QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Slipper* [2019] QCAT 146
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **ROBIN JOHN SLIPPER** (respondent)
APPLICATION NO/S:	OCR 110-14
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	10 June 2019
HEARING DATE:	22-23 August 2018
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons QC, Judicial Member Assisted by: Ms Megan Mahon Dr Margaret Steinberg AM
ORDERS:	**1. Within 7 days of the publication of these reasons to the parties, either party may give notice to the other party and the Tribunal of its intention to make further submissions about the orders to be made.** **2. If a party gives such notice, that party is to file and serve its submissions within 14 days of the publication of these reasons; and the other party may file and serve submissions in reply within 21 days of the publication of these reasons.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – where the respondent is charged with acting in 4 estate matters where there was a conflict between his personal interest and the interest of the estate and its sole or sole residual beneficiary – where the respondent is charged with acting in a matter where there was a conflict between his personal interest and the interest of his client – where the respondent is charged with charging excessive legal costs to 6 clients – where the respondent is charged with charging legal costs to which he was not entitled on 5 occasions – where the respondent

is charged with purporting to increase the costs to which he claimed to be entitled following a request for an itemised bill – where the respondent is charged with appropriating funds to which he was not entitled – where the respondent is charged with conduct falling short of the standard of competence and diligence a member of the public is entitled to expect of a legal practitioner or which is a substantial failure to reach or keep a reasonable standard of competence and diligence – whether the above charges made out – whether the respondent's conduct in respect of each charge is characterised as unsatisfactory professional conduct or professional misconduct

Allinson v General Council of Medical Education and Registration [1894] 1 QB 750
Auspine Ltd v Australian Newsprint Mills Ltd [1999] FCA 673
Bray v Ford [1896] AC 44
Brookfield & Anor v Davey Products Pty Ltd [1997] FCA 1462
Brown v Talbot & Olivier (1993) 9 WAR 70
Chick & Anor v Grosfeld (no 3) [2012] NSWSC 1536
Clark Boyce v Mouat [1994] 1 AC 428
Council of the Queensland Law Society v Roche [2003] QCA 469; [2004] 2 Qd R 574
D'Alessandro & D'Angelo (A Firm) v Bouloudas (1994) WASC 227; (1994) 10 WAR 191
D'Alessandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198
Dore (as executor of the will of W H B Chenhall dec'd) [2006] QCA 494
Equuscorp Pty Ltd v Wilmoth Field Warne (No 4) [2006] VSC 28
Harrison v Tew [1989] QB 307
In re Hollole [1945] VLR 295
In re Nickson [1916] VLR 274
In re Orwell's Trusts [1982] 1 WLR 1337
In re Weall, Andrews v Weall (1889) 42 Ch D 674
Law Society of ACT v Roche [2002] ACTSC 104; (2002) 171 FLR 138
Law Society of NSW v Foreman (1994) 34 NSWLR 408; [1994] NSWCA 69
Legal Profession Complaints Committee v O'Halloran [2011] WASAT 95
Legal Services Commissioner v Baker (No 2) [2006] 2 Qd R 249; [2006] QCA 145
Legal Services Commissioner v Bone [2013] QCAT 550
Legal Services Commissioner v Podmore [2006] LPT 5
Legal Services Commissioner v Urban [2013] QCAT 521
Maguire & Tansey v Makaronis (1997) 188 CLR 449; [1997] HCA 23

O'Brien & Anor v Smith & Anor [2012] QSC 166
Re Craig (1952) 52 SR (NSW) 265
Re Veron; Ex parte Law Society (NSW) [1966] 1 NSWR 511; (1966) 84 WN (Pt 1) (NSW) 136
Robinson v Pett [1734] EngR 54; (1734) 3 P Wms 24; 924 ER 1049, 1050
Saffron v Cowley & Anor; Estate of Saffron [2012] NSWSC 1108
Southern Law Society v Westbrook (1910) 10 CLR 609; [1910] HCA 31
Speight v Gaunt (1883) 22 Ch D 727; (1883) 9 App Cas 1
Stott v Milne (1884) 25 Ch D 710
Tobin v Ezekiel (2012) 83 NSWLR 757; [2012] NSWCA 285
Turner v Hancock (1882) 20 Ch D 303
Veghelyi v The Law Society of New South Wales [1995] NSWCA 483
Walsh v Tattersall (1996) 188 CLR 77; [1996] HCA 26
Wintle v Nye [1959] 1 WLR 284

Legal Profession Act 2007 (Qld), s 3, s 24, s 111, s 112, s 113, s 117, s 120, s 122, s 125, s 248, s 237, s 255, s 456, s 656C

Queensland Civil and Administrative Tribunal Act 2009, s 28, s 323

Trusts Act 1973 (Qld), s 5, s 19, s 101

APPEARANCES & REPRESENTATION:

Applicant:	G R Rice QC instructed by Legal Services Commission
Respondent:	B T Cohen, solicitor, of Bartley Cohen

REASONS FOR DECISION

[1] These proceedings were commenced by application filed on 19 May 2014, which set out 15 charges. The applicant filed an application on 8 October 2015, to amend the application by adding charges 16 to 18 (which will be referred to as the Saunderson charges). The matter has been conducted on the basis that the application was amended to include these three charges, as identified in that application. The respondent has filed a response in which he has admitted many of the facts alleged against him. He declined in his response to deal with the Saunderson charges, claiming privilege against self-incrimination.

[2] The Commissioner has alleged that Robin John Slipper, the respondent, is guilty of professional misconduct and/or unsatisfactory professional conduct ('conduct allegations') and has sought disciplinary orders pursuant to s 456 of the *Legal Profession Act* 2007 (Qld) ('LP Act').

Overview of charges

[3] The charges relate to eight client matters. Five of these were estate matters (Jacobs, Coughlan, Munt, Trill and Saunderson); two were family law matters (Tonge and Heginbotham); and one (Tully) was a matter in which the respondent held enduring powers of attorney (EPOAs). In relation to the Saunderson (charges 16 to 18), it is alleged that the respondent was incompetent in relation to the drafting and execution of a will; and that he subsequently transferred from an estate bank account the sum of $1,040,000, to his own bank account, when he had no entitlement to do so. In all of the other matters there are allegations relating to fees charged by the respondent's law practice; and in Tully and the estate matters other than Saunderson, there are allegations that the respondent was in a position of conflict of interest.

Some common matters in response

[4] The fees referred to in the discipline application include amounts sometimes described as "uplift fees", which will be referred to as the conditional agreement uplift; charges for postage, photocopying, telephone, facsimile etc (referred to in these reasons as the sundries uplift); and charges sometimes referred to as a charge for care and consideration, but, in the language of the costs agreement, referred to as the care and conduct uplift. The respondent has, in a number of cases, admitted that he was not entitled to charge the conditional agreement uplift; and that the amount of the sundries uplift, the care and conduct uplift, or the amount charged generally, was excessive.

[5] The respondent's response alleged that he has made the following repayments (for convenience, the amount billed is included):-

Matter	*Amount invoiced*	*Amount repaid*	*Repayment date*
Jacobs	$27,427.59	$16,464.73	2 June 2014
Coughlan	$26,405.73	$15,297.34	31 March 2015
Munt	$23,576.60	$14,855.87	31 March 2015
Trill	$5,950	$2,425.58	15 April 2015
Tully	$61,793.45	$35,926.14	31 March 2015
Tonge	(Not in evidence)	$2,498.25	13 September 2013
Heginbotham	$10,373.22	$2,468.62	13 November 2014

[6] In addition, the respondent alleged that he has in most cases paid interest on these amounts, and in one case (Jacobs) an amount for legal fees.

[7] The making of these repayments was the subject of evidence by way of hearsay in an affidavit of Rachel Su-Jing Liang. Neither Ms Liang, nor the respondent who was the source of the evidence, were cross-examined; nor has any submission been made about the failure to do so.

[8] On the evidence in Ms Liang's affidavit, the respondent transferred money into estate accounts, but the money was transferred to the relevant beneficiary somewhat later. The applicant accepted that the evidence demonstrated that the repayments were made, but submitted that, beyond the admissions made in the response, there was no acknowledgement of overcharging; nor was there evidence of remorse for or insight into the respondent's conduct. That submission should be accepted. As the applicant pointed out, the respondent has contested these proceedings. Many of the allegations have been contested unsuccessfully, and at times without any real basis for doing so. The respondent has given no evidence as to his reasons for making the repayments. It is a curious feature of the repayments that each is described as a repayment of an amount said to have been overcharged by the respondent. As will become apparent, between 6 and 21 July 2014, the Queensland Law Society carried out an investigation of the law practice's trust account. Two of the repayments were made before the investigation. The only conclusion that can be drawn is that the repayments were responsive to a complaint of some kind, and that they were generally made under the shadow of an investigation. It is possible that the repayments were also the result of the application (filed in its original form on 19 May 2014), but there is no evidence as to the date when it was served, or that the respondent had any earlier knowledge of its contents. The repayments do not provide any basis for taking a more favourable view of the respondent's conduct which is the subject of the charges than would otherwise be the case.

[9] The respondent has alleged that, for all of the allegations of overcharging, any excessive charging was the result of his flawed understanding of the legal practice's entitlement to render accounts including the excessive charges. There is no evidence of this, and the Tribunal finds that it is not made out. Given some of the instances of overcharging which have been established, there would be some difficulty in accepting evidence in support of the allegation.

[10] In each of the cases where a conflict is alleged, the respondent has denied that he allowed his personal interest to conflict with the relevant client interest. Comment was made in oral submissions on behalf of the respondent about the accuracy of the expression "conflict of interest", but no objection was taken to the use of this expression in the charges; and it is the language used in the *Legal Profession Act* 2007 (Qld) (*LP Act*),[1] and was the language used by de Jersey CJ in *Legal Services Commissioner v Podmore*.[2] It is apparent that, in the present case, it carries with it the notion that the respondent was under a duty to act in the interest of the client-beneficiary. It is unnecessary to consider this expression further.

The significance of the ILP

[11] The respondent was a sole practitioner from 1 July 2004, until 31 March 2008. From 1 April 2008, the practice was conducted by Slipper Lawyers, an incorporated legal practice (*ILP*). The respondent was its sole legal practitioner director.

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1 See for example s 122 of the LP Act.

2 [2006] LPT 5 at [83].

[12] A corporation is an ILP if it engages in legal practice in this State.[3] It may also provide other services and conduct other businesses.[4] An ILP is an exception to the general prohibition on persons who are not Australian legal practitioners engaging in legal practice in this State;[5] and it is not required to hold a practising certificate.[6] It is, however, required to have at least one legal practitioner director,[7] that is, a director who is an Australian legal practitioner holding a practising certificate entitling the practitioner to practise as a principal.[8] A legal practitioner director of an ILP is, for the purposes of the LP Act, responsible for the management of the legal services provided by the ILP; and must ensure that appropriate management systems are implemented and kept to enable the provision of legal services by the ILP under the professional obligations of Australian legal practitioners and other obligations imposed by the LP Act. If it ought to be reasonably apparent to a legal practitioner director that the provision of legal services by the practice will result in breaches of the professional obligations of an Australian legal practitioner or other obligations imposed under the Act, the director must take all reasonable action to ensure that the breaches do not happen.[9] Professional obligations are defined to include obligations in connection with conflicts of interest, duties to clients, and ethical rules.[10] An Australian legal practitioner who provides legal services for an ILP in the capacity of an officer (including a director[11]) is not excused from compliance with the professional obligations, or the obligations under any law, of an Australian legal practitioner;[12] and the professional obligations of an Australian legal practitioner apply as if (where there is only one legal practitioner director) the practice were a sole practitioner, and the employees of the practice were the employees of that director.[13] Further, for the application of any law or the legal profession rules relating to conflicts of interest to the conduct of an Australian legal practitioner who is a legal practitioner director of an ILP, the interests of the ILP are taken to be the interests of the practitioner.[14] Finally, legal profession rules which apply to an Australian legal practitioner, apply to a legal practitioner director of an ILP, unless the rules otherwise provide.[15]

[13] It is inconceivable that the references in the LP Act to conflicts of interest were intended to be read in a narrow, technical sense, as references to conflicts of interest with interest. They are plainly intended to include a conflict of interest and duty, and a conflict of duty and duty. The expression "conflicts of interest" is commonly used in this sense; and it would be inconsistent with the general tenor of the Act, and its purpose of providing for the regulation of legal practice for the protection of "consumers of the services of the legal profession"[16] to think otherwise.

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3 See s 111 of the LP Act.
4 See s 112 of the LP Act.
5 See s 24 of the LP Act.
6 See s 113(3) of the LP Act.
7 See s 117 of the LP Act.
8 See the definition in s 110 of the LP Act.
9 See s 117 of the LP Act.
10 See the definition in s 110 of the LP Act.
11 See the definition in s 110 of the LP Act, together with the definition in s 9 of the *Corporations Act* 2001 (Cth).
12 See s 120 of the LP Act.
13 See s 120 of the LP Act.
14 See s 122 of the LP Act.
15 See s 125 of the LP Act.
16 See s 3 of the LP Act.

[14] It is apparent from the overview of the provisions of the LP Act set out earlier, that the interposition of an ILP is not intended to affect the obligations relating to conflicts of interest and duties, and the other ethical obligations, to which a practitioner would otherwise be subject. The respondent remained subject to those duties, notwithstanding that the practice was conducted by an ILP. The case has been conducted on that basis.

Jacobs – the background

[15] The following facts are established by the Statement of Agreed Facts (*SOAF*). Adrian Jacobs died on 26 February 2012, without a will. He was divorced from Marlene Evans. Their son, Je, was then under 18 years of age, and lived with Ms Evans, his legal guardian. Je was the only person entitled to the estate of Mr Jacobs. On about 3 March 2012, Ms Evans approached the respondent about the estate. On 5 March 2012, the respondent entered into a costs agreement with Slipper Lawyers. On 6 June 2012, the respondent applied for letters of administration for the estate. The estate was finalised by November 2012, save that funds had to be held for Je until his 18th birthday in 2014. On 30 November 2012, the respondent, on behalf of Slipper Lawyers, rendered a bill "to the estate" for $27,427.59, including GST and disbursements. On 21 December 2012, the respondent authorised payment of the bill from funds held in trust for the estate.

[16] There can be no doubt that the respondent (most likely as agent for Slipper Lawyers) was approached by Ms Evans, in his capacity as a lawyer, to act in the interests of Je in relation to the administration of the estate, and that he agreed to do so. All of his subsequent conduct in relation to the estate stems from this. There has been no suggestion that his conduct when representing the estate, or as its administrator, is not properly the subject of the discipline application.

[17] The respondent commenced to act with a view to being appointed the administrator of the estate by no later than 5 March 2012. There is no suggestion that anyone other than the respondent had any involvement in the conduct of the matter during the period of administration.[17] For a consideration of the charges there is no relevant distinction between the position of the respondent and the position of Slipper Lawyers.[18]

[18] A perusal of the costs agreement reveals the following:-

(a) The work was described as, "Estate of the Late Adrian Jacobs";

(b) The practice would charge its time spent on the basis of six-minute units; with "each unit or part thereof" to be charged for at one-tenth of the applicable hourly rate;

(c) The respondent's hourly charge-out rate was $350 (plus sundries, outlays and GST);

(d) The hourly charge-out rate for the paralegal was $160 (plus sundries, outlays and GST);

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17 The tax invoice reflects the involvement of a paralegal for work which might be performed by a secretary.

18 See also s 122 of the LP Act.

(e) The practice reserved the right to charge an amount that it considered reasonable for the solicitor's care and conduct, being 15% of professional fees; matters relevant to such a charge included the complexity of the matter; the difficulty and novelty of any question raised; the importance of the matter; the skill, labour, specialised knowledge and responsibility of the solicitor; the number and importance of documents prepared or perused; and research and consideration of questions of law and fact.

(f) The agreement being a "proposed conditional costs agreement", the practice would charge a conditional agreement uplift of 25% on professional fees (excluding professional fees paid during the course of the matter, one warrant for the uplift fee being the "non-payment of upfront fees");

(g) A further 15% of professional fees would be charged for photocopying, telephone, facsimile, postage and other sundry expenses;

(h) Fees and costs referred to in the agreement were exclusive of GST;

(i) Fees were estimated at between $7,500 and $12,500, plus sundries, outlays and GST;

(j) The estimate did not include the conditional agreement uplift;[19]

(k) A number of specified factors might affect the accuracy of the fee estimate;[20]

(l) No fee was required in advance[21] (in a case where an advance was payable, the relevant clause stated that the conditional agreement uplift would be charged if the fees were not paid in advance);

(m) Accounts were payable within 7 days of issue, and would thereafter accrue interest;

(n) The client had been informed that he should seek independent advice in relation to the costs agreement;

(o) Accounts were to be on an interim basis or on finalisation of the matter, at the discretion of the practice;

(p) A Disclosure Notice pursuant to s 308 of the LP Act was attached to the costs agreement, receipt of which was acknowledged both by the respondent's signature on the notice and in the costs agreement.

Jacobs – Allegations and contentions

[19] Filed with the discipline application was a document entitled "DETAILS OF APPLICATION". For convenience it will be referred to as the application. It alleged that the respondent acted in this matter where there was a conflict between his personal interest, and the interest of the estate and its sole beneficiary. Its particulars included the following:

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19 See cll 5.8 and 5.11 of the costs agreement.
20 See cl 7.
21 See cl 9.2 and Item 7 of the Schedule.

1.13 The respondent allowed his personal interest in obtaining fees from the estate to conflict with the interests of the estate of which he was the administrator and trustee, and the interests of the sole beneficiary whom he owed fiduciary obligations (namely, the interests of the estate and Je in minimising costs to the estate and maximising the value of the estate for Je) by:

a. Giving advice to Marlene that there was "no way" that the court entertain her being the administrator of the estate, and that he should be appointed as administrator instead;

b. Entering into a costs agreement with the law practice of which he was the sole legal practitioner director;

c. Entering into a costs agreement which allowed charging at hourly rates in excess of the rates allowed under the Supreme Court scale, plus specified uplifts, and a lump sum for obtaining letters of administration, without either obtaining the informed consent of Marlene (as Je's guardian), or disclosing to her the likely total legal costs of the matter;

d. Consenting to the imposition of charges against the estate by the law practice without the informed consent of of [sic] Marlene (as Je's guardian); and

e. Rendering the bill of 30 November 2012; approving that bill for payment; and authorising payment of it from estate funds.

[20] Paragraph 1.13a was not relied upon. Paragraph 1.13b relates to the conduct of the respondent as in some way representing the estate. Paragraph 1.13c could refer to the conduct of the respondent acting in the same capacity, or as the solicitor with the conduct of the matter on behalf of the ILP. Paragraph 1.13d refers to the conduct of the respondent as either the administrator of the estate, or at least as its representative. Paragraph 1.13e includes acts of the respondent in both capacities. No point was taken about the form of these allegations.

[21] The application also contained the following allegations:

2.2 By the bill of 30 November 2012, the respondent, on behalf of the law practice, rendered costs to the estate.

2.3 The costs so rendered were excessive in all the circumstances.

2.4 The costs and outlays rendered to the estate were in the total amount (to the date of the bill) of $27,427.59 including GST.

2.5 The bill included the following charges:

a. A "lump sum" of $5,000 plus GST ($5,500 in total) for obtaining letters of administration;

b. An "uplift fee" of $3,917 plus GST ($4,308.70 in total);

c. A fee of $2,350.20 plus GST ($2,585.22 in total) for "postage, photocopying, telephone, facsimile, etc"; and

d. A fee of $2,350.20 plus GST ($2,585.22 in total) for "care and consideration".

2.6 The fair and reasonable value of the respondent's work in connection with the state to the date of the bill was approximately $10,962.86.

2.7 In the premises the costs rendered by the respondent, and authorised by him for payment, were excessive.

[22] In his response, the respondent denied that he allowed his personal interest to conflict with the interests of the estate or Je. He admitted that the practice was not entitled to charge the conditional agreement uplift; and that the amounts charged for the sundries uplift and the care and conduct uplift were excessive. He alleged that the fees otherwise rendered in accordance with the costs agreement were fair and reasonable, and not excessive.

[23] The applicant's written submissions contended that, in both his capacities, the respondent was under a duty to limit the extent to which the estate was exposed to diminution, and to avoid conflict with his own interests. The respondent was under a duty to disclose the proposed charges, either under s 308 or the general law. In making the excessive charges without disclosure to, or the informed consent of, "the beneficiary", the respondent had allowed his interests to conflict with those of the beneficiary. In context, this submission must be referring to disclosure to Ms Evans, as the legal guardian of the beneficiary, and the obtaining of her consent.

[24] Orally, Mr Rice QC, who represented the applicant, adopted by way of submission paragraphs 52 to 61 of the report of Mr Reardon, which include the following (reformulated and summarised):-

(a) As personal representative, the respondent owed a duty to Je to ensure that the estate was exposed to no more by way of charges and fees than may be necessary, proper and reasonable;

(b) A solicitor owes fiduciary obligations to the client; and the solicitor may not prefer his or her own interests to those of the client;

(c) A personal representative owes fiduciary obligations to the ultimate beneficiary of the estate; and the personal representative may not prefer his or her own interests to those of the beneficiary;

(d) A person who is a fiduciary must not enter into engagements in which the fiduciary has or can have a personal interest conflicting with the interests of the person to whom the fiduciary obligations are owed;

(e) A trustee's fiduciary duty of care is underlain by an obligation to avoid situations of conflict or where there is a real possibility of conflict between the interests of the trustee and those of the beneficiaries of the trust;

(f) A solicitor acting in an estate matter is under a duty to the beneficiary of the estate to conduct the work efficiently and with that degree of financial economy which is consistent with performing the work with competence and diligence;

(g) A solicitor acting in an estate matter must not allow the beneficiary's interest in having the work undertaken with reasonable economy to conflict with the solicitor's interest in increasing the firm's revenue;

(h) A personal representative who is a professional person may not directly charge to the estate professional fees for work done as personal representative; but the commission (fixed by the Court) may take into account the fact that a personal representative would be entitled to engage a professional person at the estate's expense;

(i) Where a trustee arranges to be remunerated in what would be a breach of fiduciary obligations to the beneficiaries, the arrangement may be carried out with the informed consent of the beneficiaries, if they are sui juris and capable of consenting; in the present case, Je's consent could be given through his guardian;

(j) For the respondent to discharge his fiduciary obligation to Je, he had to make disclosure in accordance with s 308 of the LP Act, and there is no evidence that this occurred.

[25] The written submissions for the applicant pointed out that there was no provision in the costs agreement for a lump sum fee. The estimate of fees ranged from $8,000 to $12,000. The applicant relied on Mr Reardon's report to submit that the care and conduct uplift was not properly chargeable; the work did not justify a conditional agreement uplift; the sundries charge was not a genuine estimate of likely costs; the costs agreement did not provide for a lump sum for obtaining letters of administration, and the amount charged was greatly in excess of the amount chargeable in accordance with the costs agreement; there were a variety of other objectionable and excessive charges; and there were serious concerns about the respondent's billing practices. Based on that evidence, it was submitted that the uplifts, in a bill with time charging, and the other matters dealt with by Mr Reardon, made the bill grossly excessive; and made the charging "of a disgraceful kind". Even if not all of the criticisms made by Mr Reardon were accepted, the Tribunal could be satisfied that there was rapacious overcharging by the respondent.

[26] The applicant's written submissions also referred to the facts and decisions in a number of cases relating to overcharging as a form of misconduct. They were *Re Veron*,[22] *Law Society of ACT v Roche*,[23] *Legal Services Commissioner v Urban*,[24] and *Council of the Queensland Law Society v Roche*.[25]

[27] In his oral submissions, Mr Rice submitted that Mr Reardon approached the question by considering what was a reasonable range of costs for the services provided, consistently with s 341 of the LP Act. He submitted that the disparity between what was charged and what would be reasonable informs the question whether there has been misconduct by the respondent. He referred to Mr Reardon's opinion that the matter was not complex, and that a reasonable fee would be in the range of $8,000 to $12,000.[26] He also referred to the passages in the report expressing an opinion that a care and conduct component was not appropriate in a case like the present one.[27] He referred to Mr Reardon's evidence that the conditional agreement uplift was in this

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22 [1966] 1 NSWR 511.
23 [2002] ACTSC 104; (2002) 171 FLR 138.
24 [2013] QCAT 521.
25 [2004] 2 Qd R 574; [2003] QCA 469.
26 Reardon paras 32-42.
27 Reardon paras 62-87.

case charged for a matter that was not speculative; and viewed as an interest charge, it was well in excess of what is permitted by the LP Act.[28] He referred to Mr Reardon's evidence about the sundries uplift.[29] He also referred to Mr Reardon's evidence that the costs agreement did not allow for a lump sum charge for obtaining letters of administration, though a sum of $5,000 was charged in the tax invoice.[30] With uplifts, the amount charged was in fact $7,000. Based on the practice's time records for work done in relation to obtaining the grant (only one item of which was charged for separately in the tax invoice), and using the respondent's hourly rate, the fee should have been $1,031 (plus a disbursement of $99.18, not charged for as such).[31] He referred to Mr Reardon's evidence that amounts had been charged for research, file review, and administrative tasks, for which professional fees could not properly be charged. There was one instance of twice billing for the same work. Mr Reardon also regarded a number of other charges as excessive.[32] Mr Rice stressed the relative simplicity of obtaining letters of administration or a grant of probate in the matters the subject of the charges. He submitted that on any view the amount charged was more than double what it ought to have been.

[28] The respondent's written submissions contended, with respect to paragraph 1.13b of the application, that there is no conflict of interest or breach of fiduciary duty in the respondent entering into the costs agreement with the legal practice of which he was the sole legal practitioner director. Similar conduct has occurred for many years. There is no authority to the contrary.[33] The submissions contended, with respect to paragraph 1.13c of the application, that there was no breach of any ethical obligation in entering into a costs agreement with rates above the Supreme Court scale; that there is no legal or ethical principle which limits a solicitor in circumstances like these to entering into a costs agreement which charges fees according to the scale; that there was no direct evidence that informed consent was not obtained, or that disclosure was not made; and that a failure to make a costs disclosure under s 308 of the LP Act was not a breach of fiduciary duty. With respect to paragraph 1.13d it was contended that this depended on the absence of informed consent, which was not proven; and that there was no authority for the proposition that the respondent required the informed consent of Ms Evans to the fees charged by the practice, nor for the proposition that a failure to provide a copy of the costs agreement to Ms Evans was a breach of fiduciary duty. With respect to paragraph 1.13e it was contended that this could only be made out if the other allegations in paragraph 1.13 were established.

[29] In his oral submissions, Mr Cohen referred to *LSC v Bone*[34] where the practitioner had purported to enter into a costs agreement with himself, which was thus of no effect,[35] but the Tribunal observed that this course was recommended in a text on

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28 Reardon paras 88-95.
29 Reardon paras 96-99.
30 Reardon paras 133-135.
31 Reardon para 138.
32 See Reardon paras 100-131.
33 See Transcript 22 August 2018 (*T 1*) pp 68-69.
34 [2013] QCAT 550 at [69]-[70].
35 The difficulty identified in that case, where the practitioner purported to enter into a costs agreement with himself, does not arise in this case, Slipper Lawyers being an incorporated practice. The question is also discussed by James Edelmann (prior to any of his Honour's appointments) in a paper, *Understanding the "Self-dealing Rule" in Equity* given on 15 May 2013, and published on the website of the Supreme Court of Western Australia.

administration practice in Queensland. He also pointed out that in this case the agreement was between the respondent and the ILP. He submitted that there can be no conflict of interest arising from the fact that the respondent had entered into a costs agreement with Slipper Lawyers.

[30] Mr Cohen took exception to a submission that the lump sum, the conditional agreement uplift, the sundries uplift, and the care and conduct uplift were not authorised, on the basis that this was not alleged in the discipline application. He submitted that the fact a practitioner charged amounts which were not authorised did not make the bill excessive. He submitted, by reference to the judgment of Mahoney JA in *Veghelyi v The Law Society of New South Wales*[36] that misconduct is only established where the charges are so far beyond what is reasonable as to be grossly disproportionate. This should be proven by a comparison between particular items of work done, and the charges made for it. The fact that charges were made in accordance with a costs agreement is a significant factor in determining whether there has been gross overcharging, even if the costs agreement permitted high charges to be made. Mr Reardon's approach was said to be totally misconceived. Mr Reardon approached the matter by considering what charges would be allowed on an indemnity costs assessment. None of the bases for his assessment (documents and time records) were in evidence. Mr Cohen objected to paragraphs 22 to 27 of the report as unproven, except to the extent they appear in the SOAF. The inclusion of matters of law in Mr Reardon's report meant that it was of no value. Mr Reardon's identification in paragraph 28 of matters he considered in determining whether the charges were reasonable was erroneous. Mr Reardon was wrong to say that a key factor in determining whether a fee is reasonable "is informed by the extent to which the law firm has, or has not" complied with its disclosure obligation under s 308 of the LP Act. Mr Cohen's objections to Mr Reardon's report were to be (and were) detailed in a schedule (the schedule was dated 4 September 2018, and included Mr Rice's responses). Mr Cohen submitted that the blank form of invoice which appears at p 13 of the costs agreement bundle, along with clause 10 of the costs agreement, authorised the charge of a lump sum. He also referred to s 330 of the LP Act. Notwithstanding its appearance, the charge for obtaining letters of administration was not charged as a fixed fee. He referred to an objection that Mr Reardon had not qualified himself as an experienced expert in this State.

[31] In his oral reply Mr Rice again referred to the discussion of authorities in Mr Reardon's report;[37] and to a passage from the judgment of Higgins J in *Southern Law Society v Westbrook*[38] to the effect that a solicitor who drew a will under which he took benefits, and who acted for other beneficiaries under the will who supported its validity in a probate action, and who was also the solicitor for the executors, had a duty to communicate to the beneficiaries all material facts by which they might direct their actions. He also submitted, with respect to paragraph 1.13b of the application, that the mere fact that a solicitor acting as an executor enters into a costs agreement with an incorporated legal practice of which he is the sole director, does not give rise to a conflict of interest. The conflict arose because the agreement contained provisions for unusual and excessive charges, without informing the beneficiary; and

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36 [1995] NSWCA 483.
37 At paragraphs 52-60.
38 (1910) 10 CLR 609, 627.

because he also proceeded to make and pay those charges without informing the beneficiary.

Jacobs – Legal context

[32] To give proper consideration to the allegations in the discipline application and the submissions of the parties, it is necessary to identify the relationships and duties which resulted from the facts set out earlier in these reasons.

[33] It seems highly likely that, by accepting her instructions, a contractual relationship was created between the respondent, on behalf of the ILP, and Ms Evans; and that the ILP then also became subject to obligations in tort towards her. The ILP may then have also become subject to contractual and tortious obligations owed to Je. For the purpose of the discipline application, it is not necessary to discuss these matters further.

[34] It is, however, clear, that the ILP undertook to act in the interests of the estate generally, and in particular in Je's interest; and as the sole legal practitioner director, and the legal practitioner with the conduct of the matter, the respondent also undertook to do so. The respondent thereby became subject to fiduciary duties owed to Je, and in particular became subject to obligations relating to conflicts of interest, among which were the obligation to avoid a conflict between his duty to act in the interests of Je, and his own interests, including the interests of the ILP.

[35] It is an agreed fact between the parties that on 5 March 2012, the respondent entered into a costs agreement with Slipper Lawyers. He signed the costs agreement, as or on behalf of the "client". The client is not otherwise identified. It is extremely unlikely that he entered into the agreement as client, purely on his own account, on the basis that he personally would bear the ultimate liability for the costs. There would have been no real point in the costs agreement; and it is inconsistent with his later conduct in having the tax invoice paid with estate funds. It is likely that he entered into the agreement as the person expecting to be appointed as administrator of the estate. He was thus personally liable on the agreement, but no doubt intended to rely on an administrator's right of indemnity for expenses incurred in the administration of the estate, which could be expected to extend to the costs of obtaining letters of administration. It has not been suggested that he entered into the agreement in any other capacity (for example as the agent for Ms Evans), and that would be inconsistent with his causing the fees to be paid with the funds of the estate.

[36] If the respondent was purporting to act on behalf of the estate when he entered into the costs agreement, or at least entered into the costs agreement with the intention that he would ultimately cause the estate to pay the costs, there is no reason to think that his duties were less than those of a duly appointed personal representative. It has been said that the obligations of personal representatives are "quite as compelling as trustees' obligations. There is property and there are persons entitled to it, namely the creditors of the deceased and those entitled to benefit under the will or the intestacy".[39] The respondent owed a duty to the estate, and ultimately to Je, to act in their interests. He was, accordingly, subject to fiduciary obligations when acting as the administrator of the estate, and, in the Tribunal's view, when entering into the costs agreement, with

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39 *Lee's Manual* at [9.20].

the intention that as administrator he would apply assets of the estate to meet the obligations which resulted from it.

[37] The courts have traditionally been tender about the circumstances in which a fiduciary might receive remuneration for acting in that capacity, or might otherwise profit from it. A useful starting point is the statement of Lord Talbot LC in *Robinson v Pett*.[40] It was said in a passage from *Re Craig*,[41] relied upon in Mr Reardon's report, to be the primary rule. His Lordship said:

> It is an established rule that a trustee, executor or administrator, shall have no allowance for his care and trouble: the reason of which seems to be, for that on these pretences if allowed, the trust estate might be loaded, and rendered of little value.

[38] In *Bray v Ford*,[42] Lord Herschell said:

> It is an inflexible rule of a court of equity that a person in a fiduciary position…is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict…It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.

[39] In *In re Orwell's Trusts*,[43] Vinelott J made the following statements:-

> It is trite law that an executor or trustee is in general entitled to no allowance for his care and trouble. The rule applies to fees charged by a professional man for work done in his professional capacity.
>
> The general rule which precludes a trustee from charging for his services extends to any firm of which he is a partner.

[40] With reference to what was said in *Robinson v Pett*,[44] the authors of Ford & Lee state:[45]

> This rule is conceived as part of a rule that a trustee may not allow a conflict of interest and duty…Under this rule a solicitor appointed as executor and trustee cannot charge for his work undertaken whether contentious or uncontentious, or employ and pay his own firm to act; although he or she may employ a partner to act but cannot participate in profits: *Clark v Carlon* (1861) 30 LJ Ch 639; *Re Doody* [1893] 1 Ch 129.

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40 [1734] EngR 54; 24 ER 1049, 1050; (1734) 3 P Wms 249, 251; cited in Ford & Lee, *The Law of Trusts* loose-leaf service Thomson Reuters [13.610]. The authors cite *Wickham v King* (1879) 1 QLJ 13, 14-15, as being to similar effect.

41 (1952) 52 SR (NSW) 265, 267-268; the passage itself was included in a citation from *Saffron v Cowley & Anor; Estate of Saffron* [2012] NSWSC 1108.

42 [1896] AC 44, 51,

43 [1982] 1 WLR 1337, 1340, 1341; cited in Ford & Lee *Principles of the Law of Trusts* (loose-leaf, Thomson Lawbook) [13.610].

44 [1734] Eng R 54; 24 ER 1049, 1050; (1734) 3 P Wms 249.

45 Ford & Lee, *The Law of* Trusts, loose-leaf service Thomson Reuters at [13-610].

[41] In the present circumstances it is also relevant to consider the personal representative's right to be indemnified, out of the estate, for the engagement of an agent in relation to its administration. The question was considered by Kekewich J in *In re Weall*.[46] The headnote records that trustees under a will employed a solicitor to collect the rents, and allowed him to deduct from the rents certain costs. The tenant for life brought an action against the trustees, alleging that some of the costs were chargeable against *corpus* and not against income, and that other of the costs had been unnecessarily incurred. With regard to the right to engage agents, and to be indemnified for their remuneration, his Lordship said:[47]

> Consider for a moment the position of that special agent called a trustee as regards the employment of sub-agents. He certainly has the right to appoint them, if and so far as the work of the trust reasonably requires; for instance, he may appoint a broker to make or realize investments, or a solicitor to do legal business, and the power of employment involves that of remuneration at the cost of the trust estate. The limit of the power of employment is, as is pointed out in the well-known case of *Speight v Gaunt*,[48] reasonableness, and whether there happens to be a standard to which appeal can be made by taxation or otherwise or not, reasonableness must also, I think, be the limit of the power of remuneration. A trustee is bound to exercise discretion in his choice of agents…It does not, however, follow that he can intrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the Court would be disposed to support any conclusion at which he arrives, however erroneous, provided it really is his conclusion – that is, the outcome of such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence guided by such rules and arguments as generally guide such a man in his own affairs. If trustees fail to exercise their discretion, or purporting to exercise it do so in such a manner that the Court is bound to infer that they have not done so honestly, their costs or any proceedings challenging their accounts are taken out of the rules laid down in *Turner v Hancock*[49] and *Stott v Milne*;[50] and the Court is at liberty, and under certain circumstances may be bound, for the protection of *cestuis que trust*, to disallow the trustees' costs, or even make them pay those of others.

[42] After noting that trustees deserve and receive the utmost consideration at the hands of the Court, his Lordship continued:[51]

> But *cestuis que trust* also have their rights, their claim to consideration. The trust property is theirs, managed for their benefit, and on the trial of a question between them and their trustees, by whom costs are to be borne, they may fairly require something more to be proved than absence of dishonesty. They must not complain of mistakes or errors in judgment, but reasonable prudence is not

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46 *In re Weall, Andrews v Weall* (1889) 42 Ch D 674. The case is referred to in *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Learmonth, Ford, Clark & Martin, Thomson Reuters 2018) as showing circumstances in which executors might be deprived of their costs.

47 At p 677.

48 (1883) 22 Ch D 727; (1883) 9 App Cas 1.

49 (1882) 20 Ch D 303.

50 (1884) 25 Ch D 710.

51 (1889) 42 Ch D 674 at p 678.

> too much for them to require, and by reasonable prudence I mean that which is defined in the judgment in the case of *Speight v Gaunt*[52] already mentioned.

[43] His Lordship concluded that less than 50% of the costs charged were properly chargeable; and that the rest "has been improperly paid to or allowed to be retained by the solicitor".[53] There is no reason to think that the principles stated by his Honour would not be applicable to an administrator under the general law. The position is stated in one Australian text[54] in the following terms:-

> As a personal representative, for the purposes of administering a deceased estate, represents the estate, he or she is personally liable for the debts and liabilities of the estate. Like a trustee, however, due to acting in a representative (and fiduciary) capacity, the personal representative is entitled to an indemnity from the estate for debts and liabilities properly incurred in its management. That personal representatives hold full title to the assets of the estate, whereas trustees hold only legal title, makes no difference to the scope of the right to indemnity. Accordingly the case law setting those parameters for trustees is equally relevant to personal representatives. Hence the reference in both the trustee and executorial context to the right of indemnity being premised on the expense having been properly or reasonably incurred.

[44] For completeness it might be noted that in *Speight v Gaunt*[55] Lord Blackburn said:

> The authorities cited by the late Master of the Rolls, I think shew that as a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own.

[45] A similar conclusion was reached by Roper J in *Re Craig*,[56] who said:

> It is the duty of an executor and of a trustee to render accounts when properly called upon and to be constantly ready so to do. He is not bound, and indeed is not necessarily entitled, as against the estate to employ and pay an accountant to prepare them. Whether he is so entitled depends on the nature of the accounts, and whether, acting with prudence, he would employ the accountant if the affairs of the estate were his own affairs. (citation of authorities omitted)

[46] The caution with which the courts have permitted a personal representative to be indemnified for the cost of engaging professional assistance under the general law is also apparent from the following passage from the judgment of White J in *Chick & Anor v Grosfeld (no 3)*:-[57]

> Unless a will otherwise provides, an executor is not entitled to remuneration for carrying out executorial functions, except to the extent the Court allows the

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52 (1883) 22 Ch D 727; (1883) 9 App Cas 1.

53 (1889) 42 Ch D 674 at p 681.

54 G E Dal Pont & K F Mackie, *Law of Succession* (2nd ed) LexisNexis Butterworths Australia 2017 at [13-40].

55 (1883) 22 Ch D 727; (1883) 9 App Cas 1, 19.

56 (1952) 52 SR (NSW) 265, 267.

57 [2012] NSWSC 1536 at [7]. See also *Re Craig* (1952) 52 SR (NSW) 265, 267-268, cited by his Honour in *Saffron v Cowley & Anor; Estate of Saffron* [2012] NSWSC 1108 at [10], the test for determining whether the appointment of a professional is warranted appearing to be the nature of the task, and whether, acting with prudence, the personal representative would engage professional assistance if the affairs the estate were the affairs of the personal representative.

> executor commission pursuant to s 86 of the *Probate and Administration Act 1898* (NSW). (There is an inherent jurisdiction to allow remuneration, as there is in the case of trustees and financial managers.) As a general rule, an executor is expected to carry out his or her duties, including keeping accounts, personally. If he or she chooses to employ another person to carry out executorial tasks, the charges will be to his or her own account. However, where, having regard to the size and nature of the estate and the tasks that need to be carried out, it is reasonable for the executor to engage the services of another, the expense may be allowed as a disbursement (*Macartney v Macartney* [1909] Vic LawRp 32; (1909) 1 VLR 183 at 191-192; *Swanson v Emmerton* [1909] VicLawRp 68; [1909] 1 VLR 387 at 390-391; *In the Estate of Purton* (1935) 53 WN 149; *In The Estate of Instone* (Supreme Court of New South Wales, Powell J, 23 August 1993, unreported; BC9303622 at 25).

[47] His Honour continued:[58]

> Even where the executor is entitled to incur an expense and charge it to the estate, such as by engaging the services of a solicitor to act on a conveyance, or engaging the services of an accountant to complete the deceased's or the estate's tax returns, unless the will otherwise provides, an executor who is a professional is not entitled to charge for his or her services if he or she does such work. Nor is the executor entitled to engage, for remuneration, a firm of which he or she is a member if he or she would thereby directly or indirectly benefit from the engagement. This follows from the rule that unless the trust instrument or will so provides, or the beneficiaries being *sui juris* give their informed consent, a fiduciary cannot place himself or herself in the position of conflict or sensible possibility of conflict between his or her personal interest and fiduciary duty.

[48] In *Saffron v Cowley*,[59] the defendants were the executors of a deceased estate, and two of the three directors of the trustee of a trust which was the residuary beneficiary. In their latter capacity, they authorised the payment to themselves as executors of advances against commission, out of the assets of the estate. White J's finding appears from the following (after referring to *Re Craig*):-[60]

> The defendants had a clear conflict between their personal interest in receiving remuneration for what were described as advances of commission and their duty to the residuary beneficiary. In their capacity as directors of the trustee they could not properly cause the trustee to consent to their receipt of amounts by way of commission, except with the informed consent of the beneficiaries of the trust, assuming that there were identified beneficiaries who were *sui juris* who could give such consent.

[49] There is some broad analogy with the present case. As personal representative of the estate, the respondent had a conflict between his interest in the receipt of remuneration by Slipper Lawyers, and his duty to the estate, and ultimately to Je. He could not enter into the costs agreement nor approve payment to the practice for the performance of work to be undertaken by a personal representative, without the informed consent of all beneficiaries, assuming them to be capable of granting it.

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58 At [8].
59 [2012] NSWSC 1108.
60 At [11].

[50] Nevertheless, a personal representative may be authorised to receive remuneration by (relevantly) the will, a contract with the beneficiaries, or an order of the Court.[61]

[51] It can be seen, therefore, that under the general law, a personal representative was not permitted to charge the estate for work done in that capacity, including for professional work. A personal representative might, at the cost of the estate, engage professional assistance if a person acting with prudence would do so in similar circumstances in relation to his own affairs. Even then, he could not employ his own firm to act. There was an inherent jurisdiction, and there is now statutory power, for the Court to award commission. Where the personal representative has exercised professional skill in the performance of duties relating to the estate, the award of commission may reflect that. The operation of these principles might be modified by the instrument of appointment; or by the informed consent of all beneficiaries, assuming them to be *sui juris* and competent to consent.

[52] Moreover, under the general law, the position of a personal representative in relation to engaging his own firm to act is apparent from what has been quoted above from *Bray*, *In re Orwell's Trusts*, and Ford & Lee.

[53] A personal representative may also be authorised to receive remuneration from the estate by statute. Under s 68 of the Succession Act,[62] the Court may authorise the payment of commission to a personal representative for his or her services in that capacity (often referred to as "for their pains and troubles", an expression found in the *Charter of Justice* 1823[63]). In Australia, contrary to the United Kingdom, the practice has been to award commission to personal representatives.[64] For present purposes, however, the point is that the legislature has left it in the power of the Court to award commission, in the absence of authorisation in the will, or by the agreement of the beneficiaries.

[54] That said, it might be noted that under s 101(2) of the *Trusts Act* 1973 (Qld), in the absence of a direction to the contrary in the instrument creating the trust, a trustee, being a person engaged in a profession or business for whom no benefit or remuneration is provided "in the instrument creating the trust", is entitled to charge and be paid out of the trust property "all usual professional or business charges for business transacted, time expended, and acts done by the person or the person's firm in connection with the trust, including acts which a trustee not being in any profession or business might have done personally". The term "trustee" is defined in the Act[65] to include a personal representative; and the term "instrument creating the trust", to include a will. Prima facie, that would mean that the provision applies to a personal representative. However, a definition only applies if the context or subject matter does not otherwise indicate or require.[66] The definition also includes a trustee

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61 See Ford & Lee para [13.510].

62 See also s 101 of the *Trusts Act* 1973 (Qld) under which a court might authorise a trustee to charge remuneration for the trustee's services; a trustee being defined in s 5 to include a personal representative.

63 Discussed in *Re Lack* [1983] 2 Qd R 613, 614-615, by McPherson J.

64 See *Re Murphy deceased* [1928] St R Qd 1, 5-6.

65 See s 5 of the Trusts Act.

66 See s 32A of the *Acts Interpretation Act* 1953 (Qld). Although introduced in 1991, it reflects the general law: see D C Pearce & R S Geddes, *Statutory Interpretation in Australia*, LexisNexis Butterworths 2014 at 6.67-6.68.

corporation and a corporation in which trust property is vested; yet s 101 expressly provides that a trustee for the purposes of the section includes a custodian trustee.[67] This may be thought to throw some doubt on the proposition that the Act's definition of trustee is intended to apply to s 101.

[55] It might also be thought that the provisions of s 68 of the *Succession Act* are intended to cover the field, thereby excluding the operation of s 101. The *Succession Act* came into force after s 101. The legislature elected to make provision for the remuneration of personal representatives by granting the Court power to authorise "the payment of such remuneration or commission to the personal representative for his or her services as personal representative as it thinks fit"; and gave the Court power to attach conditions to the payment. If s 101 of the *Trusts Act* were to apply to personal representatives, the provision would have been unnecessary. Moreover, the Court's power to impose a condition under s 68 of the *Succession Act* could be defeated by reliance on s 101.

[56] Moreover, s 101(2) operates where the instrument creating the trust makes no provision for a benefit or remuneration for the trustee. There is, in the case of an intestacy, no instrument creating the trust. Since the trustee under an instrument will usually have been chosen by the person creating the trust, there may be reason to doubt the application of s 101(2) to the services provided by an administrator. The provision may be based on an assumption that the trustee's appointment would be made with an awareness of the consequences stated in the subsection, though the creator of the trust might choose to "opt out" of them, either by a provision to the contrary, or by specifically providing for a benefit, or some other method of remuneration, in the "instrument". None of these considerations are applicable to an intestacy.

[57] The protection which the courts have long given to the interests of beneficiaries, and the reasons behind it, would suggest that s 101(2) should not be given any wider operation than its language, properly construed, would require. In any event, s 101(2) could not have been intended to authorise a trustee to charge grossly excessive amounts, for these would not be usual professional or business charges.

[58] It will be apparent therefore, that a personal representative's duties to preserve the estate, and to act in the interests of the ultimate beneficiaries, preclude the personal representative from charging for services and from being indemnified for expenses, except in circumstances authorised by the cases, or by statute. It would seem to follow that a personal representative who undertook a liability for which the representative intended to indemnify himself or herself out of the estate, when not authorised to do so, acts in breach of the representative's duty in respect of the estate.

[59] It is also necessary to consider the question from the point of view of Slipper Lawyers, and the respondent, as its sole legal practitioner director with the conduct of the matter. It was entering into a contract with a client under which it was to receive remuneration for its work.

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67 See s 19 of the Trusts Act.

[60] As was said in the judgment of four members of the High Court in *Maguire & Tansey v Makaronis*:[68]

> The solicitor is classically a fiduciary to the client and as such owes certain duties in each particular case.

[61] Their Honours also said:[69]

> In *Clark Boyce v Mouat*,[70] the Privy Council referred to the judgment of Lord St Leonards LC in *Lewis v Hillman*[71] as authority for the proposition:
>
> > The classic case of the [fiduciary] duty arising is where a solicitor acts for a client in a matter in which he has a personal interest. In such a case there is an obligation on the solicitor to disclose his interest and, if he fails so to do, the transaction, however favourable to the client, may be set aside at his instance.

[62] With reference to cases where the solicitor acts for the client in a matter in which the solicitor has an interest, their Honours said:[72]

> In *CIBC Mortgages Plc v Pitt*,[73] Lord Browne-Wilkinson referred to the considerations of general public policy which found what he identified as the long-standing principle whereby those in a fiduciary position who enter into transactions with those to whom they owe fiduciary duties labour under a heavy duty to show the righteousness of the transactions. Similar considerations are evident in the formulation by Lord St Leonards LC in *Lewis v Hillman* that, if a transaction between solicitor and client is to stand, it must be "open and fair, and free from all objection", not merely "fair".[74]

[63] Similar views were expressed by Mahoney JA in *Law Society of NSW v Foreman*.[75] His Honour said, with respect to the fiduciary obligations which a solicitor owes to the client:[76]

> Such obligations exist, in my opinion, not merely in the carrying out of an agreement already made between a solicitor and her client, but also in respect of the making of it…The content of such obligations, that is, what is necessary to be done in order to discharge them, varies with the circumstances of the particular case….
>
> Such obligations ordinarily or at least frequently involve: that the client, because of independent advice or otherwise, be seen not to have entered into the agreement in reliance upon her relationship with or trust of the solicitor; that

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68 (1997) 188 CLR 449 at 463; citing *Clark Boyce v Mouat* [1994] 1 AC 428,437; after reference to the statement of Gibbs CJ in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68.

69 At 464-465.

70 [1994] 1 AC 428 at 437. See also *Sims v Craig Bell & Bond* [1991] 3 NZLR 535 at 543-545, 546, 547; *Witten-Hannah v Davis* [1995] 2 NZLR 141 at 147.

71 (1852) 3 HLC 607 at 630 [10 ER 239 at 249].

72 At 465.

73 [1994] 1 AC 200 at 209.

74 [1852] EngR 392; (1852) 3 HLC 607 at 630 [10 ER 239 at 249].

75 (1994) 34 NSWLR 408; [1994] NSWCA 69. His Honour's views were referred to with approval in *Law Society of the Australian Capital Territory v Roche* [2002] ACTSC 104 at [59]-[61].

76 At 435-436.

> there be full and frank disclosure to the client of all information known to the solicitor which the client should know…; and that if there be aspects of the contract in respect of which the solicitor may be in a position of advantage vis-à-vis the client, those matters be brought by her to the attention of the client so that the client can decide whether she should enter into the contract. …. The making of a special agreement in respect of costs is, in my opinion, essentially no different in principle from an agreement by the solicitor to sell property or services to her client. (*citation of authorities omitted)*

[64] Mr Cohen, for the respondent, placed reliance (in another context) on the judgment of Mahoney JA in *Veghelyi v The Law Society of New South Wales*.[77] In that case, his Honour said, in the context of a discussion about gross-overcharging as a form of professional misconduct:[78]

> Clients are, or may frequently be, in a vulnerable position vis-à-vis their solicitors; the presumption of undue influence is, I think, based at least in part upon the fact that when making decisions clients ordinarily or at least frequently place trust in their solicitors. They ordinarily are not in a position to know without investigation what work must be done and what charges are fair and reasonable: they ordinarily assume that the solicitor will only make such charges.
>
> Solicitors are, on the other hand, informed, or in a position to inform themselves, of what work may be required and what are fair and reasonable charges. They are, in that sense, in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of such an advantage. It is, I am inclined to think, the fact that that advantage has been misused which may, in a particular case, warrant what the solicitor does being categorised as professional misconduct.

[65] In *Queensland Law Society v Roche*,[79] when a matter was well advanced, the practitioner invited the client to enter into a new costs agreement. The practitioner's failure to draw the client's attention to a clause in the existing costs agreement which limited the capacity of the practice to increase the fees payable, his failure to provide an estimate of the likely impact of the new costs agreement on the total amount of fees payable, and his failure to advise the client to obtain independent legal advice before signing the new agreement, together with gross overcharging, resulted in a finding of professional misconduct. Of the failures relating to the entry into the new costs agreement, de Jersey CJ (with the support of the other members of the Court) said:[80]

> The respondent thereby failed to afford Mr Arthur "the opportunity to make an informed decision with respect to a contract which fundamentally affected his rights," amounting to "serious breach of his fiduciary duty." If sustainable, that amounted to a very serious instance of professional misconduct, resting in the respondent's preferring his own interest to that of his client.

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77 [1995] NSWCA 483. His Honour's observations were cited with approval in the joint judgment of the Court in *Law Society of the Australian Capital Territory v Lardner* [1998] ACTSC 24 at [126].

78 At p 6.

79 [2003] QCA 469.

80 At [7].

[66] Later, his Honour said,[81] before referring to statements from Kirby P and Mahoney JA in *Foreman*:

> It is repugnant to think of a solicitor withholding detail from a client, precedent to an agreement, to the solicitor's advantage and the client's disadvantage.

[67] In *Brown v Talbot & Olivier*,[82] Ipp J, when examining the reasonableness of a costs agreement which provided for time costing in lieu of the application of the statutory scale, said:[83]

> The relationship between client and solicitor is one of the most important fiduciary relationships known to the law: see *Re Van Laun; Ex parte Chatterton*,[84] *Law Society (NSW) v Harvey*.[85] In the latter case, Street CJ, in delivering the judgment of the Court said:[86]
>
> > Where there is any conflict between the interest of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest. It must be a conscientious disclosure of all material circumstances, and everything known to him relating to the proposed transaction which might influence the conduct of the client…To disclose less than all that is material may positively mislead.

[68] These views are consistent with what Isaacs J said in *Southern Law Society v Westbrook*,[87] relied upon by the applicant. There, a solicitor who had prepared a will, induced other beneficiaries to engage him to support the will in a probate action, without disclosing that he was to receive benefits under the will. Isaacs J said:[88]

> The respondent was the solicitor for the executors as well as the solicitor who prepared the will; and it was his duty to disclose to the beneficiaries all material facts by which they might direct their actions…. (By a pretence) he got the beneficiaries to trust their interests to his care. It is as if a wolf in sheep's clothing persuaded a lamb to put itself under his protection against a wolf whom he pretends to be near.

[69] Under the general law, therefore, there is a heavy duty imposed on a solicitor about to enter into a costs agreement, to disclose to the client material information known to the solicitor but not the client, relevant to the client's decision to enter into a costs agreement. A question may arise whether that position has in some way been modified by the provisions of the LP Act.

[70] Disclosure requirements are set out in s 308 of the LP Act. They are less extensive than those articulated in some judgments.[89] It might also be noted that, for the purposes of these provisions, the "client" is not limited to the contracting party, the term referring to "a person to whom or for whom legal services are provided".[90]

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81 At [32].
82 (1993) 9 WAR 70.
83 At 77.
84 [1907] 2 KB 23 at 29.
85 [1976] 2 NSWLR 154 at 169-170.
86 At 170.
87 (1910) 10 CLR 609.
88 At 627.
89 See, for example, per Ipp J in *Brown* at 77-78; *Foreman* at 435-436.
90 See the definition of "client" in Schedule 2 of the LP Act.

[71] Specific disclosure in relation to an uplift fee is required by s 313, if a costs agreement makes provision for such a fee. Changes to matters disclosed under these provisions must also be disclosed under s 315. Under s 316, failure to comply with these provisions has the effect that the law practice may not recover its fees without assessment under Division 7 of Part 3.4 of Chapter 3 of the Act; the client may apply to have any costs agreement set aside; and the failure may constitute unsatisfactory professional conduct or professional misconduct. These provisions are all found in Division 3 of this Part.

[72] Somewhat related, a conditional costs agreement must, under s 323, set out the circumstances that constitute the successful outcome by reason of which the uplift is payable; and must contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement. Some other matters must be set out in the agreement under s 324. Section 326 then provides that subject to Division 5, which contains these provisions, and Division 7, soon to be mentioned, "a costs agreement may be enforced in the same way as any other contract." Section 327 provides that a costs agreement which contravenes a provision of Division 5 is void. Section 328 provides that a costs agreement may be set aside if it is not fair and reasonable. It identifies matters relevant to the question whether a costs agreement is fair and reasonable, but these do not limit the matters which may be taken into account. In addition to matters relating to provisions of the Act (including failure to comply with the disclosure requirements), matters specifically identified include whether the client was induced to enter into the agreement by the fraud or misrepresentation of the law practice; and the circumstances and conduct of the parties before and when the agreement was made. If the Court or the Tribunal makes an order setting aside an agreement, the section specifies other orders it can make.

[73] Finally, Division 7 of the LP Act gives a client a right to apply (under s 335) to have costs assessed. If there is a costs agreement, and it has not been set aside, then by virtue of s 340, the costs are to be assessed under the costs agreement, except in certain circumstances. They are that the costs agreement does not comply in a material way with any disclosure requirement found in Division 3; or that Division 5 precludes the law practice from recovering the amount of the costs; or the parties otherwise agree. In any event, the costs assessor is required, under s 341, to consider whether it was reasonable to carry out the work; whether or not the work was carried out in a reasonable way; and, unless s 340 applies, the fairness and reasonableness of the amount of legal costs, in relation to the work. A number of matters relevant to the question whether the costs are fair and reasonable, are also identified.

[74] The Act thus identifies what is required to make a costs agreement enforceable, and significant on a costs assessment. It does not appear to be intended to alter the fiduciary obligations which a legal practitioner owes to a person with whom the practice intends to enter into a costs agreement. That view is consistent with one of the Act's main purposes, namely, "to provide… for the protection of consumers of the services of the legal profession…".[91] Moreover, a breach of these obligations would often be relevant to the question whether a costs agreement was fair and reasonable.

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[91] See section 3 of the LP Act.

[75] A finding of breach of fiduciary duty under the general law, and consequential remedies, where a fiduciary is faced with a conflict between fiduciary obligations and personal interests, may be avoided where the fiduciary establishes, by way of defence, that the beneficiaries have given their "fully informed consent".[92]

Jacobs – Charge 1 considered

[76] Charge 1 alleges that the respondent acted in an estate matter where there was a conflict between his personal interest and the interest of the estate and its sole beneficiary. This is alleged to constitute professional misconduct or unsatisfactory professional conduct. It is particularised in a number of ways. One is that the respondent allowed his personal interest in obtaining fees to conflict with the interest of the estate, by entering into a costs agreement with a law practice of which he was the sole legal practitioner director. The Tribunal does not accept the submission orally made by Mr Rice that the mere fact that a solicitor acting as an executor enters into a costs agreement with his own firm does not result in a conflict of interest. By entering into the costs agreement as the representative of the estate, with the intention of discharging the liabilities arising from it with estate funds, as the respondent did, his duty, ultimately owed to Je as beneficiary of the estate, to act in Je's interest, was placed in conflict with his interest in seeing that the legal practice received remuneration (or, arguably, his duty as the sole practitioner director of the incorporated legal practice to those ultimately interested in the practice, in relation to the obtaining of remuneration).[93] So much is apparent from the previous discussion of authorities. Its consequences for the present application turn on the terms of the agreement, and the respondent's subsequent conduct. However, the conflict arose from the entry into the agreement. While acting in the matter, he was in a position of conflict, which he had created.

[77] Other aspects of the costs agreement are alleged to support a finding that the respondent allowed his personal interest to conflict with interests of the estate, in support of the general allegation that he acted in a matter where there was such a conflict. One of them is that the costs agreement allowed charging at an hourly rate in excess of the rates allowed under the Supreme Court scale. No evidence has been identified in support of the allegation that charging at the hourly rates in the agreement would result in a greater charge than under the Supreme Court scale, and it is not a matter within the knowledge of the Tribunal. This aspect of the allegation is not established. It might be noted that, notwithstanding his criticisms of the respondent's billing practices, Mr Reardon has made no criticism of the rates themselves.

[78] It is also alleged in the discipline application that the respondent allowed his personal interest to conflict with the interests of the estate and Je, by entering into the costs agreement which, in addition to charges at hourly rates, allowed uplifts, and a lump sum for obtaining letters of administration, without the disclosure and informed consent previously discussed. In fact, the costs agreement made no provision for charging a lump sum for obtaining letters of administration. It is necessary to say something about the uplifts.

[79] Under the costs agreement, the care and conduct uplift was in the discretion of the practice. Factors identified as relevant have already been mentioned. For present

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92 *Maguire & Tansey v Makaronis* (1997) 188 CLR 449 at [43].

93 Compare *Saffron v Cowley* [2012] NSWSC 1108 at 11.

purposes, the question is not whether the uplift should have been claimed, but whether its inclusion in the costs agreement demonstrates that the respondent placed himself in a position of conflict. The applicant's submission appears to be that the provision facilitated the making of excessive charges, and that, the matter being routine, and with time costing, there was no occasion to make provision for the uplift in the agreement.[94]

[80] Mr Reardon's report includes references to, and a helpful discussion of, cases considering such an uplift. It is apparent that rules of court make provision for such an uplift because the application of a scale of costs with specified fees and rates may not properly reward the lawyer who performed the work.[95] So much is implicit in the circumstances identified as relevant to an allowance of this kind. For example, in *Brookfield v Davey Products*,[96] Branson J said, with reference to the item allowing for such an uplift:

> In my view, item 41 of Schedule 2 is principally intended to ensure that a scale of costs which is based overwhelmingly on specified fees or rates for items of work does not result in solicitors who represent clients in complex or novel matters being under-rewarded in comparison with those who are involved in more routine matters. Where a bill is based principally on time costing, the scope of operation of item 41 will, in my view, be limited.

[81] While these considerations suggest that such an uplift has no place unless fees are charged in accordance with a scale, Mr Reardon pointed to the order in *Brookfield v Davey Products*. It demonstrates that a care and conduct uplift might in particular circumstances be available notwithstanding some reliance on time costing. This should be placed in context. Her Honour was dealing with an application for an order for costs to be paid to one of the parties by another, in a fixed amount. The complexity of the matter is apparent from the fact that it was anticipated that the bill would take more than four weeks to draw, and would be of the order of 400 pages in length. Fees were claimed on a time cost basis, reduced by her Honour by 40%. In part, that was because the fees claimed for drafting documents on a time basis had led to claims being in an amount which would not be sustainable on taxation. Her Honour also referred to the fact that she had taken into account, in reducing the costs, the fact that at times two or more solicitors were involved in the same task. In those circumstances, her Honour was prepared to make a "modest allowance" under this head, of 7%. The allowance might be characterised as a relatively minor trimming of a substantial reduction of the amount claimed. While the case does not contain any statement of principle relating to the circumstances in which an allowance for care and conduct might be made where fees are charged on a time cost basis, it indicates that an uplift in such a case is exceptional. There is nothing to suggest that at the time when the costs agreement was signed in the present case, there was any prospect of a reduction of the legal practice's fees by reason of an assessment on a party and party basis, and the consequent risk of a failure properly to provide remuneration for a practitioner's work as a result of a large reduction of the claimed fees; or that there was any real

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94 See paragraphs 15 and 17 of the applicant's submissions.

95 See *Sparnon & Anor v Apand Pty Ltd & Ors* [1998] FCA 164 per von Doussa J; *Brookfield & Anor v Davey Products Pty Ltd* [1997] FCA 1462.

96 [1997] FCA 1462.

prospect that exceptional circumstances would arise which would provide a basis for such an uplift.

[82] On the other hand, O'Loughlin J said in *Auspine Ltd v Australian Newsprint Mills Ltd*:[97]

> …there should not be any mark-up in the Federal Court for care and conduct in cases that are properly described as non-exceptional and run-of-the-mill.

[83] Mr Cohen submitted that these (and other) cases referred to were cases usually dealing with orders for costs awarded on a party and party basis. However, even under the costs agreement, the uplift was discretionary, with many of the factors generally similar to those specified in court rules. There is no reason why the principles relevant to charging the uplift in the present case should be different.

[84] Nothing has been identified to suggest that the matter was likely to be complex, or difficult, or raise novel questions. No doubt the matter was important to Je and Ms Evans, but no more so than other similar matters would be to the relevant clients. The estate was in fact not large, and there is no reason to think that, when the agreement was signed, it was expected to be. Ordinarily when time costing rates are used, they reflect the different levels of skill, specialised knowledge, and responsibility of the practitioners. In the costs agreement, a higher rate was specified for the respondent than for another solicitor, and a paralegal. It is difficult to see why, when time costing is used, with varying rates for practitioners with different degrees of experience and knowledge, there might be a genuine need in a case like this for some additional fee because of the number and importance of documents. Reliance on the time spent by the solicitor as an occasion for the uplift, and on research, if the time spent on it was intended to be charged for (as it was), simply would provide an occasion for double dipping. There is no reason to think that there was any real prospect that any of the considerations specified in the costs agreement would provide a proper basis for charging 15% of professional fees, in addition to fees otherwise chargeable. In the circumstances of this case, the inclusion of the clause reflected a conflict between the respondent's interests and those of the practice, and the interests of the estate and Je, and the respondent's duty towards them. Indeed, he allowed his own interests and those of the practice to prevail over those of the estate and Je. By entering into the costs agreement with the inclusion of this uplift, without informed consent, he breached his duty towards them. It might also be noted that the clause reposed the discretion to charge this uplift in the legal practice, in effect in the respondent, which clearly placed him in a position of conflict.

[85] The provision for the conditional agreement uplift of 25% is extraordinary. The agreement stated with reference to this fee that the agreement was a "proposed conditional costs agreement (involving an uplift fee)". The expression "conditional costs agreement" is used in the LP Act to describe an agreement where the payment of some or all of the legal costs is dependent on the successful outcome of the matter.[98] For such an agreement the Act authorises the charging of an uplift fee,[99] defined to mean additional legal costs, payable under a costs agreement on the successful outcome of the matter.[100] There is no sense in which the costs agreement was a

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97 [1999] FCA 673, at [46].
98 See s 323 of the LP Act.
99 See s 324 of the LP Act.
100 See s 300 of the LP Act.

conditional costs agreement, nor was the conditional agreement uplift an uplift fee, as these expressions are described in the Act. The use of the statutory expressions appears intended to cloak the fee with a legitimacy it did not have.

[86] An examination of the agreement reveals a further attempt to identify a justification for this fee. It is the "non-payment of upfront fees". There was no obligation on the estate or Ms Evans (or, for that matter, the respondent) to pay fees in advance of the provision of services. In fact, Item 7 of the Schedule provided that no amount was to be paid in advance. Had money been so paid, it would have been "trust money",[101] to be lodged in a trust account, and dealt with under the provisions of the Act.[102]

[87] The conditional agreement uplift was in fact to be charged "upon the conclusion of the matter" on professional fees excluding those paid during the course of the matter. This had the consequence that liability for the uplift depended upon whether bills for professional fees were rendered in the course of the matter (as they could be under the costs agreement); and whether such bills were paid. Both were in the control of the respondent. The fee would only become payable if the respondent did not take action to avoid it.

[88] The fee may therefore be regarded as a form of compensation for the delay between the performance of the work and payment. Its general effect may be seen from a modification of an exercise carried out by Mr Reardon. The matter took approximately nine months to conclude. On the assumption that the work was done at a reasonably uniform rate over this period, the average delay was of the order of four and a half months (the average period would be longer if more work was done earlier, and shorter if more work was done later). On the assumption mentioned, the compensation for delay was equivalent to interest at a rate of about 67% per annum. It could not be justified by the delay in receipt of payment. The charge might be contrasted with the right of a legal practice to charge interest on an unpaid bill, which, on Mr Reardon's evidence of matters relevant to the operation of s 321 of the LP Act, was limited to 4.5% per annum. Again entry into the agreement making provision for this uplift placed the respondent in a position of conflict between his interest in remuneration being paid to the practice, and the interests of the estate and Je, and his duty to them.

[89] Moreover, the characterisation of the agreement as a conditional costs agreement as an apparent justification for this uplift fee is in conflict with the explanation relating to a delay between performance of work and payment. This conflict confirms that there was no genuine basis for the charge.

[90] Mr Reardon pointed out the lack of connection between the method of calculation of the sundries uplift (as a percentage of professional fees) and the expenses they were intended to meet, which he referred to as internal costs. He considered that it was likely that the sundries uplift was not a genuine pre-estimate of the cost of the items for which it is said to provide compensation. He considered that the uplift was "unusual"; and because it was an uplift charge, disclosure was required under s 313 of the LP Act.[103] His evidence is the subject of objection, dealt with elsewhere in these reasons. At this point, it is sufficient to note that the objection fails.

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101 See the definition in s 237 of the LP Act.

102 See ss 248 and 255 of the LP Act.

103 See his report, paras 97 and 98.

[91] The question remains whether the evidence demonstrates to the required standard that the inclusion of the sundries uplift is a factor in the conflict situation in which the respondent is said to have placed himself.

[92] There is reason for concern about this uplift. The effect of the agreement was that for every hour of the respondent's time, $52.50 was an appropriate amount to compensate the practice for sundries; while for every hour of the paralegal's time, $24 was an appropriate amount to do so.[104] A perusal of the tax invoice shows that this was unlikely to be the case. It reveals that a considerable proportion of the time charged for did not generate correspondence, and was unlikely to lead to the production of documents to be photocopied; some correspondence was by email; and many of the phone calls were likely to be local calls. It is difficult to identify any hour in which it could be said that either amount was likely to be a reasonable cost for photocopying, telephone, facsimile and postage expenses. While the actual work done in the matter is something known with the benefit of hindsight, it would appear to be broadly similar with what might be expected in a matter of this type. It is apparent that there is a gross disproportion between the fee, and any expense that it was likely to reimburse. In only one of the matters the subject of the discipline application has there been an attempt to compare the sundries uplift with the likely expense. That is in the matter of Tully, where the sundries uplift amounted to $3,181, and the expense was calculated by Mr Kelly to be $332. This was not an estate matter but it is unlikely that the differences in the type of work would make the comparison completely unreliable, given the extent of the disproportion. It is seen as giving some limited support to the Tribunal's conclusion.

[93] Mr Reardon's view that the sundries uplift was likely not to be a genuine pre-estimate of appropriate compensation should be accepted. It was not challenged or contradicted. Although it has limitations, the analysis made with reference to the tax invoice tends to confirm his opinion.

[94] Mr Reardon described the sundries uplift as unusual. It was plainly a matter to the advantage of the practice. Its amount had no obvious justification; and there are grounds for thinking that there was no reasonable basis for this uplift. By entering into a costs agreement containing such a provision, the respondent placed himself in a position of conflict.

[95] The applicant has contended that the respondent allowed his personal interest to conflict with the interests of the estate, and Je, to whom he owed fiduciary obligations, by entering into the costs agreement (containing provisions which have been discussed), without obtaining the informed consent of Ms Evans, or disclosing to her the likely legal costs in the matter. That contention plainly takes issue with the notion that the disclosure by Slipper Lawyers to the respondent was sufficient to avoid the conflict.

[96] In making that contention the applicant has taken on the onus of proving that consent was not obtained. That is different to the position under the general law, as stated in *Maguire*. It may nevertheless be correct for present purposes;[105] although another possibility may be that the applicant only bears such an onus where the evidence raises

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104 Because the minimum charge could be made for part of a unit of time, the allowances were potentially greater.

105 See s 656C of the LP Act; and note the approach of de Jersey CJ in *Roche* at [11].

a real possibility that the consent was obtained. Since the question of onus was not the subject of submissions, the Tribunal is prepared to proceed in accordance with the applicant's contention, without necessarily deciding questions of onus.

[97] It might also be noted that the applicant has proceeded on the basis that disclosure to Ms Evans, and obtaining her informed consent, would be sufficient to avoid an adverse finding, notwithstanding that Je was the beneficiary of the estate. It would appear that, under the general law (and consistent with general principle), Court approval would be required to avoid the consequences of a finding of conflict, and the grant of remedies, where the beneficiary is an infant.[106] However, for the purposes of the present application, the Tribunal is again prepared to proceed in accordance with the applicant's approach.

[98] It is therefore necessary to determine whether the terms of the costs agreement were disclosed to Ms Evans, and her informed consent to it was obtained. For that purpose, the applicant relied on evidence in the report of Mr Reardon. Mr Reardon gave evidence that he had been provided with two lever arch files, being the practice's file for the matter.[107] He found no evidence that disclosure had been made under s 308 of the LP Act to Je through his guardian;[108] nor that Ms Evans was provided with a copy of the costs agreement before the respondent entered into it.[109]

[99] This evidence is the subject of objection. Mr Cohen objected to the statement by Mr Reardon that there was no evidence on the file that disclosure was made under s 308 to Je through Ms Evans, on the basis that it was hearsay, and the asserted fact was not backed by evidence. He objected to Mr Reardon's statement that there was no evidence on the file that Ms Evans was provided with a copy of the costs agreement, on the grounds that there was no factual foundation for the opinion expressed, the file not being in evidence.

[100] The applicant referred to s 28 of the QCAT Act, which requires the Tribunal to act fairly and to observe the rules of natural justice, but provides that the Tribunal is not bound by the rules of evidence.

[101] Since the Tribunal is not bound by the rules of evidence, an objection based only on the fact that evidence is hearsay will usually not succeed. While fairness may sometimes warrant the exclusion of material, that is not so here. The application squarely raised the issues of disclosure and informed consent to entry into the costs agreement.[110] Material may also be excluded because it is of no probative value.[111] However that is not true of Mr Reardon's statements. The objections based on hearsay fail.

[102] The evidence to which objection is taken is not opinion evidence. It is evidence of the results of the examination of the file. This ground of objection also fails.

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106 See Ford & Lee para 13.3110, citing *Re McLean* [1937] NZLR 100; *Re Gambling* [1966] SASR 134.
107 See his report, para 3.2.
108 Paras 60-61.
109 Para 87; see also paras 99 and 153.8.
110 See para 1.13.
111 See *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 491-493; cited in Giles, *Dispensing with the Rules of Evidence* [1990] NSW Bar Association News 54; see also *Sudath v Health Care Complaints Commission* [2012] NSWCA 171 at [79] per Meagher JA.

[103] The respondent also submitted that the evidence of Mr Reardon did not prove the absence of disclosure and informed consent; and submitted that the orthodox course would be to call evidence from Ms Evans, who could then be cross-examined.

[104] The criticism that Ms Evans was not called was well made. No explanation was given for the failure to do so. It is unsatisfactory that the applicant has proceeded without evidence from Ms Evans, or an explanation for its absence.

[105] Nevertheless, the issue falls to be determined on the material before the Tribunal, bearing in mind the degree of satisfaction required by s 656C of the LP Act. Mr Reardon's evidence of the results of his examination of the file was not the subject of cross-examination. The absence of any file record of disclosure to Ms Evans and the obtaining of her informed consent, is to be contrasted with the fact that a copy of the costs agreement was kept on the file.[112] That seems likely to be true of the disclosure document, though there is no direct evidence of it. Mr Reardon referred to this document as part of the "engagement documents" or "engagement bundle" to which he had access; the only source for which was the file. The material with which Mr Reardon was provided did not identify any other potential source of the disclosure document. Indeed, it and the costs agreement are sequentially paginated, as if they were a single document. A record of disclosure to Ms Evans, and her consent, would be a matter of greater significance than the documents signed by the respondent, and therefore likely to be retained on the legal practice's file. The tax invoice regularly recorded the substance of communications in which the practice engaged, often of matters of little significance. It does not record the making of disclosure to Ms Evans. The result of these considerations is that the Tribunal considers it highly likely that a record would have been kept on the file of any costs disclosure made to Ms Evans, and of her consent to the costs agreement. The Tribunal is accordingly satisfied, bearing in mind the potential significance of the finding, that no disclosure was made to Ms Evans of the terms of the costs agreement, and she did not provide consent to it.

[106] The position is not quite the same in regard to the allegation that the respondent did not disclose the likely total legal costs of the matter. Mr Reardon gave evidence that there was nothing on the file to show that the disclosure under s 308 of the LP Act was made, plainly meaning to Ms Evans. He gave similar evidence in relation to the costs agreement. One of the matters to be disclosed under s 308 is an estimate of the total costs. In those circumstances, it might be thought that, if there were evidence on the file that the respondent advised Ms Evans of the likely total costs, that would have been the subject of cross-examination, though by itself, this is not particularly compelling. The tax invoice does not suggest that such disclosure occurred; and indeed does not identify an occasion when it might have. Given that the disclosure required by s 308 was not made, it seems unlikely that the respondent advised Ms Evans of the likely total costs of the matter. Weighing these matters up, and with a little less confidence than the finding that the terms of the costs agreement were not disclosed to Ms Evans, the Tribunal is satisfied that the respondent did not disclose to her the likely total costs of the matter.

[107] Accordingly the Tribunal is satisfied that the respondent placed himself in a position of conflict, by entering into the costs agreement containing the uplifts which have been discussed, without obtaining the informed consent of Ms Evans, or disclosing to

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112 See Reardon's report, para 47.2

her the likely legal costs of the matter. It might be more correct to say that, had the disclosure been made and informed consent obtained, the respondent would be relieved in equity from the consequence of the conflict situation; and his conduct would not be characterised as misconduct.

[108] The allegation that the respondent consented to the imposition of charges against the estate without the informed consent of Ms Evans is plainly directed to the conduct of the respondent as personal representative of the estate. No point has been made about the fact that technically, he was the person liable for costs under the agreement; or that the tax invoice was addressed to Ms Evans. It is an agreed fact that the bill was rendered to the estate. It is relatively clear that, at all times, the respondent intended to indemnify himself out of the estate for these costs; and the Tribunal so finds. The allegation reflects the practical effect of what happened, rather than the true legal position.

[109] The respondent's consent to the bill is to be inferred from the fact that the tax invoice was paid with estate funds, which he authorised.

[110] If Ms Evans' informed consent were to be given to the charges, she would have required some substantial explanation. As will become apparent, the charge for obtaining letters of administration would have required an explanation. So would the three uplifts, previously discussed. Although not the subject of complaint, the Tribunal considers that the charges made at professional rates for work which is not professional, and the reasons for using a paralegal charged out at $160 per hour for minor administrative tasks, would also require some explanation. So would the charges generally which are the subject of criticisms by Mr Reardon, to be discussed in relation to Charge 2. It is likely that a proper explanation of these matters would have taken considerable time, been recorded on the file, and appear in the tax invoice itself. Mr Reardon in his report has criticised the respondent for failing to make disclosure under s 308 of the LP Act; for incurring the care and conduct charge without obtaining the client's approval before recovery of the costs; for failing to advise the client (this must be a reference to Ms Evans) of the amount of the conditional agreement uplift; and for failing to obtain the informed consent of Ms Evans to the sundries uplift. If there was evidence on the file that the respondent explained these matters to Ms Evans when issuing the tax invoice, it would have been less than frank of Mr Reardon not to refer to it.

[111] Perhaps more significantly, the respondent had strong reasons not to obtain the informed consent of Ms Evans to the imposition of the charge on the estate. There was a real likelihood that the amount of the invoice alone, in the context of the size of the estate, would have raised a query. To obtain Ms Evans' informed consent, the respondent would have had to draw her attention to the original estimate of the range of fees, and explain the difference. It would have been very difficult for him to explain the uplifts charged in the invoice, in a way which properly informed her about them, which would result in her consent. The same might be said about some of the other charges which Mr Reardon criticises, particularly the charge for obtaining the grant. It is also unlikely that, having failed to obtain the informed consent of Ms Evans to the costs agreement, he would have sought that consent to the tax invoice. These considerations make it highly improbable that the respondent obtained the informed consent of Ms Evans to the imposition of the charges in the tax invoice on the estate.

[112] In the result, and notwithstanding the poor quality of the evidence, the Tribunal is satisfied that the respondent did not obtain the informed consent of Ms Evans to the imposition of the charges in the tax invoice on the estate.

[113] The allegation in paragraph 1.13e that the respondent placed himself in a position of conflict by approving the bill for payment is materially the same as an allegation in paragraph 1.13d. The allegation that he placed himself in a position of conflict by rendering the bill (no doubt taking into account those matters proven in relation to the preceding sub-paragraphs of paragraph 1.13 of the application) is made out. Rendering the bill in those circumstances was conduct in relation to which the respondent faced a conflict between his duty to the estate, (to protect it from unauthorised diminution), and his interest in remuneration to the legal practice. The same is true of the allegation that he authorised payment of the bill from the estate funds. Even if applicable, s 101(2) of the Trusts Act would not protect him. The three uplifts cannot be said to be usual expenses; and nor could the fixed fee which was charged for obtaining the grant.

[114] The question whether the conduct so found constitutes either unsatisfactory professional conduct or professional misconduct is best deferred until charge 2 has been considered.

Objections to Mr Reardon's report

[115] Some, at least, of the objections are central to the respondent's position in relation to charge 2. It is convenient to deal with them, before considering other issues.

[116] Mr Cohen objected in his oral submissions that Mr Reardon had not shown himself to be an expert in estate matters. Mr Reardon gave evidence that he was admitted as a solicitor on 14 December 1995; and was appointed a Court Approved Costs Assessor in August 2011. From February 1999 until the time of his report (dated 17 December 2013) he conducted a practice under the name, "Reardon & Associates Lawyers" in Brisbane. He alone conducted the practice, with one employed solicitor. The firm practised in a number of areas, including estate administration, estate litigation, and costs assessment. He was familiar with all of the areas in which the firm practised, and where he was not conducting a matter he supervised it. He was not cross-examined about his qualifications and experience.

[117] In *Veghelyi*,[113] Mahoney JA stated, with reference to disciplinary proceedings, that, "…what was a fair and reasonable charge – and accordingly what was grossly in excess of it – was established by the evidence of other solicitors experienced in charging for work of the relevant kind….". Plainly Mr Reardon satisfied that test for qualification to give such evidence.

[118] In addition to his evidence of a reasonable amount to charge for the administration of the estate, Mr Reardon gave evidence of the total fees for obtaining the letters of administration, based on the times recorded by the legal practice, and the rates in the costs agreement. He also gave evidence about the uplifts, and about a number of other charges. He also gave evidence about some of the work undertaken by the respondent, particularly the time likely to have been required. It is difficult to think that his appointment as a Court Approved Costs Assessor and his experience as a costs

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[113] At p 7.

assessor, as well as his experience in estate matters, although described in broad terms, does not qualify him to give this evidence. A reading of his report shows that he has some familiarity with principles relevant to costs assessment. He is sufficiently qualified to express opinions about the charges of Slipper Lawyers in this matter.

[119] Mr Cohen took a general objection to the expression by Mr Reardon of views about whether charges made by the practice were reasonable.[114] He submitted that the approach of Mr Reardon was misconceived in principle. Moreover it did not address the real test for overcharging as a form of misconduct, namely, whether the fees were so far beyond what was reasonable as to be grossly disproportionate. His evidence was not supported by evidence of other solicitors experienced in charging for similar work.[115] Moreover, without the file, his evidence could not be tested. Mr Cohen also took specific objection to Mr Reardon's observations about the sundries uplift, as being irrelevant and argumentative. Objection was also taken to Mr Reardon's report because it did not take into account ss 340 and 341 of the LP Act.

[120] As to the file, Mr Cohen acknowledged that a copy of it had been retained by his client. If anything in it was relevant to the correctness of any opinion expressed by Mr Reardon, documents from the file could have been put to Mr Reardon in cross-examination, and tendered. The submission that Mr Reardon's opinion could not be tested because the file was not in evidence is entirely without substance.

[121] It is correct to say that in a court, the factual basis for an opinion must be proven by admissible evidence. The failure to do so renders the opinion of no value; and depending on the stage at which the opinion evidence is put before the Court, if an objection is taken, the evidence may be excluded. In this Tribunal, where the rules of evidence do not apply, evidence which is truly expert opinion evidence will usually have no probative force if the Tribunal is not satisfied of the facts on which the opinion is based (or is not satisfied that there is sufficient similarity between those facts, and facts which the Tribunal finds, to render the opinion of assistance to the Tribunal). That does not mean that those facts must be established by evidence which is admissible in a court of law. For example, hearsay evidence of facts, or secondary evidence of the contents of a document, may provide a sufficient basis for the Tribunal to be satisfied of facts on which an expert opinion is based. In any event, some of the documents from the file are before the Tribunal (principally the costs agreement, the disclosure document, and the tax invoice). The tax invoice in particular sheds light on the nature of a number of other documents on the file. Some of Mr Reardon's evidence also indicates the nature of the documents on the file, and in some cases their content. In other places he reproduces matters from the file. The objection on this ground fails.

[122] The identification and the application of the correct test for determining whether the respondent engaged in misconduct by overcharging is a matter for the Tribunal. The fact that Mr Reardon did not address the correct test (if that be true) does not mean that his expert opinion evidence (or for that matter other evidence which he gave) will inevitably be of no assistance to the Tribunal in the determination of the issues in this application, and accordingly should be excluded.

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114 See the respondent's outline of argument (*ROA*) paras 11-18.

115 See the ROA at paras 11-18.

[123] It may be true that Mr Reardon did not, in terms, address the question whether the amount charged as a whole was grossly excessive. He did, however, identify the lump sum charge for obtaining the letters of administration, as evidence of "inexcusable rapacity" (and expressed the same view about one other item charged for). If accepted, this evidence is highly relevant to the question whether the respondent engaged in gross overcharging.

[124] Mr Reardon identified 3 factors relevant to his determination of a reasonable range of costs. They were, prevailing market rates for services of the same kind and level of complexity (*market value*); the benefit to the client of the services provided by the practice; and the methodology used for calculating the charges, and whether they were made clear to the client (*transparency*).

[125] There is no sensible reason to suggest that Mr Reardon's assessment of an appropriate range of fees for the services provided by the legal practice, provided when he considered the market value of the services, is not relevant to the question whether the respondent engaged in gross overcharging. It is similar in character to the evidence relied on in the traditional approach of the courts, described by Mahoney JA in *Veghelyi*.

[126] The evidence which might be considered on a charge of misconduct is not limited to evidence that the practitioner engaged in gross overcharging. A court or tribunal may consider that the disparity between the fee determined by taxation and the fee actually charged is such as to warrant a finding that a practitioner has engaged in gross overcharging.[116] In *Harrison v Tew*,[117] Lawton LJ said:

> If an allegation of serious professional misconduct based on excessive and dishonest charging is made, the appropriate tribunal, be it the Law Society's Disciplinary Tribunal or the court, exercising its inherent jurisdiction over solicitors, might have to find out what was the amount of the excessive overcharge. It could do so in whatever way it thought appropriate; and as a matter of convenience, it might refer the bill in question to a taxing master…

[127] The objection that Mr Reardon's evidence should be excluded because it was not supported by evidence from other solicitors was not based on any authority. There is no requirement for corroboration of such evidence before it can be admitted.

[128] Mr Cohen's objection to Mr Reardon's report because he considered transparency is a little surprising. One of the submissions Mr Cohen made is that a client may choose to agree to pay what would otherwise be excessive fees, and charging those fees would not amount to misconduct. That consideration does not arise in the present case. The respondent's agreement to excessive fees does not make them acceptable, given his conflicted position, and the absence of any independent and informed consent to them on behalf of the beneficiary of the estate. Nevertheless, Mr Reardon's references to an absence of transparency are not without utility in the present case. Beyond Mr Cohen's submission as to the method for determining whether there has been misconduct by overcharging, the Tribunal has not had the benefit of submissions on the question whether benefit to the client is a relevant consideration. Nothing in the

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116 See the discussion in Dal Pont, *Contextualising Lawyer Overcharging*, Monash University Law Review Vol 42 No 2 p 284, at pp 298-299.

117 [1989] QB 307; confirmed on appeal [1990] 2 AC 523, 337; cited with approval by Ipp J in *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198, 210.

present case turns on it. It is sufficient to say that Mr Reardon's references to transparency and benefit to the client do not render his report as a whole of no assistance; nor do they warrant its exclusion.

[129] Sections 340 and 341 of the LP Act identify a number of matters of potential relevance to the question whether the legal practice engaged in gross overcharging; though s 341 is not exhaustive. It might be noted that s 328 also identifies some potentially relevant considerations. However, they are sections which perform a specific function in a statutory scheme. The Tribunal is not directly concerned with the exercises which they regulate. To provide a report which is relevant to the issues in the discipline application, it was not necessary for Mr Reardon to proceed by reference to any of these sections. Moreover, in his market value approach, he refers to a number of matters which appear in s 341 (complexity, novelty, urgency; he also considered the time spent on task, which appears to be "labour" for the purposes of the section).

[130] These considerations are sufficient to establish that the general objection to Mr Reardon's evidence is without substance. Moreover, much of his evidence is of assistance to the Tribunal in determining whether the respondent engaged in gross overcharging and breach of fiduciary obligations (for example, his analysis of the conditional agreement uplift; his analysis of a large number of instances where he considered overcharging to have occurred). It is of some probative value, even in cases where it is not ultimately accepted.

[131] It is not clear what is meant by the objection that the evidence relating to the sundries uplift is "argumentative". The respondent was given the opportunity properly to formulate objections after the hearing. If this objection is meant to convey that the evidence expresses an opinion, the objection is bad. In the absence of proper formulation of the objection, it does not succeed. As will have been seen, Mr Reardon's evidence about the sundries uplift was relevant to charge 1; and it will be relevant to charge 2.

[132] Specific objections to parts of the evidence (and the applicant's responses) were set out in a schedule. Many of the objections are on the grounds of hearsay. For reasons already expressed, the hearsay objections fail. Some of the objections go to the qualifications of Mr Reardon, already discussed. Objections that evidence is argumentative fail, for reasons already stated, unless it is thought necessary to say more about the objection. Those objections which raise other grounds will now be considered. There is some duplication with matters discussed when dealing with objections made elsewhere.

[133] In paragraph 22 Mr Reardon recorded what appears to be hearsay information, that Ms Evans' only previous experience with legal matters was in relation to family law. If that be correct then the balance of the passage the subject of the objection is a statement of implication, and therefore inadmissible in a court, being a matter for the Judge to determine. Nevertheless, it serves as a reminder of a matter which potentially arises for determination. It will not be excluded, notwithstanding its limited utility in these proceedings.

[134] Paragraph 23 recorded the occupation of Ms Evans, and the fact that Je is a minor. These matters appear to be hearsay. The balance of the paragraph is similar in character to the part of paragraph 22, just discussed. The result is the same. However, if it becomes necessary to form a view on the level of sophistication of Ms Evans as

a client, the Tribunal will do so on the basis of facts that it finds, rather than the conclusion expressed by Mr Reardon.

[135] Paragraphs 26 and 27 are irrelevant, and the objection to them is accordingly upheld.

[136] Paragraph 34 was objected to on the basis that the factual foundation for it was not established, and it is argumentative. The plain basis for the evidence is Mr Reardon's reading of the material briefed to him. The nature of the work also appears from the tax invoice. Mr Reardon is qualified to express his views about the work involved. The objection fails.

[137] Paragraph 41 identified the basis for Mr Reardon's views about the charge for obtaining letters of administration, set out in paragraphs 133-145. It is apparent that he was referring to the charge of a fixed fee, not being a fee calculated on a time basis. To the extent that paragraph 41 identified the basis on which he has acted, it is unobjectionable. For that reason, the objection fails. As will appear, the Tribunal has concluded that he was correct to regard the fee as a fixed fee.

[138] Apart from matters of calculation, and perhaps a conclusion based on them, paragraphs 42-45 expressed Mr Reardon's views about the range of proper fees for the work done by the practice. It was said to be based on a comparison of estate matters of comparable or greater complexity. No doubt the fact that a comparison was made implies that regard was had to the work done, as revealed by the file and particularly the tax invoice. The objection was that the factual foundation for the opinion was not established. The factual foundation was Mr Reardon's comparison between the complexity of the work done by the respondent, and work done in other matters. The work done by the respondent was substantially established by the tax invoice, augmented by Mr Reardon's report where it set out information taken from the file. In a court of law, it might be necessary to identify the other matters and produce the files. However the Tribunal is not bound by the rules of evidence. The respondent has had Mr Reardon's report for a long time (it would seem at least 18 months). There was ample time to seek the files in advance, and to see whether they provided a proper basis for the opinion. An attempt could have been made to cross-examine Mr Reardon for the same purpose, but that was not done. The respondent has not sought to demonstrate that any unfairness would result from the admission of the evidence. Mr Reardon's evidence amounted to a very broad summary of the nature of work done in other matters, and, at least by implication the costs charged in them. Its accuracy has not been challenged. It is not without probative value. It appears to be similar in character to experience which qualifies an expert to give evidence.[118] The objection fails.

[139] It was contended that paragraph 46 "swears the issue". The paragraph set out Mr Reardon's opinion about a general principle. It is part of his methodology, rather than an issue in the case. The objection fails.

[140] The same objection was taken to paragraphs 47.2, 47.7 and 47.8. The objections are baseless. The witness simply identified what is in, or not in, the costs agreement, as part of his analysis. These objections fail.

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118 See Cross at [29150].

[141] There was also an objection to paragraph 47.8 on the basis that it is irrelevant. It is not. It forms part of Mr Reardon's analysis of the document, and notes a matter of some relevance to the role and significance of the disclosure notice, of which it forms part. This objection also fails.

[142] The respondent objected to paragraph 49 on the basis that it "swears the issue". It does not. The objection fails.

[143] The respondent objected to paragraph 50 on the basis that it is irrelevant and a legal submission. If it were tendered as evidence of the obligations imposed by s 308 of the LP Act, it would not be admissible as such in a court. There is no suggestion that it is proferred on this basis. It formed part of Mr Reardon's examination of disclosure obligations, relevant to some of his conclusions about the respondent's conduct. To the extent that this examination stated matters of law, it was generally adopted by the applicant by way of submission. The examination provided useful references for the Tribunal, although it is for the Tribunal to identify the effect of s 308, and the general law. This paragraph will not be excluded.

[144] The respondent objected to paragraph 51 on the ground that is irrelevant, and swears the issue. The paragraph is a mixture of statements of relevant facts, and the application of a provision of the LP Act, and the general law, to them. The issue addressed is not an ultimate issue. Nevertheless, the conclusions about the application of legal principles to the facts is a matter for the Tribunal. The Tribunal, not being bound by the rules of evidence, does not intend to exclude this paragraph, because it serves as a reminder of some matters which might require consideration. In addition, some of the matters are factual and relevant, and accordingly not inadmissible. In any event, the applicant adopted the paragraph as a submission, and it provides a useful record of it.

[145] Objection was taken to paragraph 52 as swearing the issue. The same objection was made to paragraph 53. Paragraphs 54 to 61 were objected to as being legal submissions; and not an appropriate expression of expert opinion. All of these paragraphs are matters of submission, and technically not admissible as evidence. They will not be excluded on that basis, because they record submissions adopted by the applicant.

[146] Objection was separately taken to the last sentence of paragraph 61 on the ground that it is hearsay, and the asserted fact is not proven by evidence. The objection is misconceived. The sentence recorded the outcome of an examination of the respondent's file.

[147] Objection was taken to paragraphs 62 to 64 and paragraphs 65 to 86 as irrelevant and being legal submission. Paragraphs 62 to 64 summarised provisions which have some statutory effect, and thus recorded matters of law. Paragraphs 65 to 86 contained a review of cases relating to uplifts for care and conduct; together with some comments based on them. Technically, all these paragraphs may be "irrelevant" as not probative of any issue of fact. The paragraphs are nevertheless of assistance in the identification of legal principles relevant to the evaluation of the respondent's conduct relating to the care and conduct uplift. They were adopted by the applicant by way of submission. On that limited basis, they will not be excluded.

[148] Paragraph 87 was objected to on the ground that the factual basis for the opinion was not established. Again, the objection is misconceived. The paragraph records the result of an examination of the file.

[149] Paragraphs 88 and 90 were said to swear the issue. This is another misconceived objection. Paragraph 88 summarised the effect of statutory provisions. Paragraph 90 was the expression of opinion, by a practitioner with some experience in the area, of the nature and likely outcome of the work undertaken by the respondent. In neither case is there a swearing of the issue. The objection fails.

[150] Objection was taken to paragraphs 90 to 93 on the basis that the paragraphs are irrelevant, and the factual foundation of the opinion expressed is not established. The character of paragraph 90 has already been identified. Its basis in part is obviously Mr Reardon's examination of the file, and in any event is apparent from the tax invoice. Otherwise it is based on his experience. The remaining paragraphs comment (helpfully, though somewhat favourably to the respondent) on the effect of provisions of the costs agreement, compared with the effect of some statutory provisions. The factual basis for the comments are established. The material assists the Tribunal in evaluating the respondent's conduct. The material will not be excluded.

[151] The respondent objected to paragraphs 94 to 98, on the basis that they are irrelevant and argumentative. The applicant argued that Mr Reardon was entitled to identify a basis for saying that the charging of two of the uplifts is unreasonable. Paragraph 94 is somewhat obscure. If it is intended to give evidence of the inference to be drawn as to the respondent's purpose, it is inadmissible, and would be disregarded. That is not a matter of opinion about which evidence might be given.[119] If it is read as an opinion on the effect of part of the costs agreement, it is of a different character. It would then deal with a matter for legal argument, not properly the subject of expert opinion. That is not the objection taken. Such an objection would be somewhat sterile. The point made in the paragraph is of potential relevance in the evaluation of the respondent's conduct, identifying a view which might be taken of the effect of the provision for this uplift. Accordingly, this paragraph will not be excluded.

[152] Paragraph 95 made observations about the conduct of the law practice by reference to s 324 of the LP Act. It was not an attempt to "prove" by evidence the effect of the section. To the extent opinions were expressed, they are of some relevance. The objection to this paragraph fails.

[153] Paragraphs 96 to 98 made comments on the uplifts, based on Mr Reardon's view of the effect of the costs agreement, and the effect of provisions of the LP Act. While those matters are themselves matters for the Tribunal to decide as matters of law,[120] their identification was necessary for the comments of Mr Reardon. The paragraphs are not irrelevant, nor are they inadmissibly argumentative. The objection to these paragraphs fails.

The objection to paragraph 99 was that the basis for the opinion was not established; and it was irrelevant and argumentative. The paragraph is a summary statement of Mr Reardon's concerns about the uplift charges. The reasons are set out earlier in the report, including the factual basis for them. The opinion itself is relevant, being of

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119 See J D Heydon, *Cross on Evidence + Cases* LexisNexis loose-leaf service para [29005] at n 2.

120 Compare Cross at paragraph [11010].

assistance in assessing the respondent's conduct. If the objection that the paragraph is argumentative is meant to convey that the paragraph is mere assertion, unsupported by reasoning or fact, then in the context of the report, that is not so. The paragraph will not be excluded.

[154] Objection was taken to paragraph 101 as argumentative. It is not inadmissible. It simply identified matters which are the subject of Mr Reardon's later examination. The opinion that they are "concerning" is explained in the course of his consideration of these matters, where he identified reasons for questioning their propriety.

[155] Mr Cohen objected to paragraphs 102 to 104 on the ground that they were irrelevant and contained legal submission. Paragraphs 102 and 103 were a prelude to Mr Reardon's consideration of the question whether or not the charges made by the legal practice were reasonable, and identified the standard which he applied. As one of the passages from the judgment of Mahoney JA in *Veghelyi* demonstrates, evidence as to what costs are reasonable is of assistance in determining whether the costs charged by a legal practice are grossly excessive. These paragraphs are relevant. The explanation for Mr Reardon's view about the reasonableness of charges is not legal submission.

[156] One of the grounds of objection taken to paragraphs 105 and 106 is that the factual foundation for the opinion is not established. The submission is simply wrong. The opinions expressed are neither argumentative, nor legal submission.

[157] Paragraph 108 is the expression of Mr Reardon's opinion about whether certain charges were proper. It is the kind of opinion which a costs assessor regularly is required to form. It may be true that it involves the application of a legal standard to facts. The type of evidence referred to by Mahoney JA in *Veghelyi* however, reflects the application by solicitors of their understanding of their rights under their agreements with their clients, and their duties including fiduciary duties, to the facts of a particular case; yet that is the type of evidence which Mr Cohen has contended should have been led in this case. The objection (that the evidence is argumentative, legal submission, and swears the issue) fails.

[158] Paragraphs 109 and 110 were said to be legal submission and argumentative, and to swear the issue. The paragraphs identify a standard which Mr Reardon has applied, and his application of that standard to a class of charges made by the legal practice. The identification of a standard, even if it be a legal standard, by reference to which an opinion is expressed, is not inadmissible. Even if it be regarded as legal submission, it is not to be excluded from consideration for this reason. Nor is it inadmissible as swearing the issue.

[159] Mr Cohen contended that the factual foundation for paragraphs 111 and 112 was not established; and that Mr Reardon swore the issue. The first objection is simply wrong. The items were extracted from the tax invoice. The description of each appears to be the basis for their characterisation. The evidence is not inadmissible as swearing the issue.

[160] Objection was taken to paragraphs 114 to 116 as the expression of legal opinion, and as argumentative. The observation about overcharging in paragraph 116 may be inadmissible inference (discussed earlier). If the Tribunal accepts that this class of overcharging has occurred, it will, if necessary, reach its own conclusion as to the explanation for it. Otherwise the evidence primarily identified categories used by Mr

Reardon later in his report, with reference to judicial criticism of the charging method which leads to some of the charges criticised. The former is admissible; the latter may be. In any event, what may be regarded as matters of submission in these paragraphs, as with many earlier paragraphs, was adopted by way of submission by the applicant. There is no utility in excluding any of it, and the Tribunal does not propose to do so.

[161] It was said that the factual foundation for paragraph 117 is not established. Again, the objection is wrong, the entries being extracted from the tax invoice, as the paragraph itself stated. The same applies to paragraph 118.

[162] The same objection was taken to paragraph 119; notwithstanding that Mr Reardon has exhibited a copy of the relevant documents from the file. Again, the objection is wrong. It was also objected that this paragraph is argumentative and swears to the issue. The latter is wrong. The opinion does not require expertise; but it explains the basis of some criticism of Mr Reardon of the costs charged by the legal practice. It will not be excluded.

[163] Paragraph 120 was Mr Reardon's explanation for his categorisation of one item in the tax invoice. It is not inadmissible.

[164] Mr Cohen has objected to paragraph 122 on the basis that the factual foundation for the opinion has not been established. The factual foundation is a number of entries in the tax invoice, reproduced in the paragraph itself; the tax invoice being attached to the report. It was also said that the paragraph is argumentative. There is a sense in which any expression of an opinion may be said to be argumentative, but that does not provide a proper basis for the exclusion of the opinion.

[165] Objection was taken to paragraphs 123 and 124 on the basis that they are argumentative. Apart from setting out a letter sent by the respondent, the paragraphs expressed a view about the prospect that a solicitor would require two hours to draft it. Mr Reardon is competent to express the opinion. The objection is without merit.

[166] Mr Cohen has objected to paragraphs 125 and 126 on the basis that the factual foundation for the opinion was not established, notwithstanding that the documents on which the opinion is based are identified in the paragraph, and copies are attached to the report. This ground fails. Otherwise he submitted that the evidence is argumentative, and that Mr Reardon swore to the issue. Mr Reardon expressed the view that a particular item is an example of overcharging, and "inexcusable rapacity". It is similar in character to the kind of evidence to which Mahoney JA referred in *Veghelyi*. In any event, evidence which swears an issue is not uncommonly received in courts of law.[121] It is not proposed to exclude the evidence.

[167] The effect of paragraph 128 is that there was no disclosure to the client about particular types of charges, and informed consent was not obtained to them; by inference, that there were features of these charges which called for disclosure; and that these items were not usually chargeable on a party and party assessment. Objection was taken that the factual foundation for the opinion is not established. It is apparent from Mr Reardon's report that non-disclosure is a conclusion to be inferred from his examination of the file; and the failure to obtain informed consent is another conclusion based on it. These ultimately are not matters for Mr Reardon to determine,

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121 Some examples are identified in Cross at paragraph [29105].

but the Tribunal. Nevertheless, it is appropriate to regard them as assumptions, for the purpose of other opinions expressed by Mr Reardon. The implicit statement that there should have been disclosure of the types of charges discussed by Mr Reardon may be regarded as a matter for submission; but, consistent with earlier reasons, it is not proposed to exclude it. That the items were not usually chargeable in the context identified is within Mr Reardon's expertise.

[168] Paragraph 129 expressed the view that the respondent breached his fiduciary obligations. The Tribunal does not consider that to be a matter about which Mr Reardon may express an opinion. However, the paragraph has been adopted by the applicant as a submission; and accordingly will not be excluded for that reason.

[169] Paragraph 130 was objected to as a submission. However, the applicant has adopted it a as a submission, and it will not be excluded on that basis.

[170] Paragraphs 131 and 132 were objected to, on the basis that they are consequential to other objectionable paragraphs. The objection fails.

[171] Paragraphs 133 to 135 were objected to as argumentative and legal submission; and because the factual foundation for the opinion was not established. Paragraphs 137 to 139 were objected to on the same grounds. These paragraphs analysed the description in the tax invoice of the work done in obtaining the grant; identified time entries for the work as recorded in the file (Mr Reardon's statement that the analysis showed "the time expended" was not challenged), and applied the rates from the cost agreement to those items, for comparison with the amount charged. The factual foundation is established (part is the tax invoice, in evidence, and part is the reproduction of file entries, which, while hearsay, or perhaps secondary evidence of documents, should not for either reason be excluded in these proceedings). The evidence is neither argumentative nor legal submission.

[172] Objection was taken to paragraph 140 as argumentative, legal submission, and swearing to the issue. The evidence that the charge for obtaining the grant is "plainly excessive" is admissible opinion evidence from Mr Reardon. His description of the conduct as "inexcusable rapacity" will be treated in the same way, and for similar reasons, as the description in paragraph 126.

[173] Paragraphs 142 to 144 were said to be argumentative, and to set out legal opinion; and it was said that the factual foundation for the opinion was not established. In fact, the paragraphs set out calculations based on earlier paragraphs of the report; and compared the result with what Mr Reardon earlier identified as a reasonable range of fees. The objections are not made out.

[174] Paragraph 145 was objected to as argumentative and legal submission. The paragraph makes an observation about the form of the tax invoice, which is a matter for submission, and not a matter for expert evidence. However, there is no utility in its exclusion.

[175] Paragraphs 146 to 152 were objected to as irrelevant, argumentative and legal submission. However, they were adopted as submissions by the applicant, and will remain on that basis.

[176] Objection was taken to paragraph 153 on the basis that it is consequential to earlier paragraphs. The objection fails.

Jacobs – Charge 2 considered

[177] The charge is that the respondent charged excessive legal costs. The application asserted that by doing so, the respondent engaged in professional misconduct or unsatisfactory professional conduct. These allegations are consistent with the provisions of s 420(1)(b) of the LP Act, which provides that "charging excessive legal costs in connection with the practice of law" may constitute unsatisfactory professional conduct or professional misconduct. It is apparent that the charge is based on the role of the respondent in the charges made by the legal practice.

[178] Professional misconduct could, under the general law, be established by showing that the amount charged was "grossly excessive". In *Re Veron; Ex parte Law Society (NSW)*,[122] the Court said:

> It has long been recognised that the charging of extortionate or grossly excessive costs by a solicitor may amount to professional misconduct….it is not in every case where a solicitor agrees with a client a fee which is substantially larger than the fee which would be allowed on taxation that he is guilty of conduct unbefitting a solicitor….it is a question of degree and dependent upon the facts of the individual case.

[179] The judgment of Mahoney JA in *Veghelyi*[123] is to similar effect. Dal Pont raises a question whether this remains the test in view of the current statutory language.[124] In the present case, the applicant, through Mr Reardon, has contended that the charges were rapacious, apparently in line with the test in *Re Veron*, and has not sought to argue for a lesser threshold for identifying professional misconduct. Accordingly, the application will be dealt with on this basis.[125]

[180] Apart from objection, there was no attack on Mr Reardon's assessment that $8,000 to $12,000 was an appropriate range for fees to be charged for the work done by the legal practice. For the purpose of comparison, it is appropriate to assume (in favour of the respondent) that this range is exclusive of GST.

[181] In the costs agreement, fees were estimated to be between $7,500 and $12,500, excluding sundries, outlays and GST. At first glance, this appears to be consistent with Mr Reardon's range. However, the costs agreement stated that the estimate included the sundries uplift; and it should have included some allowance for the care and conduct uplift provided for in the costs agreement. Since it was clear that Mr Reardon did not support the charging of either uplift, the estimate in the costs agreement would appear on analysis to be lower than Mr Reardon's range, once these factors are taken into account. Nevertheless, the respondent's own estimate provides some support for Mr Reardon's unchallenged view.

[182] Mr Reardon's evidence of the appropriate range is accordingly accepted.

[183] That range is to be compared with the total for professional fees (excluding GST and disbursements) charged in the tax invoice of $24,530. The total fee is accordingly slightly more than double the amount which marks the top of the range for an

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122 (1966) 84 WN (Pt 1) (NSW) 136, 144; and see the discussion in Dal Pont, *Contextualising Lawyer Overcharging*, Monash University Law Review Vol 42 No 2 p 284, at pp 295-297.

123 At p 6.

124 *Lawyers' Professional Responsibility* para [25.70] at n 75.

125 See Dal Pont, *Contextualising Lawyer Overcharging*, at pp 304-307.

appropriate fee, and approaching 2.5 times the mid-point of the range. That is sufficient, in the Tribunal's view, to establish that the respondent was responsible for gross overcharging in this matter. However, that conclusion is supported by an examination of some particular aspects of the tax invoice.

[184] Mr Reardon's analysis demonstrates that, had the respondent charged for the work involved in obtaining the grant of letters of administration on the basis of time actually spent on this work (and not otherwise charged for) by reference to the rates in the cost agreement, he would have been entitled to charge $1,031 exclusive of disbursements and GST. No legal basis for charging for this work, other than time costing, has been suggested. It is axiomatic that when an agreement specifies that one party is to pay the other amounts to be calculated in accordance with the agreement, the first party has no obligation to pay more, or to pay amounts differently calculated; and the only right the other party has is to charge for the work in accordance with the agreement.[126] The charge of $5,000 clearly demonstrates rapacious conduct by the respondent.

[185] Mr Cohen submitted that the respondent had not charged a fixed fee for this work. He did not identify any evidence to demonstrate that the submission is correct. Mr Reardon has shown that the charge was not based on the time actually taken for the work, and there is no other explanation for it than as a fixed fee. The submission is rejected.

[186] Comments have already been made about the inclusion in the costs agreement of provision for the conditional agreement uplift. Those comments apply, if anything with greater force, to the charging of this uplift. It was clearly rapacious conduct.

[187] It is inherently unlikely that a matter of this kind would warrant the imposition of an uplift for care and conduct, particularly when the costs agreement provided for a higher hourly rate for the work of the respondent, than for the work of an employed solicitor. No attempt was made to show why the charging of this uplift was appropriate, whether by reference to the criteria stated in the costs agreement or otherwise. Indeed, in his response, the respondent admitted that the amount charged for it was excessive. It was rapacious of the respondent to charge it.

[188] Earlier in these reasons reference was made to matters apparent from the tax invoice which showed it to be unlikely that the inclusion of the sundries uplift in the costs agreement was justified. No attempt has been made to show that it was reasonable to charge it, and again the respondent has admitted that the amount charged was excessive. The Tribunal is satisfied that this uplift bore no relation to expenses incurred in relation to the matter, of the kind described as sundries. There was no proper basis for charging this uplift, and it is another instance of the respondent's rapacity.

[189] It is convenient to refer to Mr Reardon's discussion of a number of items in the tax invoice, using the numbers Mr Reardon assigned to them.

[190] The Tribunal is not satisfied that the enquiries referred to in items 55 and 95 were such that the respondent, as a Queensland practitioner, should not have charged for them. While the times charged seem excessive, the evidence is not sufficient to

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126 And see *Southwell v Jackson* [2012] QDC 65 at [41].

establish that. Accordingly, the items are not shown to be evidence of excessive charging.

[191] In the absence of some better support than that identified by Mr Reardon, the Tribunal is not prepared to accept that the respondent should not have made any charge for file reviews. It is possible that some of these charges, because of the number of them, account in some small way for the fact that the amount charged as a whole was grossly excessive, but it is unnecessary to make a determination about this to decide the charge.

[192] Items 3, 4 and 5, and the other items classified as other administrative charges, show that the respondent has charged at professional rates for tasks, many of which would ordinarily be done by a secretary, without charge.[127] It is likely that to some extent, these charges contribute to the fact that there was gross overcharging in this case, but again it is not necessary to decide this.

[193] The second occasion on which the respondent charged for perusing the coroner's report (assuming this to be a document perused on 28 June 2012) was associated with correspondence with an insurance company. It is not clear that it was inappropriate for the respondent to charge for reading the document again at that time.

[194] It is highly likely that many of the documents identified in the table under the topic "Discriminator Blindness" could have been perused in a few seconds. Notwithstanding the provisions of the costs agreement, the approach reflected by the charges made for these items has the consequence that the effective rate of charge is a multiple of the hourly rate shown in the costs agreement. It was not proper for the respondent regularly to charge for these perusals as he did, notwithstanding the terms of the cost agreement.[128]

[195] It is highly unlikely that the document referred to in item 10, and annexed to Mr Reardon's report, would have required more than six minutes to peruse. It is, however, not possible to extend that conclusion to a conclusion about the other items in the table under the topic "Unit Creep"; and Mr Reardon does not appear to do more than raise a query about the extent to which the last unit of time charged for each of them was properly charged. It is not possible to make a finding adverse to the respondent about them (other than item 10).

[196] Item 9 is a charge for two hours of the respondent's time to draft a short letter which would appear to be in relatively common, if not standard, form. On the evidence, it is a clear, example of gross overcharging, even if the amount involved is not large. It seems that the times charged for the perusals the subject of items 67, 97, and 121 were in excess of what the respondent could have spent on these tasks. However, the amounts involved are so small that they do not materially contribute to the conclusion reached about gross overcharging, and accordingly it is unnecessary to make a finding about them.

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127 But note the observations of Malcolm CJ in *D'Alessandro & D'Angelo (A firm) v Bouloudas* (1994) WASC 227 at p 40 (F Ct); (1994) 10 WAR 191 at 213.

128 See the observations in *Legal Profession Complaints Committee v O'Halloran* [2011] WASAT 95 at [133]-[136].

[197] The fact that the Tribunal has not accepted all of the matters raised by Mr Reardon in regard to specific items does not affect its overall conclusion that the respondent engaged in gross overcharging.

[198] The judgment of Mahoney JA in *Veghelyi* does not support the proposition that a charge which a practitioner has no right to make is not excessive for that reason. Mr Cohen cited no other authority with reference to this submission. The inclusion of a fee item in a tax invoice which the practitioner is not entitled to charge inevitably makes it "excessive", at least in the sense that it exceeds what the practitioner is entitled to charge. The following appears in Dal Pont:[129]

> The charging of grossly excessive costs by a lawyer is professional misconduct, *as is charging of costs and disbursements where none are properly chargeable*. (emphasis added, citations omitted)

[199] For the latter part of the statement, the author refers to *Legal Services Commissioner v Baker (No 2)*.[130] There, one charge against the practitioner was that he wrongfully charged professional fees and disbursements in circumstances in which none was properly chargeable, or they were in excess of what was properly chargeable.[131] A finding of professional misconduct on this charge was upheld.[132] It may well be that not every case of the imposition of such a charge will amount to misconduct, and that questions of degree, and the circumstances in which the charge was made, will come into consideration. The imposition of an unauthorised charge, when that would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency under the *Allinson* test,[133] would amount to professional misconduct. That would seem to be consistent with the language used in *Re Veron*.

[200] Mr Cohen's reliance on the costs agreement in the present case is misplaced. In *D'Alessandro v Legal Practitioners Complaints Committee*,[134] Ipp J held that a costs agreement authorised by a statutory provision did not operate as a bar to a charge of misconduct by excessive charging.[135] In *Roche* de Jersey CJ said:[136]

> The circumstance that a solicitor's right to exact certain charges is enshrined in an executed client agreement will not necessarily protect the solicitor from a finding of gross overcharging. For example, as here, the client may not have given his or her "fully informed consent" to the agreement; or the very extent of the particular charges may itself evidence inexcusable rapacity.

[201] There is no reason to question the correctness of the observations of Mahoney JA in *Veghelyi* as to the potential significance of a costs agreement; but they apply when the client, who has been fully informed, has voluntarily entered into the agreement. His Honour also emphasised the fiduciary obligations of the legal practitioner, and the imbalance between the position of the practitioner and the position of the client. Here,

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129 *Lawyers' Professional Responsibilities* at [25.70].
130 [2006] 2 Qd R 249; [2006] QCA 145.
131 See at [19], charge 2.
132 See at [22].
133 See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; and the discussion in Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6th ed, 2017), [23.85].
134 *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198.
135 See at 207-212.
136 At [32].

the respondent went through the charade of making disclosure to himself. His entry into the agreement on behalf of the estate, without disclosure to Ms Evans, and the obtaining of her consent, deprives it of any utility as a defence to the charge. Indeed, reference to the costs agreement demonstrates that the conditional agreement uplift was rapacious. Though less obvious, the same applies to the uplift for sundries. Even if, contrary to the Tribunal's view, it was not a breach of his obligations to the estate for the respondent to agree to the inclusion of the care and conduct uplift, the exercise of the discretion to charge it, where nothing has been shown to warrant doing so, demonstrates rapacity. Moreover, the respondent charged more than was authorised by the agreement, notably the charge for the application for letters of administration.

Characterisation of respondent's conduct in Jacobs matter

[202] The applicant has drawn attention in his written submissions to cases with some similarity to the present case, where the overcharging was found to be professional misconduct. The respondent has admitted some misconduct, but has made no submission as to how that should be characterised; nor as to the consequences of other findings for which the applicant contended.

[203] At least from the time when he executed the costs agreement, the respondent engaged in a course of conduct designed to enable the law practice to engage in gross overcharging, which then occurred. The overcharging was facilitated by the respondent's failure to comply with his fiduciary obligations to the estate, which played a significant role in the respondent's overcharging. While in absolute terms the amounts involved were not particularly large, they were not insignificant; and in the context of the total value of the estate, they were substantial. It is an aggravating feature of the respondent's conduct that the sole beneficiary of the estate was an infant. The conduct would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency. The conduct which is the subject of charges 1 and 2 is found to be professional misconduct.

Coughlan – the background

[204] Gregory Coughlan died on 2 February 2009. His will appointed the respondent as executor and trustee of his estate. Mr Coughlan left a life interest in a house property to his mother, Ms Phyllis Coughlan; with the residue to be held on trust for his daughter, Tori Cox, until she attained the age of 25. At the time of Mr Coughlan's death, Tori was an infant, living with her mother, Ms Kylie Cox. From about 2 February 2009, the respondent acted as executor and trustee of the estate, having been notified by Ms Coughlan of Mr Coughlan's death. On 6 February 2009, the respondent entered into a costs agreement with Slipper Lawyers to act in relation to the estate. On 21 April 2009, he applied for probate, granted on 1 May 2009. On 22 December 2009, the respondent, on behalf of the law practice, rendered a bill to the estate for $26,405.73 (inclusive of GST and disbursements); and on 23 December 2009, he authorised the payment of that bill from the estate funds held on trust. The bill included a lump sum of $5,000 for obtaining probate, an "uplift fee" of $4,666, and a fee of $2,434.50 for "care and consideration", in each case plus GST. These facts appear from the SOAF.

[205] The costs agreement provided:-

(a) The work to be undertaken was estate administration;

(b) The fees would be charged by reference to time spent;

(c) The respondent's hourly charge-out rate was $330 plus GST (with lower charge-out rates for a senior and a junior solicitor);

(d) The hourly charge-out rate for a paralegal was $160 plus GST;

(e) There was an hourly charge-out rate of $120 plus GST for secretarial services;

(f) Time would be charged in six-minute intervals; with six minutes being the minimum interval recorded for professional services;

(g) The firm would charge professional fees of $100 plus GST for opening the file and the preparation of the costs agreement;

(h) Individual fee rates were specified for photocopying, faxes, lodgement of documents, secretarial and word processing (in this provision, the rate was $90 per hour plus GST); some computer services, clerical and accounting services; and general library services;

(i) An uplift fee of 25% of "the professional fees usually charged" would be payable "on the successful outcome of the matter"; the reason why the fee was warranted was "non-payment of up-front fees" (*conditional agreement uplift*);

(j) Interest was payable on bills unpaid after 14 days, at the benchmark rate, effectively under the LP Act.

Coughlan – Allegations and contentions

[206] The application alleged that the respondent acted in this matter where there was a conflict between his personal interest, and the interest of the estate, and its sole beneficiary. Its particulars include the following:

> 3.12 The respondent allowed his personal interest in obtaining fees from the estate to conflict with the interests of the estate of which he was the executor and trustee, and the interests of the residual beneficiary whom he owed fiduciary obligations (namely, the interests of the estate and Tori in minimising costs to the estate and maximising the value of the estate for Tori) by:
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> a. Entering into a costs agreement with the law practice of which he was the sole legal practitioner director;
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> b. Entering into a costs agreement which allowed charging at hourly rates in excess of the rates allowed under the Supreme Court scale, plus specified uplifts, without either obtaining the informed consent of Kylie (as Tori's guardian), or disclosing to her the likely total legal costs of the matter;
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> c. Charging a "lump sum" fee of $5,500 (including GST) for obtaining probate, when that fee was neither authorised by the costs agreement, not disclosed to Kylie (as Tori's guardian), nor approved by Kylie (as Tori's guardian);

> d. Consenting to the imposition of charges against the estate by the law practice without the informed consent of of [sic] Kylie (as Tori's guardian); and
>
> e. Rendering the bill of 22 December 2009; approving that bill for payment; and authorising payment of it from estate funds.

[207] As in the Jacobs matter, the particulars referred to acts of the respondent both in his capacity as personal representative, and as the sole practitioner director of the ILP.

[208] The application also alleged that the bill included the specific fees previously mentioned, and that the fair and reasonable value of the work was $11,108.39. It then alleged that "in the circumstances" the costs were excessive.

[209] In his response, the respondent denied that he allowed his personal interest to conflict with the interests of the estate or the residuary beneficiary. He admitted that the practice was not entitled to charge the uplift fee; and that the amount charged for care and conduct was excessive. He alleged that the fees otherwise rendered in accordance with the costs agreement were fair and reasonable, and not excessive.

[210] The applicant's written submissions contended, with respect to charge 3, that the respondent's interest in maximising fees to himself was in conflict with his fiduciary duties to the beneficiary; and that there was no evidence on the file that the beneficiary was ever given any cost disclosure, that informed consent to the charges was obtained, or that the bill was provided to the beneficiary.

[211] The submissions also contended that the costs agreement made no provision for a lump sum fee; and that the bill included the conditional agreement uplift, the care and consideration uplift, and a lump sum of $5,000 for obtaining probate. The care and consideration uplift was not chargeable. Nor was the lump sum fee for obtaining probate. The actual cost of doing so was $1,571.45. On the evidence of Mr David Edwards, there were excessive time charges.

[212] For this matter, the applicant relied upon an "analysis" from Mr Edwards, a person employed as a principal legal officer with the Legal Services Commission. In his oral submissions, Mr Rice relied upon what Mr Edwards had provided in relation to the fee for obtaining probate. Mr Rice submitted that the respondent was not entitled to charge this fee; nor the uplift for care and consideration. He also drew attention to a number of other charges identified by Mr Edwards, which were said to be "suspect". He submitted that the amount charged was disgraceful. He drew attention to other matters identified by Mr Edwards,[137] the charges for which were said to be excessive.

[213] With respect to charge 3, he made a similar concession about the particular 3.12a as in the Jacobs matter. He relied upon the evidence of Mr Edwards to show that no costs disclosure was made, and informed consent was not obtained from Tori's guardian.

[214] The respondent's written submissions relied upon objections taken to the material provided by Mr Edwards in relation to charge 3. The respondent did not accept that the costs charged in this matter were excessive, notwithstanding that the respondent accepted that he ought not to have charged both the conditional agreement uplift and

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137 At pp 123-124 of the exhibit to his affidavit.

the care and consideration uplift. The costs agreement authorised a charge for care and consideration (a submission which was withdrawn orally). There was no prohibition on including a lump sum charge in an invoice based on an agreement where fees were determined by time costing.

[215] Orally it was submitted that the fee for obtaining the grant of probate was charged on a time cost basis.

[216] Generally, the parties relied upon submissions about matters of law raised in the Jacobs matter, which have already been determined.

Objections to the evidence of Edwards

[217] In addition to the present matter, these objections are relevant to material provided by Mr Edwards in relation to the Munt, Trill, Tully and Heginbotham matters. The character of the material in these matters, and the substance of the objections, are the same. It will be sufficient to deal with the objections in relation to the Coughlan matter, with the outcome being the same in the other four matters. Some of the objections relate only to the Saunderson matter, and will be dealt with separately.

[218] Mr Edwards' analysis was prepared "by applying the principles outlined in Mr Reardon's report". Objection was taken to the analysis on the basis that Mr Reardon's approach was misconceived. It was also submitted that Mr Edwards did not qualify himself as an expert witness on the question of the fairness and reasonableness of legal costs, nor did he otherwise qualify himself as having relevant expertise. On this basis, his affidavit was inadmissible. The evidence was of the poorest quality. The foundation for opinions expressed by Mr Edwards was not established. It was also submitted that, the files not being in evidence, the evidence of Mr Edwards could not be tested.

[219] The applicant did not provide an express response to these objections. Oral submissions, however, reflected some awareness of them.

[220] No evidence was provided of any relevant qualification or expertise of Mr Edwards. No opinion expressed by Mr Edwards will be acted upon, unless it falls within the limited classes of opinion evidence which a person without any expertise might express.

[221] A number of statements of fact appear in the material provided by Mr Edwards. These do not require expertise. No attempt was made to establish that these were based on hearsay, nor was that a ground of objection. It is probable that many or most of them are hearsay, or secondary evidence of the content of documents.[138] Nevertheless, since the Tribunal is not bound by the rules of evidence, there is no question of unfairness, and as the facts which they disclose were not challenged, there is no reason to disregard them.

[222] The application by Mr Edwards of the "principles" from the report of Mr Reardon takes a number of forms. There is much that is in truth legal submission, at times similar to what is in Mr Reardon's report, but at times going beyond that. There is no

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138 Cross at [39005].

reason to treat this material differently from the way such material from Mr Reardon was treated.

[223] Otherwise much of Mr Edwards' material involves collating information, sometimes with calculations, in a manner similar to Mr Reardon. Thus Mr Edwards has collected times for work done relating to obtaining the grant of probate for Mr Coughlan's estate. The entries are reproduced in Mr Edwards' Schedule 1. That material should be received. To those times he has applied the respondent's hourly rate from the costs agreement, unless the entry indicates that the work was done by someone else, and calculated a charge for each item of work. The accuracy of the description of the work has not been challenged. The approach taken in the calculation, in this respect, favours the respondent. The Tribunal is prepared to accept the calculations into evidence. Mr Edwards has incorporated into the schedule disbursements, and calculated a total. There is no reason not to accept this material into evidence. To the extent Mr Edwards expresses any opinion about these matters, it will not be treated as expert opinion. Much of it might be regarded as submission, raising matters for the Tribunal to consider. It is not appropriate to exclude such matters from consideration.

[224] When dealing with the uplift for care and conduct, Mr Edwards gave evidence of the Reserve Bank's Cash Target Rate as at December 2009. There is no reason to exclude this evidence. He also presents some calculations. There is no reason to exclude them from evidence. To the extent he expressed opinions they will be disregarded; though matters which might be treated as submission will be considered by the Tribunal if thought appropriate for the determination of the application.

[225] In relation to other topics, Mr Edwards reproduced items from the tax invoice (separately proven), and sometimes made some calculations. His comments on these matters will be treated as submission, as previously stated.

[226] The submission based on the fact that the files were not in evidence is rejected, for similar reasons for rejecting the objection on this basis in relation to Mr Reardon's evidence.

Coughlan – Charge 3 considered

[227] For reasons similar to those given in relation to the Jacobs matter, the Tribunal considers that the respondent entered into a position of conflict by entering into the costs agreement.

[228] Again, there was no evidence that the hourly rates in the costs agreement exceeded the rates as allowed under the Supreme Court scale. This allegation is not made out.

[229] The comments and findings made in relation to the conditional agreement uplift in the Jacobs matter apply to the current matter. The finding that no disclosure was made to Ms Cox is based on Mr Edwards' statements that there was no evidence of this on the file; and his later statement that there was no disclosure to either Ms Cox or Tori of the basis on which costs would be charged. It is also supported by an examination of the tax invoice. There is a record of a conference on 9 February 2009 with "Phyllis and April" (apparently Mrs Phyllis Coughlan, and Mrs April Riley), regarding probate and the receipt of documents; but none with Ms Cox or Tori regarding the fees to be charged. Indeed, the tax invoice does not record any communication with Ms Cox; and nor does Mr Edwards' Schedule 1.

[230] The costs agreement did not authorise the charge of a fixed fee (described in the application as a lump sum) for obtaining probate. The respondent clearly placed himself in a position of conflict by charging this fee. He did the same as executor by consenting to the charges imposed. There is no evidence that he obtained informed consent to do so; and the Tribunal considers it is highly unlikely that he did, for reasons similar to those in the Jacobs matter. The respondent placed himself in a position of conflict by rendering the bill, approving it for payment, and authorising payment from the estate.

Coughlan – Charge 4 considered

[231] The application asserted that the reasonable value of the work performed by the practice in connexion with this estate was $11,108.39. There was no admissible opinion evidence to that effect. However, the amount was the result of a calculation by Mr Edwards, aspects of which will be discussed.

[232] The starting point for the calculation was the amount charged. From that was deducted an "adjustment" for the charge for obtaining probate, the care and consideration charge, the conditional agreement uplift, an amount for non-chargeable items; and adjustments for "discriminator blindness", "unit creep", and "time padding".

[233] Apart from the improbability that an amount calculated by time costing would be a round figure of $5,000 (by chance, identical with that in the Jacobs matter), Mr Edwards' Schedule 1 demonstrates that not to be so. Mr Cohen's oral submission to the contrary should be rejected.

[234] There was no entitlement under the costs agreement to a fixed fee for obtaining the grant of probate. The amount was charged for professional fees. The only evidence of any work which would entitle the respondent to charge professional fees for obtaining the grant of probate appears in Mr Edwards' Schedule 1. The professional fees chargeable, excluding GST, amount to $817.40, on the assumption made by Mr Edwards as to the extent to which the respondent did the work recorded. The amount charged was grossly excessive, and is clear evidence of rapacity.

[235] There was no entitlement under the costs agreement to an uplift for care and consideration (or care and conduct). Yet the respondent charged $2,434.50 for this. While the amount is substantially less than the fee for obtaining the grant, it is clear evidence of rapacity; and is of some significance on the question whether the fees charged were grossly excessive.

[236] The respondent charged a conditional agreement uplift of $4,666.12. Although this was authorised by the costs agreement, there was no reasonable basis for making this charge. The views previously expressed in relation to the inclusion of the conditional agreement uplift in the costs agreement for the Jacobs matter, and reliance on it for the charge, are applicable in this case. It was plainly an excessive charge, and strong evidence of rapacity.

[237] Mr Edwards identified a number of items as non-chargeable. The admissible evidence is not sufficient to establish that the respondent was not entitled to charge for them.

[238] The items which Mr Edwards identified in relation to discriminator blindness are all perusals of documents. None of the documents is in evidence. Without them the

Tribunal is unable to form a view as to whether there was any excessive charging for the perusals.

[239] Whether the charges for the items identified in relation to unit creep were properly charged for depends entirely on the opinion of Mr Edwards about the time involved in performing the tasks. He is not in a position to offer expert evidence on this question. Accordingly, the Tribunal does not find that the respondent overcharged for these items.

[240] With reference to time padding, Mr Edwards described eight letters sent on 17 February 2009, which were materially the same, and for each of which the respondent charged for 12 minutes of his time. The description strongly suggests that these were standard letters sent out in all estate matters. It may be doubted that the whole exercise required more than six minutes of the respondent's time; and it is highly unlikely that it took as much as 12 minutes. The Tribunal is satisfied that for these letters the respondent charged fees which were excessive, by an amount of the order of $400. The amount is not large, but the conduct is indicative of rapacity, and casts a shadow over much of the tax invoice. However, the Tribunal has already indicated its views about opinion evidence from Mr Edwards, and it is not prepared to make any other finding of excessive charging under this head.

[241] In the result, the Tribunal is satisfied that the amount charged by the respondent was excessive, in an amount of the order of $11,500 (exclusive of GST). The total amount charged (exclusive of GST) was about $24,000, with the consequence that excessive charges were almost half of the total amount charged.

[242] Accordingly, the Tribunal is satisfied that the respondent engaged in gross overcharging in this matter, and that, in this sense, the costs rendered by the respondent, and authorised by him for payment, were excessive.

Coughlan – Characterisation of the respondent's conduct

[243] Again, from the time when he executed the costs agreement, the respondent engaged in a course of conduct designed to enable the practice to engage in gross overcharging, which then occurred. The overcharging was facilitated by the respondent's failure to comply with his fiduciary obligations to the estate. That failure played a significant role in the overcharging. Again, the amounts involved were not particularly large, but they were not insignificant; and in the context of the total value of the estate (on Mr Edwards' evidence, worth less than $200,000), they were substantial. It is an aggravating feature of the respondent's conduct that the sole beneficiary of the estate was an infant. The conduct would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency. The conduct which is the subject of charges 3 and 4 is found to be professional misconduct.

Munt – the background

[244] The following facts are established by the SOAF. Mary Munt died on 9 May 2012, leaving a will. The will appointed the respondent as executor and trustee of the estate. In the events which happened, apart from gifts of jewellery, Ms Munt left her estate to her brother John Geran. On about 9 May 2012, Ms Jenny Curcio, a cousin of Ms Munt, advised the respondent that Ms Munt had died. Thereafter, the respondent acted

as executor and trustee of the estate. On 9 May 2012, he entered into a costs agreement with Slipper Lawyers. On 6 June 2012, the respondent applied to the Supreme Court for probate of the will, which was granted on 15 June 2012. The estate was largely finalised by August 2012. On 28 August 2012, the respondent, on behalf of Slipper Lawyers, rendered a bill to the estate for $34,505.74, including GST and disbursements. On about 7 September 2012, the respondent authorised payment of the bill from funds held in trust for the estate. On about 15 October 2012, the respondent advised Mr Geran of a clerical error in the bill, and refunded part of it, with the result that the total charged was reduced to $23,576.60, including GST.

[245] A perusal of the costs agreement reveals the following:-

(a) The legal practice undertook to perform the work set out at Item 3 of the Schedule, in addition to drafting and arranging for the execution of the costs agreement;

(b) The practice would charge its time on the basis of six-minute units; with "each unit or part thereof" to be charged for at one-tenth of the applicable hourly rate;

(c) The respondent's hourly charge-out rate was $400 (plus sundries, outlays and GST);

(d) The hourly charge-out rate for another solicitor was $280 (plus sundries, outlays and GST);

(e) The hourly charge-out rate for a paralegal was $160 (plus sundries, outlays and GST);

(f) The practice reserved the right to charge an amount that it considered reasonable for the solicitor's care and conduct, being 15% of professional fees (*care and conduct uplift*); matters relevant to such a charge included the complexity of the matter; the difficulty and novelty of any question raised; the importance of the matter; the skill, labour, specialised knowledge and responsibility of the solicitor; the number and importance of documents prepared or perused; and research and consideration of questions of law and fact;

(g) The agreement being a "proposed conditional costs agreement", the practice would on the conclusion of the matter charge an "uplift fee" of 25% on professional fees (excluding professional fees paid during the course of the matter, the warrant for the uplift fee being the "non-payment of up-front fees") (*conditional agreement uplift*);

(h) A further 15% of professional fees would be charged for photocopying, telephone, facsimile, postage and other sundry expenses (*sundries uplift*), which would be incorporated into the practice's professional fees;

(i) Fees and costs referred to in the agreement were exclusive of GST;

(j) Fees were estimated at between $10,000 and $20,000, plus sundries, outlays and GST;

(k) The estimate did not include the conditional agreement uplift;[139]

(l) A number of specified factors might affect the accuracy of the fee estimate;[140]

(m) No fee was required in advance[141] (in a case where an advance was payable, the relevant clause stated that the uplift fee would be charged if the fees were not paid in advance);

(n) Accounts were payable within 7 days of issue, and if not paid within 14 days would accrue interest;

(o) The client had been informed that he should seek independent advice in relation to the costs agreement;

(p) Accounts were to be on an interim basis or on finalisation of the matter, at the discretion of the practice;

(q) A Disclosure Notice pursuant to s 308 of the LP Act was attached to the costs agreement, receipt of which was acknowledged both by the respondent's signature on the notice and in the costs agreement.

[246] It is a curious feature of this costs agreement that Item 3 includes, handwritten, "Estate Administration"; and on the next line, "Probate $6,600 (incl. advertising)".

Munt – Allegations and contentions

[247] The application alleged that the respondent acted in this matter where there was a conflict between his personal interest, and the interest of the estate, and its sole beneficiary. Its particulars included the following:

> 5.14 The respondent allowed his personal interest in obtaining fees from the estate to conflict with the interests of the estate of which he was the executor and trustee, and the interests of the residual beneficiary whom he owed fiduciary obligations (namely, the interests of the estate and John in minimising costs to the estate and maximising the value of the estate for John) by:
>
> a. Entering into a costs agreement with the law practice of which he was the sole legal practitioner director;
>
> b. Entering into a costs agreement which allowed charging at hourly rates in excess of the rates allowed under the Supreme Court scale, plus specified uplifts, without either obtaining the informed consent of John, or disclosing to him the likely total legal costs of the matter;
>
> c. Charging a "lump sum" fee of $6,600 (including GST) for obtaining probate, when that fee was not disclosed to John prior to it being charged to the estate;
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> d. Consenting to the imposition of charges against the estate by the law practice without the informed consent of of [sic] John; and

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139 See cll 5.8 and 5.11 of the costs agreement.
140 See cl 7.
141 See cl 9.2 and Item 7 of the Schedule.

e. Rendering the bill of 28 August 2012; approving that bill for payment; and authorising payment of it from estate funds.

[248] These allegations related to the conduct of the respondent both as solicitor and as executor.

[249] The application also contained the following allegations:

> 6.2 By the bill of 28 August 2012, the respondent, on behalf of the law practice, rendered costs to the estate.
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> 6.3 The costs so rendered were excessive in all the circumstances.
>
> 6.4 The costs and outlays rendered to the estate were in the total amount (after the refund referred to in 5.12) of $23,576.60 including GST.
>
> 6.5 The bill included the following charges:
>
> a. A "lump sum" of $6,000 plus GST ($6,600 in total) for obtaining probate;
>
> b. An "uplift fee" of $3,413.83 plus GST ($3,755.21 in total)
>
> c. A fee of $2,048.30 plus GST ($2,253.13 in total) for "postage, photocopying, telephone, facsimile, etc"; and
>
> d. A fee of $2,048.30 plus GST ($2,253.13 in total) for "care and consideration".
>
> 6.6 The fair and reasonable value of the respondent's work in connection with the estate to the date of the bill was approximately $8,720.73.
>
> 6.7 In the premises, the costs rendered by the respondent, and authorised by him for payment, were excessive.

[250] In his response, the respondent denied that he allowed his personal interest to conflict with the interests of the estate. He admitted that the practice was not entitled to charge the conditional agreement uplift; and that the amounts charged for the sundries uplift and the care and conduct uplift were excessive. He alleged that the fees otherwise rendered in accordance with the costs agreement were fair and reasonable, and not excessive.

[251] The applicant's written submissions contended that the respondent's interest in maximising fees to himself was in conflict with his duty to the beneficiary of the estate. There was no evidence on the file that the beneficiary was given costs disclosure, that his informed consent was obtained, or that the bill was provided to him.

[252] It was submitted that the estate had a total value of $285,658.77. All of the uplifts were charged. There was no proper basis for charging the care and conduct uplift. The uplift for sundries was excessive, and not a realistic estimate of the actual cost. The amount charged for obtaining probate was excessive, the "actual cost" being $1,939.04. Excessive charges in addition to the uplifts were apparent from the tax invoice.

[253] Orally, Mr Rice submitted that the uplifts were similar to those in other matters. Although the charge for obtaining probate was mentioned in the costs agreement, it was well in excess of the value of the work. The estate was simple to administer: all that had to be done was to get in a refund from an aged care facility, and to get in moneys in a bank account. The beneficiary had not consented to the costs agreement. In trying to understand the charges, it seems likely that the refund represented the uplifts charged on 28 August 2012 (uplifts having also been charged on 16 July 2012). Actual sundries were identified by Mr Edwards, and the cost of them would be far less than the uplift. Other excessive charges were identified by Mr Edwards. There was a pattern of making such charges across a number of files. The bill (after the refund) was more than double what it should have been. There was no evidence that costs disclosure was made to the beneficiary, or that he saw the bill.

[254] The respondent's written submissions accepted that he should not have charged both the conditional agreement uplift and the uplift for care and conduct. Otherwise, they relied on submissions made in the matters already dealt with. Orally, it was submitted that there was no point in considering the use of units for time-costing. The question was whether the total fee was grossly disproportionate to a reasonable range, which might be a large range. The lump sum charge was an inadequately described charge for time costing. Alternatively, on the proper construction of the costs agreement, it provided for a fixed fee for obtaining probate. The sundries uplift was authorised by the costs agreement. Such charges were sanctioned in the regulatory guide published by the Legal Services Commission, and were not improper. It is not intended to be an expense recovery charge. The fact that it might be grossly disproportionate to the expenses incurred (or likely to be incurred) for the matters specified in the costs agreement was irrelevant.

[255] In oral submissions in reply, Mr Rice referred to the evidence of Mr Reardon in relation to the sundries charges.

Munt – Charge 5 considered

[256] The reference to the sum of $6,600 in relation to obtaining probate in the costs agreement, and the charge of $6,000 (exclusive of GST) for this work in the tax invoice, require comment, which will be relevant to a consideration of this charge and charge 6. Mr Edwards has identified in Schedule 1 the work done to obtain probate, and what the fees would be on the basis of the rates set out in the costs agreement. This evidence depends upon an examination of the file. It is clear that Mr Edwards has included items not included in the tax invoice, with one exception, perusing the grant of probate, which was charged for separately in the tax invoice in an amount of $88. It is not material.[142] The description of the work done in each case makes clear that the items not separately charged for in the tax invoice related to obtaining the grant of probate. There is no reason not to accept the evidence of Mr Edwards that the file records these uncharged items, and the times he reproduces in his schedule. There is no challenge to his calculation; or to anything else in the schedule. It is therefore appropriate to accept it. For the work, and certain disbursements, it showed a total of $1,939.04.

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142 While it might be appropriate to add $88 to the total cost of obtaining probate, using the rates in the costs agreement, the result would then be compared to the charges of $6,000 and $88.

[257] The schedule included a filing fee of $555. The tax invoice charged this amount separately; and charged $6,000 for work and disbursements associated with obtaining the grant. Thus the sum of $1,939.04 may be compared with the charges made totalling $6,555; or alternatively, excluding the filing fee, the sum of $6,000 can be compared with $1,384.04. The latter seems the more appropriate comparison, since $6,000 is the amount charged in the tax invoice (there being a separate charge for the filing fee). The amount charged for professional fees and some disbursements is more than four times greater than the amount which would be payable for professional fees, on a time costing basis, and the same disbursements. In fact, the exclusion of all disbursements reduces the figure of $6,000 to $5,643.96; and the professional costs total in Mr Edwards' Schedule 1 to $1,028. The ratio of professional fees charged (excluding disbursements) to the amount payable on a time costing basis is about 5.5. There has been no attempt to justify the charge actually made, beyond the fact that it appeared in the costs agreement. The charge imposed was grossly excessive.

[258] Clause 5.1 makes it clear that the agreement was to do work on a time cost basis. The function of Item 3 was to identify the work to be undertaken. It did not purport to alter the basis for charging. Accordingly, the legal practice was not entitled to charge a fixed fee for this work. That view is confirmed by Item 2 of the costs disclosure. If there were doubt, the costs agreement should be construed against the interests of the legal practice, who took on the task of drafting it. On that basis, it cannot be said that the respondent entered into a position of conflict by entering into the costs agreement, because it provided for this fixed fee.

[259] If that view were wrong, different considerations would arise. As has been seen, the value of the work done, at the rates in the costs agreement, is substantially less than the sum of $6,000. No basis has been suggested for thinking that the respondent, as executor, should, consistent with his duties, have agreed to this sum. He would have placed himself in a position of conflict by entering into the agreement for that reason.

[260] In a manner somewhat similar to his evidence in the Coughlan matter, Mr Edwards gave evidence that there was no disclosure to Mr Geran of the basis on which costs would be charged. He also said that there was no evidence on the file the respondent provided Mr Geran with proper costs disclosure. He also said that there was no evidence that Mr Geran ever saw the tax invoice. He also spoke of "the lack of any kind of costs disclosure to the ultimate beneficiary". None of this evidence was challenged (save for the objections already ruled upon); nor was it the subject of cross-examination. It should be accepted. Again, there are no entries in the tax invoice, or in Mr Edwards' Schedule 1, suggesting that the respondent undertook disclosure to Mr Geran of the proposed fees; or discussed the tax invoice with him, and obtained his informed consent to the fees charged in it.

[261] An understanding of the uplift fees charged in this matter is complicated by the refund of $10,929.14 in October 2012. Since professional fees attracted GST, this appears to be a refund of such fees, net of GST, of $9,935.58. The costs invoice charged a conditional agreement uplift of $2,737.48; a care and conduct uplift of $1,642.49; and a sundries uplift in the same amount. They appear in the tax invoice amongst entries in July 2012, and will be referred to as the July uplifts. Uplifts were again charged on 28 August 2012, being $5,006.34 for the conditional agreement uplift, and $3,003.80 for the sundries uplift, and the same amount for care and conduct. These will be referred to as the August uplifts. The July uplifts total $6,022.46. The August uplifts total $11,013.94. Handwritten markings on the costs agreement suggest that the

refund was the product of the fact that uplifts were charged twice. However, the refund does not match either total. Together the July uplifts and the August uplifts total $17,036.40. If the refund (exclusive of GST) were deducted from this total, the remaining amount is $7,100.82. If that were apportioned in the same way as the uplifts appear to be (25:15:15), the two smaller amounts would be $1,936.58; and the larger would be $3,227.65. The amounts $3,413.83, $2,048.30, and $2,048.30 appear in handwriting on the tax invoice, but do not match any of the calculations just referred to.

[262] Mr Edwards suggested, from his examination of the tax invoice and in particular the handwritten notations, that the total of professional fees, without uplifts, was calculated in the amount of $13,655.32, which figure appears, handwritten, on page four of the tax invoice. It is very close to the Tribunal's calculation of the handwritten totals on pages 1-3 of the tax invoice, plus an entry on page four of $16. The handwritten figures mentioned earlier of $3,413.83 and $2,048.30 (appearing twice) are respectively 25% and 15% of this figure. Assuming these to be the uplifts calculated by the respondent, when they are added to the handwritten figure apparently representing professional fees, the total is $21,165.75, a figure also appearing in handwriting on page four. A calculation also appears which adds GST to this figure, resulting in a total of $23,282.33, a figure close to, but not identical with, the total charged in the tax invoice as issued, less the refund.

[263] Despite these anomalies, it is clear that the amount paid (net of the refund) included substantial charges for the uplifts, of at least $3,227.65 for the conditional agreement uplift, and $1,936.58 for each of the other uplifts. More likely, however, is the conclusion that the respondent charged (and was paid, as part of the total fees) uplifts of $3,413.83 and $2,048.30 (twice), and the Tribunal so finds. The amounts will be treated for convenience as $3,400 and $2,000.

[264] In this matter the respondent has referred to Regulatory Guide 1, dated 20 May 2013 and published by the applicant, in relation to the sundries uplift, for the proposition that there was no misconduct in making the charge, if it was disclosed in the costs agreement; though he conceded that this uplift could be relevant to the allegation that the total fee charged was grossly disproportionate to a reasonable fee.

[265] The Guide is intended to identify for the profession factors which the Legal Services Commission takes into account in dealing with complaints; and the Commission acknowledges that it itself does not set the standards of conduct for members of the profession. The Guide also referred to the judgment of Byrne J in *Equuscorp Pty Ltd v Wilmoth Field Warne (No 4)*[143] for a discussion of disbursements. There, Byrne J said,

> …In the law of costs, the definition of "disbursements" does not extend to the general overheads or operating expenses of a solicitor. This must be covered by professional fees….

[266] Nevertheless, the Guide indicates that "postage and petties", "sundries", photocopies and facsimiles should only be billed to clients as outlays or disbursements when they are capable of being, and have been, accurately costed. Otherwise they might be billed under the heading "professional fees" provided that the amounts have been the subject

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143 [2006] VSC 28, at [53]-[58].

of agreement with the client or have been adequately disclosed to the client at the time of the retainer.

[267] It is unnecessary in the present case to decide whether it is proper to make such charges in addition to charges for professional fees, charged, for example, by reference to hourly rates. There was no disclosure to Mr Geran, who was in truth the client. The uplift bore no relationship to likely expenditure for sundries. There was no proper basis for the respondent to agree, as executor, to the costs agreement including this uplift.

[268] The observations previously made about the respondent placing himself in a position of conflict by entering into an agreement with the practice of which he was sole practitioner director, and containing the uplifts, otherwise apply in this case. The respondent allowed his personal interest in obtaining fees to conflict with the interests of the estate and its residuary beneficiary, by entering into the costs agreement with the firm of which he was the sole legal practitioner director; and in particular by entering into a costs agreement which contained the care and conduct uplift, the conditional agreement uplift, and the sundries uplift. He did not disclose these fees to Mr Geran, as residuary beneficiary; and so did not obtain his informed consent. Likewise, he placed himself in a position of conflict by charging the fixed fee for obtaining the grant of probate; and by charging as described (after the refund) and authorising payment of the bill, when it included the uplifts and the amount for obtaining the grant of probate.

Munt – Charge 6 considered

[269] Mr Edwards has pointed out that the trust account records reveal that Ms Curcio paid a sum of $260, credited, it would seem, to the trust account for the estate; and this was the source of the advertising fee. Nevertheless the advertising fee has been taken into account in Schedule 1, appropriately in the Tribunal's view. It is unnecessary to say more about this item, or the payment by Ms Curcio.

[270] Mr Edwards also pointed out that the fixed fee for the grant included perusing the grant; but an additional sum of $88 was charged for this task. The respondent also charged a file opening fee of $100, and a fixed fee for retrieving an old file, not authorised by the costs agreement. The amounts are small, but the charges are some indication of the nature of the respondent's charging practices.

[271] Mr Edwards has identified a number of other items in the costs invoice which he contended were not chargeable. There is insufficient evidence to support this conclusion.

[272] Under the heading "Discriminator blindness", Mr Edwards has identified a number of items which should have taken considerably less than 6 minutes to complete, but for each of them a unit of time has been charged. Amongst them is an entry of 25 June 2012 for correspondence to Tricare, being the original of a facsimile, and an entry of 19 July 2012, for correspondence to BoQ, being the original of a facsimile. These were each charged as one unit of the respondent's time.

[273] In fact, there are two entries on 25 June said to be for the original of a facsimile to Tricare, in each case, requiring one unit of the respondent's time. There is also one entry of that date, for a facsimile to Tricare enclosing a copy of Probate for the deposit

bond, recorded as requiring 3 units of the respondent's time. No other facsimile to Tricare appears at about this date. It would appear from the tax invoice that only one charge could be made for drawing the correspondence to Tricare, which took less than 6 minutes of the respondent's time. That is consistent with the description of the facsimile, which indicates that the letter was one commonly sent in estate matters. Mr Edwards referred to the charge for the facsimile itself under the heading, "Unit creep", but in the Tribunal's view it is best understood in the context of the charge for the original. In fact, under that heading, Mr Edwards pointed out that there were a number of occasions on which the respondent had charged for his time for preparing correspondence, and then charged for his time (often as much again) for a facsimile of the correspondence. The respondent has made no attempt to explain these charges. Although the evidence is limited, the Tribunal considers that there was no reasonable basis on which the respondent could make a charge for his time for the facsimile to Tricare, when he has charged for the original; nor could he charge twice for the original of the facsimile. Moreover it is difficult to think that the sending of the facsimile occupied three units of the respondent's time. The charges for the communication to Tricare provide some evidence of the respondent's approach to charging in this matter.

[274] In addition to the charge for the original of the facsimile to Bank of Queensland, the respondent charged for two units of his time on 19 July 2012 for the facsimile itself, described as "follow up Estate funds". The analysis and conclusion are effectively the same as for the correspondence to Tricare.

[275] For the other matters raised by Mr Edwards under the heading, "Discriminator blindness", there is insufficient evidence to reach a conclusion adverse to the respondent.

[276] The same conclusion is reached about the other items raised by Mr Edwards under the heading, "Unit creep".

[277] Under the heading, "Time padding", Mr Edwards referred to two items dated 23 May 2012, each identified as "Correspondence to S Geran enclosing copy of will and advising of probate", for each of which the respondent charged for four units of his time. In fact, the tax invoice has three entries for correspondence, described in the way stated by Mr Edwards, save that the correspondence was to Mr J Geran, Ms S Geran, and Ms C Ralph, respectively. It is likely that the letters were substantially the same, and a commonly used form of letter. Again, there has been no explanation for the charges raised on behalf of the respondent, and no evidence to rebut the inference open from the tax invoice. In the circumstances, the Tribunal is prepared to find that the charge for 72 minutes of the respondent's time was grossly excessive; and considers that these charges demonstrate the respondent's approach to charging in this matter.

[278] Mr Edwards also referred to an entry dated 6 June 2012 for a letter to Lohrisch (elsewhere in the tax invoice referred to as L G Lohrisch Funerals) being the original of a facsimile, the respondent charging for two units of his time. Mr Edwards expressed the view the task should not have taken more than six minutes. For the same date, the tax invoice recorded a charge for a facsimile to Lohrisch enclosing a cheque in payment of funeral expenses, for which the respondent charged two units of his time. The likely inference is that the letter itself was a standard letter, not requiring two units of the respondent's time; and that there was no basis for the

respondent to charge for his time for sending the facsimile. Again, this provides evidence of the respondent's charging practices in this matter.

[279] Mr Edwards referred to a charge made on 18 June 2012 for two units of the respondent's time, for perusing a refund cheque from Lohrisch Funerals. The respondent has made no attempt to demonstrate that the description in the tax invoice of the work charged for is inadequate. In those circumstances, the Tribunal is prepared to conclude that the charge is excessive, and provides some further evidence of the respondent's charging practices in this matter.

[280] Mr Edwards referred to two charges made on 11 July 2012 for correspondence to Mr J Geran and Ms C Ralph, the correspondence being described as, "advising Probate granted and please contact". For each of these letters the respondent charged for three units of his time. In fact, the tax invoice records a third charge of that date, to Ms S Geran, similarly described, and for the same time. Although the times charged are slightly shorter, the Tribunal reaches the same conclusion as for the correspondence of 23 May 2012, for substantially the same reasons.

[281] Mr Edwards drew attention to a charge dated 16 July 2012 for correspondence to Mr J Geran, described in the tax invoice as "advising Probate has been received and incorrect address has been rectified". The charge was for three units of the respondent's time. Mr Edwards has expressed the view that this should have taken less than six minutes. The tax invoice also included a charge of 16 July 2012 for "Drafting correspondence to Mr J Geran", claiming two units of the respondent's time. The tax invoice did not identify any other correspondence to Mr Geran around that date, and the only sensible conclusion is that both entries refer to the same letter. The description of the correspondence indicates it was simple. Having charged for twelve minutes to draw the correspondence, there is no reasonable basis for charging for the correspondence again. Although this conclusion is not identical with the conclusion expressed by Mr Edwards, the respondent was on notice that there was an issue about this entry, and did not seek to explain it. The Tribunal is again satisfied that this provides another example of the respondent's approach to charging fees in this matter.

[282] There are a number of other charges which Mr Edwards considered to be "padded". With proper materials the Tribunal may have come to the same view; but the applicant has not put them forward. Accordingly, the Tribunal is not prepared to reach the same conclusion as Mr Edwards.

[283] The Tribunal has already expressed the view that the charge made for obtaining probate was grossly excessive. Making an allowance for the work recorded in Mr Edwards' Schedule 1, on a time costing basis, the Tribunal calculates the excessive charge to be $4,615.96. The respondent has conceded that he was not entitled to charge the conditional agreement uplift, a view which the Tribunal would have reached in any event. No basis has been shown for charging the care and conduct uplift and the sundries uplift. The uplifts total a little over $7,400. No attempt has been made to establish any value for the expenses associated with sundries. A perusal of the tax invoice indicates they are likely to be minimal. There are also a number of small amounts overcharged, identified from a consideration of Mr Edwards' document. Thus the overcharges are in excess of $12,000. These figures are net of GST, and should be compared with the amount ultimately charged, excluding GST, which the Tribunal calculates to be $21,433.27. Thus the overcharges constituted

more than half of the amount ultimately charged. Put another way, the increase in fees beyond what could reasonably be charged, on the time costing basis in the costs agreement, was more than 100%.

[284] Again, the Tribunal is satisfied that the respondent engaged in gross overcharging in this matter, and that, in this sense, the costs rendered by the respondent, and authorised by him for payment, were excessive.

Munt – Characterisation of the respondent's conduct

[285] Again, from the time when he executed the costs agreement, the respondent engaged in a course of conduct designed to enable the practice to engage in gross overcharging, which then occurred. The overcharging was facilitated by the respondent's failure to comply with his fiduciary obligations to the estate. The amounts involved were not particularly large, but they were not insignificant; and both in the context of a reasonable charge, and in the context of the total value of the estate (on Mr Edwards' evidence, worth about $285,000), they were substantial. The conduct would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency. The conduct which is the subject of charges 5 and 6 is found to be professional misconduct. While that finding is based primarily on the charges for obtaining probate and the uplifts, it finds support in those matters to which Mr Edwards drew attention, which the Tribunal has considered to provide evidence of the respondent's approach to charging in this matter. They are strongly indicative of rapacity.

Trill – the background

[286] The following facts are established by the SOAF. On 22 December 2009, Gertrude Trill died, leaving a will. The will appointed the respondent as executor and trustee of the estate. The sole beneficiary was Ms Trill's son, George Matthews. On about 21 January 2010, Mr Matthews advised the respondent that Ms Trill had died. Thereafter, the respondent acted as executor and trustee of the estate. On 21 January 2010, he entered into a costs agreement with Slipper Lawyers. On 2 June 2010, the respondent applied to the Supreme Court for probate of the will, which was granted on 25 June 2010. The estate was largely finalised by August 2010. On 6 August 2010, the respondent, on behalf of Slipper Lawyers, rendered a bill to the estate for $5,950, including GST and disbursements. The bill included a "lump sum" of $5,000 (plus GST) for obtaining probate. On about 9 September 2010, Mr Matthews paid the bill from his own funds.

[287] A perusal of the costs agreement reveals the following:-

(a) Slipper Lawyers was instructed to provide legal services, including "Estate Administration";

(b) The professional fees charged by Slipper Lawyers would be an amount calculated by reference to the time spent;

(c) Time would be charged at six minute intervals, with six minutes being the minimum interval recorded for professional services;

(d) The hourly charge-out rate for a "partner" was $330 (plus GST);

(e) Other hourly charge-out rates were specified for a senior solicitor, a junior solicitor, and a clerk (each amount plus GST);

(f) The hourly charge-out rate for a paralegal was $160 (plus GST);

(g) Slipper Lawyers also charged $100 for opening a file and preparing a costs agreement;

(h) Charges were specified for photocopying, faxes and document lodgement (on a per page or per item basis);

(i) Charges for secretarial work and word processing, some computer services, clerical and accounting services and general services, were at specified hourly rates (plus GST);

(j) Other expenses and disbursements would be charged at cost;

(k) The agreement being a "proposed conditional costs agreement", the practice would on the conclusion of the matter charge an "uplift fee" of 25% on professional fees (excluding professional fees paid during the course of the matter, the warrant for the uplift fee being the "non-payment of up-front fees") (*conditional agreement uplift*).

[288] The agreement identified the client as "Estate of Gertrude May Trill". It was signed by the respondent on behalf of the client, and was dated 21 January 2010. It was subsequently provided by the respondent to the Legal Services Commission. It did not contain any provision for a lump sum fee or a fixed fee (other than a fee of $100 for opening a file and preparing a costs agreement, which from the tax invoice, does not appear to have been charged in any event). Nor did it contain an estimate of the costs to be incurred.

[289] A disclosure notice purportedly under s 308 of the LP Act, was also provided by the respondent to the Legal Services Commission. It was dated 21 January 2010, and was signed by the respondent as client.

[290] It is apparent from the tax invoice that the respondent charged a fixed fee of $5,000 for professional costs and outlays in relation to preparation of documentation for the grant of probate. The conditional agreement uplift was not charged. The total fee was $6,630; but a discount was given of $1,253.90; the balance actually charged being $5,409.10, plus GST.

Trill – Allegations and contentions

[291] The application alleges that the respondent acted in this matter where there was a conflict between his personal interest, and the interest of the estate, and its sole beneficiary. Its particulars include the following:

> 7.11 The respondent allowed his personal interest in obtaining fees from the estate to conflict with the interests of the estate of which he was the executor and trustee, and the interests of the residual beneficiary whom he owed fiduciary obligations (namely, the interests of the estate and George in minimising costs to the estate and maximising the value of the estate for George) by:

a. Entering into a costs agreement with the law practice of which he was the sole legal practitioner director;

b. Entering into a costs agreement which allowed charging at hourly rates in excess of the rates allowed under the Supreme Court scale, plus specified uplifts, without either obtaining the informed consent of George, or disclosing to her the likely total legal costs of the matter;

c. Charging a "lump sum" fee of $5,500 (including GST) for obtaining probate, when that fee was neither authorised by the costs agreement, nor disclosed to George;

d. Consenting to the imposition of charges against the estate by the law practice without the informed consent of of [sic] George; and

e. Rendering the bill of 6 August 2010.

[292] These allegations relate to the conduct of the respondent both as solicitor and as executor.

[293] The application also contains the following allegations:

> 8.2 By the bill of 6 August 2010, the respondent, on behalf of the law practice, rendered costs to the estate.
>
> 8.3 The costs so rendered were excessive in all the circumstances.
>
> 8.4 The costs and outlays rendered to the estate were in the total amount of $5,950 including GST.
>
> 8.5 The bill included a "lump sum" of $5,000 plus GST ($5,500 in total) for obtaining probate.
>
> 8.6 The fair and reasonable value of the respondent's work in connection with the estate to the date of the bill was approximately $3,524.42.
>
> 8.7 In the premises, the costs rendered by the respondent were excessive.

[294] In his response, the respondent denied that he allowed his personal interest to conflict with the interests of the estate. He alleged that the fees rendered and authorised by him for payment were not excessive, and were a fair and reasonable value for the respondent's work in connection with the estate.

[295] The applicant's written submissions referred to a file note dated 15 July 2010, that "George advised Probate about $5k – horrified! But OK".

[296] It was submitted that the respondent's interest in maximising fees to himself was in conflict with his duty to the beneficiary of the estate. There was no evidence on the file that the beneficiary was given costs disclosure other than the file note of 15 July 2010. The costs agreement made no provision for charging other than on a time basis. The file note does not show the beneficiary's informed consent to the fixed fee charge, as he had not been advised that the costs agreement made provision only for charging on the basis of time spent on the matter.

[297] It was submitted that the estate consisted of an amount of $9,198.54 in a Westpac account; and $100,000 in shares. The amount charged for obtaining probate was excessive; the "actual cost" being $1,939.04. Excessive charges in addition to the uplifts were apparent from the tax invoice.

[298] Mr Rice's oral submissions provided further detail, but were substantially in accordance with his written submissions. He pointed out that the file note recorded a discussion after probate had been obtained; and did not disclose that the fee was a fixed fee, rather than a fee based on time costing, and thus was not in accordance with the costs agreement.

[299] The respondent's written submissions relied on submissions made in the matters already dealt with. Orally, it was submitted that there was no point in considering the time-costing approach. The charging of a fixed fee was not objectionable without more in a disciplinary context. The client could object to it, but the form of the bill does not establish that the costs were excessive. Orally, Mr Cohen submitted that disproportion in relation to the fee charged had not been shown. He also said that Mr Rice had fairly taken the Tribunal to Mr Edwards' assessment of what the file contained about informed consent.

Trill – Charge 7 considered

[300] Again, the respondent placed himself in a position of conflict by entering into an agreement with the practice of which he was sole practitioner director. It is true that the respondent also placed himself in a position of conflict by entering into an agreement containing the conditional agreement uplift, but, because it was not acted on, it cannot be seen as part of a course of conduct to facilitate overcharging.

[301] The file note of 15 July 2010 may not be consistent with the tax invoice. The latter records that on 8 July 2010, the respondent spoke by telephone with Mr Matthews "regarding Grant of Probate – received today". It also records on 15 July 2010 that the respondent had both a conference and a telephone conversation with Mr Matthews regarding bank accounts. No point was taken about this. The file note of 15 July appears, from the evidence of Mr Edwards, to deal with other matters, which may have been the bank accounts. What is clear from Mr Edwards' evidence, is that the only record of any discussion about costs before the bill was sent was what is recorded in the file note. Had the respondent given Mr Matthews an appropriate explanation and obtained his informed consent, it is likely that a file note, and probably the tax invoice, would make mention of this. Accordingly, the Tribunal is satisfied that that did not occur. The only basis in the costs agreement for charging for work was the time costing basis. The respondent, in the language of the charge, placed himself in a position of conflict by charging the fixed fee for obtaining a grant of probate; or perhaps more accurately, in the position of conflict in which he had placed himself, he allowed his interest in fees to conflict with, and prevail over, the interests of the client, when he was required to act in the interests of the client.

Trill - Charge 8 considered

[302] Mr Edwards has identified entries which were not charged for on a time cost basis, and which relate to obtaining the grant of probate, and related disbursements. He has provided costs on a time cost basis, using the rates from the costs agreement; as well

as by reference to the Supreme Court scale. The total for the former approach is $1,541.02; and for the latter it is $1,152.62.

[303] In each case, Mr Edwards has identified work for which he has included no fee. His explanation is that the file indicates that some of the work is consequent on the failure of the respondent to send the application to the Supreme Court until 2 July 2010; and some of the work so treated was consequent on the failure to have affidavits witnessed. Since there was no challenge to his approach to these items, it should be accepted.

[304] The evidence based on the Supreme Court scale involves the application of the scale to identified items of work. There has been no specific suggestion that this task involves expertise, or that it was incorrectly carried out. This evidence will also be accepted.

[305] The estate was a simple one to administer, consisting only of a bank account and some shares, held through an investment adviser. The charge of $5,000 (before the discount, and exclusive of GST) for the application for probate may be compared with Mr Edwards' calculated figures. It is more than three times the amount chargeable on the time costing basis set out in the costs agreement. Even if the whole of the discount were applied to this charge, it is between two and three times the amount authorised by the costs agreement. Put another way, it represents an overcharge, by comparison with the amount calculated under the costs agreement, of just over $2,200 (treating the discount in the same way), about 40% of the total bill; or an increase of what could be charged under the costs agreement of about two thirds. This is sufficient, in the Tribunal's view, to show that the charge was at least substantially excessive.

[306] The same analysis could be carried out by reference to the total calculated by Mr Edwards using the Supreme Court scale. The outcomes would inevitably be less favourable to the respondent. This approach would support the Tribunal's conclusion; though that would require a finding that the costs agreement was not enforceable. That has not been specifically alleged, and accordingly the Tribunal does not intend to rely on this approach.

Trill – Characterisation of the respondent's conduct

[307] The mater of significance in the present case is the charge made for the application for probate. The amount involved is relatively small; though it represents a substantial proportion of the fee. This case does not have some of the aggravating features found in cases discussed earlier in these reasons. The conflict issue relates to the overcharging only. Mr Rice did not contend that the respondent's conduct in this case was rapacious; nor did he explicitly seek a finding of professional misconduct. In these circumstances, the Tribunal finds the respondent's conduct to be unsatisfactory professional conduct.

Tully – the background

[308] The SOAF sets out a number of relevant facts. On 16 September 2009, Mr Paul Tully executed an enduring power of attorney for financial matters, referred to as the financial EPOA, appointing the respondent immediately as Mr Tully's sole attorney for financial matters. Thereafter, the respondent acted as Mr Tully's attorney in the "financial matter" (that is, under the financial EPOA).

[309] On 10 December 2009, Mr Tully entered into a costs agreement with Slipper Lawyers, to act in the financial matter.

[310] On 13 September 2011, Mr Tully executed an enduring power of attorney for personal/health matters, referred to as the personal EPOA, appointing the respondent immediately as his sole attorney for such matters. Thereafter, the respondent acted as Mr Tully's attorney in the "personal matter" (that is, under this EPOA). No costs agreement was entered into with Slipper Lawyers for acting in this role.

[311] In the financial matter, the respondent on behalf of the legal practice rendered a bill on 25 October 2010 for $1,526.72; another on 11 November 2010 for $37,221.53; and yet another for $10,000 on 13 October 2011. Each of these bills included GST and disbursements.

[312] In the personal matter, the respondent on behalf of the legal practice rendered a bill on 8 March 2012 of $13,045.20, including GST and disbursements.

[313] The November 2010 bill included a conditional agreement uplift of $5,301.75; and a "care and consideration" fee of $3,181.07. It is an agreed fact that there was no entitlement to charge either fee.

[314] The March 2012 bill included several items (identified in paragraph 10.9 of the application), which, it is agreed, the respondent was not entitled to charge.

[315] Mr Edwards also recorded that a costs disclosure document accompanied the costs agreement, both being provided to Mr Tully. Mr Tully also signed a document dated 20 December 2010 acknowledging that the respondent "is able to charge professional fees and outlays in relation to any of my matters including that of his appointment as my attorney"; and authorised the respondent to "pay his accounts from any monies he controls (with me)".

[316] The work the subject of the costs agreement was described in it as "Legal & Financial Matters". Fees would be charged by the practice for time on the basis of six minute units, each unit or part thereof to be charged at one-tenth of the applicable hourly rate. The respondent's hourly rate was $330; that for an employed solicitor was $280; and the rate for a paralegal was $160; in each case, plus sundries, outlays and GST. The agreement provided for a 25% conditional agreement uplift; and a 15% sundries uplift. It did not contain an uplift for care and consideration (or care and conduct). The agreement also estimated fees and outlays at between $30,000 and $50,000 (plus sundries, outlays and GST). The amount payable in advance was specified as Nil.

[317] It appears from the tax invoices that, from about the beginning of September 2009 till about November of that year, Mr Tully was a patient at Carrara Health Centre, after which he resided at his own home. On 6 April 2010, the Guardianship and Administration Tribunal (*GAAT*) conducted a hearing, presumably in relation to some aspect of Mr Tully's competency. He was admitted to the Gold Coast Hospital on 21 January 2012. He moved to the Nerang Nursing Home about the beginning of March 2012. Mr Edwards recorded that Mr Tully died on 24 June 2012. There is no direct evidence of Mr Tully's age, though the tax invoices show that he had children, to whom he did not wish to leave his estate, and who apparently were living independently of him.

Tully – Allegations and contentions

[318] Three charges were made in the application in relation to this matter. Charge 9 alleged a conflict of interest; charge 10 alleged charging legal costs to which the respondent was not entitled; and charge 11, charging excessive legal costs.

[319] The critical allegations for charge 9 appeared in paragraph 9.13 of the application, as follows:-

> 9.13 The respondent allowed his personal interest in obtaining fees from the [sic] Paul to conflict with the [sic] Paul's interests (namely, Paul's interests in ensuring costs charged to him were fair and reasonable, that his estate was not unreasonably diminished by excessive legal costs and that transactions undertaken under the financial and personal EPOAs were in his best interests) by:
>
> a. Charging costs to Paul which were not authorised by his costs agreement;
>
> b. Charging for work which was not legal work and for which no costs agreement has been entered into with Paul;
>
> c. Failing to disclose to Paul that he proposed to charge for non-professional work at professional rates;
>
> d. Entering into a conflict transaction with Paul;
>
> e. Charging a "lump sum" fee of $2,750 (before GST) for attending a hearing, when that fee was not disclosed to Paul prior to it being charged to the estate.

[320] Charge 10 was in part based upon the charging of the conditional agreement uplift, and a fee for care and consideration. It also alleged that the respondent was not entitled to charge the lump sum amount set out in the October 2011 bill, because it described no legal work or financial advice to which it could have related; and it included fees for periods of time covered by another bill. Relevantly, it also relied on the charges in the March 2012 bill which it is agreed the respondent was not entitled to charge. An allegation that the tax invoice included a lump sum fee for obtaining probate was said to be included in error, and was abandoned.

[321] Charge 11 was a general allegation of excessive charging. The hearing proceeded on the basis that the document provided by Mr Edwards set out the matters in issue.

[322] In his response, the respondent alleged that the costs agreement was "adequate to cover further matters" and accordingly it was unnecessary to enter into a new costs agreement in relation to the personal matter. The respondent denied that he had allowed his personal interest "to conflict with the interests of the estate" (in context, a reference to the interests of Mr Tully).

[323] With respect to the October 2011 bill, the respondent alleged that he was entitled to charge the fees, notwithstanding the period covered was also the subject of the March 2012 bill. The respondent admitted that he was not entitled to charge the fees particularised in paragraph 10.9 of the application.

[324] For charge 9, the applicant's written submissions relied only on the rendering of bills by the respondent which included excessive charges and charges which the respondent was not entitled to make. It was submitted that, "Preference by the solicitor of his own interests over that of the client will be implicit in any case of deliberate overcharging".

[325] The written submissions for charge 10 relied on the charging of the conditional agreement uplift, and the uplift for care and consideration; as well as the charges particularised in paragraph 10.9 of the application. It was submitted that the charge of $10,000 in the October 2011 bill represented 27 hours of the respondent's time, but there was no evident basis for making the charge. The March 2012 bill covered work from 6 December 2010 to 4 October 2011, relating to the same "Will and Estate Preparation Matter" as the October 2011 bill. Reliance was placed on Mr Edwards' discussion of this bill.

[326] For charge 11, it was submitted that the sundries uplift was not a realistic estimate of the cost of sundries. Mr Edwards' examination of the file indicated that the actual cost was $332.30. Reliance was placed on a number of charges identified by Mr Edwards; and on the fact that, in the March 2012 bill, the respondent charged for his time at $350 per hour, when the agreed rate was $330.

[327] Orally, Mr Rice contended that Mr Tully was elderly and unsophisticated, and had placed more than the usual degree of trust in the respondent. The costs agreement related to the provision of legal services. The first bill in dispute was the November 2010 bill. All bills related to the same matter. The October 2011 bill was a rounded figure of $10,000; which by reference to the respondent's hourly rate reflected some 27 hours of work. It charged for all work done since the November 2010 bill. However the March 2012 bill commences with charges for work on 6 December 2010; and the total charged from then to 13 October 2011 was $3,920. It was open to the Tribunal to find that this bill had no justification whatsoever. He relied on Mr Edwards' discussion of the charges for sundries, non-chargeable items in the bill, and time padding. Services of a personal kind were not the subject of the costs agreement, and ought not to have been charged for. Mr Rice referred to a number of specific matters discussed in Mr Edwards' document.

[328] The respondent's written submissions contended that charge 9 was bad for duplicity, covering the same matters as charges 10 and 11, and should be dismissed. They accepted that the respondent was not entitled to charge the conditional agreement uplift and was not entitled to charge for care and consideration; and that he was therefore guilty of unsatisfactory professional conduct under s 418 of the LP Act. There was insufficient evidence to make a finding adverse to the respondent in relation to the October 2011 tax invoice. A lump sum invoice was consistent with the costs agreement. It was submitted that paragraph 10.7 of the application only alleged that the bill described no legal work to which it could have related, which is the lump sum proposition. Charge 11 depended entirely on Mr Edwards' work, to which objection had been taken. It has not been established, to the necessary degree of satisfaction, that the respondent has a practice of deliberately making excessive time charges.

[329] Orally, in relation to the sundries uplift, Mr Cohen submitted that this was disclosed in the costs agreement; and there is no allegation that Mr Tully did not give his informed consent. That submission was confined to charge 9. The estimate in the costs agreement did not support the allegation of gross overcharging.

[330] It will be apparent that Mr Cohen did not place reliance in his submissions on the document of 20 December 2010.

Tully – Charge 10 considered

[331] The respondent has admitted charging the conditional agreement uplift and charging for care and consideration when he was not entitled to do so. He has also admitted that he was not entitled to charge the fees particularised in paragraph 10.9 of the application, which amount to $2,542. The only dispute relates to the charge of $10,000, in the October 2011 bill.

[332] It is clear from the application that the allegation against the respondent is not that the respondent was not entitled to charge a fee in the form of a lump sum. Rather, it is about the entitlement of the legal practice to charge the amount claimed. That is confirmed by Mr Edwards' analysis, which contended that there was at least duplication with charges made in the March 2012 bill; and that the amount charged was "plucked out of the air" and should be disallowed altogether. The submission on behalf of the respondent that the costs agreement permitted the sending of an invoice in lump sum, rather than itemised, form, may be correct, but is irrelevant.

[333] As mentioned, the matter identified in the bill was the same as in the other bills. That bill described the work as, "Professional fees in relation to this matter including all works up to and including 13 October 2011". In this matter, the respondent was entitled to charge only on a time costing basis. In the circumstances, the round figure of $10,000 immediately gives rise to suspicion. So too does the failure to itemise the work.

[334] On its face, the October 2011 bill purported to charge for all work done in the matter until 13 October 2011. Yet the March 2012 bill, which was itemised, clearly charged for work in the matter prior to 13 October 2011 (and after the November 2010 bill). The total for that period, as calculated by Mr Edwards, was $3,920, exclusive of GST. It is apparent from a perusal of the March 2012 bill that some of the charges prior to 13 October 2011 related to the ultimate disposition of Mr Tully's estate.

[335] There is no reason to think that the detail in the March 2012 bill for work done prior to 13 October 2011 was not recorded by the legal practice at the time when the work was done, and available to the respondent when the October 2011 bill was prepared. There is no evidence that any other work was done by the legal practice in the matter prior to 13 October 2011, apart from work charged for in earlier bills. There is accordingly no evidence that there was any basis for making the charge in the October 2011 bill. It may be true that the respondent was then entitled to charge (subject to some specific criticisms, discussed later in these reasons) an amount of $3,920; but that is not what he purported to do. And that that was not his intention may be gleaned from the fact that he included the items, charges for which amount to that total, in the March 2012 bill.

[336] It follows that, on the evidence before the Tribunal, the respondent charged the sum of $10,000 in the October 2011 bill, without any entitlement to do so. There has been no attempt to challenge this conclusion, or to lead evidence to explain the charge, or to cast doubt on the conclusion by cross-examining Mr Edwards, for example, about the content of the file, and records of work done. Some limited support for the conclusion which has been reached might also be found in the fact that on other

occasions the respondent made charges in this matter which he (or more correctly the legal practice) was not entitled to make.

[337] Accordingly, the Tribunal finds that the respondent charged fees totalling, on the Tribunal's calculation, $20,116.73 (plus GST), which the respondent was not entitled to charge.

Tully – Charge 11 considered

[338] The allegation of excessive charging is based on the conditional agreement uplift, the charge for care and consideration, the sundries uplift, the October 2011 bill, billing for non-chargeable items, charging at a rate higher than in the costs agreement, and items which Mr Edwards has gathered under the heading, "time padding".

[339] The legal practice charged the sum of $3,181.05 as the sundries uplift in the November 2010 bill. Mr Edwards has examined the file to identify the photocopying, phone calls, facsimiles, postage, and emails, for which expense might have been incurred in the period of the bill. He has estimated that 500 pages were photocopied, acknowledging that he had had access only to a photocopy of the file. That is not a judgment which requires expertise, it was not the subject of specific criticism, and it should be accepted. He then applied rates, some based on the Supreme Court scale, and some unexplained, but which to the Tribunal seem reasonably indicative of likely costs. The total from his calculations is $332.30. In the circumstances, it provides a reasonable basis for assessing the charge made. Allowing for some imperfections in Mr Edwards' approach (some of which may have favoured the respondent), it is apparent that the charge made for sundries was grossly excessive, by an amount of the order of $2,800.

[340] The items which Mr Edwards identifies as non-chargeable items come to a total of $5,213. They include the items set out in paragraph 10.9 of the application, which the respondent has admitted he was not entitled to charge. Some of the other matters are clearly not matters within the costs agreement. For some, Mr Edwards has recorded that there was no evidence of any legal work or financial advice; and for others, that there was no record on the file relating to the item. The former indicates that there is a file record, for work which did not come within the costs agreement. That is consistent with the fact that a number of the items, on their face, were for the provision of services which did not come within the agreement, and accordingly for which the respondent had no entitlement to charge. Since there has been no attempt to suggest any error on the part of Mr Edwards, it follows that the entries for which there is no evidence of legal work or financial advice should not have been charged for.

[341] For the entries for which Mr Edwards says there is no record on the file, there is no positive evidence that the service was not provided. They accordingly fall to be determined by the information in the tax invoice. Each of them is found in the March 2012 tax invoice, agreed to be in the personal matter, that is, in the course of acting under the personal EPOA. Mr Cohen referred to entries in the March 2012 bill, dated around 6 December 2010, to show that some of the dealings between Mr Tully and the respondent had some relationship to the disposal of Mr Tully's estate. The intention appeared to be to demonstrate that these related to the provision of legal services, and accordingly were the subject of the costs agreement, and properly charged for. While that may be accepted for those entries, that does not establish that other items referred to by Mr Edwards were for the provision of legal services, and

accordingly properly charged for. Since it is agreed that this bill issued in relation to the personal EPOA, it should be taken that, in the absence of other evidence, these entries relate to acting as Mr Tully's attorney in personal matters. The attendance on 2 September 2011 (in part) has some relationship to the provision of legal services. Of the other three entries in this category, two plainly do not, and the third does not appear to be. It is therefore concluded that the legal practice was not entitled to make any of these three charges.

[342] Mr Edwards said that the entry of 24 August 2011 records work not performed by the respondent. The rate charged was $350 per hour. It is an entry from the March 2012 bill; and does not appear to relate to the provision of legal services. On the material, the respondent had no right to charge for this item.

[343] Mr Edwards' table includes entries from the November 2010 bill, agreed to be in the financial matter, about which Mr Edwards made no specific comment. The entry of 20 April 2010, however, plainly does not relate to the provision of financial and legal services. There is insufficient evidence in relation to the other entries in this category to reach a conclusion adverse to the respondent. It follows that they should be disregarded. The total for these items is $261.

[344] Making the best it can of the evidence, the Tribunal considers it likely that at least $4,000 of the total for Mr Edwards' table of non-chargeable items was for matters for which the respondent was not entitled to charge.

[345] Clearly the respondent was not entitled to charge for his time at a rate higher than that in the costs agreement. There is no reason not to accept Mr Edwards' calculation of overcharging on this basis at $640.

[346] As has been noted, on 16 September 2009, Mr Tully executed the financial EPOA. Under the heading, "time padding", Mr Edwards referred to an entry dated 4 September 2009 for drafting the power of attorney, for which the respondent charged $330, or one hour of his time. Mr Edwards said that this involved adding approximately 50 words to a standard form document, plus ticking seven boxes. This evidence, recording the contents of a document, should be accepted. Mr Edwards also referred to another charge of the same date for another solicitor to confer with Mr Tully, travel with the respondent to visit Mr Tully, attest to Mr Tully's capacity, and witness the execution of the power of attorney. A charge was made for 2.2 hours of that solicitor's time. There are charges on 16 September 2009 for the respondent's conference with the client at "carrara care" (Mr Tully having been admitted to the Carrara Health Centre on about 31 August 2009), including travel, at which time the financial EPOA was executed. The time charged for was 2 hours 12 minutes. There was another entry of 16 September, for "conference with Paul as witness for Robin John Slipper to confirm lucid", the charge being for an hour's time, at the respondent's rate. Mr Edwards said that the respondent's file note for 16 September 2009 showed that 50 minutes was involved; and the file note for Ms Ammala (her role and position are unclear) recorded an hour.

[347] The charge for the attendance of the solicitor on 4 September 2009 to witness the execution of the EPOA is, on the material before the Tribunal, a charge for work which was simply not done. The charge for drawing the financial EPOA, given the nature of the document, is plainly excessive. There is no suggestion that the time charged for on this date included time conferring with Mr Tully. It is apparent from

the tax invoice that such conferences were specifically recorded, and there is no evidence of contact between the respondent and Mr Tully on 4 September. The overcharging on this date is of the order of $700.

[348] The charge for three hours and twelve minutes of the respondent's time on 16 September is also excessive. The file note shows that the time involved on the respondent's part was only 50 minutes. The overcharging on this date is again of the order of $700.

[349] Mr Edwards referred to two entries of 22 December 2009, one being correspondence to Mr Tully seeking instructions, and the other correspondence to him enclosing copies of correspondence received. For each, $99, representing 18 minutes of the respondent's time, was charged. There appears to be no basis for charging for a second letter.

[350] Mr Edwards referred to an entry of 18 February 2010, charging for a conference with Mr Tully. He challenged the charge on the basis that there was no file note of the attendance. Since the file is not before the Tribunal, it is unable to draw an inference from the absence of a file note.

[351] Mr Edwards also referred to entries dated 6 April 2010 relating to the GAAT hearing. For that date the respondent charged $3,250, which included $500 for Ms Ammala's attendance. If this charge were made on a time basis, it would represent more than eight hours of the respondent's time. He also charged for two and a half hours of preparation; one and half hours for travel; and one hour for drafting file notes for the hearing. The tax invoice indicates that Mr Tully was collected for the hearing at 12.30; and that the hearing was at the Watermark Hotel. It is likely that the hearing commenced in the early afternoon.

[352] Mr Edwards contended that the respondent charged a fixed fee for the attendance at the hearing, not authorised by the costs agreement. That appears to be correct. The tax invoice does not record the respondent's time for the hearing. It is inherently unlikely that the hearing would have continued until late at night, it being unlikely that a Tribunal would do so, particularly when an elderly person whose competence was in issue was in attendance. The amount which the respondent was entitled to charge is likely to be substantially lower than the amount charged; but it is not possible on the evidence to conclude precisely by how much. To allow $1,000, in addition to the other fees charged on that date, would seem on the material to be a not unfair estimate of the amount the respondent was entitled to charge. It follows that for the appearance on 6 April, the respondent overcharged Mr Tully by a little over $2,000.

[353] Mr Edwards was critical of the payment to Ms Ammala, but in the absence of better evidence, the Tribunal cannot reach a conclusion about this.

[354] For the other matters dealt with under the heading, "Time padding", there is insufficient evidence presented by the applicant for the Tribunal to reach a conclusion adverse to the respondent. The overcharges under this heading amount to $3,500.

[355] For the purposes of this charge, the total amount of excessive charging is calculated to be approximately $28,500, plus GST. This amount overlaps the amount found in relation to charge 10.

Tully – Charge 9 considered

[356] Charge 11 is founded on a comparison between the amount charged by the respondent, and the amount which the legal practice could properly charge. Charge 10 is founded on the fact that the respondent included in the tax invoices fees, which the legal practice had no entitlement to charge. Charge 9, as advanced in the applicant's submissions, was founded on the rendering of the bills which are the subject of charges 10 and 11. However, it requires a further finding, namely, that the respondent allowed his interest in obtaining fees to conflict with the interests of his client, Mr Tully.

[357] Duplicity refers to the charging of a defendant with more than one count in an indictment.[144] It is not relevant in the present matter. Perhaps Mr Cohen intended to submit that the respondent was being subjected to punishment twice for the same act or omission, with reference to s 16 of the *Criminal Code*. However, it is well established that proceedings such as a discipline application are not punitive in character.[145] It is difficult to speculate further as to whether Mr Cohen had some other legal principle in mind. It would be correct to say that, where two charges rely entirely on identical conduct, it would be an error to take the conduct into account twice, when determining orders to be made against a respondent. Here it is sufficient to note that charge 9 identifies an aspect of the respondent's conduct, not directly raised by charges 10 and 11. That aspect is that, in rendering the bills, the respondent placed himself in a position of conflict between his interest in obtaining fees, and the interest of Mr Tully in ensuring that the fees charged were fair and reasonable. That allegation is made out. Moreover, in charging excessive and unauthorised fees, the respondent preferred his own interest to that of his client.

Tully – Characterisation of the respondent's conduct

[358] Mr Edwards has provided a calculation showing the total fees charged as $61,793.45, including GST, and the overcharges or unauthorised charges on his analysis as $35,926.64, inclusive of GST. The only areas where his position does not fully coincide with the conclusions reached in these reasons are the areas of non-chargeable items, and time padding. In total these are, on Mr Edwards' approach, slightly under $10,700, plus GST. While there is some uncertainty about the extent of overcharging in these areas, the Tribunal is satisfied that it is of the order of at least $7,500. The Tribunal considers that the amount overcharged, inclusive of GST, is more than $31,000, which is more than half of the total amount billed. Put another way, the amount charged which the respondent was not entitled to charge is a little more than the amount which the respondent was entitled to charge.

[359] The amount of the overcharge is quite significant, both when considered on its own, and when considered in relation to the amount which the respondent was entitled to charge. Moreover, it is the product of overcharges or unauthorised charges, both large and small, made by the respondent on a number of occasions. The conduct is

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144 See *Walsh v Tattersall* (1996) 188 CLR 77, and the discussion in *Carter's Criminal Law of Queensland* Loose leaf service, LexisNexis Butterworths at [s 567.130] to [s 567.135].

145 See, for example, *Southern Law Society v Westbrook* (1910) 10 CLR 609, 622, 625; and the discussion, including cases cited, in Dal Pont, *Lawyers' Professional Responsibility* (6th ed) Lawbook Co 2017 [23.25] at n 31.

rapacious, and should be characterised as professional misconduct. The finding in relation to charge 9 provides confirmation of this conclusion.

Tonge

[360] On about 1 November 2011, Mr Tonge retained the respondent to act for him in a family law matter, and the respondent did so. Mr Tonge entered into a costs agreement with the legal practice in relation to the retainer. On 5 July 2012, the respondent, on behalf of the law practice, rendered a bill, which included an "uplift" fee, purportedly in respect of a "conditional costs agreement", of $2,498.25. The respondent was not entitled to charge such a fee for proceedings under the *Family Law Act* 1975 (Cth), by virtue of s 323 of the LP Act. On 13 September 2013, the respondent repaid the uplift fee, with interest. These matters are either admitted, or the subject of the SOAF.

[361] No other information about this matter has been provided to the Tribunal. The respondent's written submissions accepted that the conduct could be categorised as unsatisfactory professional conduct, when considered in the context of the charging of the conditional agreement uplift in other matters. While the material might otherwise be insufficient for it to do so, in light of the respondent's submission, the Tribunal finds this conduct to be unsatisfactory professional conduct.

Heginbotham – the background

[362] On about 10 September 2012, Ms Heginbotham retained the respondent to act for her in a family law property matter. On 1 November 2012, Ms Heginbotham signed a costs agreement with the legal practice (the costs agreement is not in evidence). On 21 August 2013 the respondent, on behalf of the law practice, rendered a bill to Ms Heginbotham in the amount of $10,362.22. The bill was a lump sum bill (not itemised). It was paid with funds held in the law practice's trust account on behalf of Ms Heginbotham. Ms Heginbotham then requested an itemised bill. On 14 October 2013, the respondent sent to Ms Heginbotham an itemised bill, totalling $11,983.40. The bill included an "uplift" fee of $2,095 (plus GST). The accompanying email noted that the amount of $1,610.18 was outstanding. The SOAF recorded an agreement that the respondent was not entitled to increase the amount claimed for his fees from the amount stated in the first bill, to the amount stated in the second bill. It also recorded an agreement that the respondent was not entitled to charge the "uplift" fee (being a fee referred to elsewhere in these reasons as a conditional agreement uplift), by reason of s 323 of the LP Act.

Heginbotham – Allegations and contentions

[363] Charge 13 (incorrectly numbered as charge 12 in the application) was, in substance, that the respondent increased the total fee charged, in the second bill. The facts alleged were admitted in the response. The respondent has also alleged that the bill did not demand payment within 7 days; and that Ms Heginbotham did not pay the amount said to be outstanding at the time of the second bill. He also admitted that he was not entitled to increase the amount claimed for his fees.

[364] Charge 14 alleged that the respondent charged a fee to which he was not entitled. It related only to the uplift fee. The response admitted that the second bill included the

uplift fee; and that the respondent was not entitled to charge it. It alleged that the uplift fee had not been paid by Ms Heginbotham.

[365] Charge 15 alleged that the respondent had charged excessive legal costs, the fair and reasonable value of the work done by the respondent being $7,893.60.

[366] The applicant's written submissions add little to the allegations in the application, beyond identifying reliance on some matters referred to in a document provided by Mr Edwards. The applicant's oral submissions did not add materially to the written submissions.

[367] The respondent's written submissions equated charge 14 to the charge in the Tonge matter, and incorporated the submissions made in relation to that charge. They also contended that there were different views about whether an itemised bill could charge more than an earlier lump sum bill for the same work. It was said that charge 15 was not made out, in view of the objections to Mr Edwards' document. Orally, Mr Cohen did not add to the written submissions.

Heginbotham – the charges considered

[368] The respondent did not seek to withdraw the admission contained in his response that he was not entitled to increase the amount charged, when providing the second bill. The written submissions should be understood in that light. It follows that the applicant has established, with reference to charge 13, that the respondent increased the amount charged, when he was not entitled to do so.

[369] The respondent's allegation that the email accompanying the second bill did not demand repayment within seven days is not of significance in determining the charge. The email is not in evidence, with the consequence that there is no evidentiary material to support the allegation, and it is not made out. It might be noted that the second bill, which is in evidence, included the notation, "TERMS STRICTLY 7 DAYS".

[370] Charge 14 was admitted.

[371] Charge 15 is based on the document provided by Mr Edwards. In part he relied on the uplift fee. He also relied on what he described as non-chargeable items, discriminator blindness, unit creep, and time padding.

[372] Most of the items for which Mr Edwards said that fees could not be charged were unsuccessful telephone calls. He relied, without specific reference to passages, on *Queensland Law Society v Roche*.[146] In that case, amongst the matters alleged by the Law Society, was an allegation that the solicitor was guilty of gross overcharging because charges were made for telephone calls which were unanswered, or the person sought was unavailable. The Tribunal did not rely on these allegations, finding that it could not be satisfied that the time involved was substantial. The Law Society appealed, unsuccessfully, the Court holding that error on the part of the Tribunal had not been demonstrated.[147] This is far from being clear demonstration of the proposition for which Mr Edwards contended.

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146 [2003] QCA 469.

147 See *Roche* at [23].

[373] In the present case, the applicant has chosen not to put the costs agreement in evidence, and there is no satisfactory evidence of its terms. In the circumstances, it is not possible to find that the respondent was not entitled to charge for these telephone calls.

[374] The balance of the items under this heading relate to failed facsimile transmissions, and a file review. Again, without the costs agreement (and, perhaps, evidence as to the cause of the failure of the facsimile transmissions), it is not possible to make a finding about these matters, adverse to the respondent.

[375] The applicant's contentions in relation to the items listed by Mr Edwards under the headings, "Discriminator blindness" and "Unit creep" depend on the opinions of Mr Edwards. In the absence of some evidence of his competence to express them, the Tribunal does not make any adverse finding about these items.

[376] For the only item listed under "Time padding", Mr Edwards stated that the file note recorded only two units, though three were charged. In the absence of any other evidence, it should be found that there was overcharging of an amount of $40.

[377] Accordingly, the applicant has established that the respondent charged Ms Heginbotham $2,135 (exclusive of GST) more than the law practice was entitled to charge. The charge is that the respondent engaged in "excessive charging". Section 420(1)(b) of the LP Act provides that the charging of excessive legal costs in connection with the practice of law may constitute unsatisfactory professional conduct or professional misconduct. The legislature did not adopt the language of the common law, which regarded "the charging of extortionate or grossly excessive costs" as amounting to professional misconduct;[148] and nor did it provide that the charging of excessive costs necessarily constituted such conduct. The language of the statute suggests the unprofessional conduct may occur when the overcharging is not extortionate or grossly excessive. It may be correct to say that not every instance of overcharging will amount to excessive charging, as that term is used in s 420. In a total bill of $11,983.40, the respondent charged about $2,350 more than he was entitled to charge. This is approximately 20% of the bill. In the Tribunal's view, that is sufficient to constitute excessive charging.

Heginbotham – Respondent's conduct considered

[378] The statute does not specify at what point charging becomes so excessive that it would constitute professional misconduct. That is left to the judgment of the Tribunal, in the circumstances of the case. Generally, overcharging which would satisfy the common law test for professional misconduct will be found to be so under the legislative provision; and other excessive charging will usually be found to be unsatisfactory professional conduct.

[379] The amount involved is relatively modest, though a not insignificant proportion of the bill. Moreover, in this case, only two instances of overcharging have been proven, rather than the rapacious course of conduct seen in some other matters. While members of the profession would undoubtedly regard the overcharging in this matter as improper, it is doubtful that they would regard it as extortionate or grossly excessive. Nor is it clear that they would regard the respondent's conduct in this

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148 See *Re Veron*, *supra*.

matter as disgraceful and dishonourable. The respondent's conduct which is the subject of charge 15 should be categorised as unsatisfactory professional conduct. The conduct which is the subject of charge 14 should be similarly categorised. However, because the conduct is included in the conduct the subject of charge 15, and has no separate aggravating feature, this finding should not be given any additional weight when determining orders.

[380] Neither party identified the legal basis for the proposition that the respondent was not entitled to increase the amount charged. That occasions some difficulty when attempting to determine whether the mere fact that the respondent increased the amount charged is either unsatisfactory professional conduct or professional misconduct. It may have consequences only in relation to the right of the legal practice to recover fees. The applicant has made no attempt to demonstrate by submission that the mere increase in the amount charged constitutes either professional misconduct or unsatisfactory professional conduct. It may be that the increase is explained, wholly or partly, by the charging of amounts which the legal practice was not entitled to charge, but the applicant has not demonstrated that. Accordingly, the Tribunal is not prepared to find that the conduct the subject of charge 13 constitutes either form of misconduct.

Saunderson – the background

[381] In this case, there are no agreed facts. The following facts are established by the evidence of Mr Edwards, and from an affidavit of Mr Martin Francis Kelly.

[382] Mr Saunderson was a client of the law practice. The respondent drew a will, which Mr Saunderson executed on 28 February 2011. It appointed the respondent executor and trustee of Mr Saunderson's estate. Clause 3 of the will bequeathed the estate to the respondent as trustee, to convert it into cash, and after payment of debts, "UPON TRUST to my Trustee to distribute same to whomever, including the support of young footballers through schooling, equipment, tours and the like". It contained a clause setting out Mr Saunderson's reasons for not providing for his wife. It authorised the respondent to charge for his work as executor and trustee, and instructed him to engage the legal practice to administer and manage the estate.

[383] The execution of the will was witnessed by the respondent and by a receptionist at the legal practice.

[384] Mr Saunderson died on 30 April 2013 in Lima, Peru. Probate of the will was granted on 2 September 2013. The respondent proceeded to administer the estate, largely finalised by 22 May 2014. The estate had a value of approximately $1,850,000.

[385] On 12 May 2014, the balance held in the law practice's trust account on behalf of the estate was $1,220,109. On 16 May 2014, a withdrawal was made from this account in the amount of $1,200,000, described as an "interim distribution". It was paid to the estate bank account, controlled by the respondent. On 16 July 2014, $1,040,000 was paid from this account to the respondent's personal account.

[386] Mr Saunderson's former wife made a claim for a property settlement. There had been matrimonial proceedings between them, but it is not clear whether they were divorced when Mr Saunderson died. Ms Anna Maria Villanueva made a claim against the estate under the *Succesion Act*, on the basis of a de facto relationship. These claims

were settled, and apparently paid out of the estate, but there is conflicting information about the amounts for which they settled.

[387] On 30 May 2014, the respondent wrote to the law practice, withdrawing instructions in relation to the estate.

[388] Between 16 and 21 July 2014, the Queensland Law Society carried out an investigation of the law practice's trust account. The investigator provided a report dated 31 July 2014. Amongst other things, the report recorded that on 27 July 2014, $1,040,000 was paid to the law practice's trust account, and apparently receipted to the trust ledger for the estate file for Mr Saunderson.

[389] The law practice had provided the investigator with printout reports relating to the trust account. Curiously, the report of ledger balances as at 1 January 2013 included a listing for the estate, although Mr Saunderson died subsequently. The report of trust account ledgers from 1 January 2013 to 16 July 2014, and the report of trust account transactions from 1 January 2014 to 30 June 2014, did not include entries for the estate file, although the pages of the report were consecutively numbered. A check of the trust account cash book for the period from March to May 2014 showed that it contained transaction records for the file in this period.

[390] On 15 September 2014, the respondent wrote to the Law Society in relation to the investigation. He was unable to account for the omission of the estate from the two reports mentioned earlier. He also stated that he advised Mr Saunderson that if he wanted to leave a benefit to the respondent, he would need to obtain independent legal advice, and Mr Saunderson said he would do so on his return to Australia.

[391] On 20 October 2014, the respondent sent a further letter to the Society. He advised that the Trust balance "was transferred to the Beneficiary on 16 May 2014 and at 30 May 2014 there was a zero balance and the file subsequently closed". The letter enclosed "the full Trust ledger of 71 pages". The last entries recorded in the ledger printout, which is dated 20 October 2014, are for 1 July 2014.

[392] The Legal Services Commission, through Mr Edwards, conducted an enquiry into the matter. On 6 May 2015, the respondent's solicitors wrote to the Commission. The letter denied any misappropriation by the respondent, and any breach of duty or exercise of undue influence. It stated that the respondent recommended that Mr Saunderson go to another lawyer, identified to Mr Saunderson, to draw the will, but Mr Saunderson declined. The letter also stated:-

> Mr Slipper has voluntarily transferred into trust the full amount of the benefit that he received under Mr Saunderson's will. This transfer occurred on 27 July 2014, the timing of which is instructive given the voluntary nature of Mr Slipper's action.

[393] The letter of 6 May 2015 also enclosed the respondent's file. The file included what appears to be a handwritten file note dated 22 February 2011. This recorded that the benefit of the estate was to go to the executor and trustee, to distribute at his sole discretion, including to the respondent; the respondent suggested that it might be used to support football players and others; and other possible beneficiaries were discussed but rejected. It also recorded a recommendation to see another solicitor. The file included another such note dated 28 February 2011, of discussions about the disposition of Mr Saunderson's estate, and possible beneficiaries; and the author's

discomfort with a disposition of the estate to him. The file included a letter dated 28 February 2011 from the respondent to Mr Saunderson, confirming his "clear instructions that until a further Will is executed the benefit is to the writer to do with as he chooses including for the benefit of young footballers". The letter also pointed out that Mr Saunderson could change his will at any time; and recommended that he do so if he remarried or committed to another relationship.

[394] In more recent times, the Public Trustee gave consideration to whether Mr Saunderson's will, or at least the dispositive clause, was valid. On 22 August 2016, Senior Legal Pty Ltd, on the instructions of the respondent, wrote to the Official Solicitor for the Public Trustee. The letter stated that on about 21 July 2014, $167,000 was paid to the Australian Tax Office; and $20,000 was distributed to charitable and other bodies consistent with the dispositive clause in the will. The letter stated that the estate had been paid out to the legal personal representative in his personal capacity, and to various entities identified by him in accordance with clause 3. It made no mention of a repayment to a trust account. Rather, it stated that the respondent instructed that, "there are no funds standing to the credit of the deceased's estate in any account styled for that purpose".

[395] Proceedings were commenced by the sisters of Mr Saunderson against the respondent as the executor of the will. In those proceedings, an order was made on 27 February 2018 that the respondent be removed as executor and trustee, and the grant of probate of the will was revoked. An order was also made appointing the sisters as administrators of the estate, vesting Mr Saunderson's property in them, and ordering the delivery of the property of the estate to the solicitors acting for the administrators. Other parts of the application, including an application for an order that clause 3 be held invalid on the grounds of uncertainty, were not expressly determined, and the administrators were given leave to apply for directions as to the administration of the estate.

Saunderson – Allegations and contentions

[396] In essence, charge 16 alleged that the respondent appropriated funds to which he was not entitled. The particulars alleged that he caused the sum of $1,200,000 previously mentioned, together with a sum of $85,000 on 8 July 2014, to be transferred to the estate bank account. They also alleged the transfer of $1,040,000 to the respondent's personal account, and the repayment of this amount on 27 July 2014.

[397] Charge 17 alleged incompetence in relation to the drawing and execution of the will. It alleged that the dispositive clause failed to identify any beneficiary or charitable purpose, and, as a result, failed to establish a trust. The respondent witnessed the execution of the will, although he was an "interested witness" for the purposes of s 11 of the *Succession Act*. The respondent failed to ensure that the dispositive clause was effective to dispose of the estate in accordance with Mr Saunderson's wishes. In so far as the will may have benefited the respondent, the respondent failed to refer Mr Saunderson for independent legal advice. He also failed to have regard to the effect of his becoming an "interested witness" on the will and on Mr Saunderson's wishes. He thus failed properly to advise Mr Saunderson.

[398] At the end of the hearing on 23 August 2018, an order was made that this charge be varied by adding paragraph 2.7e, alleging that the respondent, in breach of paragraph 10.2.2 of the *Legal Profession (Solicitors) Rule* 2007, continued to act on the

instructions of Mr Saunderson in relation to the will, under which the respondent would or might receive a substantial benefit in addition to reasonable remuneration.

[399] Charge 18 alleged incompetence in relation to the estate. It repeated particulars from charges 16 and 17. It alleged that the respondent failed to have regard to the obligations imposed on him, both as executor and as solicitor for the executor, of the estate. He failed to have regard to Mr Saunderson's intent, as expressed in the will; and he failed to consider or properly consider the terms of the will, and the effect his becoming an "interested witness" might have on the management of the estate and the disposition of any property in his favour. He also decided to benefit himself in circumstances where he knew or ought to have known that he could not do so.

[400] In this case, the respondent has declined to respond to the allegations made in the charges, on the ground that he might incriminate himself.

[401] The applicant's written submissions contended that clause 3 of the will was void for uncertainty. No reasonably competent solicitor would have drafted a will in such uncertain terms. Contrary to the wishes of Mr Saunderson, his sisters will now take the estate on intestacy. This was a failure of competence and diligence on the part of the respondent.

[402] It was also submitted that the respondent took advantage of the uncertainty of clause 3 by making a distribution to himself of in excess of $1 million, despite being the solicitor for the estate, and its executor and trustee, when he was not entitled to do so. By the letter of his solicitors of 6 May 2015, the respondent has acknowledged receipt of a benefit under the will, but contended that it had been refunded. By the time the money was refunded, the respondent was under investigation by the Queensland Law Society. The refund did not appear in the law practice's trust account statement for the estate. This is the best evidence that there was no refund.

[403] The respondent was also precluded from benefitting under the will because he was an interested witness, in view of s 11 of the *Succession Act*. The respondent knew or ought to have known of the effect of s 11, when taking the money from the estate. The respondent also knew, when drawing the will, that he was acting in contravention of the conduct rules, being *Legal Profession (Solicitors) Rule* 2007, which required him to decline to act if he was to take a benefit under the will. The circumstances surrounding the drawing and execution of the will would also support the presumption of undue influence. The taking of the benefit involved a knowing breach of ethical rules of serious proportions. The respondent is guilty of professional misconduct.

[404] Orally, the applicant made particular reference to paragraph 3.2.6 of the application. It was contended that the respondent's absence of entitlement to the money which he took from the estate, for the purposes of charge 18, depended on the fact that clause 3 made a gift to the respondent, which would be void under s 11 of the *Succession Act*; and would be presumed to be void under the general law. At the time when the money was taken, there was no order under s 11 which would validate the disposition in clause 3. Nor had the presumption under the general law been rebutted. By avoiding making an application about these matters, the respondent avoided any consideration of the question whether clause 3 was void for uncertainty. Mr Rice also referred to

O'Brien & Anor v Smith & Anor[149] and *In re Hollole*,[150] for the proposition that the clause was void for uncertainty. He referred to evidence of the fact that the respondent had acted for Mr Saunderson in other matters. He claimed to have prepared several hundred wills. His reference to authorities showed that he was aware of the circumstances in which Courts are suspicious of the validity of a will, because of undue influence; and the onus which falls on a person who takes a benefit under a will which he played a role in preparing.

[405] Mr Rice drew attention to the fact that the trust ledger recorded the transfer out of $1,200,000, but did not show any record of a repayment of $1,040,000. He also submitted that the respondent admitted, in the letter from Senior Legal, that there had been no repayment. He referred to the file notes, pointing out that they do not record Mr Saunderson's instructions. However, the notes show that Mr Saunderson wanted to establish a trust, and wanted the respondent to give the estate to other people. He did not want his sisters to benefit from it. On the respondent's recorded understanding of Mr Saunderson's intentions, the respondent continued to act, in breach of rule 10 of the *Legal Profession (Solicitors) Rule*. The respondent's letter of 28 February 2011 did not point out the uncertainty in clause 3 of the will.

[406] The respondent's written submissions contended that the applicant's written submissions ranged beyond the matters alleged in the application. The taking of the money alleged in charge 16 was established, but the absence of entitlement was not. Assuming the purported trust was void for uncertainty, if Mr Saunderson intended the respondent to benefit from the will, clause 3 would be construed to give effect to that intention, subject to s 11 of the *Succession Act*. The applicant has not established that the clause is void for uncertainty; nor that s 11 would apply. The respondent's file showed that Mr Saunderson knew exactly what he wanted. The questions posed are to be litigated in the Supreme Court, that Court having refused to determine them summarily. This Tribunal ought not to decide them.

[407] It was further submitted that the applicant had failed, in charge 17, to allege what Mr Saunderson's intention was. Thus the allegations in paragraphs 2.7a and 2.7c cannot be made out. The file notes demonstrated that the respondent had regard to the effect which the fact that he was an interested witness to the execution of the will might have on the will, and the achievement of Mr Saunderson's wishes. The applicant had failed to identify the advice which it is alleged in paragraph 2.7d of the application the respondent ought to have given. Paragraph 2.7 has not been made out. The applicant's contention of the respondent's incompetence in relation to the drafting of the will, with the result that Mr Saunderson's sisters will benefit, contrary to his wishes, is beyond the allegations made in the application, and thus beyond the jurisdiction of the Tribunal.

[408] Charge 18 was submitted to be duplicitous, relying on facts on which charges 16 and 17 are based. It should be dismissed on that basis. It was submitted that the obligations referred to in paragraphs 3.2.1 and 3.2.2 were not identified, and nor were the respects in which the respondent was said to have failed to have regard to them. The allegations were as to the respondent's state of mind, but the applicant did not identify the evidence from which the state of mind was to be inferred. Paragraphs

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149 [2012] QSC 166.
150 [1945] VLR 295.

3.2.3 and 3.2.5 faced similar difficulties, as did paragraph 3.2.4. Paragraph 3.2.6 was, in substance, the allegation made in charge 16.

[409] Mr Cohen, in the course of Mr Rice's oral submissions, conceded that the letter from Senior Legal was an admission by the respondent against his interest, and could be relied upon. He also conceded that, if a sum of the order of $1 million had been repaid to the trust account, that would likely have attracted the attention of the external examiner.

[410] In his oral submissions, Mr Cohen referred to passages from the judgment of Philip McMurdo J (as his Honour then was) in *Dore (as executor of the will of W H B Chenhall dec'd*)[151] to the effect that a will leaving a benefit to the solicitor who drew it may be valid, notwithstanding that the solicitor breached ethical requirements in drawing it and taking the benefit. He also submitted, with respect to the allegation that his client was negligent in drawing the will, that clause 3 was not clearly void for uncertainty; and it was not clear that the estate passed under the intestacy rules. In support of that proposition he relied upon the fact that in the Supreme Court proceedings, that question was not determined summarily. The interpretation of clause 3 would require a consideration of Mr Saunderson's intentions under s 33C of the *Succession Act*. Nor could it be said that the respondent acted to avoid scrutiny by applying for probate in common form, when the matters relied upon by the applicant are apparent from the face of the will. If Mr Saunderson intended the respondent to take the benefit of the estate, it was difficult to resist the proposition that in drawing the will and witnessing its execution, the respondent was negligent. The proposition that the respondent was not entitled to take the estate without a Court determination because he was an interested witness to the execution of the will was not within charge 17. Mr Cohen accepted that there was no evidence that the respondent advised Mr Saunderson to go to another solicitor, because the respondent was a witness to the will. Particular 2.7b of the application could not be read as alleging a failure to comply with paragraph 10.2 of the *Legal Profession (Solicitors) Rule*. Mr Cohen accepted that, if Mr Saunderson's intention were to leave the estate to the respondent, then it was a substantial failure of competence on the part of the respondent to execute the will.

[411] In his oral reply, Mr Rice accepted that there was evidence of a referral of Mr Saunderson by the respondent to another solicitor in relation to the will, for the purposes of paragraph 10.2.2b.

Objections to evidence: the Saunderson charges

[412] Mr Cohen objected to the admission of the report by Mr Edwards of his investigation, exhibited to his affidavit, as evidence of the truth of its contents. It was submitted that it contained Mr Edwards' analysis and opinions in relation to the matters referred to in it. For reasons already stated, expressions by Mr Edwards of opinion which require expertise will be disregarded. Factual matters are, in many cases, likely to be hearsay, but will not be excluded from evidence on that basis. In some cases, the report includes secondary evidence of the contents of a document; but again this evidence will not be excluded. There is no reason to think that the evidence is (at least generally) unreliable; and there has been no suggestion of unfairness. Matters of law, or matters which are properly the subject of submission rather than evidence, will be

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151 [2006] QCA 494 at [53]-[55].

treated in a similar fashion to such matters in Mr Reardon's report and in other documents from Mr Edwards. They will not be regarded as evidence of the truth of any fact.

[413] Mr Cohen objected to the admission of the Queensland Law Society investigation report exhibited to the affidavit of Mr Edwards, as evidence of the truth of its contents, apparently referring to the analysis and opinion of its author. The report primarily records matters of fact, some at least of which were based on an examination of the file. There is no reason to exclude this evidence. The Tribunal intends to disregard the opinions of the author of the report, because his qualifications are not identified.

[414] In paragraph 91 of his outline of submissions, the applicant made reference to the fact that the respondent claimed, through his solicitor's letter of 6 May 2015 to the applicant, to have fully transferred into trust the benefit he received under the will. This apparently is a reference to the sum of $1,040,000 which the respondent transferred to his personal account on 16 July 2014; and a payment made to the trust account of his practice on 27 July 2014. This appears to be the only matter from that letter relied upon by the applicant in paragraphs 91 and 92 of his outline. The respondent's written submissions contended that this is irrelevant to any allegation in the discipline application, and that the letter of 6 May 2015, at least in relation to the assertion of repayment, was inadmissible. The submission is misconceived. In paragraph 1.8 of the Saunderson charges, it was alleged that on 16 July 2014 the respondent withdrew $1,040,000 from the estate bank account and paid it to his personal account; and in paragraph 1.10 it was alleged that on 27 July 2014, the respondent repaid that amount to the law practice's trust account. In his written submissions, Mr Rice relied on the repayment as an admission by conduct that the applicant knew he had no entitlement to the money. Paragraph 3.2.6 of the Saunderson charges alleged that the respondent decided to benefit himself (by taking the money) when he knew or ought to have known that he could not do so (in the sense he was not entitled to do so). On that basis, the statement would be relevant. At the hearing, Mr Rice submitted that the evidence demonstrated that the money was not repaid. If that be correct, the statement in the letter could be a false claim of repayment of money alleged to be unlawfully appropriated by the respondent. The letter would remain relevant.

[415] The respondent's submissions also contained an objection to the matters relied upon in paragraphs 91 and 92 of the applicant's written submissions, apart from the letter from the respondent's solicitors of 6 May 2015. These are said to be irrelevant. The objection does not make clear what is said to be objectionable, beyond the matter already discussed. The letter enclosed the will file, contained some admissions, and set out the respondent's version of some events. It is relevant to the Tribunal's consideration of the application.

[416] In the respondent's written submissions, objections were taken to exhibits 4, 5, 6 and 10 to Mr Kelly's affidavit. These objections were subsequently withdrawn.

Saunderson – Charge 16 considered

[417] As mentioned, Mr Cohen accepted that the letter from Senior Legal of 22 August 2016 established that the respondent had taken the sum of $1,040,000 from the estate; and he submitted that the issue was whether the respondent was entitled to do so. He did not advance a positive argument of entitlement.

[418] The particulars of charge 16 do not specify the basis on which the applicant contended that the respondent was not entitled to take the money. Three matters were advanced by Mr Rice in relation to clause 3 which are of present relevance. The first was whether, on the assumption that language of clause 3 would, if valid, have given the respondent the benefit of the estate, the clause was effective at the time when the respondent took the money, in view of s 11 of the *Succession Act*. The second was whether, under the general law, the respondent was entitled to take the money without satisfying the Court that Mr Saunderson knew and approved of the contents of the will.

[419] The third matter of potential relevance was raised by Mr Rice in connexion with this charge, as a matter, scrutiny of which was avoided by the respondent's application for probate in common form. It was whether clause 3 was intended to create a trust, but was void for uncertainty, so that the estate passes as on an intestacy.

[420] The respondent could only claim an entitlement to take the money beneficially on 16 July 2014, if clause 3 on its proper construction gave him the benefit of the residuary estate. No attempt has been made to suggest that the respondent then took the money, intending to hold it as a trustee. In the circumstances under consideration, the respondent having witnessed the will, it follows that s 11 was engaged.

[421] The effect of s 11(2) is that clause 3 would, so construed, be void. However, s 11(3) provides, relevantly, that s 11(2) does not apply if the court is satisfied the testator knew and approved of the disposition; and that it was made freely and voluntarily by the testator. There has been no application to the court for a determination under s 11(3), notwithstanding the passage of almost six years since Mr Saunderson's death; indeed, there is no evidence of a proposed application in the future. Without a determination under that provision, the respondent had no right to take the money. Accordingly, on the material before it, the Tribunal finds that, if the effect of clause 3 was to give the respondent the benefit of the estate, the respondent had no entitlement to take the sum of $1,040,000, which appears to be the whole of the residue of the estate, on 16 May 2014.

[422] In support of his contention that, under the general law, the respondent was required to place the circumstances in which the will was made before the Court for its scrutiny, Mr Rice relied on *Southern Law Society v Westbrook,*[152] *Wintle v Nye*,[153] *In re Nickson*,[154] and *Tobin v Ezekiel*.[155] It is unnecessary to consider these cases, in view of the findings made in relation to the other two matters. It might be observed that there was no reference in them to a provision such as s 11 of the *Succession Act*; and accordingly a question might arise as to whether they have any independent operation when the issue is whether a clause making a disposition to an interested witness may be effective on the ground that the testator knew and approved of the disposition, and the disposition was made freely and voluntarily.

[423] Strictly speaking, it is unnecessary to consider the third matter mentioned. The only basis on which the respondent could be entitled to take the money beneficially is that clause 3 was intended to give him the benefit of the estate. If clause 3 were intended

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152 At p 614.
153 [1959] 1 WLR 284, 291.
154 [1916] VLR 274, 281; as cited in *Leitch v Dore* [2005] 2 Qd R 168 at [8].
155 (2012) 83 NSWLR 757 at [44]-[47].

to create a trust, then the respondent had no right to take, or purport to take, the money. Either the money was subject to a trust, or, if the clause was ineffective, the estate was to pass as on an intestacy. As will appear, the Tribunal is of the view that it is likely that clause 3 was intended to create a trust, but failed to do so. On that basis, therefore, the respondent was not entitled to take the residue of the estate.

[424] Paragraph 1.10 of the application relating to the Saunderson charges alleged that the respondent repaid the amount of $1,040,000 to the trust account of the law practice on 27 July 2014. Mr Rice submitted that the repayment had not occurred. No objection was taken to his doing so. The trust account printout of 20 October 2014 does not record the repayment. The respondent's letter of the same date stated that on 16 May 2014 the balance of the estate was transferred "to the Beneficiary" and that on 30 May 2014 there was a zero balance and the file subsequently was closed. The letter from Senior Legal, accepted to be written on the respondent's instructions, stated that the estate "had been paid out to (the respondent) in his personal capacity" (though there is a reference to payment to other entities identified by the respondent pursuant to clause 3); and that there were no funds standing to the credit of the deceased's estate. The evidence demonstrates that the respondent did not make the repayment alleged to have been made on 27 July 2014.

[425] The application also alleged that on 8 July 2014, $85,000 was paid to an estate bank account. There is no evidence of this. The allegation is not made out.

[426] The Tribunal therefore concludes that on 16 July 2014, the respondent appropriated $1,040,000, being the residue of the estate, to which he was not entitled.

Saunderson – Charge 17 considered

[427] There is a tension between the allegations in paragraph 2.5 and paragraph 2.6 of the application. The former implied that it was Mr Saunderson's intention to leave his estate to the respondent on trust. The latter implied that clause 3 left the estate to the respondent beneficially. These allegations can only sensibly be understood as alternatives.

[428] In support of the proposition that the will on its face intended to create a trust, Mr Rice referred to *In re Hollole*.[156] There, O'Bryan J held that a will with features some of which are significantly similar to clause 3, was intended to create a trust, rather than to give the estate to a named person beneficially. The features relied upon by his Honour were that the estate was left to the trustee and executor on trust; and that (after certain periods during which the trust was to subsist) the property was to be disposed of by the trustee as he saw fit. His Honour's judgment included summaries of several rather similar cases.

[429] Mr Saunderson's will left the estate to "the executor and trustee UPON TRUST", to be collected and converted to cash, with debts to be paid and other obligations met; and directed the respondent to hold the balance "UPON TRUST to my Trustee to distribute same at his sole discretion to whomever, including the support of young footballers through schooling, equipment, tours and the like". Although some of the features relied upon by O'Bryan J are not present, the repeated references to a trust, and to the respondent as trustee, strongly support the view that it was intended that

156 [1945] CLR 295 at 297-298.

the respondent hold the residue of the estate on trust. This is confirmed by the direction to distribute. It is not the mere expression of a wish, as occurred in one of the cases referred to by O'Bryan J, *Stead v Mellor*.[157] Subject to the matter next discussed, the Tribunal considers that the language of clause 3 demonstrates an intention to create a trust.

[430] Mr Cohen referred to s 33C of the *Succession Act* for the proposition that extrinsic evidence of Mr Saunderson's intention might be relied upon for the interpretation of clause 3; no doubt thereby intending to raise the prospect that, by reference to the evidence that might be given by the respondent based on the diary notes, the respondent might demonstrate that Mr Saunderson intended him to take the residue of the estate beneficially.

[431] There are difficulties with this submission. There is no evidence that the respondent intends to propound that construction of clause 3. If he did, it is not inconceivable that the Court would consider that there is no ambiguity about Mr Saunderson's intention to create a trust, and accordingly not admit evidence intended to demonstrate the contrary. The evidence of the respondent would undoubtedly be scrutinised with great care, because of the respondent's personal interest in the outcome of the proceedings, because of his relationship of influence with Mr Saunderson, and because he drew the will. The diary notes would attract similar attention.

[432] There is also a question about the effect of the evidence based on the diary notes. The note of 22 February 2011 commenced with a statement that the benefit of the estate was to go to the executor and trustee, to distribute at his sole discretion, to whomever, including the respondent. The will was drafted consistently with this instruction. The reference to the respondent as trustee, and the intention that he distribute, indicate an intention to impose some form of trust-like obligation on him. While there was discussion in both diary notes about the fact that the respondent would obtain a benefit, there is no evidence of a departure from the original expression of intention. Indeed, the respondent's letter to Mr Saunderson of 28 February 2011 placed some emphasis on the instructions that the respondent was to be appointed as trustee of the estate, as well as executor under the will; including an intention to charge fees for acting in both capacities. Evidence consistent with the diary notes may ultimately be held not to provide a basis for finding that it was not intended to create a trust.

[433] On the evidence before it, the Tribunal considers that, if the construction of clause 3 were litigated, it is likely that it would be found that the clause was intended to create a trust, even if reliance were placed on s 33C of the *Succession Act*, and evidence from the respondent.

[434] Mr Rice referred to *O'Brien & Anor v Smith & Anor*[158] for the proposition that, if it was intended to create a trust, clause 3 is void for uncertainty. In the Tribunal's view, the proposition is correct. As Margaret Wilson J pointed out, the beneficiaries of a trust must be identified with sufficient certainty, so that in the case of discretionary trust (as was intended by clause 3) it is possible to say whether any particular person is or is not a member of the class of potential beneficiaries.[159] That is not possible with clause 3.

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157 [1877] 5 Ch D 225; discussed in *Hollole* at p 298.
158 [2012] QSC 166.
159 *O'Brien* at [29].

[435] It follows that clause 3, as drafted, fails for uncertainty. The allegation that the clause was void for uncertainty was one of the particularised allegations in the application in support of the allegation at the commencement of paragraph 2, as to incompetence. In the Tribunal's view, its drafting demonstrated a substantial failure to reach a reasonable standard of competence and diligence.

[436] If, on the other hand, the clause was intended to pass the residuary estate to the respondent beneficially, then it was accepted, correctly, that the witnessing by the respondent of the execution of the will was a substantial failure on the part of the respondent to reach a reasonable standard of competence. It might be observed that, on the basis of the file notes of 22 and 28 February 2011, the respondent apparently believed that he was to receive a benefit under the will. Even if the belief was mistaken, his witnessing of the execution of the will displays a substantial failure in competence.

[437] Paragraph 2.7a alleged that the respondent, in the course of drawing and executing the will, failed to ensure that the dispositive clause was effective to dispose of the estate in accordance with Mr Saunderson's intentions. If, as the Tribunal considers, a trust was intended, the clause is void. If, on the other hand, it was intended that the respondent take the estate absolutely, the intention failed because the respondent was an interested witness. On either basis, the respondent failed to ensure that clause 3 was effective.

[438] In the end, paragraph 2.7b was not pursued. Paragraph 2.7c made an allegation about the respondent's state of mind. If it were accepted that Mr Saunderson intended the respondent to take the estate beneficially, then it is an almost inevitable inference that the respondent failed to have regard to the effect that his being an interested witness would have on the will. However, the Tribunal has taken a different view of Mr Saunderson's intentions.

[439] It is also clear, for the purposes of paragraph 2.7d, that the respondent failed to advise Mr Saunderson properly in the circumstances. It is clear that he failed properly to advise Mr Saunderson on the manner in which he might express his intentions in his will in a way which was achievable. He failed to advise Mr Saunderson of the uncertainty created by clause 3. He failed to advise him that, if clause 3 were intended to confer a benefit on the respondent, he should not have witnessed the execution of the will.

Saunderson – Charge 18 considered

[440] The identified difference between the particulars supporting this charge and those supporting charge 16 was the allegation in paragraph 3.2.6 that the respondent knew or should have known that he was not entitled to take the money which formed the residue of the estate. Reliance was orally placed primarily on s 11 of the *Succession Act*. It is apparent from the diary notes that the respondent believed that he was to receive a benefit under the will. Given the experience claimed by the respondent he ought to have known that, having witnessed the execution of the will, he was not entitled to take the residue of the estate, unless an order was made under s 11(3) of the *Succession Act*.

[441] Mr Rice contended that the charge raised "a conscious decision" on the part of the applicant, and his state of mind. The issue is his state of mind, not at the date when

he executed the will, but when he took the estate. The fact that the respondent witnessed the execution of the will, believing he was to take a benefit under it, strongly suggests that he did not advert to s 11 at that time. Beyond his apparent experience with wills and estates, there is no evidence that the respondent was conscious of the effect of s 11 when he took the residue. The (untrue) assertion of repayment, made in May 2015, is far from compelling evidence of this. The evidence is insufficient to establish that the respondent actually knew he had no entitlement to take the money at the time when he took it. However, it is a matter which he ought to have known. On that basis, charge 18 is established.

[442] Mr Cohen submitted that this charge was duplicitous with charge 16, but in oral argument withdrew the submission.

Saunderson – Characterisation of the respondent's conduct

[443] For the respondent to take in excess of $1 million from the estate when he was not entitled to do so is plainly a very serious matter. It would be regarded as disgraceful or dishonourable conduct by members of the profession. The respondent's conduct which is the subject of charge 16 is therefore found to be professional misconduct.

[444] Charge 18 would add a fault element to this conduct. Given the characterisation of the conduct in relation to charge 16, and the difficulties with the fault element, a consideration of this charge does not materially assist in the characterisation of the respondent's conduct.

[445] Charge 17 demonstrates gross incompetence on the part of the respondent in relation to the drawing and execution (more specifically, witnessing the execution) of the will. The conduct is at least a substantial failure to reach or keep a reasonable standard of competence and diligence. It is characterised as professional misconduct.

Costs

[446] In oral argument, Mr Cohen accepted that, unless the respondent were successful on a substantial number of charges, a costs order should be made against his client. In view of the findings made in these reasons, it would appear that such an order should be made.

Other orders

[447] Mr Cohen requested the opportunity to make submissions about other orders, after publication of these reasons. It might be noted that the respondent does not hold a practising certificate.

[448] The Tribunal has found that, in five of the matters to which the application relates, the respondent placed himself in a position of conflict, and then engaged in rapacious conduct, resulting in each case in a finding of professional misconduct. In the Saunderson matter, the respondent took $1,040,000 of estate moneys to which he was not entitled, and demonstrated gross incompetence.

[449] In the Tribunal's view, subject to further submissions, it would be appropriate to recommend that the respondent's name be removed from the local roll of legal practitioners.

[450] In the circumstances, the Tribunal will indicate the orders it proposes to make in the absence of further submissions, but will permit the parties the opportunity to make further submissions as to appropriate orders. The proposed orders are as follows:-

1. The Tribunal recommends that the respondent's name be removed from the local roll.

2. The respondent is to pay the applicant's costs of and incidental to the application, to be assessed on the standard basis.

[451] In the meantime, the following orders are made:-

1. Within 7 days of the publication of these reasons to the parties, either party may give notice to the other party and the Tribunal of its intention to make further submissions about the orders to be made.

2. If a party gives such notice, that party is to file and serve its submissions within 14 days of the publication of these reasons; and the other party may file and serve submissions in reply within 21 days of the publication of these reasons.