

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and MASTEN [2010] WASAT 47

MEMBER : JUDGE J ECKERT (DEPUTY PRESIDENT)
MR J MANSVELD (MEMBER)
MR M ODES QC (SENIOR SESSIONAL MEMBER)

HEARD : 3-5 FEBRUARY 2010

DELIVERED : 8 APRIL 2010

FILE NO/S : VR 75 of 2009

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

PAUL ERNEST MASTEN
Respondent

Catchwords:

Professional misconduct - Dishonest conduct - Fraudulent falsification of records - Trust account - client funds - Payment of stamp duty

Legislation:

Legal Profession Act 2003 (WA), s 137(1)(b)
Legal Profession Act 2008 (WA), Pt 2, Pt 9, Div 2, s 3, s 205(1), s 214 - s 229, s 215, s 216(1), s 216(1)(a), s 216(1)(b), s 222, s 221(1), s 226, s 226(1)(a),

s 226(3), s 227(1), s 228(3)(b), s 402, s 403, s 404, s 404(a), s 404(c), s 436(1), s 438, s 438(1)

Legal Profession Regulations 2009 (WA), reg 120

Mental Health Act 1996 (WA)

State Administrative Tribunal Act 2004 (WA) (as amended), s 61, s 62

Result:

The practitioner is guilty of professional misconduct

Category: B

Representation:

Counsel:

Applicant : Ms P Cahill SC
Respondent : Ms W Gillan

Solicitors:

Applicant : Legal Profession Complaints Committee
Respondent : Fairweather & Lemonis

Case(s) referred to in decision(s):

Briginshaw v Briginshaw (1938) 60 CLR 336

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The practitioner in this matter, Mr Paul Ernest Masten, is a legal practitioner and was the sole director and principal of a small incorporated legal practice. On 10 October 2008, the practitioner was appointed executor and trustee under a will made by one of his clients. The client passed away ten days later and probate of the will was granted to the practitioner on 5 December 2008. From about 19 November 2008, the firm maintained a trust account ledger with respect to the trust money held on behalf of the estate.

2 On 24 November 2008 Noble House Holdings Pty Ltd, a company directed solely by the practitioner to act as the trustee of a trust of which the practitioner was a beneficiary, purchased a block of land south of Perth. Settlement of the purchase of that land occurred on 22 December 2008. Stamp duty in respect of the purchase was assessed by the Office of State Revenue at \$11,115. Due to the practitioner's financial difficulties at the time, this amount remained outstanding until on or about 10 April 2009, when the practitioner authorised the Office of State Revenue to deduct \$11,115 from the firm's trust account.

3 On 26 April 2009, an entry was made in the trust account ledger of the estate debiting its account for \$11,115, purportedly in payment of a stamp duty liability. The practitioner was aware that at all relevant times, the estate had no liability to pay stamp duty to the Office of State Revenue.

4 When the entry in the trust account ledger of the estate was discovered by a solicitor at the firm and brought to the practitioner's attention in early May 2009, the practitioner alleged that the entry had been a mistake made by the firm's bookkeeper. The practitioner further submitted that he did not report the errors to the Legal Practice Board or act to rectify the errors in the trust account and the trust account ledger of the estate prior to 12 May 2009 (a day after the Legal Profession Complaints Committee commenced its investigation), due to the immense stress he was under in both his professional and personal life.

5 As a result of its investigation, the Legal Profession Complaints Committee alleged charges of professional misconduct by the practitioner, including specific allegations of illegal and dishonest conduct and intentional breach of trust, arising from his conduct related to the trust account and in particular the unauthorised withdrawal of trust money

which he used for his own benefit. The Committee also alleged that the practitioner made or caused a false entry to be made in the trust account ledger of a client of the firm and that the practitioner failed to report any irregularities to the Legal Practice Board.

6 The Tribunal held that the charges had been proved to the requisite standard. The Committee, through its witnesses and documentary evidence, established a strong prima facie case. The practitioner admitted to authorising the payment of \$11,115 from the trust account to pay Noble House's stamp duty liability, despite there being no funds in the trust account for this payment. The practitioner also conceded that an entry into the trust account ledger of the estate could only have been made by himself or by the firm's bookkeeper on his direction. The practitioner contended that the entry in the trust account ledger had been made by the bookkeeper on his direction; however, he had directed the bookkeeper to debit the money from the trust account ledger for the Office of State Revenue and she had erred in debiting the money from the trust account ledger of the estate.

7 Whilst the Tribunal accepted the expert evidence of Dr Zlatan Golic, that the practitioner was under considerable stress at the time of the events in question, it found that the practitioner's demonstrated capacity to effectively run all other aspects of his practice for which he was solely responsible, without error (other than this transaction which related to his personal dealings), was evidence of the practitioner's ability to function despite these stressors. The Tribunal found that as a witness the practitioner was often evasive and sometimes argumentative and his inability to explain his admitted failures to attend to important entries which he failed to make at numerous stages between December 2008 and May 2009 did not impress the Tribunal. Ultimately, the improbability of his entire version of events led the Tribunal to the inevitable conclusion that the practitioner's evidence could not be relied on nor accepted.

8 The Tribunal found the practitioner guilty of professional misconduct. The Tribunal also ordered that a date be set to hear oral submissions on penalty and costs.

Background

9 The following facts have been agreed by the parties in their Statement of Agreed Facts. The respondent practitioner, Paul Ernest Masten, was admitted to legal practice in Western Australia on 2 May 2003. He was the sole director and principal of Denning Deane Masten Pty Ltd (Denning Deane) which was an

incorporated legal practice under the *Legal Profession Act 2008* (WA) (LP Act). At all times, Denning Deane maintained a general trust account (trust account) within the meaning of s 205(1) of the LP Act.

10 The practitioner was appointed executor and trustee under a will made on 10 October 2008 by his client (referred to in the firm's trust account ledger as 'ODO'), who died on 20 October 2008. Probate of the client's will was granted to the practitioner on 5 December 2008. From about late November 2008, the administration of the client's estate (estate) was carried out by an employee of Denning Deane, Mr Alan McNeill, on behalf of the practitioner as executor. From about 19 November 2008, Denning Deane maintained, relevantly, a trust account ledger with respect to trust money held by it on behalf of the estate (estate's trust ledger).

11 At all relevant times, the practitioner was the sole director of Noble House Holdings Pty Ltd (Noble House) which, in turn, was the trustee of Noble House Trust, of which the practitioner was a beneficiary. By a contract made on or about 24 October 2008, Noble House, as trustee of Noble House Trust, purchased land at No 3 Waterbank Avenue, Beeliar, Western Australia (land purchase). Settlement of the land purchase occurred on or about 23 December 2008.

12 A certificate of duty was created by Denning Deane on 19 December 2008 (certificate) using the 'Revenue Online System' (ROS) for stamp duty assessed of \$11,115 and payable on the land purchase. Pursuant to the terms and conditions of the standard form Office of State Revenue (OSR) special tax return, which at all times applied to the use by Denning Deane of the ROS, payment of the amount of the certificate was required to be made to the OSR by 15 January 2009.

13 On 10 April 2009, the trust account held \$337,427.48 as trust money on behalf of the estate. By 23 April 2009 this amount had increased to \$362,050.50.

14 On about 10 April 2009, the practitioner authorised the OSR to deduct \$11,115 from the trust account to pay the stamp duty liability of Noble House in respect of the land purchase, as shown on the certificate and on 14 April 2009 the trust account was debited for that exact amount.

15 On 26 April 2009, an entry was made in the estate's trust ledger debiting its account for \$11,115, purportedly in payment of the stamp duty liability referred to above. The estate did not, at any relevant time, have any liability to pay stamp duty to the OSR, a fact of which the practitioner was at all times aware.

16 The practitioner did not at any time prior to the commencement of the Legal Profession Complaints Committee (LPCC) investigation on 11 May 2009 report to the Legal Practice Board (Board) the fact and circumstances of the withdrawal on 14 April 2009 from the trust account of \$11,115. Nor did he report to the Board the entry made in the estate's trust ledger on 26 April 2009, debiting \$11,115 from the estate in payment of a stamp duty liability which the estate had not incurred.

17 On 12 May 2009, the practitioner deposited \$11,115 into the trust account.

The allegations

18 The Committee alleges that the practitioner, between about 10 April 2009 and about 12 May 2009, engaged in professional misconduct, namely:

- a) dishonest conduct;
- b) illegal conduct, namely, stealing and/or fraudulent falsification of records;
- c) a contravention or contraventions of the LP Act; and
- d) an intentional breach of trust,

by withdrawing without authority and using for his own benefit funds from the trust account. The Committee also alleges that the practitioner made or caused a false entry to be made in the trust account ledger of a client of the firm and that he failed to report any irregularities to the Board.

19 The case against the practitioner falls into two broad allegations:

- i) the unauthorised use of trust money; and
- ii) the failure to report an irregularity in the trust account.

20 The allegations made in respect of each are dealt with separately although we have attempted not to repeat the facts. We outline the disputed allegations and the practitioner's response in relation to each of them and those allegations that are not disputed but to which an explanation is offered.

The unauthorised use of trust money

21 The Committee alleges that between 10 April 2009 and 11 May 2009, the practitioner knew that the trust account did not hold any money to which either he or Noble House was beneficially entitled, and that neither he nor Denning Deane was authorised or directed by any person beneficially entitled to any of the trust money to withdraw money from it in order to pay the stamp duty liability of Noble House.

22 The practitioner denies those allegations and states that on 10 April 2009 he genuinely and reasonably believed that, after authorising the payment to the OSR, he transferred funds to Denning Deane's trust account to cover the payment in question. He says, further, that he first became aware that the money had not been transferred to the trust account on 8 May 2009 when an employee of Denning Deane, Mr McNeill, showed him the estate's trust ledger.

23 The Committee alleges that on or about 10 April 2009, the practitioner withdrew or caused to be withdrawn \$11,115 from the trust account, by effecting an electronic funds transfer from the trust account to the OSR with the intention of using that money to pay the stamp duty liability of Noble House in relation to the land purchase. The Committee further alleges that he then did in fact use the money withdrawn from the trust account to pay Noble House's stamp duty liability.

24 The practitioner's response to those allegations constitutes some of the main struts to his defence. He avers that on 10 April 2009 (Good Friday), he authorised payment of Denning Deane's account on ROS (practitioner's response at [15]). He admits that by authorising that payment, he knew that the trust account would be debited \$11,115, but he reasonably and honestly believed, from his previous use of ROS, that the debit by the OSR would not occur until the next business day after the authority had been given. He states that at the time of authorising the payment to the OSR, he had the intention of immediately transferring \$11,115 from Denning Deane's general account to the trust account to cover the payment to be made the next business day. However, he states that he only became aware that he had not made the transfer to the trust account on 8 May 2009 when Mr McNeill showed him the estate's trust ledger. He states that the debit of the trust account by the OSR did not occur until 14 April 2009 (the Tuesday after Easter).

25 The Committee alleges that the practitioner's conduct in withdrawing or causing to be withdrawn \$11,115 from the trust account in the

circumstances it alleges, was dishonest and illegal conduct, constituting stealing. These allegations are denied by the practitioner.

26 It is further alleged by the Committee that the practitioner's conduct in withdrawing, or causing to be withdrawn, \$11,115 in the circumstances alleged above:

- a) contravened s 137(1)(b) of the *Legal Practice Act 2003* (WA) (2003 Act) and therefore pursuant to reg 120 of the *Legal Profession Regulations 2009*, he contravened:
 - i) s 216(1) of the LP Act; and
 - ii) s 226(1)(a) of the LP Act; and
- b) further, or alternatively to (a), he contravened:
 - i) s 216(1) of the LP Act; and
 - ii) s 226(1)(a) of the LP Act.

27 In his response, the practitioner admits that he breached s 216(1)(b) of the LP Act but he denies the remaining allegation (practitioner's response at [17]). It is convenient at this stage to note that the reason the alleged contraventions are couched in the alternative is to cover the possibilities that either the provisions of the LP Act or its predecessor, the 2003 Act, apply. It has been agreed between the parties that, on a proper interpretation of the transitional provisions, the LP Act applies. We agree with that construction.

28 The grounds then move on to the circumstances surrounding the debiting of the estate's trust ledger, in which it was agreed that the practitioner knew that the estate had no liability to pay stamp duty to the OSR.

29 The Committee alleges that on about 26 April 2009, the practitioner either caused an employee of the firm to or did himself make an entry in the estate's trust ledger with the intention and for the purpose of debiting \$11,115 from the trust money held by Denning Deane on behalf of the estate, purportedly for the payment of a stamp duty liability.

30 The practitioner's response to this allegation constitutes the other major strut to his defence. He admits that the estate's trust ledger was debited on the date and in the amount alleged, but he denies that he made

or caused an employee of the firm to make the entry. He states that he does not know how the entry was made; the system records show that the entry was made by the login code assigned to Denning Deane's bookkeeper, Ms Beryl Allen. He further denies that the entry was made with the intention and for the purpose of debiting the estate file for the payment of the stamp duty liability of Noble House (practitioner's response at [19]).

31 The Committee then alleges that by reason of the conduct in relation to the debiting of the estate's trust ledger referred to above, the practitioner contravened s 221(1), s 226(1)(a) and s 228(3)(b) of the LP Act. These allegations are denied by the practitioner.

The failure to report an irregularity

32 The Committee alleges that the practitioner did not report to the Board as soon as practicable, or at all, that he had on 10 April 2009 withdrawn or caused to be withdrawn \$11,115 from the trust account in the circumstances alleged above, and that in failing to report to the Board, he contravened s 227(1) of the LP Act. The Committee further alleges that the practitioner also failed to report to the Board as soon as practicable, or at all, that on 26 April 2009, an entry had been made in the estate's trust ledger debiting \$11,115 from the trust money held by Denning Deane on behalf of the estate, purportedly for the payment of a stamp duty liability which it had no liability to pay, and that this failure was conduct that similarly contravened s 227(1) of the LP Act.

33 The practitioner's response to the allegations of a failure to report the alleged irregularities is fairly detailed and to some extent repetitive. For the sake of completeness, we set out that defence comprehensively and concisely, without repetition.

34 The practitioner denies that he was aware that the trust account was deficient on 10 April 2009 or the next business day, 14 April 2009. He repeats that he reasonably believed that he transferred funds into the trust account on 10 April 2009 to cover the stamp duty liability, and he reasonably and honestly believed that amount would be debited the next business day. He says that he first became aware that the stamp duty liability had been paid from the trust account without sufficient funds being deposited there and that the stamp duty liability was entered into the estate's trust ledger, on or about 8 May 2009 when Mr McNeill showed him the estate's trust ledger.

35 He further says that on 8 May 2009 he intended to correct the error and to seek counsel's advice as to how to report the error to the Board. However, before he was able to seek counsel's advice, on 9 May 2009, he flew to Melbourne for a friend's 70th birthday celebration. On 11 May 2009 he was advised by Mr McNeill that the Committee had issued a summons for the estate file and Noble House's settlement file. On 12 May 2009 he deposited \$11,115 into the trust account and attended the Committee to be interviewed, at his request, about the error.

Relevant legislation

36 The Committee avers that the practitioner has, by his conduct, contravened a number of sections of the LP Act. In relation to the allegations of unauthorised use of trust money, the Committee relies on s 216(1), s 221(1), s 226(1)(a) and s 228(3)(b) of the LP Act.

37 Section 216(1) provides as follows:

- (1) A law practice must -
 - (a) hold trust money deposited in a general trust account of the practice exclusively for the person on whose behalf it is received; and
 - (b) disburse the trust money only in accordance with a direction given by the person.

Penalty: a fine of \$5,000.

38 Section 221(1) of the LP Act reads as follows:

- (1) Subject to section 222, a law practice must ensure that trust money that is the subject of a power given to the practice or an associate of the practice is dealt with by the practice or associate only in accordance with the power relating to the money.

Penalty: a fine of \$10,000.

39 The provisions of s 222 have no relevance to the issues before us and the qualification to s 221(1) may for present purposes be ignored.

40 Section 226(1)(a) specifies as follows:

- (1) An Australian legal practitioner commits an offence if the practitioner, without reasonable excuse, causes -
 - (a) a deficiency in any trust account or trust ledger account; or

(b) ...

Penalty: a fine of \$25 000.

41 Section 226(3) gives content to the words 'cause' and 'deficiency' as used in subsection (1) and reads as follows:

(3) In subsection (1) -

'cause' includes to be responsible for;

'deficiency' in a trust account or trust ledger account includes the non-inclusion or exclusion of the whole or any part of an amount that is required to be included in the account.

42 Finally, the Committee relies on s 228(3)(b) which is expressed in the following terms:

(3) The law practice must keep the trust records -

(a) in accordance with the regulations; and

(b) in a way that at all times discloses the true position in relation to trust money received for or on behalf of any person; and

...

Penalty: a fine of \$5 000.

43 In relation to the allegation of failure to report an irregularity, the Committee relies on s 227(1):

(1) As soon as practicable after a legal practitioner associate of a law practice becomes aware that there is an irregularity in any of the practice's trust accounts or trust ledger accounts, the associate must give written notice of the irregularity to -

(a) the Board; and

(b) ...

Penalty: a fine of \$5 000.

Does s 226 of the LP Act circumscribe the jurisdiction of the Tribunal

44 It is contended by the practitioner's counsel, Ms Gillan, that s 226 is an offence provision and that the Tribunal cannot make findings that an offence has been committed. From that point, she argues that the Tribunal has no jurisdiction to make any findings falling within the ambit of that

section. Those findings, Ms Gillan contends, can only be made by a criminal court. She relies on s 404(c) of the LP Act which, relevantly, specifies conduct capable of constituting unsatisfactory professional conduct or professional misconduct as including:

- (c) conduct in respect of which there is a conviction for -
 - (i) a serious offence; or
 - (ii) ...
 - (iii) an offence involving dishonesty;

45 Ms Gillan submits that because the practitioner has not been convicted of a serious offence or offence involving dishonesty, it is not open to the Tribunal to make a finding of unsatisfactory professional conduct or professional misconduct, which might fall within s 226.

46 We agree that the sole power to determine the commission of an offence rests with the criminal courts but, as pointed out by the Committee, the enquiry does not end there. In our view, the mere fact that s 226 creates an offence does not mean that conduct falling within the purview of its provisions is not justiciable by the Tribunal. An analysis of the provisions of Pt 9 of the LP Act serves, in our view, to negative the practitioner's argument. We also note at this point that the practitioner has been charged with criminal offences relating to the conduct the subject of these proceedings. In the usual course, when that occurs, the Tribunal adjourns the proceedings before it pending the finalisation of the criminal proceedings. In this case, the practitioner elected (even insisted) that these proceedings continue immediately, despite the criminal charges and the Tribunal's recommendation, because he hoped to continue practising, thereby earning an income, pending finalisation of the criminal proceedings. Although this was not a factor that assisted us to reach our conclusion regarding the application of s 226 it is somewhat for the practitioner to now seek to raise a defence based on the lack of criminal findings.

47 Part 9 deals with trust money and trust accounts. It contains 46 sections providing stringent conditions for the opening, operating and regulating (including inspection) of trust accounts for the protection of clients and others. As the opening section of Pt 9 (s 204) emphasises, its purpose is inter alia:

- (a) to ensure trust money is held by law practices in a way that protects the interests of person [sic] for or on whose behalf money is held, both inside and outside this jurisdiction;

48 Division 2 of Pt 9, being s 214 to s 229 inclusive, sets out in detail what a law practice must do in order to comply with its provisions, and the penalty in the event of a contravention. Of the 14 subsections in Div 2 providing for a penalty for failure to comply with its provisions, only s 226 is couched in the language of an offence. In substance, however, each of the 16 sections (including s 226) provides for a penalty for its contravention. There is no suggestion but that contravention of these sections (other than s 226) would constitute professional misconduct or unsatisfactory professional conduct. Why then would a contravention of the serious and most important provisions of s 226 not be similarly labelled? It is difficult to imagine that the legislature intended to exclude a practitioner from the disciplinary provisions of the LP Act for having a deficiency in the trust account. We are of the view that if that were the intention of Parliament, it would surely have done so expressly and not in a most indirect way.

49 As indicated above, s 226 deals with a deficiency in a legal practitioner's trust account, the very situation which Parliament has sought to prevent. The legislature has gone to extreme lengths to ensure, in the interests of protecting the money of clients held in trust, that such a situation does not eventuate. To avoid such an eventuality is central and lies at the core of the whole of Pt 9 of the LP Act. To argue that a practitioner who contravenes s 226 cannot be found guilty of professional misconduct because it creates an offence which is not justiciable by the Tribunal, undermines, and flies in the face of, the purpose of the provisions of Pt 9 proclaimed in its opening section. It would effectively require any relevant criminal charges to be finally disposed of before the Tribunal could make a finding regarding serious misconduct of this kind.

50 Parliament could not possibly have intended to limit or circumscribe the Tribunal's power in the manner contended for by counsel for the practitioner. Section 438(1) of the LP Act confers unbridled power on the Tribunal to make a finding that a practitioner has engaged in unsatisfactory professional conduct or professional misconduct. There is nothing in the LP Act which attempts to circumscribe the Tribunal's power to deal with that conduct.

51 We are of the view that an unduly narrow view of s 404 is taken by the practitioner. Indeed, a perusal of s 402 and s 403 gives the widest possible definitions of 'unsatisfactory professional conduct' and

'professional misconduct' respectively, and s 226 must be considered in that context. Unsatisfactory professional conduct includes conduct of a practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. The definition of professional misconduct in s 403 is of a similarly wide, and in our view wider, ambit as it too includes:

- (b) ... **conduct** ... whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice (emphasis added).

52 Section 404(c) should also be considered within the context of s 404 as a whole. The section does not purport to set out an exhaustive list of the conduct that might be unsatisfactory professional conduct or professional misconduct. The preamble which is an express part of s 404(c) specifically provides that it does not operate to limit the scope of s 402 and s 403 which are the definition sections; it merely sets out conduct 'capable' of constituting unsatisfactory professional conduct and professional misconduct. Section 404(a) is relevant:

- (a) conduct consisting of a contravention of this Act or a previous Act;

53 When considered in its proper context within the scheme of the LP Act, s 404(c) cannot mean that conduct under s 226 is not justiciable before this Tribunal unless there are criminal convictions against the practitioner for the conduct complained of.

54 Therefore, because of s 438 of the LP Act and our view expressed above, the Tribunal has the jurisdiction to deal with complaints relating to the acts or omissions of legal practitioners and of determining whether those acts or omissions constitute unsatisfactory professional conduct or professional misconduct (or both). It matters not that the acts or omissions may also constitute an offence. As long as the behaviour of the practitioner falls within the definitions referred to, the behaviour is justiciable by the Tribunal. We therefore reject the argument of counsel for the practitioner to the contrary.

The burden of proof where criminal conduct is alleged

55 The Tribunal is required to determine, where necessary, on inferences properly drawn according to the principles enunciated by the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and the

numerous authorities adopting those principles, whether the Committee has discharged the burden of proof resting on it on the balance of probabilities. Serious allegations of dishonesty and falsification of trust accounts have been made by the Committee and a finding on these may have far-reaching consequences. These consequences must be borne in mind by the Tribunal when making findings of fact, as Dixon J (as he then was) held at 362:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ...

56 However, the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 (*Neat Holdings*) explained that the considerations referred to by Dixon J above did not in any way affect or alter the standard of proof. The majority in *Neat Holdings* explained the position in the following terms (at 449 - 450):

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

(Authorities cited by the court have been omitted from the above passage.)

57 After detailing the issue before it, the majority in *Neat Holdings* concluded on the question of the standard of proof (at 451) that:

The most that can validly be said in such a case is that the trial judge should be conscious of the gravity of the allegations made on both sides when reaching his or her conclusion. Ultimately, however, it remains incumbent upon the trial judge to determine the issue by reference to the balance of probabilities.

58 It should be noted that in *Neat Holdings*, there were allegations of fraud by both parties against each other (which is not the position in this case). However, in our view, that difference does not detract from the principles outlined and does not affect the approach we must, and do, apply in the present matter.

The evidence

59 Despite the duration of the hearing over three days, there is a great deal of evidence which is common ground. The issues are confined to events occurring over a relatively short period of time from late December 2008 to mid-May 2009. These issues relate primarily to a single transaction, the land purchase, and the entries made in the trust records of Denning Deane in dealing with the stamp duty liability of the purchaser, Noble House, of which the practitioner was personally and directly interested.

60 It is common ground that the entries were made within Denning Deane, either by the practitioner or an employee, by the use of computer software known as Filepro. What is essentially in issue are the circumstances surrounding the making of those entries and, more particularly, the practitioner's intention, beliefs, actions and omissions at various points of time.

61 There are two dates that assume central importance in the resolution of the issues - 10 April 2009 and 26 April 2009 - as will appear below.

62 In all, the statements of 11 witnesses were put into evidence. By consent, the statements of four of those were tendered without the need to cross-examine. Because of the fairly extensive agreement of the facts, we do not propose to deal in detail with the evidence of those witnesses not directly involved in the events forming the basis of the central issues. We will refer to the evidence where it impacts upon the versions proffered by the main witnesses at the hearing: namely, the practitioner, Ms Anna Young, Mr Alan McNeill, Ms Beryl Allen and Dr Zlatan Golic. Evidence was also given by Mr Todd Keeler on the operation of the Filepro software package used by Denning Deane for its general and trust accounts entries. While we do not propose to set out the workings of that system in detail, we will explain aspects of it insofar as is relevant to the issues.

Anna Young

63 The first witness called by the Committee was Ms Anna Young, the Committee's Senior Trust Inspector. She deposed to a meeting which she had with the practitioner at the Committee's offices on 12 May 2009, at which he informed her of the land purchase by a company associated with him personally and the circumstances surrounding the payment of the stamp duty. He admitted to her that he knew that there were no funds in the trust account from which he was entitled to pay the stamp duty, but did not know how the estate's trust ledger came to be debited for the stamp duty. He did, however, inform her that he had paid the amount of the stamp duty from his own funds into the trust account that morning. Ms Young then attended Denning Deane after the meeting and described the documents examined and investigations made by her and the results thereof.

64 We need not detail her findings as these are largely common ground and are incorporated in the Statement of Agreed Facts. It suffices, for present purposes, to note her evidence that the Filepro system requires all transactions relating to the trust account to be allocated to a particular file and client file number. She stated, further, that any debit is generally supported by an instruction sheet, referred to as an electronic funds transfer (EFT) or a cheque request form. The EFT indicates the date, the amount of debit, the trust account balance and other relevant details and is generally required to be authorised by the principal of the practice. In an extensive search of the records of the practice Ms Young was unable to locate an instruction sheet in relation to the estate's trust ledger reflecting the debit of \$11,115.

65 Ms Young's enquiries and investigations further revealed that Denning Deane maintained a trust ledger for the OSR into which funds to pay stamp duty are deposited from clients' trust funds. If funds are held on behalf of a client in the OSR trust ledger, the OSR is authorised by the practice to deduct funds from that account. These payments were generally made on the 15th of each month. On that date, the firm's principal or an authorised person would access ROS and print off a list of the stamp duty amounts to be paid, then check that sufficient funds were held in the OSR trust ledger to pay that amount and authorise payment. Within a few days of authorisation, the OSR would debit the trust account.

66 In the present case, Ms Young's inspection revealed that the principal or other authorised person authorised payment of the stamp duty from the

trust account on 10 April 2009, that the OSR drew the funds from the trust account on 14 April 2009 and that the debit was allocated to the estate's trust ledger on 26 April 2009. These entries are reflected in the estate's trust statement and the firm's trust audit report.

67 Ms Young continued her investigations on 15 May 2009, during which she signed a copy of a Trust Cheque Listing for the period from 1 April to 13 May 2009. The report lists all trust payments made over that period and indicates the person by whom the payment was entered. Over 60 payments were entered, all but seven of which were made by PM; the remaining seven were entered by Sys_ADMIN. PM is the practitioner's login code while Sys_ADMIN is that of Ms Allen.

68 Ms Young returned to Denning Deane for further investigation, undertook a full inspection of the practice records for an 18 month period ending April 2009, and found that the trust and general accounting records were being maintained appropriately (save for the matter under investigation).

69 She also examined the final trust trial balance dated 26 April 2009, and found that as at 25 April 2009 there were only three client trust ledgers (including the estate's trust ledger) which had sufficient funds to meet a debit of \$11,115.

70 In cross-examination, Ms Young stated that the practitioner and his staff were helpful and cooperative and in no way obstructed her in her investigation. She also stated that the practitioner, when asked how the estate's trust ledger had been debited, stated that either he or someone else did it, but it was a mistake.

Beryl Allen

71 Ms Beryl Allen was called by the Committee to give evidence. Her evidence is of importance in relation to the events and entries debiting the estate's trust ledger on 26 April 2009.

72 Ms Allen is a bookkeeper who, from time to time, from October 2007 performed bookkeeping services for Denning Deane as an independent contractor. She originally assisted the then office manager to set up the Filepro accounts package in Denning Deane, relying on her experience in installing the system for many small to medium firms since 2005. She also trained staff members of other firms in the installation and operation of Filepro and has used the program continuously, both as an operator and a consultant since 2008.

73 In her witness statement, she relates the comings and goings of various bookkeepers and accounting staff employed by Denning Deane until January 2009, when both the office manager and the accountant left the employment of the firm. From that time, she tried to attend Denning Deane every week to do the trust and general bank reconciliations previously performed by the office accountant. The practitioner wanted to learn what was involved in the process before he employed another person in that role. He then did the processing of all entries into the bank accounts himself, including trust receipts and transfers.

74 Ms Allen says as at April 2009, it was the practitioner who processed the trust account transfers and then entered all the data relating to the relevant transaction into Filepro, including the details of the trust ledger to which any trust account debit was to be allocated (witness statement at [7]). Ms Allen did not generally enter the trust data for the practice and, as far as she was aware, the practitioner was the only person authorised to do trust transfers.

75 The procedure generally followed when she was required to reconcile the trust account was that the practitioner would print out the trust internet bank statement from which she would reconcile the trust account. This would involve checking off the trust account entries from the trust ledger bank reconciliation area in the Filepro system against the trust internet bank statement. If there was an entry in the bank statement which did not appear in the Filepro system, she would have to ask the practitioner what it was, the purpose of the debit and the client code, and would either enter those details into the Filepro system or the practitioner would enter the missing entry himself. When an entry was missing, she would have to ask the practitioner about it and she would usually be given an EFT to authorise the trust transfer. As Ms Allen stated in cross-examination, she had no knowledge of the firm's client base nor of what was going on in the office and therefore she had to request the above details from the practitioner (T: 82, 03.02.10). Usually the EFT containing the necessary details would be handed to her from which either she or the practitioner would make the relevant entry. Ms Allen stated that 99% of the time, she would be furnished with the paperwork from which to enter and complete the entry into the trust ledger.

76 If there was no EFT or cheque request form relating to a particular trust debit, Ms Allen would not be able to reconcile the trust account without an oral instruction from the practitioner informing her what the debit was for and how it was to be allocated. If the practitioner was not in

the office when she arrived to do the reconciliation, she was unable to print out the trust account bank statement and could therefore not do the reconciliation.

77 By arrangement with the practitioner, Ms Allen attended at Denning Deane on 26 April 2009 to do the reconciliation of the accounts. It was a Sunday morning and it is common ground that she and the practitioner were the only persons present at that time.

78 Ms Allen states that she has no independent recollection of making the entry debiting \$11,115 in the estate's trust ledger on 26 April 2009. It appears that she spent five and half hours at the firm from 10.30 am to 4 pm (invoice from Ms Beryl Allen to Denning Deane, dated 15 May 2009 at 15) during which time she performed her duties, including normal activities such as making coffee and working in different parts of the office.

79 The documents created at the time in relation to the debiting of the estate's trust ledger indicate that the details were entered under the login code 'SyS_ADMIN'; that is the code used by Ms Allen when logging onto the Filepro system. She states that as far as she was aware, the practitioner does not have the password to log on as the System Administrator. In fact, she recalls an occasion when he asked her for her password which she refused to give him.

80 Despite the above, Ms Allen does not believe she made the entries in question. She states that she does many entries of a like nature every week in the various contracts she has and expresses the view that the particular entry in question is inconsistent with her usual procedure and terminology.

81 In making that assertion, Ms Allen relies on two window entries to the Filepro system (a screen shot of these entries has been included in the Committee's book of documents at 29). The topmost entry demonstrates a trust transfer and reflects a transfer from Ref. TFER 0000304 (the estate's reference number) to 'Stamp Duties WA' with a field for the insertion of the branch and account number of the payee to be filled in. In the window entry in question, these numbers are reflected as 'BSB 0000' and 'Account 0000'. Thus the payee's bank details have not been inserted. As explained by Mr Todd Keeler (the Western Australian Filepro representative) in his evidence, the entry cannot be completed unless something is inserted in the space for the

'BSB' and 'Account' details, even if four dots or four zeros are inserted (T: 73, 03.02.10).

82 The second window entry appearing on the bottom half of page 29 of the Committee's book of documents, upon which Ms Allen relies, reflects a trust statement of the estate, revealing a transaction date of 14 April 2009 when an entry was first recorded and a processing date of 26 April 2009 when payment was in fact made from the estate's trust ledger. The reason given for the payment has been entered as 'Stamp Duties WA - Tax Liability'.

83 From these two window entries, Ms Allen contends that those entries were not made by her because she states that she would not enter 'zeros' in the bank detail area for a transaction in which funds were being debited from trust and paid to a third party; she would insert the trust account details. She states that if one looks at all the other transactions made by SyS_ADMIN, the entry for the estate was the only one which had zeros in the bank detail entry.

84 It is relevant to note at this point that Mr Keeler was asked by the Committee to print out a list of all trust payments processed on 26 April 2009. In [9] of his statement, he annexes the list which reflects five trust payments on the date in question, all with Ms Allen's login reference code and in all entries other than the transfer from the estate which contains four zeros, the full details of the BSB and account have been inserted. Moreover, immediately below those entries and on the same date, an entry made by 'PM' (the practitioner's user code), shows four zeros in the bank details area.

85 A further reason which Ms Allen suggests supports her view that she was not the author of the debit entry in the estate's trust ledger on 26 April 2009 is that although she may enter 'Stamp Duties WA' to describe the entry if that was the information on the bank statement, she would not have used the description 'Tax Liability' for entering a debit for stamp duty. 'Stamp duty' and 'Tax Liability' have, according to her, different connotations.

86 As a third reason for the view she holds, Ms Allen has stated that she is particular about the correct use of capital letters and would not have typed the word 'Liability' with a capital L.

87 The file code for the estate is 'ODO' followed by the number, while the file code for the Office of State Revenue is 'OSR'. To counter the suggestion that she had merely typed the letter 'O' or 'OD' instead of 'OSR'

('D' on the keyboard being next to 'S'), Mr Keller demonstrated what would have happened on the Filepro system. If she merely typed the letter 'O', the first name which appeared on the screen was the relevant client's name. If the person did not check the name of the account before proceeding, the entry would be processed to the client's (and therefore the estate's) trust ledger (the same would have occurred if she had typed 'OD' instead of 'OS').

88 Ms Allen states that, as a creature of habit, in order to have made the entry in the estate's trust ledger she would have had to make four errors or done four things wrong, in an entry which only has six keying areas. She would, in the first place, have had to type zeros in the bank account entry, something she is not in the habit of doing, and something inconsistent with the other entries she made that same day. Secondly, she would not have used the description 'Tax Liability', but would simply have typed 'Stamp duty' as a description for the entry. Thirdly, she would not have typed a capital 'L' in the description 'Tax Liability'. Fourthly, she would have had to type the file code 'OSR' incorrectly by typing 'ODO' and then failing to check that file code which she was always in the habit of checking.

89 Ms Allen was cross-examined in respect of each of these reasons for stating that the entry in issue was not made by her. She repeated that she always put the bank details of the payee of money out of the trust account and would not have used zeros (T: 92 and T: 98, 03.02.10). In regard to the use of a capital 'L' in the description 'Tax Liability', she conceded that she does not always follow that particular process when she was shown a number of entries admittedly made by her, where capital letters were used (T: 91 – 92, 03.02.10). Ms Allen stated, in regard to the error in the client file code, that she would have had to type 'ODO' instead of 'OSR' and then not notice the difference. In response to the question of whether she would have typed only 'O' or 'OD' for the error to emerge, she stated that she always typed three letters; she would not simply type 'O' and wait to see what came up, because there were a lot of clients with names beginning with the letter 'O'. She stated further that if she had typed 'OSR', it would have indicated that there was no money in that account with the result that she would have been unable to make the entry (T: 93 - 94, 03.02.10).

90 Ms Allen stated further that in May or June 2009, she was advised by Ms Young, the trust inspector, that Denning Deane had a trust ledger account for the OSR, a fact that she had, until then, been unaware of. She repeated that she was not familiar with the firm's procedures or clients'

names and that no other legal firms for which she works had an OSR account. In her experience, funds to pay stamp duty are always taken from the relevant client trust ledger.

91 Ms Allen identified a copy of the trust bank reconciliation statement bearing her signature which indicates that she had completed the reconciliation on 26 April 2009 at 11:20:18.

92 In cross-examination, Ms Allen was taken to the supplementary witness statement of Mr Todd Keeler which indicates the times at which entries were made on 26 April 2009. The first entry was made at 10.54 am and thereafter at intervals ranging from one minute to six minutes until the disputed entry was made. The entry debiting the estate's trust ledger was made at 11.12 am and the following one three minutes later. Numerous entries (over 50 in all) were made at differing intervals thereafter, finishing at 2.23 pm. She agreed that the list evidenced that 10 transactions were processed to the trust account over a 20 minute period, each with the SyS_ADMIN log on code.

93 Ms Allen was taken to a list of entries, all made under her user code. The disputed entry is the only one containing four zeros in the bank details column. It is on the basis of this list that the witness furnished her reasons for stating that the entry in question was not made by her.

94 In re-examination, Ms Allen was asked whether the practitioner ever made an entry on the computer while she was logged on to Filepro in her presence. She did not recall a specific occasion, but stated that if she was working on her computer and there was an entry which she did not know what to do with or how to process, she would ask him what the entry was about and there were times when he would make the entry for her on her computer. There was nothing unusual about them both doing entries at the same time, depending on whose computer was on. She stated further that she was not even working on her computer that day. When she walked in, the practitioner was working on an employee's computer and told her not to bother starting her computer up. She could not specifically say that the interaction she described occurred on a particular day, but it did happen at times (T: 96 – 97, 03.02.10).

95 Ms Allen concluded her evidence by stating that it would take about 30 seconds to make a data entry if the paperwork was available and she was uninterrupted. Otherwise, it would take about a minute. The gap of three minutes between the disputed entry and the next indicates that something must have occurred at that particular time (T: 98, 03.02.10).

Alan McNeill

96 Mr Alan McNeill is a restricted legal practitioner admitted to practice on 19 December 2008. He was employed by the firm from 25 August 2008 to 19 December 2009 and he completed his Articles of Clerkship under the practitioner's supervision.

97 Mr McNeill was directly involved in the estate and its administration, having taken instructions from the client for the drafting of the will, thereafter obtaining the grant of probate of the estate, and being charged with its administration by the practitioner.

98 In early May 2009, Mr McNeill began preparing a spreadsheet to determine how much each of the beneficiaries under the will was entitled to after expenses and disbursements were accounted for. In the process of that exercise, he looked at the estate's trust account statement and noticed a debit of \$11,115 detailed as 'Stamp Duties WA - Tax Liability' reflecting a transaction date of 14 April 2009 and a processing date of 26 April 2009.

99 Because he had no recollection of a liability of the estate for stamp duty, he carefully examined the estate file for an EFT or similar request for authorisation. He was aware of Denning Deane's practice that the employee having conduct of a file was required to complete the written request supported by relevant documentation, sign the form and hand it to the practitioner. The latter would then also sign the form after reviewing the file and supporting documents and on being satisfied himself that the payment should and could be authorised. Mr McNeill was unable to find a written authorisation or request for payment of stamp duty in the estate's file.

100 On or about 5 May 2009, Mr McNeill asked the practitioner about the transaction. He recalls having printed out the estate's trust ledger and with it in hand, approaching the practitioner who was seated at his desk. Holding out the trust account statement and moving toward the practitioner, Mr McNeill asked what the stamp duty payment by the estate was for. As he turned his head toward Mr McNeill, the practitioner replied: 'That was a mistake that Beryl (Allen) made'. Mr McNeill then said: 'Well, it doesn't reconcile and I couldn't find anything in the file for that amount', whereupon he recalled the practitioner saying: 'I will fix it' (T: 109 – 110, 03.02.10).

101 On 6 May 2009, Mr McNeill, at the request of the practitioner to prepare a summary showing the position of the estate, prepared a more

detailed reconciliation of the estate's trust account, but was unable to balance the estate's funds. He showed the practitioner the spreadsheet again, stating his inability to balance the account, and left the spreadsheet with the practitioner. The practitioner then walked over to Mr McNeill's desk and pointed to the figure representing the net amount of the estate prior to the stamp duty sum being deducted and said: 'Use that figure'. Mr McNeill did so and was able to balance the estate's funds.

102 At that time, Mr McNeill believed that the payment of the stamp duty from the estate's fund had to be a mistake and set out to discover the client file or account which should have been debited with the amount of the stamp duty. He described a series of enquiries of others in the firm and he discovered the details of the land purchase. He established that no funds were ever held in trust in the Noble House account for payment of stamp duty.

103 When Mr McNeill printed out the trust audit report on 7 May 2009, he thought it was unusual that the stamp duty transaction was dated 14 April 2009 and that the processing date was 26 April 2009, expecting the transaction to have been processed shortly after 14 April 2009.

104 That same evening, he sought the advice from a senior member of the legal profession and as a result reported the matter to the Board the following day. He met with a Mr Bentley, a trust account inspector, on Sunday 10 May 2009 and handed him several documents relevant to the matter. After receiving a phone call from Ms McCahon of the Committee on 12 May 2009, Mr McNeill delivered the estate file to the Committee's office.

105 The majority of cross-examination of Mr McNeill was directed to the first conversation between the witness and the practitioner in relation to the debit in the estate's trust ledger for stamp duty and the state of readiness of the estate money for distribution to the beneficiaries and the practitioner's knowledge thereof.

106 There was no real dispute about what occurred at the first conversation referred to in the immediately preceding paragraph. Mr McNeill places the date at about 5 May 2009, while the practitioner placed it later that week, which Mr McNeill denies (TS: 107, 03.02.10). The content of the conversation was not challenged, nor did the practitioner challenge the evidence that when he was asked about the stamp duty on the estate's trust ledger, his response was immediately and without looking at any documentation, to say that it was a mistake made

by Ms Allen (T: 109 – 110, 03.02.10). It was conceded by the witness that after the first conversation, the practitioner left the conduct of the file with Mr McNeill, did not ask him to take steps to hide it nor to reveal the incorrect entry to anyone.

107 The cross-examination relating to the distribution of the estate revealed that it was awaiting the receipt of a single cheque before distribution could be effected. The practitioner was not involved in the day-to-day details of the estate and Mr McNeill never discussed them with anybody else. Mr McNeill informed the practitioner some days after Easter (14 April 2009) that he was in a position to distribute the estate (T: 112, 03.02.10). Mr McNeill further deposed that the beneficiaries of the estate were rather laid back about receiving their entitlements and that the bequests of two of them, a brother and sister aged about 18 or 19 years, were to be held in trust until they reached the age of 25 years (T: 100 – 101, 03.02.10).

The Committee's other witnesses

108 The Committee closed its case after tendering the witness statements of Ms Chelsea Drowley and Mr Michael Christie, an articled clerk and a recently admitted legal practitioner, respectively, who were charged with the conduct of the settlement of the land purchase subject to the supervision of the practitioner. At the time of the settlement, towards the end of December 2008, Mr Christie was still an articled clerk. Both witnesses were aware that Noble House was an entity controlled by the practitioner and that effectively, the land purchase was regarded as a purchase by the practitioner. They depose to the settlement of the land purchase in December 2008, the details of which are agreed in the Statement of Agreed Facts.

109 Of relevance for present purposes is the evidence of Mr Christie that some time in early April 2009, he attempted to use ROS but the system would not respond because when he tried to begin the process of stamping the transaction, a message blocker prevented him from proceeding due to an overdue account. He asked Ms Drowley whether she knew what the overdue amount related to. She could only think that it was the amount for Noble House, but was not sure. Mr Christie then telephoned the practitioner and asked him to deal with it because he needed to stamp his documents. It must be remembered that shortly after this (and probably as a result of it), the practitioner paid \$11,115 to the OSR from the firm's trust account.

Dr Zlatan Golic

110 The first witness for the practitioner (interposed at the start of the hearing) was Dr Zlatan Golic whose evidence in chief was contained in two letters dated 25 September 2009, with attached letter to the Board dated 4 November 2008, and 10 October 2008. Dr Golic is a consultant psychiatrist who saw the practitioner on five occasions, the first on 2 October 2008, then 8 and 29 October 2008, 23 July 2009 and 12 August 2009.

111 The information gathered by Dr Golic for the purpose of his reports was provided not only from the practitioner himself, but also from his former wife and his father. The main causes for the considerable stress referred to by Dr Golic and upon which he based his opinions were the separation of the practitioner from his wife and aspects relating to his practice, Denning Deane, namely a dispute with his former partner who reported him to the Board (a complaint unrelated to these proceedings and dismissed within a short time).

112 Other stressors recorded by Dr Golic in his interviews were the practitioner's admission to the Fremantle hospital under the *Mental Health Act 1996* (WA) (MH Act) for psychiatric assessment following concerns by his friends. He was discharged two days later after a consultant psychiatrist found there was no evidence to support the claim by his friends that he was suffering from Bipolar Affective Disorder. During his two day stay at that hospital, no medication was given to or prescribed for him (letter dated 25 September 2009 (2009 letter) at 5). A further stressor was that after the dispute with his former partner who had attempted to take over Denning Deane and then left the practice, the former partner's father, the landlord of the premises from which the practice was conducted, commenced an action to remove Denning Deane from those premises (2009 letter at 6). Further stress to the practitioner came in the form of two audits of Denning Deane by the Board but, despite that, he continued to work very hard in the business.

113 In his various interviews with the practitioner, Dr Golic reported that he presented as a well-groomed man whose self-care was exemplary. The practitioner was appropriate throughout with good eye contact. He was a good historian, with no evidence of abnormal movements and easy to establish a good rapport. The practitioner responded to Dr Golic's challenges appropriately, without evidence of undue anxiety, hesitation or denial and he was able to balance most of the issues appropriately. He had an objective and reasonably balanced approach (2009 letter at 8).

Similar observations were made by Dr Golic in his earlier report dated 10 October 2008 at 2.

114 Dr Golic explained the statement in his 2009 letter (at 8) that the practitioner 'was unable to fully explain his action of transferring money from the trust account to pay a stamp duty, except that it related to his quick lapse of judgment ...' by indicating that he did not record verbatim what was said but represented his overall impression and his own conclusions (T: 41, 03.02.10). He later conceded in cross-examination that the passage quoted represented the effect of the words said and was not Dr Golic's impression of what the practitioner meant (T: 46, 03.02.10).

115 Dr Golic expressed the opinion that the practitioner's mood was reasonably good and was euthymic (stable) (2009 letter at 9, T: 37, 03.02.10). He also formed the view that there was no evidence of excessive anxiety, or of thought disorder. His judgment was well balanced and his insight was appropriate (2009 letter at 9). Dr Golic prescribed no medication for him.

116 Dr Golic's diagnosis was that 'there was no evidence of any clear cut Axis 1 diagnosis except for ongoing stress (possible Adjustment Disorder)'. He formed the view that on several occasions, the practitioner experienced acute stress reaction. Dr Golic summarised his opinion in the following terms:

... his insight and judgment were not impaired but rather affected. This presentation could best be understood on the basis that out of character stressors have impacted to some degree on his coping and functioning leading to a degree of short term maladaptive reaction, as in Adjustment Disorder' (2009 letter at 9).

117 The term 'Adjustment Disorder' elicited elaboration by Dr Golic in his evidence, as being:

... experience of subjective distress which might manifest in a range of problems, like a poor coping planning performance, developing a degree of mood systems, anxiety, worry, tension and anger. All those symptoms are not of such severity to either apply to any psychiatric disorder or a range of anxiety disorders and psychosis ... it can have a good influence ... but some people, they become very creative and do quite extraordinary things when they are under the pump, under the stress (TS: 42, 03.02.10).

118 Dr Golic was also asked to explain the use of the term 'short term maladaptive reaction'. He stated that in order to be classified as an adjustment disorder, a person needs to have three months of significant

and persistent stressors with or without a wide range of symptoms, which can be transient. In the practitioner's case, Dr Golic had a real difficulty in reaching a clear cut decision whether the practitioner in fact had an adjustment disorder, taking into account the length and number of stressors. Because the symptoms were not present all the time, he concluded that they were rather transient (T: 44, 03.02.10). He further stated that if someone does not cope, it does not mean that that person's insight and judgment are affected; the practitioner's decision-making was affected, but not to a point where he had a total breakdown in insight and judgment. He therefore agreed that the adjustment disorder was fairly mild and although his insight and judgment were affected, they were not impaired (T: 49, 03.02.10).

119 In fact, Dr Golic expressed the opinion that the practitioner showed a considerable strength in coping with adversities in his private and occupational life (2009 letter at 10) and found it 'remarkable' that in spite of his difficulties, he continued to cope and function well.

120 In our view Dr Golic's views are borne out by the fact that the practitioner ran his practice, being solely responsible for all the general and trust account entries in the Filepro system from January 2009 to May 2009. It also explains why, in his letter to the Committee dated 4 November 2008, after his separation from his wife, the disputes with his partner and his landlord, his hospitalisation in Fremantle, the previous complaint to the Committee and the two audits of Denning Deane's accounts by the Committee's trust inspectors, Dr Golic was prepared to express the opinion that the practitioner was 'fit and capable to practise in the area of legal practice'.

The practitioner

121 The practitioner's evidence in chief is in a witness statement dated 17 December 2009 and a supplementary witness statement dated 30 January 2010.

122 In his witness statement, the practitioner sets out details of Denning Deane, the shareholding arrangement and his interest in Noble House and the land purchase.

123 He then describes the ROS of which the firm was an approved user and, relevantly, states that the ROS allows users to log on, enter details of a property transaction and self-assess the stamp duty payable thereon. ROS would then issue a certificate of duty and add the duty assessed to the system user's account. The account would then be payable on the

15th day of the following month. Although the duty had yet to be paid to the OSR, the certificate allowed settlements to proceed as the transfer of land would be treated as having been stamped on the issue of the certificate.

124 Because the ROS allowed settlement to be completed with stamp duty being paid after settlement, the registered user is ultimately responsible to the OSR for payment of the duty and is required to ensure that sufficient funds are paid to the firm to cover the assessed duty. The general policy of the firm was to ensure, prior to using ROS, that either the duty was paid by the purchaser into the trust account or that the purchaser's bank was instructed to pay the relevant amount of duty into the trust account on settlement.

125 A separate trust ledger in the firm's Filepro system was created for the OSR to which all stamp duty assessments were allocated. This permitted the firm to determine the amounts payable for stamp duty on the 15th of each month (OSR statement). If money was already held in trust for a client, a journal ledger entry would be made transferring those funds from the client trust ledger to the OSR trust ledger.

126 The practitioner was responsible for authorising payment from the trust account to the OSR to pay each monthly OSR statement. He would only authorise payment once the OSR statement was reconciled with Denning Deane's internal records and it had been checked that there were sufficient funds in the OSR trust ledger. To authorise payment, the practitioner was required to log on to ROS and authorise payment by EFT from the trust account by clicking on the 'pay' button. It was a requirement of ROS that the nominated account was a trust account because the firm was required to hold money collected from clients for stamp duty to be held in a trust account.

127 The practitioner says, in relation to the land purchase, that the payment of stamp duty to the OSR was not due until 15 January 2009, that he had arranged for a net sum of \$121,164.50 to be advanced to Noble House and that the stamp duty would be paid from this amount.

128 Settlement of the land purchase took place on 22 December 2008, when the \$121,164.50 was deposited into Noble House's general account. It is common ground that the practitioner did not pay the stamp duty at settlement nor on 15 January 2009 when it became due. He states that as he had allocated the stamp duty as part of the loan, he thought that he had paid the duty.

129 The practitioner stated that because of the acute stress he was under he was distracted and must have forgotten to pay the stamp duty. In addition to the stressors listed by Dr Golic, the practitioner submitted that his involvement, in August 2008, in the failed acquisition of the Newmarket Hotel for \$1.95 million caused him considerable stress also.

130 He says he did not realise that he had not paid the duty until March 2009 when he was contacted by the OSR. At that time, the practice and he were under pressure as key administrative staff and his partner had left the firm and he had to relocate his office on 6 and 7 March 2009.

131 When first contacted by OSR, the practitioner says he did not know what the liability was for, but after investigation, discovered that it related to the land purchase. Again, he says he was distracted and did not pay the outstanding duty immediately.

132 In early April 2009, he was again contacted by the OSR and was told that if payment was not made forthwith, action would be instituted against him. He advised the OSR officer that he was aware of the transaction and would have it paid immediately.

133 On Good Friday, 10 April 2009, shortly after that conversation with the OSR, the practitioner logged onto ROS and authorised payment to the OSR. At the same time as authorising payment, he intended to immediately transfer sufficient funds from Denning Deane's general account into its trust account to pay the stamp duty liability. He states he had sufficient funds to pay that debt and thought he had done so.

134 From past experience with ROS, the practitioner says he knew that the trust account would not be debited with the payment to the OSR until the next business day after he had authorised payment. As it was Good Friday, he believed that funds would be transferred from the firm's general account to its trust account before the deduction by the OSR would be made.

135 Once again, he believed that he had transferred funds from the general account to the trust account straight after he had authorised the OSR payment, but this did not occur.

136 In April 2009, additional stressors other than those previously referred to occurred. That Easter, usually a family affair, was the first holiday that he had been apart from his wife and stepdaughter. He had also just moved into his property, starting a new life. At about the same

time, he had received a letter from the Committee concerning a complaint by a former client who, in March 2009, had threatened him with violence and he was still responding to the Committee's investigation of a complaint by his former law practice partner.

137 On Easter Sunday, he flew to Sydney to attend the Inglis National Broodmare Sales and on 16 April 2009, flew from Sydney to Cairns to attend a board meeting for the Duyfken Foundation, returning to Perth on 18 April 2009. It should be mentioned at this stage, in connection with his interest in broodmare sales, that the practitioner was a director of West Coast Racing and Breeding Pty Ltd, registered in December 2008 for the purpose of operating a thoroughbred racing and breeding business and was a member of the Western Australian Turf Club.

138 On 14 April 2009, during the period of his absence from Perth, the OSR deducted \$11,115 from the trust account.

139 The practitioner then set out in detail his staff problems resulting in his decision in mid-January 2009 to take personal control of Denning Deane's banking and accounting matters. He recounts being taught by Ms Allen how to operate the Filepro accounting system, and his evidence as to his role and that of Ms Allen, and to the procedure followed during the reconciliation process, accords with Ms Allen's evidence as outlined above.

140 Of the events in the office on 26 April 2009 and the debiting of the OSR liability of \$11,115 to the estate's trust ledger, the practitioner states that from the trust cheque listing downloaded from Filepro, it appears that Ms Allen made the entry, as the log on code of SyS_ADMIN had been used. He has no knowledge of how that error came to be made. He states that he did not make the entry himself, nor does he recall giving Ms Allen the instruction to record the OSR liability to the estate's trust ledger. He states further that if Ms Allen had tried to post the liability to the OSR trust ledger, she would have been unable to enter the record because Filepro would have blocked entry into the OSR ledger because of insufficient funds in that account. He says that this would have alerted Ms Allen and himself that there was a problem. However, because the estate's trust ledger had sufficient funds, no alert was sounded by Filepro and Ms Allen was able to complete the trust reconciliation.

141 The practitioner's account of the events surrounding Mr McNeill's enquiry relating to a stamp duty liability recorded in the estate's trust ledger, accords to a large extent with Mr McNeill's version set out

above and needs no repetition, save that the practitioner dates the events on or about 8 May, as opposed to 5 May 2009. The practitioner also denies Mr McNeill's evidence that there was a second meeting two days later (T: 48 - 52, 05.02.10).

142 Having told Mr McNeill that he would attend to correcting the error, the practitioner states that he intended to make a Filepro journal entry transferring the \$11,115 debit from the estate's trust ledger to the OSR trust ledger, to pay that amount into the trust account and to seek advice from counsel about how he should notify the Board of the error.

143 The practitioner admits that he knew that it was important to restore the trust account balance, but he panicked and due to other stress factors at the time, he avoided dealing with the matter immediately, and instead, on Saturday 9 May 2009, he flew to Melbourne to attend the 70th birthday party of a friend and to inspect his Victorian-based thoroughbred broodmares (T: 53, 05.02.10).

144 Shortly before boarding his return flight on 11 May 2009, the practitioner was informed by Mr McNeill that the Board had served a summons on him to produce the estate file and the settlement file for the land purchase. He told Mr McNeill to comply with the summons.

145 On his arrival in Perth at 11 pm on 11 May 2009, he immediately attended at Denning Deane's office and made a journal entry to transfer the stamp duty payment from the estate's trust ledger to the OSR ledger and at 9.30 am the following day, he deposited \$11,115 into the trust account.

146 The supplementary statement of the practitioner dealt with his financial position as at 10 April 2009 and his ability to pay \$11,115 from Denning Deane's general account at ANZ bank, from another general account at NAB and from an overdraft facility of \$70,000 arranged on 6 April 2009 with Macquarie Bank. This supplementary statement also deals with the then current position of the practice, details of which are not relevant at this stage.

147 The practitioner was subjected to a searching cross-examination. Considerable attention was given to whether the practitioner was, at the relevant times, able to pay the stamp duty when he said he intended to do so. Ultimately, the practitioner admitted that 'there is no question whatsoever that we were under financial stress throughout that period of time. I don't contend anything else' (T: 54, 04.02.10). He admitted later that 'things were tight. Things were very, very difficult. There were lots

and lots of issues which had lots of draws on cash flow at that time, throughout that whole period of time' (T: 57, 04.02.10). In fact, he conceded further that after he had received an email from the OSR on 19 March 2009 requesting payment, he deliberately failed to pay the duty in March because he had no money to pay it. He decided to leave payment to April (T: 68, 04.02.10), even though he knew that was a direct breach of the OSR terms and conditions.

148 The practitioner was shown several emails sent by OSR in March 2009 seeking payment. He stated he did not receive the first email dated 9 March because it was addressed incorrectly. However, he did receive an email dated 12 March, claiming immediate payment, to which he responded on 19 March, saying that he would investigate the matter immediately. The OSR responded the next day providing full details of the land purchase 'to assist you in your investigation'. On 30 March, the practitioner emailed the OSR saying that 'somehow we paid duty online and didn't retain funds on trust for this client ... Anyway the client is aware of the situation and has undertaken to transfer the stamp duty into our trust account first thing this week'. Two further emails from the OSR were sent to him, one dated 6 April claiming immediate payment, and another two days later referring to a telephone message the day before requesting the practitioner to contact the OSR urgently to discuss payment and threatening legal proceedings. He also remembers receiving telephone messages from the OSR at that time (T: 75, 04.02.10).

149 The practitioner stated further in cross-examination that even though he could pay the duty by 6 April 2009 when the overdraft facility of \$70,000 became available, he waited until 10 April to pay. He was unable to explain why he left it to that day to pay the OSR, except that there was a lot going on at that time (T: 76 - 77, 04.02.10). Nor was he able to explain why after making the payment he did not immediately make a Filepro entry debiting the Noble House account (T: 77 - 81, 04.02.10). He admitted that it was the usual procedure in the firm for a Filepro entry to be made before a withdrawal from the trust account was authorised (T: 80 - 86, 04.02.10), but stated that he made a mistake in not doing so (T: 81, 04.02.10). He denied that he deliberately refrained from making the Filepro entry in order that the withdrawal from the trust account for his own purposes would not be recorded (T: 81, 04.02.10). He attributed the oversight to the stressors referred to above (T: 82, 04.02.10). The practitioner however fully understood at all times that if he did not pay money into the trust account, a withdrawal which he authorised on 10 April would be made against money to which Noble House was not

entitled and he knew that was a serious matter (T: 87, 04.02.10). He knew that the withdrawal was for his own benefit (T: 88, 04.02.10).

150 Lengthy cross-examination ensued over the practitioner's statement that after authorising the withdrawal of funds from the trust account on 10 April, he had failed to make the necessary entry in the Filepro system documenting the withdrawal. He stated that he forgot to make the entry believing that he had transferred the funds. He was taken through his various bank accounts at the relevant time, questioning his belief that he had the funds at his disposal to have justified that belief. The practitioner persisted in his view that he could have paid the funds into the trust account at that time and therefore had grounds for the belief.

151 The practitioner again repeated that he had no recollection of how the entry in Filepro debiting the estate's trust ledger came to be made on 26 April. He does not remember Ms Allen asking him about the \$11,115, save that he asserted once more that the entry was a mistake and that he did not make it. He was however taken to the statement of Mr Keeler which lists all the trust entries processed on 26 April 2009. The printout reveals that there were six entries made, five of which were under Ms Allen's user code (SyS_ADMIN) and one under the practitioner's user code (PM). In the field of the bank details, the practitioner conceded that in the entry made under his user code, he had typed four zeros. Of the five entries made under Ms Allen's user code, only in the entry relating to the estate's trust ledger were zeros used; in all other entries the full bank details of the accounts were entered. The practitioner was also shown Denning Deane's Final Trust Account Cashbook in which the practitioner admitted that those entries indicating the bank details with zeros were all made by him.

152 He admitted that on his own case, he forgot to pay the stamp duty amount into the trust account in December 2008 (T: 88, 04.02.10). He also forgot to pay the duty on 15 January 2009 when it became due. He also admits that even after being chased by the OSR he did not attend to payment between 6 and 10 April 2009. He stated that he did not forget to pay, but failed to attend to it. He then admitted that he did not attend to documenting the payment he made to the OSR on 10 April 2009 (T: 89, 04.02.10). He could give no explanation except that he did not attend to it. He then forgot after 10 April 2009 to transfer money into the trust account to replenish the withdrawal from that account used to pay the OSR. He mistakenly believed that he had done so (T: 90 - 91, 04.02.10). He admits that he ought to have documented a

deposit into the trust account before the withdrawal was made (T: 93, 04.02.10).

Findings of the Tribunal

153 We have little hesitation in finding that during the period from mid-2008 to mid-2009, the practitioner was subjected to tremendous stress. He had personal problems with his wife, leading to a separation and ultimately to divorce. His partner at the firm had attempted to take over the control of the firm, eventually resulting in a split, taking with him certain personnel, which left the firm in administrative difficulties. That in turn led to the partner's father, the landlord of the firm's premises, taking action to evict the practitioner and necessitating relocation in March 2009 to new premises. In the latter part of 2008, the difficulties experienced with his wife and his partner led to his being arrested under the MH Act and taken to Fremantle Hospital, only to be discharged two days later with a diagnosis that he suffered nothing more than stress. The Board then required a medical report that he was fit to operate a legal practice which was given by Dr Golic after examining him on several occasions. A trust account audit undertaken by the trust inspectors of the Board revealed no irregularities. A proposed purchase by him of the Newmarket Hotel fell through resulting in litigation to recover the deposit.

154 However, we accept the evidence of Dr Golic who examined the practitioner on no less than five occasions and came to the conclusion that, despite the above stressors, neither the practitioner's judgment nor his insight was impaired and that it was remarkable to notice, despite his difficulties, that he continued to cope and function well. Dr Golic concluded that the practitioner showed considerable strength in coping with his adversities. These findings allowed Dr Golic to express the opinion in November 2008 to the Board that he was fit and capable to practise law. That the practitioner in fact learnt and applied the Filepro system from January 2009 onwards, being solely responsible for the payments into and withdrawals from, the firm's trust accounts, in most of the cases making the necessary entries in the system personally without error, other than the estate's trust ledger entry, underlines in no small measure his ability to run a legal practice effectively, despite the stressors.

155 The only transaction in respect of which the practitioner made mistakes, forgot to make entries, was distracted or held a belief that entries were made when they were not, related to his personal dealings - the payment of stamp duty in regard to the land purchase.

Generally, we find that he was evasive and sometimes argumentative in his evidence on this point. However, it was the improbability of his entire version of events which drove us inexorably to the conclusion that his evidence could not be accepted. We were particularly unimpressed in relation to his inability to explain his admitted failures to attend to important entries which he failed to make at numerous stages from December 2008 to 8 May 2009. His evidence that he forgot to pay the stamp duty amount into the trust account in December 2008, that he forgot to pay the stamp duty when due on 15 January 2009, that he forgot to pay after 9 March 2009 when pursued relentlessly by the OSR, that he overlooked attending to payment between 6 and 10 April, that he failed to attend to documenting the withdrawal in Filepro, having no explanation for that, and that after 10 April, he forgot (or mistakenly believed that he had) transferred money into the trust account to replenish the withdrawal, and that after being alerted by Mr McNeill to the problem, he intended to pay the money into the trust account and panicked and flew, instead, to a birthday party in Melbourne, in its cumulative effect, totally beggars belief. We find that it is inconceivable that after being reminded repeatedly by the OSR to the point of being threatened with proceedings to make payment of the stamp duty, and later being alerted by Mr McNeill to the errors and oversights, he would not have immediately attended not only to the payment but to all the required entries with meticulous attention.

156 The practitioner's response to the OSR's string of emails and telephone messages in March 2009 were, on his own admission, deliberately aimed at delaying payment primarily for lack of funds, preferring to make the payment in April and knowing at that stage that his failure to pay was in breach of the terms of use of the ROS (T: 68, 03.02.10). His email reply to the OSR on 19 March 2009 that he 'will investigate immediately to revert to you as soon as I understand how this situation has occurred' was calculated to buy time by reason of his admitted inability to pay at that stage. Moreover, his email to the OSR on 30 March 2009 that 'the client is aware of the situation and has undertaken to transfer the outstanding stamp duty into the Trust Account first thing this week' was disingenuous in the extreme in that he conveyed to the OSR the impression that it was a third party client responsible for payment when it was his personal liability. We reject his evidence that he needed to investigate the situation to find out what the OSR claim was for. We find that he at all times knew precisely, especially since the transaction was a personal one, that the OSR's claim related to the land purchase.

157 We find further, as he admitted, that he knew that the withdrawal of funds from the trust account which he authorised on 10 April 2009 would be made against trust money to which Noble House was not entitled (T: 87, 03.02.10) and that the withdrawal was for his personal benefit. The seriousness of that situation was fully appreciated by him (T: 87, 03.02.10).

158 Ms Gillan argues that the practitioner could have paid the stamp duty on 14 April 2009 from Denning Deane's general account with ANZ. A copy of the statement for this account reveals that as at 14 April 2009 (when he said he intended to pay but forgot) there was a balance of \$11,209.13. A payment of the stamp duty from this account would have reduced the balance to approximately \$100 and would have left Denning Deane without working capital - an impossible scenario. That account was in fact used to pay his employees' wages and by 21 April 2009 (a week later) had been reduced to \$3,812.37. To pay from that account would have effectively required choosing between employee entitlements and Noble House's obligations.

159 We accept that the practitioner had arranged an overdraft facility of \$70,000 for Denning Deane with Macquarie Bank on 1 April 2009, but to have paid the stamp duty liability for Noble House from that source would have been in clear breach of the terms and conditions of the loan, being 'to assist with working capital' (T: 28, 05.02.10).

160 A perusal of the practitioner's bank accounts at the various stages at which he avers he intended to pay but forgot to do so, or thought that he had paid, reveals that throughout the period from 15 January 2009 when the stamp duty became payable to 26 April 2009 when the estate's trust ledger was debited, the practitioner's financial position was nothing short of parlous. On 15 January 2009, the firm was in overdraft with NAB, its banker, to the tune of \$34,644 increasing to \$47,266.55 the following day. Between January and the end of March, the firm's overdrawn account with NAB fluctuated between a low of approximately \$28,000 to highs at times reaching \$48,688 on 1 April 2009. On his own evidence, his financial position at that stage was very tight, preferring deliberately to postpone payment of stamp duty until April. On 9 April 2009, the account at NAB was overdrawn to the extent of \$29,533, while the ANZ account of the firm on that date was in credit for \$3,592.94. The state of Denning Deane's accounts at those banks were in similar positions as at 27 April 2009. The statement of the practitioner that he was under financial pressure was therefore no exaggeration but it serves to underline

and emphasise our finding that his intention from the inception was to delay payment of the stamp duty as long as possible.

161 We find, however, that regardless of whether the practitioner had sufficient funds to pay the liability at the various stages he claimed he could have paid, he did not do so. A simple depression of the 'pay' button of the ROS would have solved that problem. In light of our finding that he knew at all times that the payment to the OSR was outstanding and that no funds had been transferred into the trust account either by Noble House or himself to meet that liability, it is irrelevant to make a finding on his actual financial ability to make that payment.

162 In regard to the events on Sunday 26 April 2009, we were impressed with the evidence of Ms Allen. We accept her evidence that although the user code SyS_ADMIN was hers, there were times when once she had logged on, both she and the practitioner would use the same computer to make entries (T:96 - 97, 03.02.10). Although she could not remember this particular occasion, significantly, that evidence was not challenged in cross-examination.

163 We were impressed with her evidence that when reconciling the bank statement with the trust account, she, as a matter of course, always typed the bank details into the field specified in order to track the trust payments and that she never typed zeros into that field (T: 92 - 93, 98, 03.02.10). On the other hand, the practitioner admitted that he on occasion typed zeros into that field.

164 To a lesser extent, we are impressed with her evidence that she would not have typed a 'tax liability' as a description of the nature of the entry, as that description and 'stamp duty' had entirely different connotations (the former being an amount payable to the Commonwealth Deputy Commissioner of Taxation or tax department while the latter connotes a payment to the OSR (T: 93, 03.02.10).

165 However, we do not accept Ms Allen's evidence that the entry was not processed by her due to the incorrect use of capital letters, as it was demonstrated in cross-examination that her alleged non-use of capital letters was not consistently followed.

166 In assessing the evidence we find it significant that the entries processed immediately before the entry made in the estate's trust ledger bore the bank numbers in the appropriate field and were made a minute apart. Then followed the entry into the estate's trust ledger some three minutes later with zeros inserted into the bank detail field

(supplementary witness statement of Todd Keeler, annexure B); the evidence revealed that it took less than one minute to complete an entry (T: 98, 03.02.10). The interval of three minutes indicates that there was an interruption in the reconciliation process and there was an uncharacteristically long break in the series of entries. Immediately after the estate entry was processed, the following entry was, as before, processed a minute later.

167 It is common ground that had 'OSR' instead of the estate code 'ODO' been typed into the system, there would have been a blockage as there were insufficient funds in the OSR trust ledger to meet the liability (T:75, 03.02.10); (the practitioner had been warned earlier in April 2009 by Mr Christie that he had been blocked from using the ROS because of non-payment of the stamp duty (T: 74, 04.02.10; T: 35, 05.02.10; witness statement of Michael Christie, [10] - [13]). That would result in an inability to effect a reconciliation. In order to achieve a reconciliation, there needed to be access to an account that did have sufficient funds. Only three of the firm's clients had sufficient funds to pay the stamp duty liability, the estate being one of them (Anna Young's witness statement at [29]). Ms Allen knew none of this as she was unaware of Denning Deane's client base (T: 82, 03.02.10). The practitioner was the only one who was aware of the above position and without the use of the funds of one of those clients referred to (in the absence of the practitioner himself depositing money into the trust account), the bank statement could not be reconciled with the trust account.

168 We reject the argument that Ms Allen could have mistakenly typed the letters 'OD' instead of 'OS' which would have brought up the estate's trust ledger instead of the OSR trust ledger. We do so because such a scenario is highly improbable and would have required Ms Allen to have made four errors in a single processing procedure, namely typing incorrectly the letters 'OD' instead of 'OS', inserting zeros instead of the bank details, describing the entry as a tax liability, and then failing to check all those entries.

169 We are satisfied, for the reasons stated above, that the entry debiting the estate's trust ledger was made by the practitioner. He was sitting within a few feet of Ms Allen when she was doing the reconciliation (T: 83, 03.02.10) and, as stated above, they did at times make entries using the same computer. We find that the practitioner, as the only person with knowledge of the firm's client base, deliberately used the estate's trust ledger in order to enable the reconciliation to be effected.

170 This finding is confirmed by the events in early May 2009 when Mr McNeill approached the practitioner with his query related to the debit entry in the estate's trust ledger. It is common ground that when he approached the practitioner with the problem, the latter immediately replied that the entry was a mistake made by Ms Allen and that he would fix it (T: 109 - 10, 03.02.10; witness statement of Paul Masten at [83] - [85]). The practitioner deposed that this was the first time he discovered that the mistake had been made, believing from 10 April to early May that the duty had been paid (T: 98 - 101, 04.02.10). Mr McNeill was surprised that the practitioner was able to identify the problem without even looking at the document which Mr McNeill intended to show him, indicating the problem. We find it improbable that the practitioner would have immediately reacted as he did if he was unaware until that moment that a mistake had been made. We find that had he been unaware of the entry in the estate's trust ledger until then, the probabilities are that he would have first examined the documents brought to him by Mr McNeill and would have conducted a full investigation as to how the so-called error occurred. That he identified the problem immediately confirms our finding that he was responsible for deliberately making the entry on 26 April. It follows that we reject his evidence that he only discovered the 'mistake' when it was drawn to his attention by Mr McNeill in May.

171 The practitioner argues that, as he cooperated fully with the Board in its investigation, that he did not take control of the estate file and that he did not ask anyone not to disclose the error, it follows that he did not have a dishonest intention. We cannot accept that argument because the entire series of events was fully documented and there was no way he could conceal it. The only alternative open to him was to 'confess and avoid' by stating that the entries were mistakes.

172 The practitioner's evidence that, on discovery of the incorrect debiting of the estate's trust ledger in May, he intended to pay the amount into the trust account, to make the necessary journal entries and then to seek legal advice as to how to inform the Board, compounds the improbability of his version of events. Yet again the practitioner became distracted and yet again he omitted to do what any innocent person in his position would have done, namely, pay the amount into the trust account immediately and rectify the error in the journal. But once again, he failed to do just that, instead leaving Perth to attend a birthday party in Melbourne spontaneously and to inspect his thoroughbred broodmares. His conduct is in our view inconsistent with the innocent explanation he has sought to portray.

173 There is some validity in the argument of the practitioner that because the estate was ready for distribution, he would not have used funds from that account as that would be readily detected. We cannot speculate as to why he used the estate's funds and not one of the other two accounts having sufficient funds but, as indicated above, the practitioner resorted to a number of curious actions and this may have been one of them.

174 Ms Gillan has argued that if her client had given Ms Allen instructions to make an entry (although he could not remember doing so), he would have requested her to debit the sum to the OSR account. We cannot accept that argument either, because the practitioner was aware that there were insufficient funds in the OSR account to meet that liability and that an instruction of that nature would have been futile.

175 The practitioner also submits that because Denning Deane's account had been subjected to scrutiny by the Board in the months preceding 10 April 2009, the practitioner was well aware that any irregular transaction could well be uncovered if the Board came back for another spot check. We find that the fact that two successful inspections were conducted could have instilled in the practitioner a sense of security that it was unlikely that the Board would return in the near future. Why should the Board have conducted another spot check when recent inspection revealed no irregularity apart from minor criticisms? The practitioner's contention goes both ways.

176 By reason of the above, we find that on 10 April 2009, the practitioner withdrew the sum of \$11,115 from the trust account by effecting an EFT from the trust account to the OSR with the intention of using that money to pay the stamp duty liability of Noble House in respect of the land purchase. At that time, the practitioner knew that the trust account did not hold any money to which either Noble House or the practitioner was entitled. He also knew that neither he nor Denning Deane was authorised by any of the persons beneficially entitled to any of the money held in the trust account to withdraw money from the trust account to pay the stamp duty liability for the land purchase.

177 We therefore find that the practitioner was dishonest. By reason of that conduct, the practitioner contravened s 216(1) of the LP Act which obliges a law practice (which in terms of s 3 includes an Australian legal practitioner who is a sole practitioner) to disburse trust money only in accordance with a direction of a person on whose behalf the trust money is held.

178 We find further that the practitioner has contravened s 226(1) which
prohibits a practitioner, without reasonable excuse, from causing a
deficiency in any trust or trust ledger account.

179 In relation to the debiting of the estate's trust ledger, we find that on
26 April 2009, the practitioner made an entry in the estate's trust ledger
with the intention and for the purpose of debiting \$11,115 from the trust
money held by the practice on behalf of the estate purportedly for the
payment of a stamp duty liability. We find further that at the relevant
time, the practitioner knew that the estate had no liability to pay stamp
duty to the OSR. By reason of that conduct, we find that the practitioner
was dishonest, that his conduct was illegal in that the records were
fraudulently falsified and that his conduct constituted an intentional
breach of his duty as the executor of the estate.

180 We, however, cannot find that the practitioner contravened s 221(1)
of the LP Act which requires a law practice to ensure that trust money that
is the subject of a power given to the practice is dealt with only in
accordance with the power, by reason of the failure to adduce evidence of
any requisite power having been given to the practice.

181 We do, however, find that the practitioner contravened s 226(1)(a)
referred to above, by reason of the practitioner's conduct in causing,
without reasonable excuse, a deficiency in the estate's trust ledger.

182 We further find that the practitioner contravened s 228(3)(b) because
of the practitioner's failure to keep trust records in a way which at all
times discloses the true position in relation to trust money received on
behalf of the estate.

183 In relation to the allegations of a failure to report an irregularity to
the Board, we find that the practitioner failed to make a report as soon as
practicable when he withdrew on 10 April 2009 \$11,115 from the
trust account to pay Noble House's stamp duty liability, knowing that
Noble House was not entitled to any money held in that trust account.

184 We also find that in failing to report the debit entry in the estate's
trust ledger made on 26 April 2009 purportedly in payment of a
stamp duty liability for which the estate was not liable and waiting to
report that entry to the Board on 12 May 2009, the error was not reported
as soon as practicable; in acting in this way, the practitioner contravened
s 227(1) of the LP Act.

185 By reason of our findings above, we find that the practitioner engaged in professional misconduct between 10 April 2009 and 12 May 2009, namely:

- (a) dishonest conduct;
- (b) illegal conduct namely stealing and fraudulent falsification of records;
- (c) contravention of the LP Act; and
- (d) an intentional breach of trust.

Orders

1. The practitioner is guilty of professional misconduct.
2. The Tribunal will hear submissions on penalty and costs on a date to be fixed.

I certify that this and the preceding [185] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE J ECKERT, DEPUTY PRESIDENT