory professional conduct or

professional misconduct – whether an order should be made for removal of respondent's name from roll of practitioners – whether to make a compensation order

Australian Solicitors Conduct Rules 2012 r 4
Legal Profession Act 2007 (Qld) s 120, s 237, s 418, s 419, s 420, s 443, s, 456, s 462, s 464, s 656C
Workers' Compensation and Rehabilitation Act 2003 (Qld) s 275, s 289

Adamson v Queensland Law Society Incorporated [1990] 1 Qd R 498
Degiorgio v Dunn (No 2) 62 NSWLR 284
Deputy Commissioner of Taxation v Shi (2021) 273 CLR 235
Johns v Law Society of New South Wales [1982] 2 NSWLR 1
Legal Services Commissioner v Mauritz [2023] QCAT 325
Legal Services Commissioner v Smith [2011] QCAT 126
Legal Services Commissioner v Twohill [2005] LPT 1
Lemoto v Able Technical Pty Ltd (2005) 63 NSWLR 300
O'Reilly v Law Society of New South Wales (1988) 24 NSW LR 204
Prothonotary of the Supreme Court of New South Wales v P [2003] NSWCA 320
R v Solicitors' Disciplinary Tribunal; Ex parte L (a solicitor) [1988] VR 757
Re Moseley (1925) 25 SR (NSW) 1

APPEARANCES & REPRESENTATION: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

REASONS FOR DECISION

[1] The respondent was retained by Mr Edward Bell to act in relation to claims for a psychiatric condition which Mr Bell had acquired during his employment by UGL Operations and Management (Services) Pty Ltd ("UGL"). That has resulted in the applicant bringing charges in the Discipline Application against the respondent, relating primarily to his delay in the conduct of Mr Bell's matter, and his dealings with a sum of money paid to him by Mr Bell. A further charge in the Discipline Application relates to the failure of the respondent to comply with a written notice issued by the applicant pursuant to s 443(3) of the *Legal Profession Act 2007* (Qld) ("LP Act"). The questions which arise in relation to the Discipline Application are whether the respondent's conduct should be characterised as professional misconduct or unsatisfactory professional conduct; and whether an order should be made recommending that his name be removed from the local roll.

[2] Mr Bell has also made a claim for compensation under the provisions of the LP Act.

Background

[3] Having been admitted to the legal profession in Victoria on 23 April 1992, the respondent was admitted to the legal profession in Queensland on 19 February 2002. He held a practising certificate (for the most part, an unrestricted practising certificate) during the period relevant to these proceedings. From 11 August 2008 until 30 June 2017 he was the Legal Practitioner Director of Eureka Legal Pty Ltd in Mackay. From 29 May 2017 to 30 June 2018, he was an employed solicitor at Strutynski Law in Mackay, and from 1 July 2018 to 30 June 2023, he was the sole practitioner at that practice.

[4] On 28 January 2015, Mr Bell made a WorkCover claim in relation to his employment with UGL. On 5 February 2015, WorkCover Queensland notified him that his claim had been rejected. He engaged Mr Bell to act for him in respect of his claim for workers compensation, and potentially the prosecution of a common law claim for damages.[1]

[5] Mr Bell was given a disclosure notice, and he executed a costs agreement.[2] The costs agreement was a conditional costs agreement, Mr Bell's liability for professional fees and for expenses and disbursements (which were defined) being conditional on the successful outcome of the matter.[3] The disclosure notice made clear that Mr Bell would remain liable for the costs of other parties awarded against him.[4]

[6] The respondent then pursued the claim for workers compensation. On 5 May 2015 he applied to the Workers Compensation Regulator ("WCR") for a review of the decision to reject Mr Bell's WorkCover claim. He undertook a number of steps and enquiries for this purpose.

[7] On 18 June 2015, the WCR determined to uphold the decision of WorkCover Queensland to reject Mr Bell's claim. On the same day, the respondent wrote to Mr Bell, advising of the decision. The respondent also outlined the options available for Mr Bell, which included to appeal to the Queensland Industrial Relations Commission ("QIRC"), or to abandon his claim for compensation. The letter included estimates of fees and other costs should Mr Bell choose to commence an appeal. It referred to the possibility of finding a barrister willing to act on a speculative basis. It also suggested that a litigation lender might be prepared to assist. The letter stated that Eureka Legal was not in a financial position to conduct an appeal on a fully speculative basis. It also noted that the appeal needed to be lodged promptly.

[8] Mr Bell instructed the respondent to file a Notice of Appeal, which he did on 16 July 2015.[5] However, there is no suggestion that Mr Bell entered into a new costs agreement with Eureka Legal. The respondent and Mr Bell appear to have proceeded on the basis that the existing costs agreement remained in force.

[9] A directions order was made on 30 July 2015 specifying steps to be taken in relation to the appeal, and setting it down for hearing on 3, 4 and 5 November 2015.[6] The

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1 Hearing Book p 70.
2 Hearing Book p 48.
3 Hearing Book pp 65-66; see also pp 60-61.
4 Hearing Book pp 62-63; see also 59 and 61.
5 Hearing Book pp 94 and 49.
6 Hearing Book p102.

respondent wrote to Mr Bell on 5 August 2015, enclosing a copy of the order and identifying matters that required attention.[7]

[10] In 2015, Mr Bell was receiving treatment from a psychiatrist, Dr Sarkar. On 21 October 2015 the respondent wrote to Dr Sarkar, requesting a report.[8] Dr Sarkar saw Mr Bell on 3 February 2016.[9] On 16 February 2016, the respondent wrote to Mr Bell, confirming receipt of the doctor's report. The respondent stated that the report was "tremendously useful for your application for acceptance of the claim", explaining that it supported the existence of a causal relationship between Mr Bell's work and the onset of his injury, and it did not suggest that reasonable management action made any contribution to the stressors which led to the development of Mr Bell's condition.[10]

[11] In the meantime, the respondent made an application for an adjournment of the hearing listed to commence on 3 November 2015. On 22 October 2015 an order was made granting the adjournment.[11]

[12] On 24 February 2016 the respondent filed Notices of Non-Party Disclosure.[12] One of the respondents was UGL.[13] Arrangements were then made for a hearing of the matter,[14] apparently resulting in the hearing being listed for 11, 12 and 13 April 2016.[15]

[13] On 8 April 2016, the respondent sent an email to the QIRC and to the lawyer for the other party to the appeal.[16] He stated:

> I have been advised this morning by Mr Phillip Moore of counsel for the appellant that the matter simply cannot proceed in the absence of certain documents which are not available, without Mr Bell's case being severely compromised …
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> These are the documents sought from the employer under the Notice of Non-Party Disclosure issued 26 February 2016. I have been unable to serve that document on the employer because of a combination of factors; primarily difficulties locating addresses for the affected parties who must be served prior to the employer.

[14] The email requested an urgent telephone mention of the matter to seek an adjournment, so as to minimise inconvenience and expense.[17] It is apparent that the WCR, at least to some extent, accepted the position stated by the respondent.[18] The hearing listed for 11, 12 and 13 April 2016 was vacated. By reasons delivered on 28 April 2016, costs were also ordered against Mr Bell, fixed at $3,122.50.[19] These costs were not paid at this time.

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7 Hearing Book pp 100-101.
8 Hearing Book p 322.
9 Hearing Book p 49.
10 Hearing Book p 107.
11 Hearing Book p 325.
12 Hearing Book p 333.
13 Hearing Book p 418.
14 Hearing Book pp 332, 335.
15 Hearing Book p 345.
16 Hearing Book p 340.
17 Hearing Book p 340.
18 Hearing Book p 344.
19 Hearing Book p 343.

[15] Mrs Bell gave evidence that, on 27 June 2016, she spoke with the respondent by telephone, and provided him with the names of some potential witnesses.[20] There is reason to doubt the accuracy of this date. There is a file note of a conversation between them, dated 27 June 2017, apparently from the respondent's file.[21] There is, apparently, no record on the file of a conversation between them on 27 June 2016.[22] It seems more likely that the conversation occurred in June 2017. Apart from this occasion, there was a long period of inactivity by the respondent after the adjournment of the hearing.

[16] In about May 2017, the practice of Eureka Legal ceased, and the respondent took employment with Strutynski Law.[23] The respondent retained possession of Mr Bell's file, though no step had by then been taken to obtain instructions from Mr Bell for the conduct of the matter by that practice.

[17] In September 2017, Mr Strutynski withdrew from practice, with the respondent conducting Mr Strutynski's work as well as his own.[24]

[18] On 13 September 2017, the respondent wrote to Mr Bell.[25] He said he had the file from Eureka Legal and that he was willing to prosecute the appeal in the QIRC. He advised that unless the decision of WorkCover, which had been affirmed by the WCR, was set aside then the prospective common law claim was extinguished. He said, "… the potential claim carries high value. It is imperative that you succeed in the appeal". The respondent also stated that he would like to prosecute the appeal aggressively on Mr Bell's behalf. He identified a number of steps which needed to be taken and concluded that he looked forward to acting for Mr Bell.

[19] In mid-September 2017, Mr and Mrs Bell were receiving some assistance from Mrs Bell's cousin, a Ms Kristen Wall, who was a legal practitioner.[26] The three of them attended at the office of Strutynski Law on 13 September to discuss whether Mr Bell should continue to retain the respondent. The meeting occurred at night.[27] No decision was made at the meeting, nor for a period of time after it.[28]

[20] On 26 September 2017, the QIRC sent an email to the respondent at the email address for Eureka Legal.[29] The email referred to an earlier letter of 29 August requesting the respondent to show cause why Mr Bell's appeal should not be struck out. It stated that there having been no reply, the matter was struck out in accordance with the *Industrial Relations (Tribunals) Rules* 2011. This email, and the letter of 29 August 2017, were not in fact received by the respondent.[30]

[21] In the meantime, on 14 September 2017, Ms Wall had met with a WCR staff member who informed her of the history of the appeal, including the costs order.[31] On 27 September 2017, WCR sent to Ms Wall a copy of correspondence received from the QIRC, being an email of 26 September 2017, which stated that the appeal had been

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20 Hearing Book p 28.
21 Hearing Book pp 348, 188.
22 Hearing Book p 188.
23 Hearing Book pp 411, 185.
24 Hearing Book p 411.
25 Hearing Book p 108.
26 Hearing Book p 28.
27 Hearing Book p 350.
28 Hearing Book pp 28, 49-50.
29 Hearing Book p 351.
30 Hearing Book p 419.
31 Hearing Book p 350.

struck out.[32] It is not clear that this was communicated by Ms Wall to Mr and Mrs Bell. It seems clear that the respondent was not advised of the striking out of the appeal at this time.

[22] On 9 October 2017, the respondent again wrote to Mr Bell. He stated that since their meeting on 13 September, he had not received further instructions from Mr Bell. He reiterated that he was willing to accept instructions to prosecute the claim in the QIRC and drew attention to the limitation period for the common law claim.[33]

[23] That resulted in a meeting between Mr and Mrs Bell and the respondent on 25 October 2017, where Mr Bell gave instructions for Strutynski Law to take on the conduct of the appeal, and the prospective common law claim for damages.[34] The respondent then took a number of steps for the purposes of the appeal.

[24] On 26 October 2017, the respondent sent a letter to Mr Clark enclosing a number of documents. They included a disclosure notice and a costs agreement. The latter is included in the material before the Tribunal, but the disclosure notice is not. The respondent's letter stated that these documents "effectively mirror the provisions of the former retainer documents" which Mr Bell had received when he first engaged Eureka Legal. That appears to be correct. The costs agreement was a conditional costs agreement, conditional both in respect of the payment of professional fees as well as expenses and disbursements (again defined). The condition on which Mr Bell was required to pay was a successful outcome of the matter.[35] Mr Bell executed the costs agreement, but the date on which he did so is not recorded.

[25] The costs awarded as a consequence of the adjournment of the hearing in April 2016 had not yet been paid. The respondent was conscious of the need to have the costs paid before the appeal could proceed. At some point (the material from Mr and Mrs Bell shows considerable uncertainty about the time) the respondent collected a sum of money, apparently $3,122.50,[36] from Mr and Mrs Bell. He kept the cash on the client file. On 1 December 2017, the respondent wrote to WorkCover stating that he needed to pay the costs.[37] He sought details of the appropriate bank account. On 6 December, he paid the costs, and notified WorkCover.[38] In his email to WorkCover of that date, he stated that he had been unaware that the appeal had been struck out, until he received a message earlier that day from WorkCover.

[26] On 29 December 2017, the respondent attended the home of Mr and Mrs Bell. Mr Bell signed a notice of claim for damages, intended to protect his entitlement to claim damages at common law notwithstanding that the limitations period for the claim had almost expired.[39] On 12 January 2018, the respondent served the notice of claim for damages, pointing out the notice was noncompliant and expressing the view that the expiry of the limitation period was imminent.[40] WorkCover was represented by DWF (Australia) ("DWF"). On 16 January 2018, DWF gave notice that WorkCover was

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32 Hearing Book pp 352-353.
33 Hearing Book p 111.
34 Hearing Book p 112.
35 Hearing Book pp 112-121.
36 Hearing Book pp 223, 235. There is nothing to suggest that any of the cash the respondent was given by Mrs Bell remained on the file after the payment made on 6 December, or was retained by the respondent.
37 Hearing Book p 382.
38 Hearing Book p 385.
39 Hearing Book pp 29, 50, 125-140.
40 Hearing Book p 449.

prepared to waive compliance with s 275 of the *Workers' Compensation and Rehabilitation Act 2003* ("WCR Act") on certain conditions.[41] By letter dated 18 January 2018, the respondent gave notice to DWF that Mr Bell unconditionally accepted the terms of the waiver.

[27] On 22 January 2018, Mr Fraccaro from DWF wrote to the respondent. His letter confirmed that compliance had been waived as at 19 January 2018, and noted that WorkCover Queensland's liability response was due by no later than 18 July 2018. The latter also noted that Mr Bell's application for compensation had not yet been accepted by WorkCover, and stated that there was at present an appeal on foot before the QIRC. Mr Fraccaro asked to be advised of the hearing date in due course.[42] The respondent did not reply to this letter.[43]

[28] On 12 February 2018, Ms Godfrey, representing the WCR in the QIRC, wrote to the respondent asking whether Mr Bell was proceeding with his appeal.[44] The respondent replied, stating that he was meeting with Mr Bell on 14 February 2018 to settle materials for the application to reinstate it. Ms Godfrey responded, stating that the WCR would object to the appeal being reopened.[45]

[29] On 14 February 2018, Mr Bell signed the application to reinstate the appeal.[46] The application included the following statement:

> The Appellant has reasonable prospects of success in his appeal and seeks reinstatement of the appeal so that he may prosecute same to hearing.

[30] The respondent sent a copy of the application to Ms Godfrey on 20 February 2018, stating that he intended to forward it for filing in the QIRC the following day; and that he was intending to file and serve an affidavit addressing the delay in relation to the application. The application was not filed then, apparently due to an oversight, but was filed on 21 May 2019.[47]

[31] On four occasions in March 2018, Mrs Bell telephoned the respondent's office, seeking information in relation to her husband's claims.[48] She left messages for the respondent. It would appear that there was no response.

[32] On 27 March 2018, Ms Godfrey telephoned the QIRC, enquiring whether an application had been filed to reopen the applicant's appeal to the Commission. She was advised that nothing had occurred on the file since the matter had been struck out. She then emailed the respondent, advising him of her telephone conversation with the QIRC. She stated that she intended to close her file.[49] The respondent did not reply to the email.

[33] On 24 April 2018, Mr Fraccaro wrote to the respondent, enquiring whether the appeal in the QIRC had been set down for hearing.[50] He made a similar enquiry on 23 May 2018.[51] On 18 July 2018, Mr Fraccaro sent an email to the respondent

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41 Hearing Book p 466.
42 Hearing Book p 470.
43 Hearing Book p 191 [84].
44 Hearing Book p 393.
45 Hearing Book p 392.
46 Hearing Book pp 50,141-145.
47 Hearing Book pp 423-424, 504-505.
48 Hearing Book p 29.
49 Hearing Book p 423; see also p 473.
50 Hearing Book p 471.
51 Hearing Book p 472.

enclosing his client's Liability Notice, and referring to the requirement that Mr Bell's response be provided within 10 business days. The email also referred to the fact that Mr Bell needed to take steps to reinstate his appeal, and to allow him time to take those steps, nominated 18 October 2018 for the compulsory conference.[52] The respondent did not reply to any of these communications.

[34] On 4 October 2018, Mr Fraccaro wrote to the respondent, confirming the compulsory conference was to be held on 18 October.[53] Again, the respondent did not reply.[54]

[35] On the morning of 18 October 2018, the respondent's secretary contacted Mr Fraccaro to advise that the respondent had become unexpectedly unavailable for a conference that day.[55] The email asked for the conference to be rescheduled to the following week. It was then rescheduled to 23 October 2018.[56] The conference did not occur on that day,[57] but on 1 November 2018 an offer was made by the respondent by email.[58] The amount sought in the offer was $500,000.[59]

[36] On 21 December 2018, the respondent filed a Claim and Statement of Claim in the Supreme Court at Mackay for common law damages against UGL.[60] This was served on WorkCover Queensland on 15 January 2019.[61] A Notice of Intention to Defend and Defence was filed on behalf of WorkCover on 18 February 2019.[62] It was served on the respondent on the 21 February 2019.[63]

[37] On 27 February, 11 March, 15 March and 18 March 2019, Mrs Bell telephoned the respondent's office enquiring about the matter. She left messages for the respondent, but he did not reply.[64]

[38] On 29 April 2019, an application by WorkCover to strike out Mr Bell's Statement of Claim was served on the respondent.[65] The hearing was scheduled for 28 May 2019. On 23 May 2019, the respondent wrote to Mr Fraccaro and advised that Mr Bell's application to reinstate his appeal had been filed (which had occurred on 21 May 2019), and proposed that until that application was determined, Mr Bell's claim in the Supreme Court should not be struck out.[66] The proposal appears to have been accepted.

[39] On 31 May 2019, a Directions Order was made in the QIRC, including a listing for hearing on 9 December 2019.[67] The respondent's affidavit in support of that application set out some matters by way of explanation of the delay that had

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52 Hearing Book p 474.
53 Hearing Book p 476-477.
54 Hearing Book p 191.
55 Hearing Book p 478.
56 Hearing Book p 480.
57 Hearing Book p 480.
58 Hearing Book p 482.
59 Hearing Book p 483.
60 Hearing Book p 484.
61 Hearing Book p 493.
62 Hearing Book p 495.
63 Hearing Book p 494.
64 Hearing Book pp 29, 398-401.
65 Hearing Book p 496.
66 Hearing Book pp 504-505.
67 Hearing Book p 415.

occurred.[68] On 5 March 2020, the application was dismissed, with an order that Mr Bell pay the WCR's costs of the application.[69]

[40] It was common ground in the Supreme Court proceedings, that as a consequence, Mr Bell no longer had any entitlement to seek common law damages. As a result, the Supreme Court proceedings were discontinued, with each party bearing their own costs.[70]

Charge 1: The allegations

[41] This charge sets out formal matters. It then alleges a number of facts relating to the chronology of events regarding Mr Bell's engagement of the respondent and the subsequent conduct of his matter. These are followed by allegations of misconduct by the respondent, set out in separate paragraphs for the proceedings in the QIRC and for the claim for common law damages.[71] They are in the following terms:

> 1.130 In respect of Mr Bell's appeal to the QIRC, the respondent failed to maintain reasonable standard of competence and diligence by:
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> a. failing to progress the appeal in a timely fashion;
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> b. allowing and/or causing Mr Bell to believe his appeal to the QIRC was progressing when it was not;
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> c. making statements to Mr Bell about aspects of his claim that were not true because they did not reflect the respondent's genuinely held opinion about Mr Bell's matter or may have had the propensity to mislead Mr Bell;
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> d. twice seeking adjournments from the QIRC on the basis of not being prepared to proceed to hearing, where one adjournment resulted in an order that Mr Bell pay costs of the WCR in the amount of $3,122.50 within 28 days;
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> e. failing to make payment of costs on behalf of Mr Bell to the WCR until approximately 18 months after they were due;
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> f. failing to serve the Notice of Non-Party Disclosure on UGL, for which one adjournment of the matter was sought to complete;
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> g. failing to advise Mr Bell that Eureka Legal had ceased trading;
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> h. failing to seek Mr Bell's consent prior to transferring his client file to Strutynski Law;
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> i. failing to lodge an updated Notice of Address of Service with the QIRC when Eureka Legal ceased trading and Mr Bell's matter was transferred to Strutynski Law;
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> j. failing to respond to a show cause notice issued by the QIRC as to why Mr Bell's appeal should not be struck out on the basis that no action had been taken in the proceeding for over 12 months;

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68 Hearing Book p 153-154.
69 Hearing Book p 438.
70 Hearing Book pp 509-512, 179-180.
71 Hearing Book pp 20-21.

k. preparing Mr Bell's application for instatement of his appeal which contained a statement as to the reasonable prospects of success of Mr Bell's claim that the respondent believed was untrue or unsupported by the available evidence and in circumstances where Mr Bell was reliant upon the respondent's advice in relation to the accuracy of the statement; and

l. witnessing Mr Bell's execution of his application for reinstatement of his appeal by taking his oath or affirmation, in circumstances where it contained a statement by Mr Bell as to the prospects of his claim that the respondent believed to be untrue.

1.131 In respect of the common law claim for damages, the respondent failed to maintain reasonable standard of competence and diligence by:

a. failing to progress Mr Bell's common law claim in a timely fashion and thereby requiring WorkCover to waive compliance with section 275 of the *Workers' Compensation and Rehabilitation Act 2003*;

b. allowing and/or causing Mr Bell to believe his common law claim was progressing;

c. making statements to Mr Bell about aspects of his claim that were not true because they did not reflect the respondent's genuinely held opinion about Mr Bell's matter or may have had the potential to mislead Mr Bell;

d. failing to attend a compulsory conference pursuant to section 289 of the *Workers' Compensation and Rehabilitation Act 2003* and

e. failing to reply to correspondence from Mr Fraccaro in a timely fashion including the organisation of a Compulsory Conference and providing information regarding the status of the QIRC appeal.

[42] The overall allegation made in Charge 1 is that the respondent failed to maintain reasonable standards of competency and diligence while acting for Mr Bell in respect of the two claims. However it is based on the allegations of misconduct which have been set out, and which will now be considered.

Charge 1: Failing to progress the appeal in the QIRC in a timely fashion

[43] The allegation in paragraph 1.130a of the discipline application is a general allegation. No specific matter is identified.

[44] It is apparent from the respondent's affidavit of 21 May 2019 that he admitted to delay in the conduct of the appeal. He repeated that admission in his letter to the applicant of 14 April 2021.[72]

[45] After the adjournment of the hearing of the appeal on 8 April 2016, the respondent took some instructions from Mrs Bell on one occasion, and received money on one occasion when he visited the Bells' home. However, these events did not advance the

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72 Hearing Book p 223.

appeal. Apart from these occasions, he took no action to progress the appeal while he remained with Eureka Legal; and then did not take action to have the matter transferred to Strutynski Law until mid-September 2017. There is no reason to think that nothing could have been done by the respondent to advance the appeal in the period following the adjournment. It would have been pointless to seek the adjournment if that were the case. What apparently needed to be done was to locate the respondents to the subpoenas and to serve them.[73] There is nothing to suggest that the respondent attempted to do this.

[46] The respondent's inactivity in relation to Mr Bell's matters continued after he moved to Strutynkski Law, and until 13 September 2017. He wrote to Mr Bell on that day, confirming that he held Mr Bell's file and was willing to prosecute the appeal in the QIRC.[74] The circumstances which led to the meeting on 13 September 2017 are not entirely clear from the material. After that meeting, the respondent, at least initially, appears to have acted promptly enough. He wrote to Mr Bell on 13 October, seeking instructions. He then appears to have taken appropriate steps to advance the appeal, up to February 2018, when Mr Bell signed the application to reinstate it. The respondent then did not take any action in relation to the appeal, until he filed the application in May of the following year. The subsequent progress of the appeal appears to reflect the directions order of 31 May 2019.[75]

[47] There are accordingly two concerning periods of little or no activity in relation to Mr Bell's matter, namely, from April 2016 to September 2017; and from February 2018 to May 2019.

[48] The respondent's affidavit sworn on 21 May 2019, in support of the application to reinstate the appeal, identified some matters said to provide some explanation for the delay.[76] They included:

(a) The respondent's eldest son became increasingly unwell in December 2015 culminating in a psychotic episode. He remained in hospital until about the end of 2015;

(b) In 2015 and 2016 the respondent's wife suffered a series of heart palpitations requiring emergency treatments, and ultimately surgery in October 2016;

(c) In February 2017 the respondent's mother was diagnosed with breast cancer. The respondent flew to Melbourne in May 2017 for several days to provide her with support; and

(d) Mr Strutynski's health failed shortly after the respondent took up employment with Strutynski Law. He left the practice in September 2017, and the respondent had to take over the conduct of his files.

[49] It may be accepted that at times, the events referred to by the respondent affected his capacity to deal with work matters, including to attend to the progress of Mr Bell's appeal. However, there was no significant delay in late 2015 and early 2016. The diagnosis of the condition of the respondent's mother occurred around the middle of a lengthy period of delay, and could not be regarded as explaining much of it. While Mr Strutynksi's circumstances (and the respondent's transition from Eureka Legal)

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73 See the respondent's letter of 13 September 2017, Hearing Book p 108.
74 Hearing Book p 108.
75 Hearing Book pp 415, 190.
76 Hearing Book pp 153-154.

may have provided some explanation for inactivity around the middle of 2017, the respondent appears to have taken reasonable action from about September of that year, in relation to Mr Bell's matter, until February 2018.

[50] In his letter to the applicant of 14 April 2021, the respondent stated that part of his "coping strategy was to compartmentalise problems files whilst attending to all other matters", an approach which he acknowledged to be erroneous.[77] In essence it is an admission of fault. It provides no satisfactory explanation for the delay.

[51] The respondent took no action to advance the appeal from February 2018 until May 2019. The explanation which he provided in his affidavit was that the application to reinstate it was not filed "(d)ue to an oversight",[78] elsewhere he said the matter had "fallen through the cracks".[79] The nature of the oversight is not explained in the material. It appears to reflect his approach of "compartmentalising problem files",[80] which on the material, should be understood as failing to attend to them. It provides no satisfactory explanation of the respondent's failure to act. This is particularly the case, in view of the communications he received from Ms Godfrey, Mr Fraccaro and Mrs Bell which drawn the matter to the respondent's attention, and made clear that he needed to take some action on the appeal.

[52] The ethical duties of a solicitor to a client are identified in the *Australian Solicitors Conduct Rules 2012* ("ASCR") as including a duty to deliver legal services competently, diligently and as promptly as reasonably possible.[81] While there may be some explanation for inactivity for relatively brief periods, the respondent's failure to advance the appeal between April 2016 and September 2017 and between February 2018 and May 2019 is a substantial failure to comply with this duty. His conduct should be regarded as a failure to maintain reasonable standards of competence and diligence.

Charge 1: The adjournments

[53] It is alleged that the respondent failed to maintain reasonable standards of competence and diligence by twice seeking adjournments of the appeal in the QIRC on the basis that he was not prepared to proceed to hearing.[82] It is specifically alleged that his failure included the failure to serve the Notice of Non-Party Disclosure on UGL, which resulted in the second adjournment.[83]

[54] The effect of paragraph 1.130d, so far as it relates to the adjournment in October 2015, is that the respondent failed to maintain a reasonable standard of competence and diligence by seeking an adjournment of the hearing on the basis that the respondent had not obtained medical evidence, which appears to be a reference to a report from Dr Sarkar.[84] It is necessary to consider the context in which the adjournment was sought.

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77 Hearing Book p 224.
78 Hearing Book p 158.
79 Hearing Book p 154.
80 Hearing Book p 224.
81 Rules 4.1.1 and 4.1.3.
82 Hearing Book p 20; Discipline Application para 1.130d.
83 Hearing Book p 20; Discipline Application para 1.130f.
84 Hearing Book p 417.

[55] On 31 July 2015, directions were made which included setting Mr Bell's appeal in the QIRC down for a hearing on 3, 4 and 5 November of that year.[85] In a file note of 20 August 2015, the respondent recognised that a report should be obtained from Dr Sarkar, a psychiatrist who was treating Mr Bell.[86] The respondent wrote to Dr Sarkar on 21 October 2015, requesting a report.[87] On 22 October 2015, an order was made vacating the hearing, at the respondent's request.[88] Dr Sarkar provided a report dated 5 February 2016, provided to the respondent on 16 February 2016.[89] Dr Sarkar saw the Mr Bell on 3 February 2016.[90]

[56] The facts thus far identified might suggest that the respondent did not act promptly in seeking a report from Dr Sarkar, notwithstanding that such a report was necessary for the appeal; and for that reason the appeal had to be adjourned. However, the respondent's file note of 20 August 2015 records that Mrs Bell then told him that Dr Sarkar was only working one day a fortnight, and was at that time overseas.[91] So far as Mrs Bell's affidavit deals with this matter, it is consistent with the respondent's file note.[92] There is no reason to think that the file note is not accurate. The fact that Dr Sarkar was away may well provide a good reason for not immediately attempting to arrange an appointment. The date of his return is not revealed by the material. It may be possible to imply from the respondent's letter of 21 October 2015 that the doctor had by then returned, but there is no reason to conclude that he returned much earlier. In any event, given his limited working hours, it would appear that an appointment with Dr Sarkar would not have been available for some months. The material does not establish that delay in seeking a report from Dr Sarkar, and hence the need to seek an adjournment, was the product of any lack of competence or diligence on the part of the respondent.

[57] Paragraph 1.130d of the Discipline Application alleges that the respondent failed to maintain a reasonable standard of competence and diligence in relation to Mr Bell's appeal to the QIRC because he sought an adjournment of the hearing scheduled to commence on 11 April 2016, as he was not prepared to proceed to that hearing. Paragraph 1.130f similarly alleges a failure to maintain a reasonable standard of competence and diligence by failing to serve the Notice of Non-Party Disclosure on UGL, for which the adjournment was sought.

[58] The Notice was filed on 24 February 2016. In one of his affidavits filed in the QIRC, the respondent stated that this hearing was adjourned so that certain witnesses could be compelled to appear at it.[93] In an email to the Legal Services Commission ("LSC") of 20 October 2021, the respondents said that the notice had to be served not only on UGL, but on a number of other parties described as affected parties, who were identified.[94]

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85 Hearing Book p 187; the document which is Exhibit CJS-20 is not the document identified in the affidavit: Hearing Book p 310. See also Hearing Book p 325.
86 Hearing Book p 318.
87 Hearing Book p 322.
88 Hearing Book pp 325, 417.
89 Hearing Book p 329.
90 Hearing Book p 49.
91 Hearing Book p 318.
92 Hearing Book p 28.
93 Hearing Book p 96.
94 Hearing Book p 273.

[59] In his email of 8 April 2016 to the QIRC, in which he requested the adjournment, the respondent gave the following explanation for the application for the adjournment:[95]

> I have been advised this morning by Mr Phillip Moore of counsel for the appellant that the matter simply cannot proceed in the absence of certain documents which are not available, without Mr Bell's case being severely compromised. Counsel's advice is that a hearing is likely to be neither just nor expeditious in the absence of these documents.
>
> These are the documents sought from the employer under the Notice of Non-Party Disclosure issued 26 February 2016. I have been unable to serve that document on the employer because of the combination of factors; primarily difficulties locating addresses for the affected parties who must be served prior to the employer. The appellant has been seeking most of this information since prior to the review decision being made.

[60] The statements by the respondent that it was necessary first to serve affected parties are consistent with the terms of the Notice, apparently reflective of the *Industrial Relations (Tribunal) Rules 2011* (Qld).[96]

[61] The respondent asserted in the email that he had not been able to find addresses for the affected parties. This explanation has not been challenged by the applicant. There is no reason to doubt it.

[62] The Tribunal is not satisfied that the applicant has established that the failure to serve the affected parties was due to a lack of diligence and competence on the part of the respondent. Nor has she established that the adjournment in April 2016 was the consequence of a failure by the respondent to maintain a reasonable standard of competence and diligence.

Charge 1: Transition to Strutynski Law

[63] The following allegations are relevant to this topic:

(a) failing to advise Mr Bell that Eureka Legal had ceased trading;[97]

(b) failing to seek Mr Bell's consent prior to transferring his client file to Strutynski Law;[98]

(c) failing to lodge an updated Notice of Address for Service with the QIRC when Eureka Legal ceased trading and Mr Bell's matter was transferred to Strutynski Law;[99] and

(d) failing to respond to a show cause notice issued by the QIRC relating to the striking out of the appeal.[100]

[64] It is convenient to repeat some of the chronology. On about 30 May 2017, Eureka Legal ceased to conduct legal practice. On 27 June 2017, the respondent met with Mrs Bell and received some instructions relevant to Mr Bell's claims.[101] On 13 September 2017, the respondent wrote to Mr Bell on behalf of Strutynski Law. The

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95 Hearing Book p 340.
96 Hearing Book pp 237-242.
97 Hearing Book p 20; Discipline Application para 1.130c.
98 Hearing Book p 20; Discipline Application para 1.130h.
99 Hearing Book p 20; Discipline Application para 1.130i.
100 Hearing Book p 20; Discipline Application para 1.130j.
101 Hearing Book p 348.

letter stated that the file had been received "from Eureka Legal on the transition of Mr Clark's business to this firm".[102] On 27 October 2017, Mr Bell signed a client services agreement by which he retained Strutynski Law to conduct his matters.[103]

[65] On 13 September 2017, the respondent met with Mr and Mrs Bell and Ms Wall at the office of Strutynski Law.[104] The date receives support from a file note of a WCR staff member recording a communication from Ms Wall. It is dated 14 September 2017, and records Ms Wall as referring to the meeting with the respondent as having occurred "last night".[105] That, and the absence in the respondent's letter of 13 September 2017 of any reference to a meeting having occurred, suggests that the letter was sent prior to the meeting.

[66] To understand the respondent's situation in relation to the allegations in the Discipline Application, it is necessary to identify the legal consequences of these events. At least until 30 May 2017, a written contractual retainer was in force between Mr Bell and Eureka Legal. There is nothing to suggest that the retainer came to an end when Eureka Legal ceased to conduct practice. A retainer is regarded as an entire contract, with some qualifications.[106] The retainer however may come to an end in certain limited circumstances.[107] These are identified in conduct rules, reflecting the general law.[108] The fact that Eureka Legal ceased to conduct legal practice does not appear to be something of itself which brought the retainer to an end. On the other hand, the retainer of Strutynski Law by Mr Bell around the end of October 2017 was inconsistent with the continuation of his retainer of Eureka Legal. That event terminated the retainer.

[67] While it was retained, Eureka Legal owed obligations to Mr Bell which were both contractual and professional. They are apparent from the following statement from Dal Pont (said to represent the general law):[109]

> Lawyers must use their best endeavours to complete any professional work competently and as soon as reasonably possible, and if it becomes apparent that this cannot be done within a reasonable time, to inform the client immediately.

[68] The ethical duties of a solicitor to a client are identified in the ASCR as including a duty to act in the best interests of a client in any matter in which the solicitor represents the client; and (as previously noted) a duty to deliver legal services competently, diligently and as promptly as reasonably possible, and if unable to do so in a reasonable time, to inform the client immediately.[110] Notwithstanding that Eureka Legal was an incorporated legal practice, the respondent, as its legal practitioner director, was required to comply with the professional obligations of an Australian legal practitioner.[111] The obligations applied as if the practice were a partnership of

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102 Hearing Book p 108.
103 Hearing Book pp 114-121, 50.
104 Hearing Book pp 28, 49, 419.
105 Hearing Book p 350.
106 See Dal Pont *Lawyers' Professional Responsibility* Digital Version ed 7e consulted on 4 June 2024 at paras [3.195]-[3.200].
107 See for example *Australian Solicitors Conduct Rules* 2012 at r 13.1.
108 Dal Pont at para [3.200].
109 Dal Pont at para [4.20].
110 Rules 4.1.1 and 4.1.3.
111 See s 120 of the LP Act.

legal practitioner directors, or where there is only one such director, as if that director were the sole practitioner conducting the practice.[112]

[69] While its retainer continued, Eureka Legal remained under a contractual obligation to conduct the appeal to the QIRC with competence and diligence. It was also subject to a professional obligation to that effect; and to act in the best interests of Mr Bell. At a practical level, in the period from May until the retainer was discharged, it was required to take steps to advance the appeal, and to receive, and deal with, communications directed to it relevant to the conduct of the appeal. The professional obligations also fell on the respondent personally as the legal practitioner director for Eureka Legal who had the conduct of Mr Bell's appeal. It was therefore the respondent's duty to receive and act on the Notice to Show Cause from the QIRC. He failed to do so, because he failed to monitor emails sent to Eureka Legal. Nor did the respondent check Eureka Legal's post office box address, to which the letter of 29 August 2017 from the QIRC was apparently sent.[113] These failures led to the failure of the respondent to respond to the Show Cause Notice, which in turn resulted in the appeal being struck out.

[70] One of the allegations under consideration is that the respondent failed to act with competence and diligence because he did not tell Mr Bell that Eureka Legal had ceased trading. The respondent told Mr Bell, apparently at some point prior to 30 May 2017, that he intended to rent office space from Strutynski Law.[114] That, however, did not amount to a communication that Eureka Law was ceasing to conduct legal practice. There is nothing to indicate that the respondent told Mrs Bell when he met her on 27 June 2017 that this had occurred. The first communication to that effect was the respondent's letter of 13 September 2017. It is highly likely that the respondent, as the legal practice director for Eureka Legal, knew well before the end of May that the Eureka Legal would cease its practice. At that time, an obligation fell on Eureka Legal, and the respondent, to inform Mr Bell that it was no longer able to act for him, so that he could make appropriate arrangements about the conduct of his matter.[115] The respondent failed to discharge this obligation.

[71] The respondent's letter of 13 September 2017 to Mr Bell stated that Strutynski Law (or perhaps, more accurately, the respondent representing that practice) had received Mr Bell's file from Eureka Legal. It seems that the file remained in the physical possession of the respondent throughout this period, and he treated it as being in the possession and control of Strutynski Law. He had no right to do so. Accordingly, the allegation that he failed to seek Mr Bell's consent prior to transferring the file to Strutynski Law is made out, so far as possession and control of the file are concerned. However, this seems to be a matter of little import. Whether the respondent treated the file as being in the possession of Eureka Legal or Strutynski Law, it seems likely that the respondent himself had the file in his possession and control.

[72] The respondent's letter of 13 September 2017 seems to be an offer to act on behalf of Mr Bell, rather than an assertion of an existing retainer with Strutynksi Law. That position is more clearly expressed in the respondent's letter of 9 October 2017. It cannot be said that the respondent "transferred the file" in the sense that he purported to establish a retainer between Strutynski Law and Mr Bell without the latter's consent. To the extent that the respondent transferred the file to Strutynski Law

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112 See s 120 of the LP Act.

113 Hearing Book p 419.

114 Hearing Book p 49.

115 Dal Pont at para [4.20].

without Mr Bell's consent, it has not been shown to involve a failure of the respondent to maintain a reasonable standard of competence and diligence.

[73] It is alleged that the respondent failed to lodge an updated Notice of Address of Service with the QIRC when Eureka Legal ceased trading, and Mr Bell's matter was transferred to Strutynski Law. It seems in part to be based on the fact that in August and September 2017, correspondence from the QIRC was sent to Eureka Legal. The facts on which this allegation are based are not specifically identified. When the respondent took the file with him to Strutynski Law, that practice was not authorised to act on behalf of Mr Bell. It was not possible to file an updated Notice of Address for Service at that time. The material is silent as to what happened in respect of an address for service after Strutynski Law was retained by Mr Bell towards the end of October 2017. This allegation is not established.

[74] The allegation that the respondent failed to respond to the show cause notice from the QIRC is not without complication. The respondent did not respond to the notice. It is apparent, however, that he was not aware of it. In other circumstances, that would excuse such a failure. However, the respondent's lack of knowledge of the notice is a consequence of his failure to advise Mr Bell promptly when Eureka Law ceased to conduct practice, so that Mr Bell could make arrangements about the conduct of the appeal to the QIRC; and his failure to monitor the email address and post office box for Eureka Legal until those arrangements were made. It is thus a consequence of his failure to maintain reasonable standards of competence and diligence.

[75] In summary, in relation to the respondent's transition to Strutynksi Law, it has been found that he failed to maintain reasonable standards of competence and diligence because he failed to inform Mr Bell that Eureka Law had ceased to conduct legal practice; and because he failed to respond to the show cause notice from the QIRC.

Charge 1: Late Payment of WCR's costs

[76] The allegation made in the discipline application is, in effect, that the respondent failed to maintain reasonable standards of competence and diligence by failing to make payment of costs on behalf of Mr Bell to the WCR until approximately 18 months after they were due.[116]

[77] To repeat some of the chronology, by order dated 8 April 2016 Mr Bell was required to pay to the WCR the sum of $3,122.50, being costs thrown away by reason of the adjournment of the hearing listed for 11 April 2016.[117] These costs were paid on 6 December 2017.[118]

[78] The applicant has not identified how it is alleged these events demonstrate a failure to maintain reasonable standards of competence and diligence. She has not identified the source of any obligation with which it is alleged that the respondent failed to comply in relation to the payment of these costs.

[79] Under the costs agreement, Eureka Legal was required to pay expenses and disbursements, with its right of recovery from Mr Bell conditional upon success in the

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116 Hearing Book p 20; Discipline Application para 1.130f.

117 Hearing Book p 346; though reasons were published subsequently: Hearing Book p 344.

118 Hearing Book p 385.

matter; but expenses and disbursements did not include costs of this kind.[119] The disclosure notice made it clear that such costs were payable by Mr Bell.[120]

[80] Mr Bell gave evidence that at some time between April 2016 and November 2017 he paid approximately $3,000 in cash to the respondent "to keep my court dates open".[121] For reasons expressed in relation to Charge 2, the Tribunal considers that this was a payment of $3,122.50, to meet the costs order. It may be accepted that from the time of the payment of that money to the respondent, he was under an obligation to pass it on to the WCR, to comply with the order.

[81] The evidence of Mr Bell in relation to when the payment was made is very vague. There is evidence from Mrs Bell, but it is similarly uncertain about when the money was paid to the respondent.[122] It is apparent from Mrs Bell's evidence that she had some prior notice of the terms of the order, as she took some steps to assemble the amount of money required. However, when she, and Mr Bell, were told of the terms of the order, and how long after that they were in a position to pay the money to the respondent, are quite unclear.

[82] Reference has previously been made to a file note made by an unidentified WCR staff member, of a conversation which the staff member had with Ms Wall.[123] The file note records the staff member informing Ms Wall that Mr Bell had been ordered to pay the regulator's costs thrown away by the adjournment in April 2016, and that that had not happened. Ms Wall responded that she knew that Mr Bell had withdrawn the cash and given it to the respondent. The file note is likely to be a reliable record of the conversation. The conversation provides good evidence that the payment to the respondent occurred prior to 14 September 2017, but it is by no means clear how much earlier it was made. It shows that the respondent remained in possession of the money for a period approaching three months, but possibly longer.

[83] In failing to make the payment more promptly the respondent was in breach of his duty to act with competence and diligence. However, in the period of established delay, the respondent sought instructions from Mr Bell for Strutynski Law to continue with the conduct of the matter; and then took some steps to advance it. The failure is unsatisfactory, but is not of any real significance in terms of its impact on the progress on Mr Bell's matter. It does not require further separate consideration.

Charge 1: Communications to Mr Bell about progress and prospects in relation to the QIRC proceedings

[84] The Discipline Application alleges that the respondent failed to maintain reasonable standards of competence and diligence by allowing and/or causing Mr Bell to believe that his appeal to the QIRC was progressing when it was not; and making statements to Mr Bell about aspects of his claim that were not true because they did not reflect the respondent's genuinely held opinion, or because they may have had the propensity to mislead Mr Bell.[124]

[85] The allegation that the respondent failed to maintain a reasonable standard of competence and diligence by allowing and/or causing Mr Bell to believe that his

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119 Hearing Book pp 65-66.
120 Hearing Book p 62.
121 Hearing Book p 49.
122 Hearing Book p 28.
123 Hearing Book pp 350 and 197.
124 Hearing Book p 20; Discipline Application paras 1.130b, 1.130c.

appeal was progressing follows a lengthy series of allegations which set out generally the history of the conduct of Mr Bell's matters. No specific facts relied upon for this allegation are, however, identified. The Tribunal considers that this is an unsatisfactory way to allege misconduct against a legal practitioner.

[86] In *R v Solicitors' Disciplinary Tribunal; Ex parte L (a solicitor)*[125], cited with approval by Clarke JA in *O'Reilly v Law Society of New South Wales,*[126] the Full Court of the Supreme Court of Victoria said, in an analogous context:

> It is sufficient to say that a solicitor presented before a full hearing of the Solicitors' Disciplinary Tribunal should be made clearly aware, before the hearing commences, of that with which he is charged, *and what material facts are alleged to constitute the charge or charges against him*. (emphasis added)

[87] Clarke JA, in *O'Reilly,*[127] also cited a passage from the judgment of Moffitt P in *Johns v Law Society of New South Wales*:[128]

> … a solicitor or barrister should be made aware of precisely what is put against him before a decision is come to or an order made adverse to him.

[88] These statements reflect the need to afford natural justice to a respondent in disciplinary proceedings. However, that is not the only consideration which underpins them. In agreeing with Clarke JA in *O'Reilly*, Kirby P said:[129]

> It is essential, both for the due protection of the interests of the solicitor *and for the proper approach by the decision-making tribunal to its task*, that charges of professional misconduct should be specified with particularity. Only then will the findings made give rise to decisions of appropriate certainty and particularity. (emphasis added)

[89] The principles adopted by their Honours are, in this Tribunal's opinion, accurately captured by the following paragraph from the headnote:[130]

> [14] An allegation of professional misconduct against a solicitor should be expressed with particularity:
>
> (a) to protect the solicitor, by alerting him to the case which he is obliged to meet.
>
> (b) to guide the decision-making tribunal as to the proper approach to its task; and
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> (c) to facilitate the making of clear findings as to the nature and quality of the solicitor's conduct.

[90] The applicant has not specified what conduct she relies upon for these allegations. It may well have been necessary, depending on the conduct alleged, for the applicant to have alleged why the respondent is said to have caused or allowed Mr Bell to hold the alleged belief; and it may also have been necessary to identify why that conduct demonstrated a failure to maintain a reasonable standard of competence and diligence.

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125 [1988] VR 757 at 770.
126 (1988) 24 NSW LR 204 ("*O'Reilly*") at 225.
127 *O'Reilly at 224.*
128 [1982] 2 NSWLR 1 at 6.
129 At 210.
130 *O'Reilly* at 206; the principles expressed by their Honours were adopted by McColl JA in *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [146], in a jurisdiction which her Honour regarded as an analogous to disciplinary proceedings; Hodgson and Ipp JJA agreeing.

However, none of these things is apparent from the applicant's pleaded case; or from her submissions.

[91] The Tribunal cannot be expected to pore through a welter of allegations, with a view to seeing whether one or an assembly of them can be considered to support the charge. It is for the applicant to identify her case and establish it.

[92] In the circumstances, the Tribunal is not prepared to make findings that the respondent failed to maintain a reasonable standard of competence and diligence by allowing and/or causing Mr Bell to believe that his matters were progressing.

[93] The allegation that the respondent made statements about aspects of Mr Bell's claim which were not true because they did not reflect the respondent's genuinely held opinion is not particularised. It may well be appropriate to reject this allegation on that basis. However, the applicant's submissions link this allegation to the respondent's letter to Mr Bell of 16 February 2016 and the respondent's response to the Commission of 14 April 2021.[131]

[94] In his letter of 16 February 2016 to Mr Bell, enclosing the report of Dr Sarkar, the respondent described the report as "tremendously useful for your application of the claim" for reasons which he set out.[132] The allegation of untruth appears to be based upon the respondent's response to the Commission of 14 April 2021, where he stated that Mr Bell's claim was "highly speculative with extremely limited prospects of success".[133]

[95] The statement in the respondent's response might well refer to the manner in which the claim appeared to him when Mr Bell first approached him. The statement is followed immediately by a statement that Mr Bell had been "turned down by other bigger players in a speculative injuries field".[134] It does not necessarily follow that he retained that view after receiving Dr Sarkar's report.

[96] In any event the respondent's view about the prospects of the claim may well have fluctuated. Notwithstanding the statement in the respondent's letter to the applicant of 14 April 2021, he may well have held the views expressed in the letter of 16 February 2016, at the time he wrote it. Moreover, the applicant has not demonstrated that the views expressed in that letter are inconsistent with a view that the claim was highly speculative, with limited prospects of success. It is not clear that it dealt with the only significant issues in the claim.

[97] The Tribunal is not satisfied, to the requisite standard[135] that the respondent's letter of 16 February 2016 contained untrue statements.

[98] The other statement made by the respondent to Mr Bell, and identified in the Discipline Application,[136] is contained in the letter from the respondent to Mr Bell of 13 September 2017.[137] In it, the respondent expressed a willingness to prosecute the appeal on the QIRC, with reference to the fact that it had previously been conducted by Eureka Legal. The respondent then stated that the illness Mr Bell had suffered was debilitating. He referred to its consequences for Mr Bell and to his circumstances,

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131 Hearing Book p 559.
132 Hearing Book p 10; Discipline Application para 1.33.
133 Hearing Book p 20; Discipline Application para 1.128.
134 Hearing Book p 20; Discipline Application para 1.128. See also Hearing Book p 223.
135 See s 656C of the LP Act.
136 Hearing Book p 12.
137 Hearing Book p 108.

followed by a statement that "the potential claim carries high value". The respondent then expressed a desire to "prosecute the appeal aggressively" on Mr Bell's behalf.

[99] In context, the statement as to the value of the potential claim may well be a reference to the quantum of the claim, if successful, rather than a view about prospects of success. The focus is on the effect of the illness on Mr Bell, its consequences in terms of loss of income, and his previous income. Again, bearing in mind the standard of proof, the Tribunal is not satisfied that the letter contains untrue statements.

[100] The applicant has not established that the respondent made statements to Mr Bell about his prospects of success, that did not reflect the respondent's genuinely held opinion.

[101] It is also alleged that the respondent failed to maintain a reasonable standard of competence and diligence by making statements that had the propensity to mislead Mr Bell. The applicant has not explained why any of the statements should be thought to have had that propensity. There is no reason to think that the letter regarding Dr Sarkar's report does not accurately state its significance. The respondent's letter to Mr Bell which refers to the value of the claim could have been more clearly expressed. However, the applicant does not explain why, for that reason, it should be regarded as demonstrating a lack of competence and diligence, such as to warrant a finding of some form of misconduct. The Tribunal is not prepared to make such a finding.

Charge 1: The application to reinstate the appeal

[102] On 14 February 2018, as previously mentioned, Mr Bell signed the application to reinstate his appeal to the QIRC.[138] The respondent was plainly responsible for the preparation of the document. He also witnessed Mr Bell's signature.[139] The application form contained a section calling for a statement of material facts relied on to support the application. That section included the following: [140]

> The Appellant has reasonable prospects of success in his appeal and seeks reinstatement of the appeal so that he may prosecute same to hearing.

[103] It is convenient to reproduce the allegations in the Discipline Application that the respondent failed to maintain a reasonable standard of competence and diligence by:[141]

> k. preparing Mr Bell's application for instatement of his appeal which contained a statement as to the reasonable prospects of success of Mr Bell's claim that the respondent believed was untrue or unsupported by the available evidence and in circumstances where Mr Bell was reliant upon the respondent's advice in relation to the accuracy of the statement; and
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> l. witnessing Mr Bell's execution of his application for reinstatement of his appeal by taking his oath or affirmation, in circumstances where it contained a statement by Mr Bell

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138 Hearing Book pp 50, 141-145.
139 Hearing Book pp 144-145.
140 Hearing Book p 144.
141 Hearing Book p 20; Discipline Application para 1.130.

> as to the prospects of his claim that the respondent believed to be untrue.

[104] Again, the Discipline Application suffers from the defect that it fails to identify the facts relied upon as demonstrating the respondent's belief.

[105] There is no direct evidence that Mr Bell relied upon the respondent's advice in relation to the accuracy of the statement that his claim had reasonable prospects of success. Nevertheless, the circumstances rather strongly suggest that to be the case, and the Tribunal is prepared to proceed on the basis that it is established.

[106] In addition to the difficulty which arises because the applicant has not identified the facts relied upon to demonstrate the alleged belief of the respondent, there is the difficulty that the applicant has not identified what she contends is the effect of the statement that Mr Bell had reasonable prospects of success in his appeal. It may well be that it should be understood in the context in which it was made, that is, in support of an application to reinstate the appeal; and in that context should be understood as a statement that the prospects of success on the application were sufficient to justify pursuing it. It is apparent that the respondent was prepared (at least for not insubstantial periods) to carry out legal work, and to have his legal practices meet the costs of disbursements, without recompense from Mr Bell, unless Mr Bell's claim was ultimately successful. This might be thought to provide some evidence that the respondent believed the appeal, and ultimately the claim, had sufficient prospects of success to warrant pursuing the appeal. In those circumstances, it cannot be concluded that the applicant has established that the respondent believed the statement that the appeal had reasonable prospects of success was untrue.

[107] It may well have been the intention of the applicant to rely upon the statement in the respondent's letter of 14 April 2021 that Mr Bell's claim was highly speculative with extremely limited prospects of success, as demonstrating a belief inconsistent with the statement that the appeal had reasonable prospects of success.[142] Again, a difficulty arises because the applicant has not demonstrated what was meant by the statement in the reinstatement application.

[108] The expression "reasonable prospects of success" has received judicial consideration. The meaning of the expression in the context of a statutory provision under which a lawyer might become personally liable for the costs of litigation was considered by Barrett J in *Degiorgio v Dunn (No 2)*:[143]

> [20] When that statutory language is examined, it is seen that, while s 198J(4) goes some way towards explaining "reasonable prospects of success", it does so in a way that does not attempt to explain or define "reasonable prospects". The meaning of that expression must be gathered by analogy, with such attention as is permissible paid to Parliamentary materials.
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> [21] In some contexts, "reasonable prospects of success" signifies no more than "arguable". I quote the following passage from the decision of the *Australian Industrial Relations Commission in Westend Pallets Pty Ltd v Lally* (1996) 69 IR 1 at p.12: "The requirement for an arguable case of either legal error or that the

142 Hearing Book p 223.

143 62 NSWLR 284.

discretion has been miscarried will mean that applicants must demonstrate that their case has a reasonable prospect of success".

[22] It may also be said that "reasonable prospects of success" connotes something less than likelihood of success – hence the formulation of Sheppard J, in *Ahern v Deputy Commissioner of Taxation* (1983) 78 FLR 202 at 213, "… will be likely to succeed *or at least* have reasonable prospects of success" [emphasis added]. That the test is not a particularly stringent one is suggested by an observation of Gleeson CJ, McHugh and Gummow JJ in *United Mexican States v Cabal* (2001) 209 CLR 165 at 174 [16]: "…A constitutional challenge to legislation is always a matter of public importance. If it has *even* reasonable prospects of success, special leave to appeal will be granted – almost as a matter of course" [emphasis added].

[23] I was referred by counsel to an article by N Beaumont, "What are 'reasonable prospects of success'?" (2004) 78 ALJR 812 in which it is suggested that a claim satisfies the statutory requirement "if it is not hopeless or entirely without merit". The "not hopeless" construction is put forward by reference to *Cadogan v McCarthy & Stone (Developments) Ltd* [2002] L&TR 249, an English decision about the phrase "reasonable prospect of being able to bring about this occupation". Saville LJ there said (at 253-254)

"The reason why it must be established that there is a reasonable prospect of obtaining permission is that otherwise the landlords could only be said to be contemplating, rather than genuinely intending, the desired course of action. A reasonable prospect in this context accordingly means a real chance, a prospect that is strong enough to be acted on by a reasonable landlord minded to go ahead with plans which require permission, as opposed to a prospect that should be treated as merely fanciful or as one that should sensibly be ignored by a reasonable landlord. A reasonable prospect does not entail that it is more likely than not that permission will be obtained."

[24] The learned author sees the "not fanciful" formulation of Saville LJ as supported by the decision of the High Court in *Bushell v Repatriation Commission* (1992) 175 CLR 408 which concerned the expression "reasonable hypothesis". Brennan J (at 428) approved the distinction drawn in *Repatriation Commission v Webb* (1987) 76 ALR 131 at 135 between "a theory that is rationally based" and one that is "irrational, absurd or ridiculous".

[25] The explanatory note accompanying the Civil Liability Bill 2002 provides nno guidance on the meaning of "reasonable prospects of success". The Premier's second reading speech (Parliamentary Debates, Legislative Assembly, 28 May 2002, at 2085) is of some assistance in that it refers to "unmeritorious claims" and "spurious defences". The adjective "unmeritorious" refers to something that is devoid of merit. Something is "spurious" if it is false or not genuine.

[26] I accept that this legislation imposes upon lawyers a standard that is more demanding than that applicable in cases where, by reference to general law principles, a costs order is sought against a party's

> lawyer. Cases of that kind turn upon the lawyer's duty to the court. Here, by contrast, the lawyer is subject to a statutory duty reflective of the interests of the community. A recent statement of the relevant general law approach may be found in the decision of the Queensland Court of Appeal in *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683. Davies JA there said (at 689 [24]), with the concurrence of the other members of the court and after reviewing earlier authorities:
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> "To the extent that those statements state or imply that it is not improper for a legal representative to present a case which he or she knows to be bound to fail, I would reject them. I would prefer to say that it is one thing to present a case which is barely arguable (but arguable nevertheless) but most likely to fail; it is quite another to present a case which is plainly unarguable and ought to be so to the lawyer who presents it. In my opinion, with respect, it is improper for counsel to present, even on instructions, a case which he or she regards as bound to fail because, if he or she so regards it, he or she must also regard it as unarguable."
>
> [27] In drawing a line at a somewhat higher point on the relevant scale of conduct, the *Legal Profession Act* should not, in my opinion, be presumed to intend that lawyers practising in New South Wales courts must boycott every claimant with a weak case. A statutory provision denying to the community legal services in a particular class of litigation cannot be intended to stifle genuine but problematic cases. Nor do I see the statutory provisions as intended to expose a lawyer to the prospect of personal liability for costs in every case in which a court, having heard all the evidence and argument, comes to a conclusion showing that his or her client's case was not as strong as may have appeared at the outset to be. The legislation is not meant to be an instrument of intimidation, so far as lawyers are concerned.
>
> [28] The several factors to which I have referred, including the references in the Premier's second reading speech and the apparent legislative purpose, cause me to adopt the construction of "without reasonable prospects of success" that equates its meaning with "so lacking in merit or substance as to be not fairly arguable". The concept is one that falls appreciably short of "likely to succeed".

[109] Barrett J's discussion of the meaning of the expression, including the range of meanings given to it, was adopted by McColl JA in *Lemoto v Able Technical Pty Ltd*.[144] His Honour's approach also attracted the attention of Edelman J in *Deputy Commissioner of Taxation v Shi*.[145] In particular, Edelman J appears to have adopted the statement by Barrett J that the expression "without reasonable prospects of success" means "so lacking in merit or substance as to be not fairly arguable"; as well as the statement that the concept, reasonable prospects of success, is one that falls appreciably short of "likely to succeed".

[110] It follows from the judgment of Barrett J that a claim may be described as having reasonable prospects of success if it is fairly arguable (a rather low threshold), even if

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144 (2005) 63 NSWLR 300 at [131]-[132].

145 (2021) 273 CLR 235, at [87].

it is less than likely to succeed. Indeed, the description may well be applied to a claim providing it is not hopeless, or entirely without merit. While his Honour's views were expressed in relation to a statute dealing with the power to order costs against a legal practitioner, they demonstrate the width of the expression; and not all of the authorities considered were limited to this context.

[111] The applicant has not attempted to demonstrate that the statement in the reinstatement application should be understood in some specific sense, or as adopting some particular threshold. The applicant has not articulated why it is said that the respondent did not believe the statement to be true. If the applicant intended to rely on the letter of 14 April 2021, and it were to be assumed that the letter expressed the respondent's view at the time when the application was signed, the letter demonstrates the respondent believed that the claim had some prospect of success, even if extremely limited. It certainly does not demonstrate that he believed the claim to be unarguable. There is, in addition, the difficulty that the letter refers to the respondent's belief as to prospects of success in the claim; which is not the same as the prospects of success in the appeal to the QIRC, referred to in the reinstatement application.

[112] The applicant has failed to demonstrate that the statement in the reinstatement application as to prospects of success in the appeal was inconsistent with the respondent's belief at that time.

[113] There is a separate allegation based on the fact that the respondent witnessed Mr Bell's execution of the reinstatement application. It fails, primarily on the ground that the applicant has failed to prove that the reinstatement application included a statement that the respondent did not believe to be true. Moreover, no explanation is given for alleging this as a separate instance of misconduct. The usual reason for having a signature witnessed is to provide evidence that the document was signed by the person whose signature appears on it.[146] Witnessing a signature does not involve any affirmation of the truth of the contents of the document.

[114] The applicant has not established any misconduct on the party of the respondent by reference to the execution of the reinstatement application.

Charge 1: Failing to progress the common law claim

[115] There is a general allegation that the respondent failed to maintain a reasonable standard of competence and diligence by failing to progress Mr Bell's common law claim in a timely fashion, resulting in the need for a waiver of compliance with s 275 of *Workers' Compensation and Rehabilitation Act 2003* (Qld) ("WCR Act"). There are also specific allegations about a failure to attend a compulsory conference pursuant to s 289 of the WCR Act; and a failure to reply to correspondence from Mr Fraccaro in a timely fashion.[147]

[116] The respondent took the view that Mr Bell could not succeed in his common law claim unless he was successful in the QIRC. It has not been suggested that he was wrong. It was common ground in the Supreme Court proceedings.[148] While there was substantial delay in the commencement of the common law claim, that may well have been a sensible course to follow until the proceedings in the QIRC were determined. This delay does not give rise to a separate instance of a failure by the respondent to

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146 See for example *Halsbury's Laws of Australia*, '140 Deeds and Other Instruments', [140-55].

147 Hearing Book p 22; Discipline Application para 1.131

148 Hearing Book pp 509-512, 179-180.

maintain a reasonable standard of competence and diligence. It is simply a consequence of his failure to advance the proceeding in the QIRC.

[117] The applicant has not provided submissions explaining why the waiver was necessary; and how this demonstrates some failure on the part of the respondent. It too appears to be a consequence of the respondent's failure to advance the proceedings in the QIRC in a timely fashion. Accordingly, the Tribunal makes no separate finding of a failure to maintain a reasonable standard of competence and diligence, by reference to the fact that a waiver became necessary under s 275 of the WCR Act.

[118] Reference has already been made to the events relating to the compulsory conference pursuant to s 289 of the WCR Act. The respondent gave an explanation for his inability to attend at the conference scheduled for 18 October 2018. The applicant has not identified any reason to conclude that the explanation was untrue; or that the fact that the respondent did not attend on this occasion demonstrates a failure in competence and diligence.

[119] The conference was rescheduled for 10.00am on 23 October 2018. The respondent advised that he was unavailable; and later advised that he was awaiting instructions, and accordingly did not attend the rescheduled conference at 4.00pm that day. On 1 November 2018, the respondent sent an offer in respect of the claim. Again, the applicant has not sought to demonstrate why this sequence of events shows some failure of competence or diligence on the part of the respondent. No separate finding will be made in respect of it.

[120] There is no apparent explanation for the respondent's failure to reply to correspondence from Mr Fraccaro on a number of occasions. The proper conduct of litigation on behalf of a client requires the maintenance of appropriate communications with the legal representative of another party. A persistent and unexplained failure to respond to appropriate communications from an opposing legal representative is a failure to conduct litigation with competence and diligence. The respondent's failure to respond to correspondence from Mr Fraccaro was such a failure.

Charge 1: Communications to Mr Bell about progress and prospects in the common law claim

[121] There is no material difference between the allegation in paragraph 1.131c of the Discipline Application relating to statements about aspects of Mr Bell's claim, and the allegation in paragraph 1.130c. The former is not made out, for the same reasons.

[122] The basis for the allegation in paragraph 1.131b that the respondent allowed or caused Mr Bell to believe his common law claim was progressing has not been identified by the applicant. It suffers from the same difficulties as the similar allegation in paragraph 1.130b. For similar reasons the Tribunal is not prepared to find that this allegation is established.

Charge 1: Overview

[123] The applicant has established that the respondent failed to maintain a reasonable standard of competence and diligence by reason of his lengthy failures to take steps to progress the proceedings in the QIRC in a timely fashion. She has also established a number of failures relating to the period when Eureka Legal ceased trading, and some delay in paying the costs ordered by the QIRC on 8 April 2016. Some of these failures played a significant part in the refusal of the application to reinstate the appeal,

and thus ultimately in the fact that Mr Bell did not get the chance to have his claim determined on its merits. The applicant has also established that the respondent failed to act with competence and diligence by not responding to correspondence from Mr Fraccaro.

[124] A number of other allegations have not been established.

Charge 2: Failure to deposit trust money into trust account

[125] This charge alleges that the respondent received trust money in cash from Mr Bell but failed to deposit this into the general trust account for the law practice.

[126] The respondent admitted receipt of the funds from Mr Bell. He said that the money was placed in the physical file. As has been discussed, it is not shown when this happened. The funds were paid to the WCR on 6 December 2017.[149]

[127] In his letter to the LSC of 13 October 2021, the respondent stated:[150]

> Transit monies are trust monies. I am aware that trust funds must be receipted and that trust monies must not be paid otherwise than by trust cheque, or, if approved, by EFT.

[128] He subsequently referred to the money from Mrs Bell as "the costs paid by Mr Bell".[151]

[129] To identify the respondent's obligations, and for another reason which will become apparent, it is necessary to identify the character of the money paid to the respondent.

[130] Mrs Bell gave evidence that at some time between April 2016 and November 2017, she gave the respondent $3,000 in cash because the respondent had said that "this amount of money was required to keep Edward's case moving".[152] Mr Bell gave evidence that in the same period, the respondent came to their home and Mr Bell paid him "approximately $3,000 in cash to keep my court dates open", the payment being made by Mrs Bell.[153] However, Ms Wall, when speaking to an identified WCR staff member was told that Mr Bell had been ordered to pay the WCR's costs of the adjournment in April 2016, and that the costs had not been paid. Ms Wall then said that she knew that Mr Bell withdrew the cash and gave it to the respondent.[154] It is clear from the diary note made by the WCR staff member that this statement was made with reference to the costs ordered to be paid to the WCR. The respondent's correspondence is also based on the proposition that the money received from Mrs Bell was the amount intended to meet the costs order. It appears to have in fact been used for this purpose.

[131] Moreover, there is no other satisfactory explanation for the payment of the money to the respondent. The law practice was acting on a conditional costs basis under which it was not entitled to claim fees prior to a successful outcome, and was not entitled to be reimbursed for outlays as defined. There is no suggestion of any other departure from these arrangements by the respondent. The explanations given by Mr and Mrs Bell relate to the payment to the advancement of the court case. The order made by the QIRC in April 2016 included an order that the appeal would not be relisted

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149 Hearing Book pp 383, 385.
150 Hearing Book p 235.
151 See Hearing Book p 235.
152 Hearing Book p 28.
153 Hearing Book p 49.
154 Hearing Book p 350.

until the costs ordered had been complied with.[155] In the circumstances, it is difficult to reach any conclusion other than that the money paid by Mrs Bell to the respondent was intended to meet the costs order.

[132] The respondent has referred to the funds he received from Mr Bell as "transit money", a term defined in s 237 of the LP Act as follows:

> ***transit money*** means money received by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice.

[133] The following provisions of the LP Act then become relevant:

> **253 Transit money**
>
> (1) Subject to section 255, a law practice that has received transit money must pay or deliver the money as required by the instructions relating to the money—
>
> (a) within the period, if any, stated in the instructions; or
>
> (b) subject to paragraph (a), as soon as practicable after it is received.
>
> Maximum penalty—50 penalty units.
>
> (2) The law practice must account for the money in the way prescribed under a regulation.
>
> Maximum penalty—50 penalty units.
>
> **255 Trust money received in the form of cash**
>
> (1) A law practice must deposit general trust money received in the form of cash in a general trust account of the practice.
>
> Maximum penalty—100 penalty units.
>
> (2) If the law practice has a written direction by an appropriate person to deal with general trust money received in the form of cash otherwise than by first depositing it in a general trust account of the practice—
>
> (a) the money must nevertheless be deposited in a general trust account of the practice under subsection (1); and
>
> (b) after it is deposited in the general trust account, the money is to be dealt with under the applicable terms of the direction so far as those terms are not inconsistent with paragraph (a).
>
> (3) Controlled money received in the form of cash must be deposited in a controlled money account under section 251.
>
> (4) A law practice must deposit transit money received in the form of cash in a general trust account of the practice before the money is otherwise dealt with under the instructions relating to the money.
>
> Maximum penalty—100 penalty units.
>
> (5) A law practice must deposit trust money that is received in the form of cash and is the subject of a power in a general trust account, or a controlled money

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155 Hearing Book p 346.

account in the case of controlled money, of the practice before the money is otherwise dealt with under the power.

Maximum penalty—100 penalty units.

(6) This section has effect despite anything to the contrary in any relevant direction, instruction or power.

(7) In this section—

appropriate person, in relation to trust money, means a person who is legally entitled to give the law practice concerned directions in relation to dealings with the money.

general trust money means trust money, other than—

(a) controlled money; and

(b) transit money; and

(c) money that is the subject of a power.

[134] Assuming the money was "transit money", the respondent was plainly required by s 255(4) to deposit it in the practice's trust account. As the respondent acknowledged, the obligation stated in s 255 remained in force.[156] He did not deposit the money into the trust account. The charge is established.

Charge 3

[135] This charge alleges that the respondent, without reasonable excuse, failed to comply with a written notice issued by the applicant under s 443(3) of the LP Act.

[136] Section 443 of the LP Act is as follows:

443 Powers for investigations

(1) The entity carrying out an investigation as mentioned in section 435 or 436 may, for the investigation—

(a) require an Australian legal practitioner who is the subject of the investigation—

(i) to give the entity, in writing or personally, within a stated reasonable time a full explanation of the matter being investigated; or

(ii) to appear before the entity at a stated reasonable time and place; or

(iii) to produce to the entity within a stated reasonable time any document in the practitioner's custody, possession or control that the practitioner is entitled at law to produce; or

(b) engage a person, whom the entity considers is qualified because the person has the necessary expertise or experience, to report on the reasonableness of an Australian legal practitioner's bill of costs.

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156 Hearing Book p 235.

(2) (Subject to subsection (6), the Australian legal practitioner must comply with a requirement under subsection (1)(a).

Maximum penalty—50 penalty units.

(3) If the practitioner fails to comply with the requirement, the entity may give the practitioner written notice that, if the failure continues for a further 14 days after the notice is given, the practitioner may be dealt with for professional misconduct.

(4) If notice under subsection (3) is given and the failure continues for the 14 day period—

(a) the Australian legal practitioner is taken to have committed professional misconduct, unless the practitioner has a reasonable excuse for not complying with the requirement within the period; and

(b) the commissioner may apply to the tribunal for an order in relation to the charge that the practitioner has committed professional misconduct as stated in paragraph (a) as if the application were an application in relation to a complaint against the practitioner.

(5) In a hearing before the tribunal about a charge of professional misconduct, a copy of the notice mentioned in subsection (3) and any enclosures with the notice are evidence of the matters in the notice and the enclosures.

(6) An Australian legal practitioner may refuse to give the entity an explanation of a matter being investigated if—

(a) the practitioner satisfies the entity that to give the explanation would contravene, or invalidate, a policy for professional indemnity insurance held by the practitioner; or

(b) the explanation would tend to incriminate the practitioner.

(7) A regulation may provide for how part 4.9 applies to an application to the tribunal for an order in relation to a charge that a legal practitioner has committed professional misconduct as stated in subsection (4)(a) and may be dealt with under that part as an application in relation to a complaint against the practitioner.

[137] There is a difficulty in the formulation of the charge. Section 443(2) establishes an obligation to comply with a notice given under s 443(1)(a). The effect of s 443(4) is that, if a further notice is given under s 443(3), and the practitioner continues to fail to comply without reasonable excuse, the practitioner is taken to have committed professional misconduct. Accordingly, the obligation which fell on the respondent was that found in s 443(2); and if the failure continued after a notice was given under s 443(3), without reasonable excuse, it was to be characterised as professional misconduct. That said, it is reasonably clear that the charge should be understood as alleging a failure to comply with a requirement made under s 443(1), which attracted such a characterisation.

[138] Between 23 February 2021 and 20 October 2021 there was correspondence between the applicant and the respondent, as a consequence of a complaint from Mr Bell. In the course of those communications, the respondent made some admissions, gave some explanations, and provided some materials relevant to the complaint.

[139] On 10 January 2022, the applicant gave notice to the respondent of her intention to conduct an investigation.[157] She identified information available to her, and the alleged conduct which was the subject of the investigation. She invited the respondent to make submissions. The respondent sought, and was granted, an extension of time. However, the respondent did not reply within the time allowed.

[140] The applicant (acting through the LSC) was the entity carrying out an investigation, for the purposes of s 443. On 10 February 2022, after the expiry of the extended period, the LSC wrote to the respondent.[158] The letter was identified as a notice pursuant to s 443(1)(a) of the LP Act. It stated that, pursuant to that section, the LSC now required the respondent to provide, in writing, a full explanation of the matters being investigated. The respondent was required to do this by 25 February 2022. The letter stated that a failure to comply had the consequence that the respondent might be dealt with for professional misconduct.

[141] On 7 March 2022, the LSC again wrote to the respondent.[159] The letter referred to the notice of 10 February 2022, and gave notice that the respondent might be dealt with for professional misconduct if he failed to comply with it by 22 March 2022, unless he had a reasonable excuse for not complying. The letter also stated the effect of s 443(4)(a) of the Act.

[142] The applicant has established that, in the letter of 25 February, notice was given to the respondent requiring him to give, within a reasonable time, a full explanation of the matter being investigated, in accordance with s 443(1)(a). The evidence of Ms Snell establishes that the respondent did not reply to the February letter.[160] Moreover, in his letter of 4 October 2022 to the LSC, the respondent acknowledged that he failed to respond to both notices within time.[161] He was therefore in breach of s 443(2). The charge, at least so far as it relates to a breach of an obligation, has been established. Characterisation of the respondent's conduct is the next topic to be discussed.

Characterisation of the respondent's conduct

[143] The applicant has submitted that the respondent's conduct, the subject of Charge 1, can be characterised as professional misconduct, by reference to some decisions of the Tribunal, and in light of the protracted nature of the conduct.

[144] Charge 1 is framed as a failure to maintain reasonable standards of competence and diligence. The following provisions of the LP Act are relevant.

> **418 Meaning of *unsatisfactory professional conduct***
>
> > ***Unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
>
> **419 Meaning of *professional misconduct***
>
> (1) ***Professional misconduct*** includes—

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157 Hearing Book p 514.
158 Hearing Book p 524.
159 Hearing Book p 526.
160 Hearing Book p 193.
161 Hearing Book p 529.

> (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.

[145] As the applicant's submissions noted, a finding of professional misconduct under s 419(1)(a) depends upon a finding of unsatisfactory professional conduct.

[146] With respect to Charge 1, it has been found that between April 2016 and September 2017, the respondent failed to take steps to advance Mr Bell's appeal to the QIRC (save for obtaining some instructions from Mrs Bell on 27 June 2017 and obtaining funds from Mr Bell). He again failed to take action to advance the appeal (which now required an application for reinstatement) from February 2018 until May 2019. It is clear that these failures, by the respondent, to take action amount to conduct 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. It is thus at least unsatisfactory professional conduct.

[147] A convenient starting point for further consideration of the respondent's conduct is the statement by Street CJ in *Re Moseley* "that mere neglect or delay in the prosecution of a client's business does not necessarily amount to misconduct of such a character as to be punishable by the Court in the exercise of its disciplinary jurisdiction, but it may do so, and each case must depend upon its own circumstances".[162] His Honour's statement is cited by Dal Pont for the proposition that gross neglect and delay can constitute professional misconduct, with the explanation that it "endangers client interests and brings the profession into disrepute".[163]

[148] In addition to the findings of general delay in these two periods, there have been specific findings of failures to act by the respondent, particularly about the time he moved from Eureka Legal to Strutynski Law. There has also been a finding based on the respondent's failure to reply to correspondence from Mr Fraccaro.

[149] It is appropriate to consider the respondent's conduct which is the subject of Charge 1 as a course of conduct over an extended period. As mentioned, there were two substantial periods of inactivity, a failure to take specific actions in relation to Mr Bell's appeal, and the failures to reply to Mr Fraccaro. It might be said that at some other times, the respondent acted with brisk competence.

[150] In the Tribunal's view, the delay in this case between April 2016 and September 2017 is concerning. However, the respondent's conduct is not to be assessed only by reference to that period of delay. His inattention to Mr Bell's case at about the time of the transition to Strutynski Law may perhaps have had some explanation by reference to the demands associated with moving to a new practice, and Mr Strutynski's retirement. That explanation is at best partial, and the respondent's failure to act is aggravated by the period of delay which preceded it. The most

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162 (1925) 25 SR (NSW) 174 at 178.

163 *Lawyers' Professional Responsibility* Digital Edition 7(e) at [25.85].

significant delay however is the delay which occurred from February 2018 until May 2019, in relation to the conduct of the appeal. The respondent's conduct should be judged, bearing in mind the previous period of delay; the fact that Mr Bell's appeal had been struck out and an application for reinstatement was required; and the communications from a number of people (Mrs Bell, Ms Godfrey and Mr Fraccaro) all of which should have drawn the respondent's attention to the need to take prompt action to reinstate the appeal. It is particularly odd that in this period, the respondent took some action in relation to the common law claim, but did not do anything to advance the appeal.

[151] Not a great deal of assistance is to be obtained from considering assessments made of a practitioner's conduct in other circumstances. In *Legal Services Commissioner v Mauritz*[164] Brown J found that a delay of two years in commencing proceedings constituted unsatisfactory professional conduct. The delay was unexplained. However, the client's claim was not prejudiced by this period of delay.

[152] In *Legal Services Commissioner v Smith*[165] delays on the part of the practitioner in relation to three different matters, for different periods including a period of two years were held to constitute unsatisfactory professional conduct. Substantial work was done to advance the cases of the clients in other periods.

[153] The other cases referred to by the applicant do little more than demonstrate that shorter periods of delay can result in a finding of professional misconduct; and the characterisation of a practitioner's misconduct will depend on the particular circumstances.

[154] Mention should be made of some of the specific failures to take action which are the subject of Charge 1, specifically those relating to the transition to Strutynksi Law. The respondent's failure to advise Mr Bell that Eureka Legal was no longer conducting a legal practice, and his failure to monitor mails and emails to that practice until some other arrangements were made, carried the risk of adverse consequences for Mr Bell's claim. Together, they are significant failures, particularly in the context of preceding delay.

[155] In the circumstances previously referred to, it is considered that the respondent's inactivity and failures constitute a substantial failure on the part of the respondent to keep a reasonable standard of competence and diligence; and a failure which, for lengthy periods, was consistent. Accordingly, the conduct the subject of Charge 1 should be regarded as professional misconduct.

[156] As to Charge 2, the respondent has admitted that he received cash from Mrs Bell, being the amount of the costs awarded to the regulator in April 2016; and that the cash was placed "in the back of the file". It is clear that it was not deposited to the law practice's trust account. It can be inferred that the cash was held in this fashion, until payment of the costs was made to the regulator to the WCR on 7 December 2017.

[157] A contravention of the LP Act is capable of constituting unsatisfactory provisional conduct or professional misconduct.[166]

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164 [2023] QCAT 325.
165 [2011] QCAT 126.
166 See s 420(1) of the LP Act.

[158] The applicant has contended that the conduct can be characterised as professional misconduct in light of the decision in *Legal Services Commissioner v Twohill*.[167] In *Twohill*, the solicitor had received a sum of $44,166.87 which he held on trust. The terms of the trust were identified as being that the solicitor would not disburse the money from the trust account, except in accordance with the joint written directions of the client and his wife, or an order of the Family Court. By inference this would suggest that the monies were held in the interests of both parties, who were involved in some litigation in that court. On six occasions in breach of the trust, the respondent transferred sums totalling $11,586.25 from the trust account to his general account. The judgment of the Legal Practice Tribunal proceeded on the basis that the client owed the amounts withdrawn from the trust account to the respondent for legal costs. The Tribunal applied a statement from *Adamson v Queensland Law Society Incorporated* to the effect that the test for determining that the conduct is professional misconduct is "whether it 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".[168] The Tribunal found Mr Twohill had engaged in professional misconduct. The matters which appear to have been of greatest significance was that the drawings were made both in breach of the trust and the *Legal Profession Act 2004* (Qld).[169]

[159] It is difficult to draw any assistance by way of analogy from the facts in *Twohill*. In that case, the breach of the specific trust appears to have been significant. Moreover, Mr Twohill took trust moneys to meet a liability to himself, when not entitled to do so.

[160] The applicant has not identified any other significant basis on which to conclude that the conduct the subject of Charge 2 should be characterised as professional misconduct.

[161] The respondent acknowledged (at least by inference) that the money should have been deposited in the trust account.[170] His only explanation was that it was unusual for him to collect funds from a client out of the office. That is in no way a satisfactory explanation for his failure.

[162] The question remains whether the conduct should be regarded as conduct which violates or falls short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competency. While the importance of compliance with the statutory provisions, particularly those relating to monies received by a legal practice, must be recognised, there are a number of features in the present case which should be noted. The conduct occurred on a single occasion. While the amount was not trivial, and it was no doubt important to Mr and Mrs Bell, it was not large. There has been no suggestion that the money was at risk while held in the respondent's office in cash. There has been no suggestion of dishonesty associated with the respondent's conduct. The money was ultimately applied for the purpose for which it was received. In those circumstances, the Tribunal is not convinced that the respondent's conduct, the subject of Charge 2, is a substantial departure from the relevant standard of conduct so as to warrant a finding of

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167 [2005] LPT 1.
168 [1990] 1 Qd R 498 at 507.
169 Ibid at 508.
170 Hearing Book p 235.

professional misconduct. The Tribunal concludes that the conduct the subject of Charge 2 is to be characterised as unsatisfactory professional conduct.

[163] It has been found, in respect of Charge 3, that the respondent breached his obligation to comply with the requirement in the letter of 10 February 2022. A further notice was given, advising that if the failure continued for a further 14 days, the respondent might be dealt with for professional misconduct, in accordance with s 443(3). The evidence of Ms Snell establishes that he failed to comply within the 14-day period.[171] The circumstances for the application of s 443(4)(a) have been established. Whether the respondent's conduct is to be characterised as professional misconduct depends upon whether he had a reasonable explanation for not complying with the requirement.

[164] In his letter of 4 October 2022, the respondent gave some explanation for his conduct He said that he failed to seek external assistance in responding to the correspondence from the LSC. He found the matters raised by the Commission to be deeply confronting. He thought that the LSC was concerned that he had failed to advise Mr Bell, misled Mr Bell, and had set Mr Bell up to make a dishonest misrepresentation under oath, which the respondent witnessed. This unsettled him and he did not respond immediately. However, he said that his advice to Mr Bell could have been better and that otherwise suggestions of misleading Mr Bell or involving him in a dishonest misrepresentation were untrue. He also said that a full response would have required a survey of applications to set aside the decision of the regulator in matters involving a psychiatric condition in the QIRC, which would have taken a substantial period of time. He pointed to the fact that there had been substantial cooperation with the LSC.

[165] The respondent's failure to seek external assistance in the period from about 10 February to 22 March 2022 can hardly be regarded as a reasonable explanation for his failure to comply with the requirement to provide a full explanation of the matters being investigated, particularly against the background of the applicant's letter of 10 January 2022. The same may be said of the fact that the respondent found the allegations confronting. It is difficult to think that an adequate response could not have been provided within the time allowed, notwithstanding the time required to survey relevant cases in the QIRC. The respondent was required to give an explanation of the matters being investigated. It seems likely that the explanation would be based on the respondent's experience and knowledge at the time of his conduct, the subject of his investigation. The matters which were raised by the respondent in October 2022 do not provide a reasonable excuse for the failure to comply with the requirement.

[166] It follows that the respondent's conduct which is the subject of Charge 3 should be characterised as professional misconduct.

Orders sought by applicant

[167] The applicant has submitted that an order should be made recommending that the respondent's name be removed from the roll. The submission relied both on the conduct the subject of the present charges, and on the respondent's lack of engagement in the disciplinary process, both prior to and after the filing of the Discipline Application.

[168] The discretion conferred on the Tribunal by s 456 of the LP Act is a broad one, not subject to any express constraint. It is well established that in deciding what orders

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171 Hearing Book p 193.

are to be made, "regard should primarily be had to the protection of the public and the maintenance of proper professional standards".[172] The achievement of these aims may also give rise to a consideration of the principles of general and personal deterrence.[173] The power to make orders is to be exercised for the purposes established by the authorities, primarily to protect the public, rather than to punish a practitioner. That protection may be achieved by an order intended to deter the practitioner from future misconduct, or to deter members of the profession generally from such conduct.[174]

[169] In *Prothonotary of the Supreme Court of New South Wales v P* Young CJ in Eq stated 10 propositions reflecting the approach of courts in cases involving personal misconduct by a practitioner, which amounts to the commission of a crime.[175] The statement of his Honour has been adopted in a number of cases in this jurisdiction, not limited to cases involving professional misconduct. Of his Honour's propositions, one in particular should be mentioned. It is that an order relating to the striking of a practitioner's name from the roll should only be made where the probability is that the solicitor is permanently unfit to practice.

[170] The extent of the respondent's failure to attend to Mr Bell's matters with competence and diligence demonstrates unfitness to practice. The conduct the subject of Charge 2 may be an aberration from the respondent's usual manner of conducting his practice, and therefore less concerning. The s 443(3) Notice clearly warned the respondent of the need to comply with its requirement, and of the consequences of the failure to do so. This was not enough to prompt action from the respondent. It shows a serious disregard for professional obligations.

[171] There might be thought to be some prospect that the respondent would in the future maintain better standards, from some of his correspondence to the LSC. The respondent has admitted fault in the conduct of Mr Bell's matter, and expressed regret.[176] He has also expressed regret for his failure to respond to the notices given under s 443.[177] He appears to have taken some steps to avoid a repetition of the conduct.[178] He was for a time affected by personal circumstances including adversities which have resolved,[179] and he believed that he was suffering from depression.[180]

[172] The adversities to which the respondent referred related to only a part of the extensive period of delay for which he was responsible.[181] While they may account for some delay, they cannot be regarded as an adequate explanation for the extensive periods of inactivity. The respondent's reference to depression relates to 2016 and 2017. There is no medical evidence to support it. In any event, it relates to only part of the total period of delay. If the respondent was (or is) suffering from some underlying psychiatric condition, there is no satisfactory evidence to show that it has been resolved, and will not re-emerge. There is no evidence that steps the respondent took in relation to his practice to avoid further failures on his part have been continued; or

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172 See *Legal Services Commissioner v Maddern (No 2)* [2009] 1 Qd R 149 at [122].
173 See *Attorney-General v Bax* [1999] 2 Qd R 9 at 22.
174 See *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor*; *Legal Services Commissioner v Shand* [2018] QCA 66 at [52], [54].
175 [2003] NSWCA 320 at [17].
176 Hearing Book pp 223-224, 235, 529-533.
177 Hearing Book p 529.
178 Hearing Book pp 224, 531-532.
179 Hearing Book p 530.
180 Hearing Book p 532.
181 Hearing Book p 153-154.

even that they were successful. These considerations are not sufficient to lead the Tribunal to depart from its finding that the respondent has demonstrated unfitness for practice, nor to reach any conclusion other than that the probability is that the respondent remains permanently unfit for practice.

[173] There is an additional consideration. The respondent has not actively engaged in these proceedings. He has not given sworn evidence of any explanation for any of his conduct. He has not given sworn evidence of ongoing measures taken to avoid a repetition of his past failures. The absence of such evidence supports the findings previously expressed.

[174] It is therefore appropriate to make an order recommending the removal of the respondent's name from the roll of practitioners.

Compensation

[175] Mr Bell, as complainant, gave notice of an intention to seek a compensation order, namely that the respondent repay to him "the amount paid for the legal services, being $3,000".

[176] Submissions were provided in support of the order sought. In those submissions, the money paid to the respondent was described as money "paid for legal services that were ultimately not provided".[182] The money was also described as money paid "to allow the appeal to progress". It was then submitted that the appeal did not progress, and was ultimately struck out; and reliance was placed on the fact that the application to reinstate it was unsuccessful. It was then said that Mr Bell had lost his opportunity to have his workers' compensation claim accepted. There was thus said to be a total failure of consideration for the payment.

[177] One of the orders which the Tribunal may make, when satisfied that a practitioner has engaged in unsatisfactory professional conduct or professional misconduct, is a compensation order.[183] Such an order is defined in s 464 as follows:

> **464 Meaning of compensation order**
>
> A ***compensation order*** is 1 or more of the following—
>
> (a) an order that a law practice can not recover or must repay the whole or a stated part of the amount that the law practice charged a complainant for stated legal services;
>
> (b) an order discharging a lien possessed by a law practice in relation to a stated document or class of documents;
>
> (c) an order that a law practice carry out stated work for a stated person without a fee or for a stated fee;
>
> (d) an order that a law practice pay to a complainant an amount by way of compensation for pecuniary loss suffered because of conduct that has been found to be—
>
> (i) unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner involved in the relevant practice; or

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182 Hearing Book p 539.

183 See s 456(4)(b).

(ii) misconduct of a law practice employee in relation to the relevant practice.

[178] Under s 456(1), where the Tribunal has made the necessary finding in relation to a practitioner's conduct, it may make "any order as it thinks fit", including those identified in the balance of s 456. One of those orders is a compensation order, defined as set out above. The terms of s 464 provide a strong indication that, notwithstanding the broad power conferred by s 456(1), compensation orders are limited to those identified in s 464. The approach taken on behalf of Mr Bell appears to recognise this. The money is described as money paid to the respondent for legal services; and the ground on which the order is sought is that the services were ultimately not provided.

[179] The Tribunal has previously expressed a view as to the character of the money paid on behalf of Mr Bell to the respondent. It was to discharge Mr Bell's obligation to pay costs to the WCR under the order of April 2016. It was not paid to the respondent as money which the practice charged for legal services. Mr Bell has not established an entitlement to compensation under a ground provided for in s 464. Accordingly, no order for compensation will be made.

Costs

[180] Both the applicant and Mr Bell have sought an order for costs. Under s 462(1) of the LP Act, where it has been found that a person has engaged in professional misconduct or unsatisfactory professional conduct, then the Tribunal must make an order requiring that person to pay costs, including the costs of the applicant and any complainant, unless the Tribunal is satisfied exceptional circumstances exist. There has been no suggestion of exceptional circumstances in the present case. It follows that an order for costs should be made.

Conclusion

[181] The following orders should be made:

1. The Tribunal recommends that the name of the respondent Peter Elliott Clark be removed from the local roll;

2. The respondent is to pay the costs of the applicant and the complainant Edward James Bell of and incidental to these proceedings, to be assessed on the standard basis as if these proceedings were conducted in the Supreme Court of Queensland.