QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v McHenry* [2018] QCAT 417
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) v **DAVID ALAN MCHENRY** (respondent)
APPLICATION NO/S:	OCR264-14
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	18 December 2018
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Peter Lyons QC Assisted by: Dr Susan Dann Mr Peter Sheehy
ORDERS:	**1. It is recommended that the name of the respondent 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.** **3. The application is otherwise adjourned for the determination of claims made for compensation.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – where Respondent has 30 charges consisting of failure to maintain reasonable standards of competence and diligence, making false representations to clients, other solicitors and the law society, acting without instructions and forgery of documents – where respondent has not challenged any evidence – where applicant submits all charges amount to professional misconduct with the exception of two charges amounting to unsatisfactory professional misconduct – whether the respondent should be recommended to be removed from the roll of solicitors

Legal Profession Act 2007 (Qld) s 419, s 435, s 462
QCAT Act 2009 (Qld) s 28

Allinson v General Council of Medical Education and Registration [1894] 1 QB 750
Re Pochi and Minister for Immigration and Ethnic Affairs (1979) 36 FLR 482
Sudath v Health Care Complaints Commission [2012] NSWCA 171 at [79]

REPRESENTATION:

Applicant:	D A Holliday, instructed by Legal Services Commission
Respondent:	B T Cohen, solicitor for Bartley Cohen

APPEARANCES:

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

REASONS FOR DECISION

[1] In the Discipline Application brought against the respondent, the applicant has specified 30 charges. A number of allegations have been made in support of each charge. One charge is the result of an investigation following advice from the Federal Circuit Court, and is thus an investigation matter.[1] The remainder relate to complaints by former clients of the respondent. Seven of the charges allege forgery of documents.

[2] The Application was the subject of a hearing on 30 April 2018 before a differently constituted Tribunal. That hearing was terminated without the making of orders. The parties agreed to a proposal that the matter be dealt with by the reconstituted Tribunal on the papers, including a transcript of the earlier hearing. Although the application has now been determined on the papers, there are references below to a hearing, which is a reference to the hearing which took place on 30 April 2018.

[3] Most of the allegations are supported by affidavit evidence relied on by the applicant. The respondent was represented at the hearing, but has neither contradicted nor otherwise challenged any of the evidence. There is generally no reason not to accept this evidence. A statement of agreed facts was filed on 22 July 2015 (SOAF). It deals with some, but not all, of the charges, and provides some additional information. It constitutes an admission by the respondent of the facts set out in it. Again, there is no reason not to rely on it.

[4] The applicant has contended generally that the material establishes professional misconduct on the part of the respondent. The only exception is the conduct relating to the client Thornley, which the applicant has contended constitutes unsatisfactory professional conduct.

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[1] See s 435(1)(c) of the *Legal Profession Act* (*LP Act*).

[5] A copy of that part of the discipline application which sets out the details of the application and the particularised allegations is Annexure A to these reasons. At the hearing, the applicant was given leave to make some minor amendments to the particulars for charge 19.

[6] To place the respondent's conduct in context, it is convenient to make brief reference to his background and career.

Respondent's background and career

[7] The respondent was born on 3 October 1970. He was admitted to practice as a solicitor in this State on 6 September 1996. He was an employed solicitor with McKenzie Forbes and then with Chris Trevor & Associates (CTA), becoming a salaried partner with the latter firm on 27 February 2003. He became the managing partner of that firm on 9 July 2008, remaining in that position until he commenced practice as a sole practitioner, under the name Dave McHenry & Associates, on 1 July 2010.

[8] The respondent's practising certificate was cancelled on 16 March 2017. On 14 December 2017, an injunction issued, restraining him from engaging in legal practice.

[9] Save in relation to the matters the subject of the present application, the respondent has no disciplinary history.

Complaint of Mr Orth: charges 1-4

[10] The only material relied upon in relation to this complaint is the SOAF, which includes some documentary support. It contains an admission that in February 2004, Mr Orth contacted the respondent for advice about a claim in relation to an income protection policy, against an entity generally referred to as Colonial Mutual, but in some of the material as Colonial First State/CommInsure. In these reasons it will be referred to as Colonial Mutual. The SOAF records that from September 2004, the respondent had the carriage of this matter on behalf of Mr Orth.

[11] The factual matters alleged in paragraphs 1.3-1.6, the allegation made in paragraph 1.7, the representations alleged in paragraph 2.2 and 2.3, the facts alleged in paragraph 3.2-3.4, 3.6 and 3.7, and the facts alleged in paragraphs 4.2-4.5 and 4.8 in the Discipline Application, are all established by the SOAF. They demonstrate (and the respondent has, by the SOAF, admitted) that he failed to maintain a reasonable standard of competence and diligence in dealing with Mr Orth's matter, primarily by reason of his failure to institute proceedings against Colonial Mutual or to take any other step to advance Mr Orth's claim. The respondent has also admitted that he failed to give Mr Orth the benefit of his professional judgment about the claim.

[12] In the SOAF, the respondent has admitted that the representations set out in paragraph 2.2 of the Discipline Application were false, because he had not commenced proceedings against Colonial Mutual. He has also admitted that the representations to Shine Lawyers set out in paragraphs 3.4 (effectively, that he had sent the file to a cost assessor) were false because he had not sent the file for assessment. He has also admitted that the representation made in an invoice he sent to Shine Lawyers as to services provided to Mr Orth was false. While the material establishes that he provided some of the services described in the invoice, it follows that the respondent has admitted that, at least to a substantial extent, the representation as to the services he provided was false. He has also admitted that the representations made to the

Queensland Law Society which are set out in paragraphs 4.5 and 4.8 were false. He has also admitted that all of the representations were deliberately misleading and dishonestly made.

[13] In summary, over a period of about eight years, the respondent failed to take any action to progress Mr Orth's claim against Colonial Mutual; and he made dishonest statements to his client, to Shine lawyers and to the Society intended to hide this failure.

[14] Charge 1 is that the respondent failed to maintain a reasonable standard of competence and diligence in relation to Mr Orth's claim against Colonial Mutual. This charge is clearly made out. There was gross failure by the respondent to perform his duty to pursue Mr Orth's claim against Colonial Mutual.

[15] Charge 2 is that the respondent made a series of false representations to Mr Orth about his conduct of the claim against Colonial Mutual. The material available to the Tribunal establishes that each of the representations relied upon in support of this charge were falsely made.

[16] Likewise, the material establishes that the respondent falsely made the representations to Shine Lawyers and the Queensland Law Society, and accordingly that charges 3 and 4 are made out.

Complaint of Mr Thornley: charges 5 and 6

[17] Mr Thornley's then wife left him in late 2007. They had been married for about a year. When the wife left, she took certain property with her. Mr Thornley retained the respondent to act for him in property settlement proceedings. The respondent commenced those proceedings in the Federal Magistrates Court early in 2008.

[18] The allegation that the respondent failed to maintain a reasonable standard of competence and diligence is particularised in paragraph 5.18. Mr Thornley deposes to the facts alleged in this paragraph. Although he does so in broad terms, elsewhere he gives more specific evidence of the conduct of the respondent.

[19] One of the matters alleged in paragraph 5.8 of the Discipline Application is that between 16 November 2010 and May 2011 the respondent failed to give Mr Thornley "the correct advice" as to whether Milvonz Pty Ltd, a company associated with Mr Thornley, was able to pursue certain claims against Mr Thornley's ex-wife. Mr Thornley deposes to this in terms, but does not identify the respects in which the advice was incorrect. From such scant material it is not possible to determine whether the advice was incorrect; and in particular, whether in giving the advice, the respondent failed to maintain reasonable standards of competence and diligence. Otherwise, the evidence of Mr Thornley as to the matters alleged in paragraph 5.18 should be accepted; and it shows that the respondent failed to maintain reasonable standards of competence and diligence. It follows that, subject to the observations made about the advice relating to Milvonz, charge 5 is established.

[20] The matters alleged in paragraphs 6.2 to 6.5 of the Discipline Application are established by the evidence of Mr Thornley. Accordingly, charge 6 is established.

Complaint of Mr Jones: charges 7 and 8

[21] In May 2011, Mr Jones was assaulted and suffered a significant injury to his knee. He engaged the respondent to pursue a claim, said to be for compensation, but more likely to be for damages. On a number of occasions between 1 January 2012 and 22 July 2016, Mr Jones had contact with the respondent and made inquiries about the case. He was led to believe that progress was being made. For example, in November 2015, the respondent informed Mr Jones that judgement had been given in his favour against the person who had assaulted him, for approximately $190,000. On one occasion, the respondent told him that the money was on its way to Gladstone from Brisbane in an armoured car.

[22] In his affidavit, Mr Jones deposed to a series of statements made by the respondent in the period between 7 October 2015 and 22 July 2016. The affidavit lists 26 such communications. Most of the communications were in documentary form, the documents being exhibited to the affidavit of Mr Jones. They include the fact that the judgement had been given, and numerous explanations for the fact that the money had not been recovered, including that the defendant had been bankrupted; as well as statements to the effect that the money would soon be available. Mr Jones exhibited a copy of an application dated 11 May 2016 for the appointment of the respondent as trustee of the estate of a bankrupt, with the bankrupt, perhaps not surprisingly, not identified.

[23] Ms Kirsty Broun, a Legal Officer with the Commission, has deposed that she has searched the Commonwealth Courts Portal and the Queensland Courts eCourts website and has found no record of any proceedings being filed by the respondent on behalf of Mr Jones whether in the District Court or the Supreme Court of Queensland or the Federal Court of Australia. She has also “interrogated” the respondent’s file for Mr Jones’ matter and found no sealed court documents, payment awards or settlement deeds; nor are there any documents indicating that the respondent had taken any step to progress Mr Jones’ claim.

[24] None of this evidence has been challenged; nor has any explanation been put forward for the absence of documents one would expect if the respondent’s communications to Mr Jones were true.

[25] It follows that the respondent’s communications to Mr Jones were an extraordinary series of lies, a fantastical construction of a course of events, to which he sought to give some credibility by producing a sham application for his appointment as trustee of a bankrupt estate.

[26] Charge 7 alleges (with particulars) that the respondent failed to maintain reasonable standards of competence and diligence in the conduct of Mr Jones’ matter. It is made out by the evidence referred to. Charge 8 alleges that the respondent falsely made the representations detailed in the application. The evidence of Mr Jones establishes the making of the representations, and the combined effect of the evidence of Ms Broun and Mr Jones establishes their falsity.

Complaint of Mr Stanley: charges 9 and 10

[27] In early 2009, Mr Stanley consulted the respondent about three incidents, one of which was said to have happened in the Gladstone watch house, one in the Chermside watch

house, and one at the Westbrook training centre, for which he wished to claim compensation. At the time of each incident Mr Stanley was a minor. On a number of occasions the respondent told Mr Stanley that he was getting onto, or was onto, the case. After two or three years, the respondent told Mr Stanley that the matter was "going through court". On two occasions in 2013, the respondent paid for Mr Stanley to fly with him to Brisbane. On the second occasion, the respondent took Mr Stanley into a courtroom and said that the judge sitting in that courtroom was the judge "doing my case". After they left the courtroom the respondent pointed to another man saying "that's the guy who will put your money in the bank, give him a wave".

[28] In November 2014, the respondent told Mr Stanley that Mr Stanley's case had been successful and that he had been awarded compensation of $225,000. Over the next year, the respondent said that there had been a dispute with Centrelink. He later said that he had resolved that dispute and produced a document in the form of a deed of settlement between Mr Stanley and Centrelink. Exhibited to Mr Stanley's affidavit was a copy of the document, bearing what purports to be the signature of the person authorised by Centrelink.

[29] In 2015, Mr Stanley told the respondent about an unrelated incident in which he suffered a broken jaw and he asked the respondent to try to recover compensation for this injury. The respondent recommended that all the claims be dealt with together. Subsequently, the respondent told Mr Stanley that the claim relating to the jaw injury had to be decided before Mr Stanley could get his money for the other claims.

[30] Early in 2016, the respondent told Mr Stanley the sum of $412,000 dollars would be deposited into his building society account, being the compensation for the first three incidents and a further sum for the injury to his jaw. At one point the respondent told Mr Stanley that the money was coming in an Armaguard truck from Brisbane to Gladstone; but then told him that "once the truck got to Gympie it got lost".

[31] In the first half of 2016, Mr Chris Trevor, another lawyer in Gladstone, told Mr Stanley that the respondent had been lying about his matters and had not filed any cases in court. Mr Stanley appears not to have accepted what Mr Trevor told him. The next year he communicated with the respondent about his matters and the respondent made statements to the effect that the compensation monies were coming.

[32] This account is based on the unchallenged evidence of Mr Stanley, which should be accepted.

[33] Ms Broun has again given evidence of her searches, showing that there are no records of any proceeding being filed by the respondent on behalf of Mr Stanley in the District Court or the Supreme Court of Queensland or the Federal Court of Australia. She also "interrogated" the respondent's file for Mr Stanley, but found no sealed court documents, no evidence of compensation payments awarded by the court, and no settlement deeds with the Queensland Government. The only indication of any action by the respondent to progress Mr Stanley's claims was a letter dated 23 April 2010 to the Department of Justice and Attorney-General.

[34] The discipline application alleges that the respondent failed to maintain reasonable standards of competence and diligence, because he failed to give Mr Stanley the benefit of his professional judgement, failed to take steps to progress the matters, failed to bring the matters to a conclusion, and failed to advise Mr Stanley about the

true status of the matters[2]. These allegations are established by the evidence of Mr Stanley and Ms Broun.

[35] The discipline application also alleges that the respondent made a series of false representations about the progress of the matters. One of the allegations is that the respondent drafted and provided to Mr Stanley a Deed of Settlement with Centrelink[3] which referred to compensation monies payable to Mr Stanley for his treatment from the Queensland Criminal Justice System. It is alleged that this, and the other representations relied upon, were false, because the respondent at no time made any real steps to progress the matters; and the respondent did not obtain any compensation payment for Mr Stanley.

[36] Mr Stanley's evidence establishes that the Deed was given to him by the respondent. It bears a signature, purportedly on behalf of "Centrelink, Queensland". The evidence of Mr Stanley is that one explanation advanced by the respondent for the fact that Mr Stanley had not received compensation money was that "Centrelink had jumped in on the act" but that the respondent had "cleared it up"; and the purpose of the Deed was to stop Centrelink taking any money from Mr Stanley. From its face, the Deed amounts to a representation that compensation monies had become payable to Mr Stanley; and that Centrelink acknowledged that it had no claim to the monies. Each was a representation by the respondent to the effect that he had taken steps to progress Mr Stanley's claims. That view of the Deed is supported by the evidence of Mr Stanley, mentioned earlier in this paragraph.

[37] The other alleged representations made were, in substance, established by the evidence of Mr Stanley. The falsity of all of these representations is established by the evidence of Ms Broun, supported by the evidence of Mr Stanley that he has not received any compensation. It is apparent from an examination of the Deed that it is not a genuine document. Again, the respondent has concocted a series of fabrications (bearing some similarity to those relating to Mr Jones), and produced a sham document, to hide his failure to take action to advance the claims of Mr Stanley.

Complaint of Ms Trevena: charges 11 and 12

[38] It is apparent from Ms Trevena's evidence that she had been previously married to Wayne King; and they were divorced by order dated 29 August 2009. Mr King continued to live in what had been the matrimonial home.

[39] Ms Trevena gave evidence that, in about April or May 2010, she engaged the respondent to act for her in relation to a property settlement consequent on the divorce. She referred to an email from her to the respondent's office which said, "any word from Dave yet? Starting to run out of time". Although she does not say so in terms, her evidence implies that she confirms the sending of this email. There has been no submission about the quality of this evidence, and it should be accepted as showing the sending of this email.

[40] Ms Trevena said that throughout 2011 the respondent was in contact with her ex-husband's solicitors about a property settlement and financial disclosure. For present purposes, nothing turns on whether she had actual knowledge of this. Her evidence

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2 The reference to "Jones's rights" in paragraph 9.7 is plainly a drafting error, and could only have been intended to refer to Mr Stanley's rights. It should be so understood.

3 Curiously, described in the Deed as a "Division of the Queensland Government".

reveals that on 24 June 2011, Mr King's solicitors wrote to the respondent, proposing a settlement. Ms Trevena made contact with the respondent throughout 2011, and he told her that he was trying to arrange a conference or was waiting for information from the ex-husband's solicitor; but the evidence does not suggest that he informed her of the settlement offer.

[41] An examination of the respondent's file by solicitors subsequently acting for Ms Trevena revealed that on 3 March 2011, he wrote to Mr King's solicitors putting an unidentified proposal and seeking financial disclosure; and that the respondent did not seek Ms Trevena's file from the solicitors who had previously acted for her until 13 April 2011. The respondent also made a proposal for settlement by letter dated 27 May 2011.

[42] At a time described by Ms Trevena as "around late 2010-2011", the respondent told her that he had started court proceedings. In late 2011, he told her that the first court appearance had gone well. In the period 2011-2012, he told her that he was waiting for a court date. Communications to this effect occurred on various occasions, with the respondent stating that, because of the backlog in the Rockhampton Court, he proposed to transfer the matter to Brisbane. When she again expressed concern about delay, he told her that the Court always gives priority to children's matters.

[43] Ms Trevena stated that in about April 2012, she told the respondent that the caveat over "the real property" had lapsed, apparently a reference to a caveat over the former matrimonial home. The respondent told her that there was no need to worry, as the bank (presumably as mortgagee of the property) was aware that court proceedings were on foot. Her evidence also shows that solicitors who subsequently acted for her found on the respondent's file a copy of a letter dated 3 April 2012 from solicitors who acted for Ms Trevena at the time of the divorce, advising her of the "proposed lapsing of the caveat"; and a reference in a letter from the respondent to Mr King's solicitors dated 11 April 2012 acknowledging that the caveat had lapsed.

[44] An examination of the respondent's file by solicitors subsequently acting for Ms Trevena revealed that on 21 November 2012 the respondent wrote to Mr King's solicitors stating that he had instructions to bring an application for leave out of time. Ms Trevena does not remember giving such instructions, and was unaware that she was out of time for bringing an application, or that she needed the Court's leave to bring an application.

[45] Ms Trevena stated that throughout 2012-2013 she heard little from the respondent, other than that he was waiting for some information from Mr King. In November 2013 the respondent had Ms Trevena sign a document entitled "Amended Initiating Application", stating that because Mr King was not co-operating in providing information, it was now necessary to seek other specific orders. The respondent's conduct on this occasion led Ms Trevena to believe that he had previously filed an initiating application.

[46] In late November 2013, the respondent told Ms Trevena that her matter was listed for final hearing in the Federal Circuit Court in Brisbane later that month; and that he had successfully opposed an attempt by Mr King's solicitors to have the matter transferred to Sydney. He said that the barrister acting for Ms Trevena was very confident that she would win. She signed an affidavit supporting her case. She arranged a flight to Brisbane for the hearing.

[47] On the day of the flight, the respondent phoned Ms Trevena and told her that Mr King was not opposing her application. There was no need for her to go to Brisbane. The respondent would attend; and they would get the orders they had sought. Shortly after, the respondent told her that they had obtained all the orders they sought, and that she had been appointed trustee for sale of the property. She would receive rent up to the sale; and 70 % of the sale proceeds. Mr King was to pay her costs.

[48] Over the next several months the respondent told her that he was waiting for a copy of the judgment. Ms Trevena then learnt that Mr King had used the property as security for further finance. She contacted the respondent, who said that they would bring an urgent application. He asked her to name 3 real estate agents proposed to act in the sale of the property.

[49] Since nothing had happened, in 2015 she engaged other solicitors. They obtained the file from the respondent. They filed a notice of change of solicitors, and were told by the Court that the only application and order were the application and order for the divorce. Her new solicitors contacted Mr King's solicitors who stated that they were unaware of any orders or proceedings, no doubt other than the divorce. The file obtained from the respondent contained a document headed "Initiating Application" with Ms Trevena identified as the applicant, and a court file number, a hearing date and identifying Rockhampton as the place of hearing. The Court advised that there was no record of the filing of this application; and the file number related to different parties.

[50] Ms Trevena also stated that throughout the matter the respondent told her that Mr King was being unco-operative, and not responding to requests for information; but a perusal of his file revealed that Mr King's solicitors had in fact provided whatever disclosure was sought; and the respondent had not replied to the settlement proposal made on behalf of Mr King in June 2011.

[51] Ms Broun gave evidence that a search of the Commonwealth Courts website and the Queensland Courts eCourts website did not reveal any proceeding instituted by the respondent in the Supreme and District Courts; and in the Federal Court of Australia. Unfortunately her searches were silent on proceedings in the Federal Circuit Court. She "interrogated" the respondent's file, and found no sealed court documents; and that the only evidence of steps taken by the respondent to progress Ms Trevena's matter between 24 June 2011 and 25 July 2015 were letters to Mr King's solicitors dated 9 December 2011, 11 April 2012 and 21 November 2012; and a letter to the Federal Circuit Court dated 2 March 2015, asking for documents.

[52] Charge 11 of the Discipline Application alleges that the respondent failed to maintain reasonable standards of competence and diligence in the conduct of Ms Trevena's matter. The particulars allege that in 2010 and up to June 2011 the respondent took steps to progress the matter; and also referred to the letters mentioned in Ms Broun's evidence. They then allege that, between June 2011 and July 2015, the respondent failed to advise Ms Trevena of the true status of the matter; he failed to give Ms Trevena the benefit of his professional judgment in the matter; he failed to take any reasonable steps to progress the matter; and he failed to bring the matter to a conclusion.

[53] Much of the evidence of Ms Trevena is hearsay. In many cases documents are referred to but not exhibited. Some of her evidence gives rise to the implication of facts which

could have been directly proven, whether by her or others, and which, in a case where serious allegations are made, would be expected to be properly proven. The details which emerge from her evidence are far more extensive than the broad allegations in the Discipline Application. However, the respondent has not taken issue, whether with the allegations, or the admissibility or quality of the evidence advanced. This Tribunal is not bound by the rules of evidence; and may inform itself in any way it considers appropriate[4]. It should also be borne in mind that, although the standard of proof in these proceedings is satisfaction on the balance of probabilities, the degree of satisfaction varies with the consequences of the finding to the practitioner. Nevertheless, it is appropriate to act on the evidence of Ms Trevena, including that which is not admissible in a court of law. The respondent has had notice of what the applicant intended to prove, and the way in which he intended to prove it; but has not contested it or challenged its adequacy as proof. Some of the evidence has support from Ms Broun's examination of the respondent's file. The account of events set out above, based on Ms Trevena's evidence, should be accepted as correct. It demonstrates the broadly alleged failures set out in Charge 11.

[54] A number of specific representations by the respondent are alleged in Charge 12. A number are explanations for delay in the matter. Others are as to the progress of the matter. The representations are proven by the evidence of Ms Trevena.

[55] It is also alleged that the Amended Initiating Application was provided to Ms Trevena, in furtherance of representations made by the respondent, to the effect that the matter had been commenced and was being progressed in the Federal Circuit Court. Although the document is not exhibited, its existence may be accepted on the basis of her evidence. The evidence of Ms Trevena leads to the inference that the document was produced in furtherance of the representations. There is no other apparent reason for its existence.

[56] The representations particularised in the Discipline Application are then alleged to be untrue, including a representation not specifically articulated but said to be made by the provision of the Amended Initiating Application. The same observations may be made about the evidence of Ms Trevena as were made in respect of Charge 11. Nevertheless, in the present case, that evidence, taken with the evidence of Ms Broun, is sufficient to establish that the representations particularised in paragraph 12.2 of the Discipline Application were false. The evidence also establishes that the Amended Initiating Application was produced by the respondent to further false representations to the effect that he had commenced and was progressing, the matter in the Federal Circuit Court. Again the respondent had produced a sham document to hide his failure to take proceedings on behalf of his client.

Complaint of Ms Willis: Charges 13 and 14.

[57] Ms Wills gave evidence that, in 2008, she engaged the respondent to act for her in relation to the recovery of wages and other entitlements from her former employment. She said that he did some work, including corresponding with relevant parties, up to 22 September 2009. In 2015, the respondent drafted a creditor's petition, and forwarded it to relevant parties. She said that he continually represented that he was working on her case, and that it was progressing.

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4 See s 28(3) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (*QCAT Act*).

[58] In April 2016, Ms Willis consulted another solicitor, Ms Parsons. She exhibited a copy of a letter from Ms Parsons to the Legal Services Commission, dated 18 October 2016. The affidavit of Ms Willis expressly records her evidence that the representations set out in Ms Parsons' letter were made to her by the respondent. Accordingly, the making of the representations set out in the letter should be accepted. While most were made orally, there were four text messages on Ms Willis's phone. The letter also records that Ms Willis was then 71 years of age, and (at least in some cases) had difficulty recalling exact dates. These matters may also be accepted.

[59] The representations are set out in detail in paragraph 14.2 of the attached Discipline Application. They extend from July 2011 to April 2016; and purport to record an extensive series of attempts by the respondent to recover money for Ms Willis, and the difficulties he encountered.

[60] Ms Broun gave evidence that she interrogated the respondent's file for Ms Willis' matter, and found no sealed court documents, no compensation documents, and no settlement deeds. Other than the creditor's petition mentioned earlier, there were no documents to indicate that the respondent took any steps to progress Ms Willis' claim.

[61] Ms Broun also searched the Commonwealth Courts Portal and the Queensland Courts eCourts website, and found no record of proceedings filed by the respondent on behalf of Ms Willis in the Supreme Court, the District Court, or the Federal Court of Australia. Nor did she find any record of a proceeding by any party lodging a caveat to prevent the distribution of funds to Ms Willis.

[62] The basis for the evidence of Ms Willis that, apart from the creditor's petition, the respondent did no work on her case between September 2009 and June 2016 is not apparent. However, it was not the subject of objection or challenge. It is consistent with Ms Broun's evidence. It also finds some support in the improbability of the body of representations made by the respondent to Ms Willis. In the unusual circumstances of this case it is appropriate for the Tribunal to act on it.

[63] Charge 13 alleges that the respondent failed to maintain reasonable standards of competence and diligence. That charge is made out by the evidence of Ms Willis and Ms Broun. With the exception of the drafting of the creditor's petition, the respondent took no action to advance Ms Willis' matter between September 2009 and June 2016.

[64] Charge 14 alleges that the respondent made numerous false representations to Ms Willis between July 2011 and April 2016 about the progress of the matter, the representations being set out in paragraph 14.2 of the Discipline Application; and that these representations were deliberately misleading and dishonest. The charge is established by the evidence of Ms Broun and Ms Willis. The respondent's communications with Ms Willis about her matter between July 2011 and April 2016 amounted to an elaborate, extensive and imaginative hoax.

Complaint of Mr Lastavec: Charges 15-19

[65] Mr Lastavec gave evidence that in 2010 he retained the respondent to conduct a court case against a company controlled by Mr Lastavec's son Steven, in relation to a property development. He deposed, partly from personal knowledge, and partly from a perusal of the respondent's file, that the respondent did some work on the case in the period up to 1 June 2011. The respondent filed an originating application and an

amended originating application, and corresponded with some relevant parties. He sent two further letters to the Court, one in June, and one in July, of 2012. He did no further work on the matter in the period up to 19 January 2015.

[66] Mr Lastavec gave evidence that the respondent did some further work in January 2015, by way of an application for ancillary costs, an application for a directions hearing, an application for further disclosure of material, an outline of submissions, a request for a consent order, and further correspondence, including with Mr Lastavec. That work apparently resulted in a hearing before Samios DCJ on 12 February 2015. A copy of his Honour's reasons is exhibited to the affidavit of Ms Broun. They describe the application before his Honour as an application to list the matter for directions. The reasons also record the respondent's acknowledgment that no step had been taken in the proceeding for two years. His Honour granted leave to proceed, and made a number of orders sought on behalf of Mr Lastavec.

[67] Mr Lastavec gave evidence that a draft order dated 6 May 2015 was prepared; and that, other than informing Mr Lastavec of the draft order by letter dated 19 May 2015, the respondent did no further work on the matter.

[68] Mr Lastavec's account of the work done by the respondent is supported by the evidence of Ms Broun, based on court searches and an examination of the respondent's file. It should be accepted.

[69] Mr Lastavec gave evidence that between 21 February 2015 and 8 March 2017 the respondent made a number of representations either in person or by telephone conversation. They are particularised in paragraph 17.2 of the Discipline Application. From 4 January 2017 he recorded conversations with the respondent. The material includes a transcript of nine such recordings. The particularised representations are established by the affidavit evidence of Mr Lavastec.

[70] Charge 15 alleges that the respondent failed to maintain reasonable standards of competence and diligence in the conduct of Mr Lavastec's matter in the period between 2 June 2011 and 19 January 2015. That includes the period in which there was a failure to take a step in the proceeding for two years. The charge is established by the evidence of Mr Lavastec, supported by the evidence of Ms Broun, and the reasons of Samios DCJ, which in this case provide an appropriate basis on which to act. Charge 16 makes a similar allegation, relating to the period from 19 May 2015 to 13 March 2017. It too is established by the evidence of Mr Lavastec and Ms Broun.

[71] Charge 17 alleges that the representations previously referred to were false, deliberately misleading and dishonest. The representations commence with a statement by the respondent that Mr Lavastec had been awarded up to $900,000; and continue with consequential matters, including attempts to recover the award. Their falsity is established by the evidence of Mr Lavastec and Ms Broun.

[72] Charge 18 alleges that the respondent made false representations to Mr Anthony Ryan, a solicitor, in relation to Mr Lavastec's matter. Mr Ryan gave evidence that in February 2017, Mr Lavastec sought his assistance in relation to his dealings with the respondent. Mr Ryan contacted the respondent on 23 February 2017, who told him that there had been a judgment in favour of Mr Lavastec; the money was being held in a trust account with the Commonwealth Bank for Steven Lavastec, and that Steven would be appealing. The respondent was to give Mr Ryan further explanation of the

conduct of the matter. When that did not happen, Mr Ryan searched the Court file. The search indicated that there was no judgment in the case, and that nothing had occurred in Court since 23 April 2015. The evidence of Mr Ryan establishes the representations alleged in this charge. It is also sufficient to establish that the representations were false, though it is supported by the evidence of Mr Lastavec and Ms Broun.

Charge 19: forgery of a document in relation to Mr Byers

[73] This charge alleges that Mr Byers retained the respondent to represent him in Family Court proceedings; and that on about 17 March 2017, the respondent forged a document, purportedly orders of Judge Demack of the Federal Circuit Court in relation to an application made by Mr Byers.

[74] Mr Edwards, a principal legal officer and investigator with the Legal Services Commission, gave evidence of the receipt of a letter from a Deputy Principal Registrar of the Federal Circuit Court dated 28 March 2017. The letter is exhibited to Mr Edwards' affidavit. Enclosed with the letter is a document in the form of an order of the Federal Circuit Court. It bears the title of a matter, including a file number for the Federal Circuit Court, with Mr Byers described as the applicant. It also states that it was prepared by the applicant's lawyer, and gave the address of the respondent's firm as the address for service of Mr Byers. It purports to record a number of orders made by Judge Demack, generally relating to parental responsibilities of Mr Byers and the person named as the respondent in the document (also described as the Mother) in relation to a child born on 13 March 2010. It is dated 17 March 2017. In three places it bears what appears to be the seal of the Federal Circuit Court.

[75] The letter from the Deputy Principal Registrar stated that Mr Byers had contacted the National Enquiry Centre to ascertain whether the document just described, and which Mr Byers was said to have stated that he had received from the respondent, was an order made by the Court. The letter recorded that the file number was for the file of a matter between quite different parties; and that no matter between Mr Byers and the person named in the document as respondent had been assigned to Judge Demack. The letter then stated that the orders recorded in the document were not orders of the Court.

[76] Mr Edwards gave evidence that he sent emails on 4 and 24 May 2017, seeking access to the court file identified in the document. He received a response dated 14 June 2017 from Ms Kym Hopwood, Judicial Services Team Leader of the Family Court of Australia, Brisbane, stating that the file number did not correlate with the parties identified by Mr Edwards.

[77] Ms Broun gave evidence that the Commission's file contained a file note of a conversation between an unidentified Commission officer and Mr Byers on 9 June 2017. It records that Mr Byers said that in March 2017, the respondent came to his home and handed him a document in the form of orders, and told Mr Byers that everything was "fixed up".

[78] This charge raises matters which are particularly serious. It is more than a little surprising that the evidence is of such poor quality. There has been no suggestion of any difficulty in obtaining evidence from Mr Byers, identifying the document described earlier, as the document which the respondent gave him. No attempt has

been made to demonstrate that the communications from the Family Court and the Federal Circuit Court are admissible as evidence of the facts which they record.

[79] Reference has already been made to the way in which this Tribunal may be informed of matters, and considerations relevant to the standard of proof in these proceedings.

[80] Notwithstanding the absence of objection or submission, it is appropriate for this Tribunal, in performing its statutory tasks, to consider whether it should act on the material placed before it. In doing so, it is relevant to consider the probative value of that material[5].

[81] A significant matter is the existence and form of the document. Given its source, there is no reason to doubt that it came to the Commission from the Federal Circuit Court. There is no reason to doubt the explanation given in the letter from the Deputy Principal Registrar of the circumstances in which the document came into that Court's possession. The material available does not suggest any other explanation for the existence of the document than that apparently emanating from Mr Byers, which in turn supports the account in the letter, of the document coming to the Court ultimately from Mr Byers. The form and content of the document itself support the account of Mr Byers, both recorded in the letter from the Deputy Principal Registrar and in the file note. As stated, the respondent has not suggested that the material should not be acted on. Notwithstanding the concerns of the Tribunal about the quality of the material put forward by the Legal Services Commissioner, in the circumstances it is appropriate to act on it, and to find that the document was provided to Mr Byers in the circumstances recorded in the file note. It is also appropriate, for similar reasons, to act on the email from the Judicial Services Team Leader of the Family Court to Mr Edwards, and the letter from the Deputy Principal Registrar of the Federal Circuit Court, to find that the document is not an order of the Federal Circuit Court. It is accordingly a forgery, as alleged.

[82] The material also provides a sufficient basis, for similar reasons, for concluding that the document was prepared by the respondent. No alternative basis presents itself.

[83] Accordingly, the Tribunal is satisfied that the respondent forged a document which purports to be orders of the Federal Circuit Court, as alleged in Charge 19.

Complaint of Ms Hodgetts: Charges 20 and 21

[84] Ms Hodgetts gave evidence that, around 7 December 2013, she retained the respondent to conduct a case for her against a jet ski shop in relation to the sale to her of two faulty jet skis. From then until 14 March 2017, she contacted the respondent by telephone or email and sought information about the progress of the case. On each occasion, he would tell her that the case was progressing. Detailed representations of the respondent are alleged in paragraph 21.2 of the Discipline Application, and reflect the evidence of Ms Hodgetts. In essence, they are to the effect that the respondent had conducted the case successfully, securing a judgment for $50,000 plus interest, but that there had been difficulties and delays in enforcing it. Exhibited to her affidavit is a complaint form, which includes her declaration that its contents are correct, and

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5 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.

which records the content of some emails and telephone calls, consistent with the evidence in her affidavit.

[85] Ms Broun gave evidence that the respondent's file for Ms Hodgetts contained no court documents, court awards of compensation, or settlement deeds; nor did it contain any document recording that the respondent took any step to progress the matter. Her search of the Commonwealth Courts Portal and the Queensland eCourts website found no record of any evidence of any proceeding being filed by the respondent on behalf of Ms Kelly. Unfortunately, her searches did not extend beyond these Courts.

[86] Charge 20 alleges that the respondent failed to maintain reasonable standards of competence and diligence in the conduct of Ms Hodgetts' matter. Ms Broun's search of court documents is unhelpful, in view of the amount in issue. Nevertheless, it is sufficient to establish the charge, particularly when her examination of the file is compared with the representations made by the respondent to Ms Hodgetts.

[87] Charge 21 alleges that the respondent made false representations to Ms Hodgetts about the progress of her matter. The representations have been referred to previously, and their making is established by the evidence of Ms Hodgetts. Their falsity follows from the evidence of Ms Broun, discussed in relation to Charge 20. This is another case where the respondent falsely represented to his client that he had successfully conducted the client's case, but in fact had done little, and in this case nothing, to advance it.

Complaints of Ms Harris and Mr Pearce: Charges 22-30

[88] Ms Harris and Mr Pearce are brother and sister. Their father, David John Baldwin, died on 22 September 2012. On about 7 March 2013 Ms Harris and Mr Pearce retained the respondent to bring an application for further and better provision out of their father's estate, in the Supreme Court of New South Wales. Both of them, and Ms Harris' husband Bradley Harris, had contact with the respondent about this matter. These matters emerge from the evidence of all three, is undisputed, and should be accepted.

[89] In the period from his retainer to 28 February 2017, the respondent made a series of representations to Ms Harris, Mr Pearce and Mr Harris about the progress of the claim. They are set out in detail in paragraph 23.2 of the Discipline Application. The making of the representations is proven by the evidence of Mr and Mrs Harris and Mr Pearce.

[90] In essence, the respondent represented that he had commenced proceedings in New South Wales in relation to the estate of Mr Baldwin; that lawyers who had drafted Mr Baldwin's will had been found to be negligent, and their insurer would pay compensation; that a number of difficulties were encountered in obtaining the money, one being that the Australian Tax Office had considered the tax implications of the receipt of the monies; that sums each of $301,776.70, had been paid into accounts (with the Commonwealth Bank; the accounts were said to be for Mr Pearce and Ms Harris); that he was taking proceedings in the District Court of Queensland and intended to take out an order; that $307,423.67 would be, and later was, deposited to accounts of Mr Pearce, and in context, Ms Harris; that a barrister, Mr Stephen Kissick, was assisting with attempts to have money paid to Ms Harris and Mr Pearce; and that Mr Kissick had a court transcript for the matter.

[91] In support of the representations the respondent provided a number of documents to Mr and/or Ms Harris and/or Mr Pearce, as appears from their evidence. The documents are identified in paragraph 23.3 of the Discipline Application, and include copy documents from the Supreme Court of New South Wales, amongst which were a summons, an application for probate, a grant of probate in favour of Ms Harris and Mr Pearce, and a one page transcript; and documents from the Commonwealth Bank and ANZ Bank and Mr Kissick. A number of them are the subject of charges 24-30.

[92] Charge 23 alleges that the representations previously mentioned were false, deliberately misleading and dishonest, because the respondent had not commenced any relevant proceedings and had not obtained any settlement entitlements for Mr Pearce or Ms Harris. To establish falsity, the applicant's submissions placed reliance on the evidence of Ms Broun. Ms Broun gave evidence of her searches of the Commonwealth Courts Portal and the Queensland Courts eCourts website, which in the circumstances of these complaints, are of limited assistance. However, she also gave evidence of her search of the respondent's file for this matter. She said there were no documents which indicate that the respondent took any step to progress the matter, although there were copies of the documents referred to in Charges 22-30; nor were there any settlement documents.

[93] The applicant's submissions also refer to paragraph 37 of the affidavit of Ms Harris. It reads, "I have spent over three years trying to get answers from (the respondent) and he has continuously offered us empty promises that we now know were false from the start. This whole experience has left me emotionally scarred and unfortunately I now question my trust in lawyers."

[94] Again the quality of the evidence identified by the applicant is somewhat disappointing. Although she does not say so, Ms Harris's evidence carries with it an implied statement that she has not recovered anything as a result of any action by the respondent. It is convenient to defer a consideration of Ms Broun's evidence of her examination of the respondent's file until other evidence has been considered.

[95] Ms Rebel Kenna is the Director and Prothonotary of the Supreme Court of New South Wales. She gave evidence that the summons, application for probate, grant of probate and one page transcript, referred to earlier, were not issued by that Court. She also gave evidence that Ms Broun provided her with documents, being a facsimile transmission from the respondent to the Registry of the Supreme Court of New South Wales dated 2 March 2017 in relation to Mr Baldwin's estate stating that he had been informed that probate had been granted on 28 October 2016, and making some further enquiries about the matter; a letter from the respondent to the Registry of the Supreme Court of New South Wales dated 3 March 2017 enclosing an application for a search report, an application to access probate, and an application for a sealed copy of a judgment or order, all in relation to Mr Baldwin's estate; and an email dated 21 March 2017 from the Client Services Officer of that Court enclosing search results which revealed no relevant proceeding after the grant of probate. Ms Wilson also confirmed the grant of probate on 28 October 2016 to Jeannette Norma Baldwin and Melvyn Robert Saunders; and that the respondent's name did not appear as the solicitor on the record for any party. The case number on the application for probate and grant of probate (being those referred to in paragraph 23.3 of the Discipline Application) was not in the format used by that court; and a search using that number in correct format brings up unrelated parties.

[96] It follows that the summons, and grant of probate, referred to in the Discipline Application, were forgeries. Though not the subject of specific charges, so were the one page transcript, and the application for probate. Given the circumstances in which these documents came to Mr Pearce and Mr and Ms Harris, and the presence of copies of them in the respondent's file, the inevitable conclusion is that their forgery was the work of the respondent. Those matters, the absence of any record of the respondent's name as the solicitor on the record for any party to proceedings in the Supreme Court of New South Wales, and the fact that the searches disclose no relevant proceedings after the 2016 grant of probate, demonstrate that the respondent did not commence proceedings in New South Wales on behalf of Ms Harris and Mr Pearce. His representation that he did so was false. The other (extensive) representations alleged in the Discipline Application were all consequent on the claimed commencement of proceedings by the respondent, and are accordingly false. The falsity of the representations relating to the role of a Queensland District Court Judge also find support in Ms Broun's search evidence. Likewise the evidence of Mr Kissick demonstrates the falsity of the representations relating to his involvement.

[97] The other documents alleged to be forged are the emails of 21 December 2016 and 20 February 2017 from the Commonwealth Bank of Australia; the email of 28 February 2017 from the ANZ Bank; and emails of 10 and 14 February 2017 from Mr Kissick. Mr Kissick's evidence proves that he was not the author of those two emails. In the light of the evidence as to their provenance, the only explanation for their existence is that they were forged by the respondent. Likewise, the only sensible explanation for the existence of the emails from the Commonwealth Bank and the ANZ Bank is that they were forged by the respondent.

[98] The evidence of Ms Broun, together with the evidence of Ms Kenna, establishes that the respondent did not take action on behalf of Ms Harris or Mr Pearce. Charge 22 has been made out. So has charge 23, the making of numerous false representations. The forgery charges, being charges 24-30, have also been established. In this matter, the respondent has perpetrated an elaborate hoax on his clients, over a period of more than three years, and in the course of doing so has manufactured documents in support of his dishonest conduct; all for the purpose of hiding his failure to take appropriate action on their behalf.

Characterisation of conduct.

[99] The applicant has submitted that the conduct which is the subject of charges 5 and 6 should be characterised as unsatisfactory professional conduct. There are grounds for thinking that the respondent consistently failed to maintain a reasonable standard of competence and diligence in relation to Mr Thorley's matter. However, the hearing was conducted on the basis just stated, and the respondent has not had the opportunity to consider what response he might make in response to a contention that his conduct in this matter amounted to professional misconduct. It should therefore be accepted that this conduct amounts to unsatisfactory professional conduct.

[100] In all of the other matters, the evidence has demonstrated that the respondent failed grossly in performing his obligations to protect and advance his clients' interests; that he lied about the actions he had taken on behalf of his clients, and their success; and that in some cases he produced forged documents to bolster his dishonest statements. In each of these matters he substantially failed to reach and maintain a reasonable standard of competence and diligence, for the purposes of s 419 of the LP Act. It goes

without saying that his conduct would reasonably be regarded as disgraceful or dishonourable by the respondent's professional colleagues of good repute and competency[6]. In these matters, his conduct should be characterised as professional misconduct.

[101] The circumstances of this case plainly warrant an order recommending that the respondent's name be removed from the local roll.

Costs

[102] There was no issue that the respondent should pay the applicant's costs, as sought, under s 462 of the LP Act.

Orders

[103] There are outstanding claims for compensation which have not been addressed. So far as they arise out of the application, the application should be adjourned and directions should issue for their conduct in due course.

[104] The following orders should be made:

1. It is recommended that the name of the respondent 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;
3. The application is otherwise adjourned for the determination of claims made for compensation.

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6 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].