# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

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| CITATION: | *Legal Services Commissioner v Munt* [2023] QCAT 479 |
| PARTIES: | **LEGAL SERVICES COMMISSIONER**<br>(applicant)<br>**v**<br>**BRADLEY JOHN MUNT**<br>(respondent) |
| APPLICATION NO/S: | OCR111-22 & OCR106-23 |
| MATTER TYPE: | Occupational regulation matters |
| DELIVERED ON: | 21 December 2023 |
| HEARING DATE: | 30 October 2023 |
| HEARD AT: | Brisbane |
| DECISION OF: | Justice Brown<br><br>Assisted by:<br>Ms Patricia Schmidt, Practitioner Panel Member<br>Dr Julian Lamont, Lay Panel Member |
| ORDERS: | **The Orders of the Tribunal are that:**<br>**1. It is recommended that the name of the respondent, Bradley John Munt, be removed from the roll of legal practitioners in Queensland.**<br>**2. The respondent be publicly reprimanded.**<br>**3. The respondent shall pay the Commissioner's costs of and incidental to the disciplinary applications, such costs to be assessed on the standard basis in the manner in which costs would be assessed if the matter were in the Supreme Court of Queensland.**<br>**4. The affidavit of Michael Leo Roessler sworn 5 December 2022 and the reproduction of that affidavit in the Hearing Book contained at Part D – sealed material in folders 4–10 be placed in a container and marked "not to be opened other than by order of the Tribunal".** |
| CATCHWORDS: | PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL MISCONDUCT – TRUST MONEY – where the Commissioner contends that the respondent withdrew funds from the firm's trust account without |

authority to do so on a number of occasions and in respect of a number of clients and failed to deposit a sum of money into the firm's trust account – whether the charges are proved – whether the respondent was dishonest or failed to exercise proper diligence – whether the respondent's conduct constituted professional misconduct or unsatisfactory professional conduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL MISCONDUCT – SOLICITOR'S COSTS – where the Commissioner contends that the respondent failed to make costs disclosure, failed to provide an itemised bill on request of clients and charged excessive legal costs – whether the charges are proved – whether the respondent's conduct constituted professional misconduct or unsatisfactory professional conduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL MISCONDUCT – OTHER MATTERS – where the Commissioner alleges that the respondent failed to comply with notices issued pursuant to s 443 of the *Legal Profession Act 2007* (Qld) – whether the charges are proved – whether the respondent's conduct constituted professional misconduct or unsatisfactory professional conduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL MISCONDUCT – GENERALLY – where the respondent was found to have engaged in professional misconduct and unsatisfactory professional conduct – whether it should be recommended that the respondent's name be removed from the roll

*Legal Profession Act 2007* (Qld)
*Legal Profession Regulation 2007* (Qld)
*Legal Profession Regulation 2017* (Qld)
*Queensland Civil and Administrative Tribunal Act 2009* (Qld)

*Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498
*Attorney-General v Bax* [1999] 2 Qd R 9

*Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand* [2018] QCA 66
*Briginshaw v Briginshaw* (1938) 60 CLR 336
*Jensen v Legal Services Commissioner* [2017] QCA 189
*Legal Profession Complaints Committee v O'Halloran* [2013] WASC 430
*Legal Services Commissioner v Beatty* [2019] QCAT 45
*Legal Services Commissioner v Conradie* [2018] QCAT 170
*Legal Services Commission v Jackson* [2017] QCAT 207
*Legal Services Commissioner v Kurschinsky* [2020] QCAT 182
*Legal Services Commissioner v Madden (No 2)* [2009] 1 Qd R 149
*Legal Services Commissioner v Quinn* [2018] QCAT 196
*Legal Services Commissioner v Redmond* [2018] QCAT 231
*Legal Services Commissioner v Twohill* [2005] LPT 001
*Macleod v The Queen* (2003) 214 CLR 230
*Pennisi v Legal Services Commissioner* [2023] QCA 234
*Peters v The Queen* (1998) 192 CLR 493
*QLS v Carberry; A-G v Carberry* [2000] QCA 450
*Re Maraj (a legal practitioner)* (1995) 15 WAR 12

APPEARANCES & REPRESENTATION:

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| Applicant: | MD Nicolson, instructed by the Legal Services Commissioner |
| Respondent: | No appearance |

## REASONS FOR DECISION

## BACKGROUND TO THE PROCEEDINGS

[1] This is an application under s 452 of the *Legal Profession Act 2007* (Qld) (**LPA**) for the Tribunal to make disciplinary orders pursuant to s 456 of the LPA.

[2] At all material times, the respondent:[1]

(a) was an Australian legal practitioner within the meaning given in s 6(1) of the LPA, having been admitted to the roll of solicitors in Queensland (as it then was) on 25 February 1985;

(b) has held an unrestricted practising certificate since 1 July 1991; and

(c) was a sole practitioner and the principal of the law practice trading as Bradley Munt & Co.

[3] There are two disciplinary applications before the Tribunal, in proceedings OCR111-22 and OCR106-23. 28 charges lie against the respondent in proceeding OCR111-22. Three charges lie against the respondent in proceeding OCR106-23.

[4] The respondent did not appear at the hearing. The Legal Services Commissioner (**Commissioner**) filed affidavits of service demonstrating that the respondent was served with the disciplinary applications and relevant evidence to be relied upon by the Commissioner at the hearing, including an evidence matrix.

[5] On 3 August 2023, in a letter sent via email to the Tribunal with the Commissioner's consent, Gilshenan & Luton, who had previously acted on behalf of the respondent with respect to the disciplinary applications, informed the Tribunal that the respondent no longer wished to engage in the proceedings currently before the Tribunal, intended to take no further part in the proceedings, and had withdrawn instructions for Gilshenan & Luton to continue acting.[2]

[6] In the email received by the Tribunal dated 3 August 2023, Mr Cranny, the respondent's former solicitor, also advised that the respondent was content to rely upon the responses and evidence already filed in the proceedings, which includes an affidavit sworn by the respondent on 9 March 2023.

[7] The respondent's position was confirmed in an email sent by him on 25 September 2023 to the Associate to the President of the Queensland Civil and Administrative Tribunal, Mellifont J, which reiterated his intention to not further engage or participate in the proceedings.[3]

[8] In the circumstances, the Tribunal was satisfied that the respondent had been served with all relevant material, had notice of the hearing, and had indicated that he did not wish to attend. Out of an abundance of caution, the Tribunal had the respondent called three times, to which there was no response. The Tribunal therefore determined that it was appropriate to proceed with the hearing, notwithstanding the respondent's

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[1] The allegations are admitted by the respondent. The Affidavit of Michael Leo Roessler sworn 6 December 2022 stated that the respondent was practising as principal of Bradley Munt & Co from 1 April 1989 until 30 June 2021 and from 7 July 2021 until the present. Nothing material turns on the gap of seven days.

[2] Exhibit KAG-2 to the Affidavit of Kelly Grainger affirmed 9 October 2023 at 6.

[3] Exhibit KAG-2 to the Affidavit of Kelly Grainger affirmed 9 October 2023 at 144.

absence, which had to be determined on the documentary material filed in the proceedings without oral evidence.

[9] The statutory requirements for the conduct of a hearing under the LPA and the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**) were conveniently set out by the Honourable Peter Lyons QC, Judicial Member, in *Legal Services Commissioner v Lawrence*.[4]

**History of the Proceedings**

[10] The application for disciplinary proceeding in OCR111-22 was filed on 18 May 2022. A response to that application was filed by the respondent through his solicitors on 5 August 2022 (**Response**), which admitted some of the allegations the subject of the charges but largely reserved the respondent's position until review of the Commissioner's evidence. A further response to the disciplinary application was filed on 19 September 2022 (**Further Response**), which contained further admissions and a further response to particulars. The respondent swore an affidavit in relation to proceeding OCR111-22 on 9 March 2023 (**Affidavit**).

[11] On 13 April 2023, the Commissioner filed a further application for disciplinary proceeding in OCR106-23. The respondent, through his solicitors, filed a response to that application on 13 June 2023 (**Response in OCR106-23**).

[12] On 23 May 2023, Mellifont J ordered that pursuant to s 55 of the QCAT Act, proceedings OCR111-22 and OCR106-23 were to remain as separate proceedings but would be heard and decided together.

[13] On 4 September 2023, the Commissioner filed an outline of submissions in proceeding OCR111-22 identifying the material upon which it relied. The Commissioner also filed what are described as supplementary submissions in respect of proceeding OCR106-23 on 4 September 2023.

[14] Justice Mellifont made further orders on 26 September 2023 that the Commissioner was to file a paginated evidence matrix in relation to OCR111-22 by 6 October 2023. That order was complied with, and the matrix was provided to the respondent.[5]

[15] The evidence which the Commissioner relies upon is extensive and includes not only affidavits from officers of the Commissioner which annex the relevant client files, but also affidavits from the respondent's clients whose matters are the subject of the charges before the Tribunal. As the respondent through his solicitors had stated to the Tribunal that he would rely on the material filed on his behalf, the Tribunal has had regard to the Response, Further Response, Response in OCR106-23 and the Affidavit in forming its decision. Given that the respondent did not attend the hearing and was not available for cross-examination, the Affidavit is of questionable weight.

[16] The Commissioner took the Tribunal through a number of the charges and the material referred to in the evidence matrix to demonstrate the basis upon which the

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4 [2018] QCAT 206 at [5]–[12].

5 A few minor corrections were made to the evidence matrix during the course of the hearing. Those corrections were not significant such that there was any unfairness to the respondent, particularly given the respondent had determined not to further participate in or attend the hearing.

Commissioner met the onus upon it, having accepted that the relevant onus was the *Briginshaw* standard,[6] particularly in relation to the allegations of dishonesty.

**OCR111-22**

[17] The conduct the subject of the 28 charges in proceeding OCR111-22 is alleged to have occurred in relation to multiple matters over which the respondent had carriage. Those matters can be summarised as follows:

(a) the **Dumic Matter** – on or about 10 May 2016, Mr Ivan Dumic engaged the respondent to assist with the administration of his deceased father's estate;

(b) the **Sainsbury Matter** – on or about 20 August 2018, sisters Ms Gail Sainsbury and Ms Jill Proud engaged the respondent to assist with the administration of the estate of their late father;

(c) the **Brinkley Matter** – on or about 8 May 2019, Ms Sandra Brinkley engaged the respondent to act for her in the matter of a property settlement with her former partner;

(d) the **Alsemgeest Matter** – on or about 25 January 2018, sisters Ms Amanda Alsemgeest and Ms Sally Degnan engaged the respondent to assist with the administration of the deceased estate of their late father;

(e) the **Spark and Aulfrey Matter** – on or about 15 January 2019, siblings Ms Madonna Spark and Mr Troy Aulfrey engaged the respondent to assist with the administration of the estate of their late father;

(f) the **Nixon Matter** – on or about 24 January 2018, Ms Suzanne Joan-Lee Nixon engaged the respondent to assist with the administration of the estate of her late mother;

(g) the **Stieler Matter** – on or about 3 April 2020, brothers Messrs Timothy, Benjamin and Daniel Stieler engaged the respondent to assist with the administration of the estate of their late father;

(h) the **Parsons Matter** – on or about 9 November 2018, sisters Ms Jacqueline Parsons and Ms Tonya Guy engaged the respondent to assist with the administration of the estate of their late father;

(i) the **Hill Matter** – on or about 5 September 2019, brothers Messrs Adrian, Alexander and Andrew Hill engaged the respondent to assist with the administration of the estate of their late mother;

(j) the **Hrynko Matter** – on or about 9 February 2012, Ms Katarina Hrynko engaged the respondent to assist with the administration of the estate of her late father; and

(k) the **Noble Matter** – on or about 10 February 2015, Ms Loreen Noble engaged the respondent to assist with the administration of the estate of her late husband.

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[6] *Briginshaw v Briginshaw* (1938) 60 CLR 336. See also s 656C of the *Legal Profession Act 2007* (Qld) (**LPA**).

[18] The 28 charges can be grouped into the following categories:

(a) Charges 1, 6, 10, 12, 16, 18, 20, 22, 24, 26 and 28 allege that the respondent failed to make costs disclosures in relation to the Dumic, Sainsbury, Brinkley, Alsemgeest, Spark and Aulfrey, Nixon, Stieler, Parsons, Hill, Hrynko and Noble Matters;

(b) Charges 2, 5, 9, 11, 15, 17, 19, 21, 23, 25 and 27 involve the alleged withdrawal of funds from the Bradley Munt & Co trust account without authority to do so. Those charges relate to the Dumic, Sainsbury, Brinkley, Alsemgeest, Spark and Aulfrey, Nixon, Stieler, Parsons, Hill, Hrynko and Noble Matters. The Commissioner has, as part of the particulars of the charges, alleged that the respondent was dishonest in withdrawing the trust monies because he knew that no invoices had been delivered, that none of the conditions for lawful withdrawal under the LPA and the *Legal Profession Regulation 2007* (Qld) or the *Legal Profession Regulation 2017* (Qld) (**LPR 2007/2017**)[7] had been met, and that he had no present entitlement to the monies withdrawn when they were withdrawn. Alternatively, the Commissioner alleges that the respondent in the exercise of proper diligence ought to have known that no invoices had been delivered and that none of the conditions of lawful withdrawal existed;

(c) Charges 3 and 13 allege that the respondent failed to provide an itemised bill on the client's request. Those charges relate to the Dumic and Alsemgeest Matters;

(d) Charge 4 concerns the respondent's conduct in failing to deposit $591.16 into the firm's trust account and relates to the Dumic Matter;

(e) Charges 7 and 8 relate to excessive charging of legal costs by the respondent in respect of the Sainsbury Matter; and

(f) Charge 14 involves the respondent's conduct in failing to comply with a notice issued by the Commissioner in respect of the Alsemgeest Matter.

[19] The Tribunal must be satisfied of each of the charges. As a result of several admissions made by the respondent in his Response and Further Response, the scope of the factual dispute was reduced. The Tribunal still considered the factual material relied upon by the Commissioner to support the particulars of the charges in considering whether each charge was established.

[20] In oral submissions, the Commissioner identified particular issues which were the subject of some dispute (whether through admission or non-denial) or where there was a conflict of evidence in relation to particular charges. In that respect, the Commissioner's counsel identified:

(a) the respondent's contention in his Further Response that Charges 7 and 8 were duplicitous;[8]

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7 The *Legal Profession Regulation 2007* (Qld) (**LPR 2007**) commenced on 1 July 2007. It was repealed by the *Legal Profession Regulation 2017* (Qld) (**LPR 2017**), which commenced on 1 September 2017.

8 Further Response to Disciplinary Application filed on 18 May 2022 (**Further Response**) at [8.2]–[8.6].

(b) a possible factual conflict in relation to the evidence with respect to Charge 9 as to whether an alleged conversation occurred, which was denied by the respondent in his Further Response;[9]

(c) a possible discrepancy between material provided to Ms Nixon and the client file and whether she may have been provided with Invoice 2345; and

(d) the basis upon which the Commissioner contends that the Tribunal should make a finding of dishonesty in relation to a number of the charges. However, the Commissioner contends that even if the Tribunal was not satisfied of dishonesty, it would still be satisfied that the respondent had conducted himself with a failure of competence and diligence.

**The Conduct**

Charges 1, 6, 10, 12, 16, 18, 20, 22, 24, 26 and 28 – Costs Disclosure

[21] According to the particulars of each of the above charges, the respondent did not make costs disclosures to any of the clients the subject of the charges as required by ss 308 and 310 of the LPA.

[22] In his Further Response, the respondent admitted the particulars founding the charges and accepted that he failed to make costs disclosures in writing as required by the LPA.[10]

[23] The evidence from the relevant clients' affidavits is that the respondent made no disclosure of costs for the purposes of ss 308 and 310 of the LPA. In most cases, as identified in the clients' affidavits, there was no disclosure at all or, at best, a rudimentary estimate was given verbally.

[24] The evidence of each of the clients concerned, together with the evidence of the respondent's files maintained in respect of each client, overwhelmingly establishes the charges which have been brought. The invoices, particulars of which are set out in the schedule to the evidence matrix, demonstrate that in relation to each of the charges the fees exceeded the prescribed amount,[11] either when the first invoice was issued or by the time second or third invoices were issued, and further invoices were issued after that time. It is therefore established that the respondent was obliged to provide costs disclosures pursuant to s 308(1) of the LPA. Such disclosures must be made in writing before or as soon as practical after the law practice is retained.

[25] In the case of the Brinkley Matter,[12] it is alleged that the respondent quoted a fee of not more than $1,500 for professional fees (the prescribed amount under s 311(1)(a) of the LPA). Ms Brinkley deposed to having been verbally advised by the respondent that his professional fees would be no more than $1,500, a conversation which was subsequently referred to in two pieces of correspondence from Ms Brinkley to the respondent's firm and not refuted. The respondent denied that in his Further Response. The Tribunal accepts Ms Brinkley's evidence, given it is corroborated by the

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9 Further Response at [9.3].

10 Further Response at [1.1]–[1.3] (Dumic Matter), [6.2]–[6.3] (Sainsbury Matter), [10.2]–[10.3] (Brinkley Matter); [12.2]–[12.3] (Alsemgeest Matter), [16.2]–[16.3] (Spark and Aulfrey Matter), [18.2]–[18.3] (Nixon Matter), [20.2]–[20.3] (Stieler Matter), [22.2]–[22.3] (Parsons Matter), [24.2]–[24.3] (Hill Matter), [26.2]–[26.3] (Hrynko Matter), [28.2]–[28.3] (Noble Matter).

11 Relevantly, throughout the period for the charges, the prescribed amount was $1,500.

12 Charges 9 and 10.

subsequent correspondence.[13] It is evident from the respondent's Affidavit that his recollection is poor at best, and in any event, he has not deposed to what occurred in his interaction with Ms Brinkley. The Tribunal therefore finds that the particulars of the charge in this respect is established.[14] Little turns on it insofar as the respondent accepts that he did not make the relevant costs disclosure and it is evident that invoices were raised exceeding the prescribed amount.

[26] In response to the charges of failing to make the required costs disclosure under the LPA, the respondent's Further Response stated that he believes he followed his usual practice of providing and discussing with the client the Supreme Court scale of fees, upon which he intended to base his professional fees.[15]

[27] The matter raised by the respondent does not provide any basis of defence to the charges concerned. It would only be relevant as a point of mitigation. In any event, it is not accepted by the Tribunal that he did outline his basis of charging to the clients relevant to the charges.

[28] None of the clients can recall any conversation as to the basis of charging in relation to their matters. Only three clients can recall an overall estimate being given of what the respondent thought the fees might be, which were in fact exceeded.[16] The Commissioner further submits that it is unlikely that the respondent told his clients that he would base his professional fees on the Supreme Court scale given the fees which were charged by the respondent did not suggest that they were charged according to the Supreme Court scale and were routinely issued for rounded amounts, which would be an unlikely outcome if the Supreme Court scale applied. That is borne out by the evidence. It is also supported by the fact that there is an absence of any evidence on the files showing calculations of fees according to scale and the fact that when the respondent was asked to provide itemised accounts, he provided the file to a costs assessor to prepare an itemised account, the result of which differed significantly from the amounts invoiced.

[29] The Tribunal finds on the evidence identified by the Commissioner that the Commissioner has proven Charges 1, 6, 10, 12, 16, 18, 20, 22, 24, 26 and 28 as particularised.

Charges 2, 5, 9, 11, 15, 17, 19, 21, 23, 25 and 27 – Trust Account Withdrawals

[30] Charges 2, 5, 9, 11, 15, 17, 19, 21, 23, 25 and 27 involve the alleged withdrawal of funds from the Bradley Munt & Co trust account without authority to do so.

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13 Exhibit SGB-1 to the Affidavit of Sandra Gayle Brinkley sworn 5 December 2022 at 9 and 12.

14 Particulars at [9.3] and [10.1].

15 Further Response at [1.1]–[1.3] (Dumic Matter), [6.2]–[6.3] (Sainsbury Matter), [10.2]–[10.3] (Brinkley Matter); [12.2]–[12.3] (Alsemgeest Matter), [16.2]–[16.3] (Spark and Aulfrey Matter), [18.2]–[18.3] (Nixon Matter), [20.2]–[20.3] (Stieler Matter), [22.2]–[22.3] (Parsons Matter), [24.2]–[24.3] (Hill Matter), [26.2]–[26.3] (Hrynko Matter), [28.2]–[28.3] (Noble Matter).

16 Relevant to Charges 5, 10 and 24. See the Affidavit of Gayle Jeanette Sainsbury sworn 24 October 2022, Affidavit of Sandra Gayle Brinkley sworn 5 December 2022 and Affidavit of Alexander William Hill affirmed 8 December 2022 at [5].

[31] The Commissioner contends that:

(a) there was no costs disclosure;

(b) there is no evidence on the client files or in the respondent's Affidavit by which the respondent can satisfy a third party that invoices had been delivered to the clients;

(c) there is no evidence that there had been acknowledgement or acceptance by the clients that they had received fee notes prepared by the respondent; and

(d) there is no evidence to support the proposition that any of the conditions for lawful withdrawal under s 258 of the LPA and s 58 of the LPR 2007/2017 were satisfied.

[32] The Commissioner's contentions are borne out by the clients' evidence that they did not receive invoices from the respondent prior to the monies being withdrawn by the respondent in payment of invoices. They are also borne out by the respective client files, on which there is no evidence supporting the fact that the invoices in question were sent to the clients, in contrast to other documents on file where there is such evidence.

[33] In relation to all charges, the respondent accepts that he had no costs agreement with his clients.[17]

[34] The respondent does not dispute that in the course of the retainers with his clients he raised invoices for legal costs and later withdrew corresponding amounts from the firm's trust account.[18] He does not dispute that some or all of the relevant invoices were not delivered to his clients. He stated, however, that it was his belief at the time of the relevant withdrawals that the invoices had been delivered.[19]

[35] The respondent contends that in relation to all the charges concerned with the withdrawal of trust monies without authority to do so, he approved the transfers on the understanding that the invoices had been delivered and that the requisite time had passed in accordance with the provisions of the LPA and LPR 2007/2017. In that regard, the respondent stated that invoices were sent by email by his secretarial staff, often directly from the printer.[20] He stated that he understood "that this [was] the practice [his] secretaries adopted when sending out invoices".[21] According to the respondent, his bookkeeper would "alert [him] to the fact that an invoice had been generated (and assumedly sent to the client) and that 14 days had elapsed" and they would then withdraw the trust funds.[22]

[36] While the respondent in his Affidavit refers to a longstanding practice of obtaining a signed trust account authority from a new or prospective client, he accepted that a

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17 Further Response at [2.4] (Dumic Matter), [5.7] (Sainsbury Matter), [9.6] (Brinkley Matter), [11.6] (Alsemgeest Matter), [15.9] (Spark and Aulfrey Matter), [17.6] (Nixon Matter), [19.7]–[19.8] (Stieler Matter), [21.5] (Parsons Matter), [23.6] (Hill Matter), [25.6] (Hrynko Matter), [27.6] (Noble Matter).

18 Further Response at [2.2] (Dumic Matter), [5.5] (Sainsbury Matter), [9.5] (Brinkley Matter).

19 Further Response at [2.3] (Dumic Matter), [5.6] (Sainsbury Matter), [9.4] (Brinkley Matter), [11.4]–[11.5] (Alsemgeest Matter), [15.5]–[15.8] (Spark and Aulfrey Matter), [17.4]–[17.5] (Nixon Matter), [19.4]–[19.6] (Stieler Matter), [21.4] (Parsons Matter), [23.4]–[23.5] (Hill Matter), [25.4]–[25.5] (Hrynko Matter), [27.4]–[27.5] (Noble Matter).

20 Affidavit at [57].

21 Affidavit at [57].

22 Affidavit at [58].

number of the client files relevant to the charges do not contain signed trust account authorities.

[37] As to Charges 5, 11, 15, 17, 21 and 25, where there is a signed trust account authority (although in some cases by only one of the clients concerned), the respondent contends that he believed the invoices had been delivered and that he acted in accordance with the trust account authorities signed by his clients.[23]

[38] As to Charges 2, 9, 19, 23 and 27, the respondent accepts that there was no general trust account authority in respect of each client.[24] It is therefore unnecessary to consider whether the withdrawal from trust funds in payment of invoices was justified due to the existence of a trust account authority.

[39] The conditions for lawful withdrawal of trust money by a legal practitioner are governed by s 258 of the LPA and s 58 of the LPR 2007/2017. Section 258 of the LPA provides as follows:

> **258 Dealing with trust money—legal costs and unclaimed money**
>
> (1) A law practice may do any of the following in relation to trust money held in a general trust account or controlled money account of the practice for a person—
>
> (a) exercise a lien, including a general retaining lien, for the amount of legal costs reasonably due and owing by the person to the practice;
>
> (b) withdraw money for payment to the practice's account for legal costs owing to the practice if the relevant procedures or requirements under this Act or prescribed under a regulation are complied with;
>
> (c) after deducting any legal costs properly owing to the practice, deal with the balance as unclaimed money under section 713.
>
> (2) Subsection (1) applies despite any other provision of this part but has effect subject to part 3.4.

[40] Section 58 of the LPR 2017 provides:

> **58 Procedures and requirements for withdrawing trust money for legal costs—Act, s 258**
>
> (1) For section 258(1)(b) of the Act, trust money, held in a general trust account or controlled money account of a law practice for a person, may only be withdrawn, for payment of legal costs owing to the practice by the person, in accordance with the procedure set out in subsection (2), (3), (4) or (5).

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[23] Further Response at [5.8]–[5.12] (Sainsbury Matter), [11.7]–[11.10] (Alsemgeest Matter), [15.10]–[15.14] (Spark and Aulfrey Matter), [17.7]–[17.10] (Nixon Matter), [21.6]–[21.11] (Parsons Matter), [25.7]–[25.10] (Hrynko Matter).

[24] Further Response at [2.5]–[2.6 (Dumic Matter), [9.7]–[9.9] (Brinkley Matter), [19.7]–[19.8] (Stieler Matter), [23.7]–[23.8] (Hill Matter), [27.7]–[27.8] (Hrynko Matter).

(2) The law practice may withdraw the trust money—

(a) if the practice has given the person a bill relating to the money; and

(b) if—

(i) the person has not objected to withdrawal of the money within 7 days after being given the bill; or

(ii) the person has objected within 7 days after being given the bill, but has not applied for a costs assessment within 60 days after being given the bill; or

(iii) the money otherwise becomes legally payable.

(3) The law practice may withdraw the trust money, whether or not the law practice has given the person a bill relating to the money, if—

(a) the money is withdrawn in accordance with—

(i) a costs agreement that complies with the legislation under which it is made and that authorises the withdrawal; or

(ii) instructions that have been received by the practice and that authorise the withdrawal; and

(b) the practice, before withdrawing the money, gives or sends to the person—

(i) a request for payment, referring to the proposed withdrawal; or

(ii) a written notice of withdrawal.

(4) The law practice may withdraw the trust money if—

(a) the money is owed to the law practice by way of reimbursement of money already paid by the law practice on behalf of the person; and

(b) the practice, before withdrawing the money, gives or sends to the person—

(i) a request for payment, referring to the proposed withdrawal; or

(ii) a written notice of withdrawal.

(5) If a cost agreement or instruction, mentioned in subsection (3)(a), authorises withdrawal of only part of the money, the remainder of the money may still be withdrawn in accordance with subsection (2) or (4).

(6) An instruction mentioned in subsection (3)(a)(ii)—

(a) if the instruction is given in writing—must be kept as a permanent record; or

(b) otherwise—must be confirmed in writing either before, or within 5 working days after, the law practice withdraws the money and a copy must be kept as a permanent record.

(7) For the purposes of subsection (4), money is taken to have been paid by the law practice on behalf of the person when the relevant account of the law practice has been debited.

[41] At the relevant times, s 58 of the LPR 2007 provided as follows:

**58 Withdrawing trust money for legal costs**

(1) This section prescribes, for section 258(1)(b) of the Act, the procedure for the withdrawal of trust money held in a general trust account or controlled money account of a law practice for payment of legal costs owing to the practice by the person for whom the trust money was paid into the account.

(2) The trust money may be withdrawn in accordance with the procedure set out in either subsection (3) or (4).

(3) The law practice may withdraw the trust money—

(a) if—

(i) the money is withdrawn in accordance with a costs agreement that complies with the legislation under which it is made and that authorises the withdrawal; or

(ii) the money is withdrawn in accordance with instructions that have been received by the practice and that authorise the withdrawal; or

(iii) the money is owed to the practice by way of reimbursement of money already paid by the practice on behalf of the person; and

(b) if, before effecting the withdrawal, the practice gives or sends to the person—

(i) a request for payment, referring to the proposed withdrawal; or

(ii) a written notice of withdrawal.

(4) The law practice may withdraw the trust money—

(a) if the practice has given the person a bill relating to the money; and

(b) if—

(i) the person has not objected to withdrawal of the money within 7 days after being given the bill; or

(ii) the person has objected within 7 days after being given the bill but has not applied for a review of the legal costs under the Act within 60 days after being given the bill; or

(iii) the money otherwise becomes legally payable.

(5) Instructions mentioned in subsection (3)(a)(ii)—

(a) if given in writing, must be kept as a permanent record; or

(b) if not given in writing, must be confirmed in writing either before, or not later than 5 working days after, the law practice

effects the withdrawal and a copy must be kept as a permanent record.

(6) For subsection (3)(a)(iii), money is taken to have been paid by the law practice on behalf of the person when the relevant account of the practice has been debited.

*Was the respondent aware of the relevant regulatory requirements?*

[42] The Commissioner contends that it can be reasonably inferred that given the respondent's length of practice and responsibilities as the sole principal and practitioner of the firm, he was aware of the requirements under the LPA and LPR 2007/2017 in respect of the withdrawal of trust monies in payment of fees. The Tribunal finds that it should be reasonably inferred that the respondent was aware of the requirements of the LPA and LPR 2007/2017 given his years in practice as a principal and that it would have been beholden upon him as principal to be familiar with the regulatory requirements. The respondent's familiarity is also supported by the fact that the firm's invoices refer to the provisions of the LPA and clients' rights to dispute invoices. The respondent's Further Response is also consistent with an awareness of the regulatory requirements. In the circumstances, it may be inferred that the respondent was familiar with the provisions of the LPA and s 58 of the LPR 2007/2017 at the relevant times.

*Did the respondent send or cause his staff to send invoices to the relevant clients?*

[43] In relation to all of the charges, the clients provided affidavits or statements to the effect that they did not receive invoices at all, or at least did not receive any invoices prior to the monies being drawn down from the applicable trust account. That is further supported by the fact that in some cases when invoices were requested by clients and invoices eventually provided by the respondent,[25] the trust account details showed that monies had already been withdrawn in payment of the respondent's invoices.

[44] In relation to Charge 17, the Commissioner as a model litigant brought the Tribunal's attention to evidence which may suggest that one of the invoices particularised in the charge, Invoice 2345, may have been sent to Ms Nixon, contrary to her evidence. Ms Nixon stated that she did not receive any invoices from the respondent during the retainer. The documents contained on the client file are confusing in this regard.

[45] Based on a review of the file and Ms Nixon's affidavit:

(a) an email dated 13 February 2018 from the respondent to Ms Nixon made a request for $1,000 to be deposited into the firm's account in anticipation of court filing fees and advertising;[26]

(b) Invoice 2345, dated 22 February 2018, was with respect to professional fees not disbursements, whereas the respondent's emails sought a deposit of $1,000 in respect of court filing fees and advertising (albeit Invoice 2345 was for an amount of $1,000);

[25] See, for example, Affidavit of Amanda Jane Alsemgeest sworn 15 November 2022.

[26] The respondent sent it to the wrong email address.

(c) subsequent emails of 26 February 2018 to Ms Nixon from the respondent stated that they attached the email of 13 February 2018 and an invoice. They are not attached in the file but are sequential in the file;

(d) Ms Nixon stated that the respondent had verbally requested that she pay $1,000 into his trust account in respect of court filing fees and advertising, which she subsequently paid in two instalments of $500 by EFT on 2 and 27 March 2018, which she notified the firm of on each occasion by telephone and which is recorded in a telephone note.[27] At least $500 is recorded on 27 March 2018 as having been paid into the trust account,[28] not the account referred to on the invoice which appears to be a general account of the firm;[29]

(e) Ms Nixon stated that she did not receive any invoices from the respondent during her retainer for legal fees; and

(f) there is correspondence in March 2018 to the Queensland Reporter referring to a cheque being enclosed for advertising.[30] That payment is then referred to as a disbursement in an invoice dated 1 June 2018.[31] There is also a receipt in respect of advertising in The Queensland Times in March 2018.[32] That payment is then referred to as a disbursement in the invoice dated 1 June 2018.[33]

[46] Two inferences are therefore open, namely that:

(a) Invoice 2345 was attached to the emails of 26 February 2018 and Ms Nixon did not realise that it was for legal fees as opposed to disbursements, given she had an oral conversation with the respondent requesting the payment of $1,000; or

(b) Invoice 2345 was not in fact the invoice attached to the email of 26 February 2018, and the invoice which was attached had been lost.

[47] In the Tribunal's view, it is unlikely that the invoice was sent to Ms Nixon. First, because work had only just begun on the matter, it would have been surprising for Ms Nixon to receive an invoice for professional fees, particularly when she deposes to not having received an invoice in respect of professional fees. Secondly, Ms Nixon recalls the request for the payment of $1,000 for advertising and court filing fees, which she then paid by two instalments and phoned the firm to confirm that the amounts had been paid. Thirdly, the emails of 13 February 2018 and 26 February 2018 refer to an invoice being enclosed in respect of monies to be paid in respect of disbursements not professional fees. Her lack of recollection of receiving any invoices for professional fees from the respondent is not inconsistent with the fact that she may have received an invoice in respect of the proposed disbursements for which she had deposited the $1,000 with the respondent's firm.

[48] There is no evidence supporting the sending of the other 17 invoices relied upon as proof of particular 17.4, and the Tribunal is satisfied that those invoices were not sent to Ms Nixon.

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27 In June 2018, Invoice 2519 was issued, which provided for advertising disbursements.
28 Hearing Book at 916.
29 Hearing Book at 5149.
30 Hearing Book at 4338.
31 Hearing Book 944.
32 Hearing Book at 4337.
33 Hearing Book at 944.

[49] The Tribunal is satisfied that the invoices particularised in each of the charges were not sent to the each of the clients concerned, given the absence of any evidence to demonstrate that the invoices were sent, in contrast to other evidence on the file that other documents sent by email or by scanning were recorded as having been sent.

*Did the trust account authorities authorise the withdrawals?*

[50] As stated above, some of the charges relate to the conduct of matters for clients who signed or purportedly signed trust account authorities. Under the trust account authorities signed, professional fees and disbursements were authorised to be paid when “acknowledged to be due to you”. Given that the Tribunal has found that invoices were not in fact sent to the clients concerned prior to the withdrawal of monies, necessarily there could be no acknowledgment that monies were due. However, given that the respondent sought to rely on the trust account authorities as justifying the withdrawal of trust monies in relation to some of the charges identified above, the Tribunal will briefly address the issue.

[51] Ms Nixon did sign a trust account authority which authorised transfer of monies from the trust account for “professional costs and disbursements acknowledged to be due”, however the Tribunal is satisfied that it is more than likely that no such acknowledgment was given by Ms Nixon even if Invoice 2345 was sent to her. Even if one assumes in the respondent’s favour that Invoice 2345 was sent to Ms Nixon, there is no evidence that the invoice for professional fees was acknowledged to be due which would have justified the withdrawal of the trust monies under the LPR 2017. The Tribunal finds subsequent payment by Ms Nixon of $1,000 in March 2018 in two instalments for advertising and court fees was consistent with the emails of 13 and 26 February 2018 and that it is likely that she did not receive any of the particularised invoices, including invoice 2345.

[52] Trust account authorities were signed by Ms Proud, Ms Hrynko and Ms Spark, which the respondent relied upon in his Further Response as authorising the withdrawal of trust monies in payment of invoices rendered by his firm. The Tribunal finds that the withdrawals of trust monies were not in compliance with the LPA and LPR 2007/2017 because:

(a) in the case of Charge 5, at best only one of the executors, Ms Proud, purportedly signed a trust account authority which provided an authority to withdraw monies from the trust account for “all professional costs and disbursements acknowledged to be due to you”.[34] It was not signed by the other joint executor, Ms Sainsbury;

(b) in relation to Charge 15, Ms Spark and Mr Aulfrey were joint executors but the trust account authority, which provided an authority to withdraw monies from the trust account for “all professional costs and disbursements acknowledged to be due to you”, was signed only by Ms Spark;

(c) in the case of Charge 25, the trust account authority purportedly signed by Ms Hrynko (though she cannot recall doing so) provided an authority to

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[34] See the Affidavit of Jill Christine Proud sworn 23 September 2021. Ms Proud stated she cannot recall signing such a document and questions whether she did so since her calendar entries indicate she was in Kingaroy with friends on the date the trust account authority was purportedly signed.

withdraw monies from the trust account for "all professional costs and disbursements acknowledged to be due to you";

(d) in the case of the Sainsbury Matter, the signing of the trust account authority in any event does not justify the withdrawal of trust monies as the Tribunal has found that no invoices had been sent which could be acknowledged as due by the relevant clients at the time of the withdrawal of trust monies as recorded in the trust statement. In fact, the Tribunal accepts the evidence of Ms Sainsbury and Ms Proud that they had requested invoices on at least one occasion, which ultimately led to the respondent sending an invoice with a trust account statement, at which time the clients discovered to their surprise that the invoices had been paid. The Tribunal accepts their evidence;

(e) in the case of Ms Spark and Mr Aulfrey, they deposed to the fact that none of the amounts in the invoices raised for which trust monies were withdrawn were acknowledged to be due prior to being withdrawn. After making a request for invoices, they were provided with some of the invoices for which trust monies were withdrawn on 31 July 2019. The other amounts particularised were not delivered but copies were found on the client file, while three invoices referred to in the trust account as having been withdrawn were not found. The Tribunal accepts Ms Spark and Mr Aulfrey's evidence that no invoices were delivered prior to amounts being withdrawn from the trust account, let alone there being any acknowledgement that they were due; and

(f) in the case of Ms Hrynko, she stated that she could only recall having received one invoice in about June/July 2019, which she queried because it was in her name and not the name of the estate.[35] She otherwise did not recall having received any of the invoices particularised in relation to Charge 25. Consistent with that, she gave evidence that she asked the respondent for an itemised account to know how much the respondent had charged after he had incorrectly completed paperwork, only to be told by the respondent that she had no right to an itemised account until the end of the matter.[36] Ms Hrynko's evidence was that she was taken by surprise when she received the trust account statement showing the amount withdrawn for professional fees. The Tribunal accepts Ms Hrynko's evidence that she did not receive the invoices the subject of the charges nor authorise the withdrawals.

[53] As to Charges 11 and 21, trust account authorities were signed by the respective clients providing for trust monies to be paid for professional costs and disbursements "acknowledged to be due to you". The evidence of Ms Alsemgeest in relation to Charge 11 was that no invoices were received from the respondent and therefore that there was no acknowledgement of the amounts being due prior to the monies being withdrawn from the trust account. There is no evidence to the contrary on the client file and the Tribunal accepts Ms Alsemgeest's evidence. As to Charge 21, Ms Parsons and Ms Guy did sign a trust account authority. However, each provided a statement to the Commissioner that none of the invoices particularised in the charge were sent to them prior to the withdrawal of trust monies, although three invoices were subsequently delivered after the trust monies had been withdrawn (while the remainder were not delivered at all). As the invoices were not delivered prior to the

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[35] Which was not the subject of a charge.

[36] Affidavit of Katrina Maria Hrynko affirmed 14 December 2022.

trust monies being withdrawn, none of the invoices were acknowledged as being due and therefore the withdrawal of trust monies was not authorised under the LPA or LPR 2017.

[54] Nor in any of the cases above were requests made or written notices given of the withdrawals in accordance with r 58(3)(b) of the LPR 2007 (in the case of Ms Hrynko) or r 58(3)(b) of the LPR 2017 (in the case of Ms Sainsbury, Ms Proud, Ms Alsemgeest, Ms Degnan, Ms Spark, Mr Aulfrey, Ms Nixon, Ms Parsons and Ms Guy).

[55] Given the above, the existence of trust account authorities signed by some clients concerned provides no defence to the charges.

*Were the withdrawals of trust monies otherwise justified by the respondent's "usual practice"?*

[56] While the respondent refers in his Further Response and Affidavit to his belief as to what had occurred based on what was asserted to be the "usual practice", the Tribunal does not accept that any "usual practice" was followed. While the respondent refers to the usual practice, he accepts in his Further Response that some or all of the invoices were not sent.

[57] The respondent described his usual practice as being that invoices were sent by the respondent's staff by scanning directly to an email from the printers which bypassed any staff inbox or sent box, appearing to rely on that to explain the lack of any record of them having been sent. The respondent said that monies were only withdrawn after his bookkeeper notified him that 14 days had passed after the invoice was sent and he approved them on that understanding. The Tribunal has found above that no invoices were sent to the clients concerned prior to the withdrawal of trust monies, given the evidence of the clients concerned and the absence of records on the files demonstrating that the invoices had been sent, particularly when there is evidence of records being retained as copies on the files for the relevant matters when documents were sent by email or scan,[37] which are not the subject of the charges. As to the respondent's belief, that is dealt with in relation to the question of dishonesty.

[58] The Tribunal is therefore satisfied that the trust monies were not withdrawn in accordance with the LPA or LPR 2007/2017 given that:

(a) there were no costs agreements in place with any of the clients the subject of the charges;

(b) no invoices were sent to the clients the subject of the charges prior to the withdrawal of trust;

(c) in relation to Charges 2, 5, 9, 15, 19, 23 and 27, there was no trust account authority at all or a valid trust account authority;

(d) even in cases where a trust account authority existed, the clients concerned did not acknowledge that the amounts in the invoices were due, nor in those cases

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[37] See, for example, Hearing Book at 1915–1917 and 2615 (sent by Ms Levi, the conveyancing clerk employed by the respondent, in respect of a sale of property which included an invoice having been emailed (not the subject of Charge 2) and 2184–2185 and 2166 (which appear to have been scanned and there is a TX report on file demonstrating it was sent).

or in fact any of the matters to which the charges have been brought, were any requests issued for payment or written notice of the withdrawals given;[38] and

(e) the trust account records show, and the Tribunal is satisfied, that the amounts were withdrawn by the respondent for his legal fees for the invoices particularised in the charges.

[59] The Tribunal accepts the evidence provided by the clients concerned.

[60] The Tribunal is satisfied that the Commissioner has proven to the requisite standard the particulars of each of Charges 2, 5, 9, 11, 15, 17, 19, 21, 23, 25 and 27, that the respondent withdrew monies without lawful authority as required by s 258 of the LPA and s 58 of the LPR 2007/2017 as particularised.

*Dishonesty or failure to exercise proper diligence?*

[61] In the case of each of Charges 2, 5, 9, 11, 15, 17, 19, 21, 23, 25 and 27, the Commissioner contends that:

(a) the respondent was dishonest because he knew that no invoices had been delivered and that he had no present entitlement to the money; or

(b) alternatively, the respondent ought to have known that no invoices had been delivered and that none of the conditions of lawful withdrawal existed.

[62] The Commissioner contends that the Tribunal should infer that the respondent acted dishonestly in withdrawing trust monies for payment of legal fees knowing that he had no entitlement to do so because he:

(a) knew there were no costs agreements in place because it was not his practice to enter into costs agreements;

(b) knew that the invoices for his fees and disbursements had not been sent to the clients and that the standard wording of the firm's trust account authority authorised trust withdrawals only where the amount was acknowledged to be due. This could not be so when the client was ignorant of the invoices; and

(c) permitted the funds to be withdrawn from the trust monies held on behalf of the clients notwithstanding he knew he had no authority to do so. According to the Commissioner, the respondent was the only legal practitioner in the firm and had the personal conduct of every matter. He was personally responsible for the raising of invoices and the operation of the trust account. From the accumulation of the matters with the same characteristics, there is an inference to be drawn that the respondent knew that he had no present entitlement to the trust money because none of the circumstances permitting transfer of monies existed. Funds were transferred from the trust account to benefit the respondent in spite of that.

[63] The Commissioner submits that the respondent's dishonesty was motivated by his engaging in a scheme calculated to give him the benefit of timely payment of invoices by making unauthorised transfers from the trust account and avoiding delay or scrutiny of invoices by clients. He was given early use of money knowing that there was no present entitlement to it. The Commissioner further submits that the respondent intended to gain an advantage over his clients and that his failures to make

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38 LPR 2007/2017 s 58(3)(b).

initial costs disclosures was a component in achieving that advantage, with his client ignorant of what had occurred and the depletion of the trust funds.

[64] The Commissioner relies on the fact that the respondent's files show that records were kept on the relevant files of documents, including invoices, that were sent via scan or email, whereas there were no records on the files reflecting that invoices had been sent. The Commissioner therefore submits that the Tribunal should draw the inference that the respondent knew those invoices had not been sent. Thus, the dishonesty is said to arise from the intentional creation of a situation in which the respondent claimed a right to payment when he knew he had no entitlement to do so in order to deprive his clients of the right to challenge the legal fees and to enable his firm to receive timely payments. It is not alleged that the respondent did not carry out the work in respect of the files for which the invoices were issued.[39]

[65] Dishonesty is to be determined according to the standards of "ordinary, decent people".[40] It is not necessary that the person concerned realised that the act was dishonest by those standards.[41] However, the Tribunal would have to be satisfied that the respondent knew he had no entitlement to the monies withdrawn from the trust account in payment of the invoices.

[66] The respondent denied in his Affidavit, Response and Further Response that he was dishonest and, as stated, has deposed to his belief that the invoices had been sent such that he was entitled to draw upon the monies on the basis that either the invoices had been sent and 14 days had passed after the invoice was sent or he was entitled to do so under the trust account authority. He attributed the failure to deliver invoices to his poor document management systems and stressors he was under at the time. In the respondent's Affidavit, while he denied dishonesty, he stated that he was "willing to accept that [he] failed to maintain due diligence in [his] management and oversight of [his] billing practices".[42]

[67] Of course, the respondent was not able to be cross-examined, which affects the weight of his evidence. Nevertheless, the onus lies on the Commissioner to satisfy the Tribunal that the respondent acted dishonestly or without exercising proper diligence.

[68] There is no question on the evidence before the Tribunal that the respondent has at best failed to exercise due diligence if it is accepted that he failed to realise that invoices had not been sent to clients, trust account authorities were not signed and carried out no checks to ensure the regulatory requirements for the withdrawal of trust monies had been met. A principal of a firm is responsible for ensuring that the regulatory requirements for the conduct of the firm are met, particularly requirements which are fundamental to the operation of a practice and for the protection of a client.

[69] As to the question of dishonesty, the Commissioner has established in relation to each client that no invoices were sent prior to the withdrawal of trust monies and that there are documents on file which demonstrate that a number of documents which had been emailed or scanned directly to email were retained on the client files, in contrast to the relevant invoices, for which there is no evidence that they had been sent.[43]

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39 Although there is an allegation of excess charging in relation to one matter.

40 *Macleod v The Queen* (2003) 214 CLR 230 at 242 [37] (Gleeson CJ, Gummow and Hayne JJ) quoting *Peters v The Queen* (1998) 192 CLR 493 at 504 [18] (Toohey and Gaudron JJ).

41 *Macleod v The Queen* (2003) 214 CLR 230 at 242 [38] (Gleeson CJ, Gummow and Hayne JJ).

42 Affidavit at [61].

43 Save for Invoice 2345 in respect of Charge 17 discussed above.

While there are repeated instances of the offending conduct the subject of the charges, and the respondent's only explanation of how that conduct occurred lacks credibility, the evidence is not sufficient to demonstrate dishonesty, particularly given there is no evidence as to how the respondent otherwise conducted his practice. The Commissioner's submission requires the Tribunal to assume a level of knowledge and competence on the part of the respondent, rather than it being established by the evidence relied upon. While it is difficult to avoid a conclusion that the respondent was acting wilfully in not ensuring that invoices were sent to clients and then withdrawing trust monies without any entitlement to do so, given the Tribunal must be satisfied to the *Briginshaw* standard, the evidence presented leaves open another explanation for the respondent's conduct.

[70] There is no evidence from any employee within the firm or anyone else as to how the respondent operated in terms of the issuing of invoices and his review of files. While the respondent was the sole operator of the firm and as principal was responsible for the invoices raised and the operation of the trust account, his failure to know whether or not invoices had been sent to clients or that there had been no compliance with the mandatory requirements of the LPA and LPR 2007/2017 before trust monies were withdrawn on a number of occasions in respect of a number of clients could be due as much to a gross dereliction of his professional obligations as it could be due to dishonesty.

[71] While the Commissioner submits that the respondent was operating a scheme to ensure he was paid in a timely way and the client deprived of a right to dispute the invoices, that is somewhat negated by the fact that the payments were recorded in the respective trust accounts and the respondent knew he had to ultimately pay the trust monies to the clients and account for the monies. As such, such a scheme would be a fairly short-sighted one and, as these proceedings demonstrate, he could not have thought that the clients were without an avenue of complaint.[44] The fact that the respondent was acting in reckless disregard of his obligations is given some support by the fact that he did not change his practise notwithstanding complaints made by Ms Sainsbury as to a lack of accounting of expenses and any itemisation of accounts in July and August 2019, in circumstances where his letter of 1 August 2019 made it clear that monies for professional costs and disbursements had been withdrawn from the trust monies. Similarly, the Commissioner wrote to the respondent on 10 December 2019 informing him of an investigation into complaints made by Ms Alsemgeest, including a failure to comply with the provisions of the LPA and the LPR 2017. Notwithstanding that, the respondent did not alter his practices when engaged by the Stielers or the Hills, which resulted in Charges 19 and 23 respectively. The fact that the respondent did not alter his practices after he was requested to provide itemised accounts and complaints were made to the Commissioner suggests blind disregard or complete ignorance of his obligations under the LPA rather than dishonesty.

[72] In the circumstances, the Tribunal is not satisfied to the requisite standard that the respondent was dishonest. The Tribunal does, however, find that the respondent grossly failed to exercise due diligence in the management of his files, rendering of

[44] For example, Mr Dumic made a complaint to the Commissioner on 24 April 2019 as to not receiving itemised accounts. Similarly, Ms Sainsbury referred to being in contact with the Commissioner as early as 19 July 2019 and in an email of 12 August 2019 referred to having threatened the respondent with going to the Commissioner if he did provide an account.

invoices and in ensuring that the requisite procedures had been followed before withdrawing monies from the trust accounts of the relevant clients.

Charges 3 and 13 – Failure to Provide Itemised Bill

[73] The Commissioner contends that the respondent failed to provide an itemised bill on the request of clients.

[74] As to Charge 3, Mr Dumic requested an itemised bill on 11 December 2018. The respondent failed to comply with that request until 12 June 2019. The respondent accepts that the itemised bill was not provided until 12 June 2019 but given the timeframe involved, does not concede that the conduct amounts to professional misconduct or unsatisfactory professional misconduct.[45]

[75] The provision of the itemised account more than six months after it was requested was clearly in breach of s 332(2) of the LPA, which obliges a practitioner to provide an itemised account within 28 days after the request is made. The charge is proven.

[76] As to Charge 13, five invoices were provided to the client, Ms Alsemgeest, as a lump sum bill. An itemised bill for each of the five invoices was requested on 17 January 2019 and further requested on 28 February 2019. The respondent failed to comply with those requests until 10 July 2020. The respondent accepts that the itemised bill was not provided until 10 July 2020.[46] The respondent explained that the client was a friend of his sister-in-law who approached him begging for help, that he wrote his fees down significantly, and that he felt aggrieved at having done the client a favour and then having been put to the significant trouble of being asked to justify his costs.[47]

[77] The provision of the itemised account more than 12 months after it was initially requested was clearly in breach of s 332(2) of the LPA. The fact that the respondent did the work as a favour to his client did not negate his obligation to comply with his statutory obligations. The charge is proven.

Charge 4 – Failure to Deposit Trust Monies

[78] The Commissioner contends that on or about 15 August 2018, in the conduct of the Dumic Matter, the respondent failed to deposit $591.16 in trust money into the trust account of Bradley Munt & Co, contrary to s 248(1) of the LPA.

[79] On 15 August 2018, Bradley Munt & Co received the proceedings from the sale of the deceased's property. Prior to the deposit of the sale proceeds into the firm's trust account, the respondent deducted $591.16 in payment of invoices for legal costs. This is evidenced by the trust account entries in relation to the Dumic Matter.

[80] The invoices[48] had not been delivered to Mr Dumic and no demand for payment had been made. Nor was there any direction from Mr Dumic to deal with the $591.16. This is verified by Mr Dumic in his affidavit relied upon by the Commissioner.[49]

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[45] Further Response at [3.2]–[3.4].
[46] Further Response at [13.2]–[13.4].
[47] Affidavit at [65].
[48] As particularised at [4.4].
[49] Affidavit of Ian Dumic sworn 6 December 2022 at [29]–[31].

[81] The respondent does not dispute that some or all of the relevant invoices were not delivered to his client but contends that he was unaware of that at the time of the relevant withdrawals.[50]

[82] Further, the respondent contends that he acted in reliance upon the general authority dated 9 August 2022.[51] However, the invoices were not provided to Mr Dumic nor had any other demand for payment been made or direction given by Mr Dumic that the amount of $591.16 could be deducted from the proceeds of sale which were required to be deposited into the trust account in relation to the sale. The withdrawal was therefore not authorised.

[83] The Tribunal is satisfied that the Commissioner has proven the charge as set out in the particulars on the evidence before it.

Charges 7 and 8 – Charging of Excessive Legal Costs

[84] Charges 7 and 8 relate to excessive charging of legal costs by the respondent in respect of the Sainsbury Matter.

[85] Charge 7 is particularised that between 5 October 2018 and 1 April 2019, the respondent charged Ms Sainsbury $18,175.00 in lump sum invoices whereas the itemised costs for the matter amounted to $4,425.70.

[86] The respondent accepts that the fees charged by him to his client were excessive but denies any allegation of dishonesty.[52]

[87] As to Charge 8, on 1 August 2019 the respondent issued an invoice for $6,750.00 plus GST (a total of $7,507.50) in substitution for the invoice relevant to Charge 7. On Ms Sainsbury's request, an itemised bill for the administration of the estate was delivered on 14 November 2019 for $4,425.70.

[88] The Commissioner contends that the invoices issued by the respondent were for excessive legal costs in connection with the practice of law and draws attention to the "significant disparity" between the final bill amount and the itemised fee.

[89] The Commissioner further submits that the conduct is aggravated against the respondent in that, notwithstanding he was alerted to a challenge to the itemised lump sum bills in Charge 7, and subsequently obtained an itemised bill, the respondent continued to claim in the final bill an amount that was excessive compared to the amount that was itemised.

[90] The respondent's submission in respect of Charge 8 is that the charge is duplicitous and/or oppressive because the particulars of the charge are, or could be, adequately reflected in Charge 7.[53]

[91] The Commissioner submits, and the Tribunal accepts, that Charges 7 and 8 are not duplicitous but arise out of different circumstances. Charge 7 relates to the issuing of a fee note on 1 April 2019 for work done between 5 October 2018 and 1 April 2019 in the amount of $18,175. That fee was subsequently assessed by a legal costs assessor and an itemised bill was delivered on 14 November 2019 in the sum of $4,425.70.

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50 Further Response at [4.4]–[4.5].
51 Further Response at [4.6].
52 Further Response at [6.2]–[6.3].
53 Further Response at [8.2]–[8.6].

Charge 8 relies on the issuing of a reduced bill on 1 August 2019 in an amount of $7,507.50 in relation to the same matter and the fact that the subsequent assessment contained in the itemised bill was $4,425.70. While Charges 7 and 8 relate to the same matter, they rely on different acts to substantiate the charge of charging excessive legal costs, namely the issuing of the fee note in the amount of $18,175 and the issuing of a reduced fee note in the amount of $7,507.50, both of which were excessive when compared to the itemised bill in the sum of $4,425.70.

[92] There is no specific criterion by which to measure whether costs charged are excessive. Some guidance is found in s 343 of the LPA insofar as it provides that a costs assessor or court may refer a matter to the Commissioner to determine whether disciplinary action should be taken where costs are reduced by 15% or more. The fact that there is such a reduction does not of itself prove that the charging is excessive.

[93] The fact that a costs assessment is lower than the amount charged, as is the case here, can be relied on to prove that the respondent has charged excessive legal costs.[54] In *Legal Services Commission v Jackson* the Tribunal stated that:[55]

> "It is undoubtedly the case (and is broadly accepted) that whilst the taxed amount is not necessarily the sole factor to be taken into account, the Tribunal is entitled to rely upon the taxed amount as the appropriate standard, and to determine, by reference to that taxed amount, that the amount in fact charged was grossly excessive. In *D'Allesandro*, the court concluded that there was no basis upon which it should interfere with that approach."
>
> (footnotes omitted)

[94] In the present case, there was no costs agreement dictating how the matter was to be charged. The bills were prepared on a lump sum basis with scant detail, such that no assessment can be done by reference to the work undertaken and the amount charged in this instance. However, the costs assessor who the respondent asked to prepare an itemised bill did so according to the Supreme Court scale of costs.[56] That assessment was $4,472.45 (inclusive of GST), some 75% less than the original bill. The fact that the charging was excessive is supported by the respondent reducing the bill, in the first instance after being challenged, by more than half the original amount of $18,175 to $7,507.50, rather than seeking to justify or explain the amount charged. It is further supported by the evidence of Ms Proud that the respondent had indicated verbally that the fees would be between $3,500 and $4,000 as probate was not required.[57] Such a dramatic difference between the original bill and the itemised bill as assessed supports the fact that the charging was excessive. The Tribunal is satisfied that Charge 7 is established.

[95] As to whether charging $7,507.50 (the adjusted amount) was excessive when compared to the assessed amount of $4,472.45, the assessed amount was 59.57 per cent of the adjusted amount, being a reduction of approximately 40 per cent.[58] Such a differential is inexplicable by any explanation other than the

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54 *Legal Services Commissioner v Jackson* [2017] QCAT 207 at [97].

55 [2017] QCAT 207 at [67].

56 Hearing Book at 132.

57 Affidavit of Jill Christine Proud sworn 23 September 2021 at [6].

58 Cf *Legal Services Commissioner v Jackson* [2017] QCAT 207, referring to *Legal Profession Complaints Committee v O'Halloran* [2013] WASC 430 where a reduction of 39% was found to be excessive charging involving personal injury clients.

respondent's charge being excessive and unjustified, without any proper measure for charging the work done by the respondent being used to determine the amount owing. The significant reduction between the adjusted amount and the final assessed amount supports the fact that the charging was excessive. The Tribunal is satisfied that Charge 8 is established.

Charge 14 – Failure to Comply with Notice

[96] Charge 14 relates to the respondent's conduct in not complying with a notice issued by the Commissioner in respect of the Alsemgeest Matter.

[97] On 10 December 2019, the respondent was notified by letter from the Commissioner that an investigation was being conducted into matters arising from a complaint made by Ms Alsemgeest. That letter required the respondent to make a "full explanation". The respondent did not respond to the matters of complaint raised in the letter.

[98] The Commissioner repeated the request for a response to the matters of complaint in correspondence dated 16 June 2020, which was issued pursuant to s 443(1)(a)(i) of the LPA which is set out below in the discussion as to the charges the subject of OCR 106-23. The respondent again did not respond to the matters of complaint.

[99] On 20 July 2020, the Commissioner issued the respondent a notice under s 443(3) of the LPA requiring the respondent to provide a response to the matters of complaint. The notice listed the matters for which an explanation was required.

[100] The respondent in his Further Response accepted that he did not address the specific matters as identified in the s 443(3) notice, notwithstanding he did provide responses on 13 January and 3 August 2020.

[101] It is clear from the respondent's correspondence to the Commissioner dated 13 January and 3 August 2020 that he did not provide an explanation for the matters outlined in either the letter of 10 December 2019 or the notice of 20 July 2020 and did not respond at all to the notice issued under s 443(1) of the LPA.

[102] The Tribunal is satisfied that the charge is made out.

**Characterisation of the Conduct**

[103] The Tribunal, having been satisfied that the conduct that has been particularised in relation to Charges 1–28 has been established by the evidence, must consider how the conduct is properly characterised. By s 456(1) of the LPA, the Tribunal's power to make a disciplinary order is dependent on it being satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct. Sections 418 and 419 of the LPA set out the statutory definitions of unsatisfactory professional conduct and professional misconduct respectively:

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

**419 Meaning of professional misconduct**

(1) Professional misconduct includes—

(a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and

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

[104] The conduct is to be assessed by reference to those provisions and the common law test.[59] In *Adamson v Queensland Law Society Incorporated*, Thomas J articulated the test for professional misconduct as follows: "The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency".[60]

[105] In characterising the conduct, the Tribunal only has regard to the conduct which is the subject of the charge. In *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand* (***Shand***),[61] the Court of Appeal confirmed that the imposition of disciplinary orders under the LPA involves a two-stage test and that each stage involves a different inquiry. First, a finding of professional misconduct or unsatisfactory professional conduct needs to be made. That finding is made by assessing the seriousness of the conduct, judged without reference to subsequent events and in particular the practitioner's subsequent rehabilitation or reaffirmation of character. Secondly, the Tribunal determines the appropriate disciplinary order. Subsequent events are relevant in deciding upon the appropriate disciplinary order once a finding is made.

[106] The Commissioner submits that the conduct in all charges is properly characterised as professional misconduct.

[107] A failure to comply with a notice issued under s 443(3) of the LPA is characterised by that section as professional misconduct, which is relevant to Charge 14.

[108] While the Commissioner submits that the Tribunal should find that the respondent's conduct, when considered in totality, constituted professional misconduct, the Tribunal determined that it was more appropriate in the present case to consider the characterisation of the conduct by reference to the conduct relevant to the different groups of offences.

[109] As to the charges that the respondent failed to make costs disclosures (Charges 1, 6, 10, 12, 16, 18, 20, 22, 24, 26 and 28), the requirement to make costs disclosure is a statutory requirement which is in mandatory terms in ss 308 and 310 of the LPA. Costs disclosure informs clients of a number of matters, including the basis upon

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59 *Legal Services Commissioner v Redmond* [2018] QCAT 231 at [27].

60 [1990] 1 Qd R 498 at 507, citing *Ex parte Attorney-General; Re A Barrister and Solicitor* (1979) 40 F.L.R. 1 at 242–243 and 245–246.

61 [2018] QCA 66.

which they will be charged, how they will be charged, and their rights to seek a costs assessment and set aside the costs agreement. This is critical to the proper accountability of a legal practitioner to a client in relation to the work carried out and charges incurred. The requirement to make costs disclosure is not a new requirement imposed upon a law practice. It has been a requirement of the LPA since its inception.[62]

[110] The respondent accepts that he failed to make costs disclosures as required by the LPA. He claimed, however, that he "believes he followed his usual practice of providing and discussing with the client the Supreme Court scale of fees, upon which he intended to base his professional fees". Even if that was accepted, it would not constitute compliance with the LPA. The Tribunal has not, for the reasons set out above, accepted that the respondent did adopt such a practice in relation to the clients to whom the charges relate. There is no evidence suggesting that the respondent had any established method of charging in relation to the clients to whom the charges relate. That is supported by the fact that in relation to the clients the subject of Charges 7 and 8, the respondent's evidence in his Affidavit was that his firm did not time cost and he would look at the work undertaken since the last invoice to assess the time and value based on his experience and issue an invoice in that amount.

[111] Given the repeated failure to comply with the mandatory statutory provisions on multiple occasions over a number of years in relation to one of the critical obligations to a client, the respondent's conduct has fallen well short of, to a substantial degree, the standard of professional conduct observed by members of the profession of good repute and competency and constitutes professional misconduct as defined in s 419 of the LPA.

[112] As to the charges that the respondent made trust account withdrawals without lawful authority contrary to s 258 of LPA and s 58 of the LPR 2007/2017 (Charges 2, 5, 9, 11, 15, 17, 19, 21, 23, 25 and 27), the respondent's failure to comply with the requirements of the LPA and LPR, by failing to exercise proper diligence which would have brought his attention to the fact that no invoices had been delivered and the pre-conditions for the lawful withdrawal of trust monies had not been satisfied, is of the most serious order. While the Tribunal is not satisfied that the respondent was dishonest, the Tribunal is also not satisfied that the respondent could have reasonably believed that the usual practice had been followed. The respondent was the sole principal of the firm and responsible for ensuring compliance with the LPA and LPR 2007/2017 and that proper systems were in place for the sending of invoices prior to the withdrawal of trust monies for the payment of legal costs. Even if he had believed that the invoices had been sent, a reasonable practitioner would have taken steps to satisfy himself that the regulatory requirements for withdrawing trust account monies in payment of fees before the withdrawal occurred. A cursory glance of the client files in question and checking with staff before drawing down the monies to pay fees would have demonstrated that the invoices had not been sent and that the requirements for withdrawing trust money had not been met.

[113] The breaches occurred not only on a number of occasions but over a number of years, spanning a period in one case from 2012 until 2020 with legal costs being withdrawn from trust monies in an amount of $46,241. That the breaches occurred on a repeated number of occasions involving not insignificant amounts in relation to 11 different

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[62] In force since 1 January 2008.

clients supports the fact that the respondent was not exercising any proper diligence to check whether the requirements of the LPA and LPR 2007/2017 had been met or invoices sent.

[114] In the circumstances, the respondent's conduct can only be regarded as reckless and a serious breach of one of his core obligations as a legal practitioner. As was observed by Daubney J in *Legal Services Commissioner v Quinn*,[63] drawing on past decisions of this Tribunal, "the start and finish of considerations concerning dealings with a solicitor's trust account must lie in recognition of the fundamental principle that proper maintenance of trust accounts by lawyers is a vitally important aspect of professional legal practice".[64] His Honour further approved the comments of Street CJ in *Law Society of New South Wales v Jones* that "reliability and integrity in the handling of trust accounts are fundamental prerequisites in determining whether an individual is a fit and proper person to be entrusted with the responsibilities attaching to a solicitor".[65]

[115] Similarly, as was noted by the Hon Peter Lyons QC in *Legal Services Commissioner v Conradie*,[66] where payments were found to have been made without authority in breach of the respondent's obligation as a trustee:

> "In principle, it is a serious matter for a solicitor to withdraw money from the solicitor's trust account, without authority. While there may be some exceptional cases, as a general rule such conduct falls short, to a substantial degree, of the standard of professional conduct observed and approved by members of the profession of good repute and competency. …"

[116] The Tribunal considers that the respondent's conduct in relation to this group of charges was a gross dereliction of the standard of competence and diligence expected of a reasonable practitioner which would justify a finding that the respondent is not a fit and proper person for practice. The Tribunal therefore finds that the conduct of the respondent in making trust account withdrawals without lawful authority constitutes professional misconduct.

[117] Charges 3 and 13 involve conduct whereby the respondent failed to comply with a request for an itemised bill. In the case of Charge 3, the respondent did not provide an itemised bill until six months after the initial request. In the case of Charge 13, the respondent did not provide the itemised bill until 18 months after the request was made. The LPA requires an itemised bill to be provided within 28 days after the date of the request.[67] The fact that Charge 13 related to work done for a friend of the respondent's sister-in-law, and the respondent resented doing the client a favour and then being asked to justify his costs, does not advance the respondent's position or lessen the seriousness of his breach of the requirements of the LPA. The fact that the respondent referred to that relationship as being relevant further demonstrates his lack of understanding of his obligations under the LPA. It is a matter of irrelevance. The respondent's conduct in relation to these charges fell short of the standard of competence and diligence expected of a reasonably competent practitioner and constitutes unsatisfactory professional conduct.

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63 [2018] QCAT 196 at [12].

64 *Legal Services Commissioner v Quinn* [2018] QCAT 196 at [12].

65 Unreported, Street CJ, NSWCA, CA No 333 of 1977, 27 July 1978 at 10.

66 [2018] QCAT 170 at [54].

67 LPA at s 332(2).

[118] The Tribunal has found that the respondent failed to deposit $591.16 into the general trust account contrary to s 248(1) of the LPA, with the respondent deducting the amount for payment of invoices for legal costs. Such conduct fell short of the standard of competence and diligence expected of a reasonably competent practitioner and constitutes unsatisfactory professional conduct.

[119] As to Charges 7 and 8, the initial invoice and second invoice were issued for amounts well above the ultimate charge assessed as appropriate by a costs assessor. Pursuant to s 420(b) of the LPA, the charging of excessive legal costs in connection with the practice of law is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

[120] The significant disparity in the ultimate charge assessed by the costs assessor and the invoices issued by the respondent is consistent with the respondent's lack of a proper system for charging clients, which he readily admitted in relation to these charges. According to the respondent in his Affidavit, he made a "serious miscalculation" which was the result of him "assessing the time and value [of work undertaken since the last invoice] based on [his] experience".[68] The Commissioner did not submit, nor did the Tribunal therefore find, that the charging by the respondent was dishonest. While overcharging a client is a serious breach of a solicitor's obligations to his client and the overcharging happened on two occasions in relation to the same client, the respondent did after the second occasion cause a proper itemisation of costs to be prepared by a costs assessor. In the circumstances, the Tribunal finds that the conduct fell short of the standard of competence and diligence expected of a reasonably competent practitioner and constitutes unsatisfactory professional conduct.

[121] As to Charge 14, the respondent did not offer any reasonable excuse for his lack of response to the notice as required. Having failed to respond within the time prescribed in the notice under s 443(3) of the LPA without reasonable excuse, which continued for a further 14 days, the respondent engaged in professional misconduct as provided under s 443(4) of the LPA.

**OCR106-23**

[122] The disciplinary application in OCR106-23 contains three charges to be determined by the Tribunal.

[123] The three charges relate to the failure by the respondent, without reasonable excuse, to comply with notices issued by the Legal Services Commission (**Commission**) under s 443(3) of the LPA.

[124] The respondent has largely accepted the conduct in his Response in OCR106-23. For the reasons set out below, the Tribunal is satisfied that the charges are established.

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68 Affidavit at [75].

[125] Section 443 of the LPA provides as follows:

> **443 Powers for investigations**
>
> (1) The entity carrying out an investigation as mentioned in section 435 or 436 may, for the investigation—
>
> (a) require an Australian legal practitioner who is the subject of the investigation—
>
> (i) to give the entity, in writing or personally, within a stated reasonable time a full explanation of the matter being investigated; or
>
> (ii) to appear before the entity at a stated reasonable time and place; or
>
> (iii) to produce to the entity within a stated reasonable time any document in the practitioner's custody, possession or control that the practitioner is entitled at law to produce; or
>
> (b) engage a person, whom the entity considers is qualified because the person has the necessary expertise or experience, to report on the reasonableness of an Australian legal practitioner's bill of costs.
>
> (2) Subject to subsection (6), the Australian legal practitioner must comply with a requirement under subsection (1)(a). Maximum penalty—50 penalty units.
>
> **(3) If the practitioner fails to comply with the requirement, the entity may give the practitioner written notice that, if the failure continues for a further 14 days after the notice is given, the practitioner may be dealt with for professional misconduct.**
>
> **(4) If notice under subsection (3) is given and the failure continues for the 14 day period—**
>
> **(a) the Australian legal practitioner is taken to have committed professional misconduct, unless the practitioner has a reasonable excuse for not complying with the requirement within the period; and**
>
> **(b) the commissioner may apply to the tribunal for an order in relation to the charge that the practitioner has committed professional misconduct as stated in paragraph (a) as if the application were an application in relation to a complaint against the practitioner. ….**
>
> (emphasis added)

## The Conduct

Muir Matter: Charge 1

[126] Charge 1 relates to the respondent's failure, without reasonable excuse, to comply with a notice issued by the Commission regarding a complaint and subsequent investigation in relation to Ms Rhlema Muir (the **Muir Matter**). The particulars of the charge have largely been admitted, save that the respondent in his Response in OCR106-23 identified some correspondence which he could not locate and therefore

could not respond to. The Affidavit of Bradley Mark Fitzgerald sworn 1 June 2023 exhibits the correspondence relevant to the particulars, and the particulars accurately reflect the content of the correspondence relevant to the charge. The Tribunal is therefore satisfied the particulars of the charge have been proven by the Commission, which include the following.

[127] At some time after August 2018, Ms Muir engaged the respondent to assist with the administration of the deceased estate of her late husband.

[128] On or about 10 February 2021, the Commission received a complaint from Ms Muir regarding the respondent's conduct in relation to Ms Muir's retainer.

[129] On or about 23 March 2021, the respondent was notified by letter from the Commissioner pursuant to s 437 of the LPA that an investigation was being conducted into the conduct raised by Ms Muir's complaint. That letter required the respondent to provide a full explanation as to the matters raised in the complaint by 13 April 2021.

[130] The respondent replied to the Commission on 13 April 2021.

[131] On or about 30 June 2021, the respondent was notified by letter from the Commission pursuant to s 437 of the LPA that the Commission had decided to broaden the scope of its investigation of Ms Muir's complaint. That letter required the respondent to provide a full explanation of the additional matters raised by 14 July 2021.

[132] The respondent replied to the Commission on 13 July 2021 but did not provide a full explanation.

[133] On or about 19 July 2021, the Commission issued a notice pursuant to s 443(1)(a)(i) of the LPA, requesting a response to the issues the subject of Ms Muir's complaint by 2 August 2021. The respondent replied to the Commission on 2 August 2021.

[134] On or about 20 July 2022, the Commission sent a second notice to the respondent issued pursuant to s 443(1)(a)(i) of the LPA, requesting a further response to the issues the subject of Ms Muir's complaint by 3 August 2022. The respondent replied to the Commission on 8 August 2022, but failed to provide a full explanation as to the matters raised.

[135] On or about 16 August 2022, the Commission sent to the respondent a notice issued pursuant to s 443(3) of the LPA requiring a response to the issues the subject of Ms Muir's complaint by 30 August 2022.

[136] The respondent replied to the Commission on 29 August 2022, 1 September 2022 and, by his solicitors Gilshenan & Luton, on 21 November 2022, but failed to provide a full explanation as to the matters raised in Ms Muir's complaint.

[137] On or about 12 December 2022, the Commission sent a letter to the respondent's solicitors, Gilshenan & Luton, requesting the respondent to provide by 16 January 2023 any submissions about any reasonable excuse the respondent believes he may have had for not complying with the s 443 notices.

[138] The respondent failed to respond to the correspondence from the Commission dated 12 December 2022.

[139] On or about 16 March 2023, the Commissioner sent to the respondent a letter in relation to his non-compliance with s 443(3) of the LPA. That letter notified the respondent that the Commissioner was satisfied that s 443(4)(a) of the LPA was

enlivened and that the Commissioner would be applying to the Tribunal pursuant to s 443(4)(b) of the LPA for a disciplinary order.

[140] On or about 29 March 2023, the Commission received an email from the respondent but he did not provide any submissions as to his s 443 non-compliance.

[141] As of 29 March 2023, the respondent:

(a) had not complied with the notices; and

(b) had not provided any reasonable excuse to the Commission or the Commissioner for his non-compliance.

[142] The respondent admits that he did not provide any submissions as to his failure to respond. The respondent also generally accepts that he failed to comply with the notices but submits that he engaged with the Commission in the early stages of the investigation[69] and notes that his correspondence confirmed that the full file had been provided to the Commission.[70]

[143] The respondent's non-compliance continued for more than 14 days after notice was given to him under s 443 and without reasonable excuse, such that the respondent is taken to have committed professional misconduct by virtue of s 443(4)(a) of the LPA.

[144] The Tribunal is satisfied that the charge is established.

Black Matter: Charge 2

[145] Charge 2 relates to the respondent's failure, without reasonable excuse, to comply with a notice issued by the Commission regarding a complaint and subsequent investigation in relation to Ms Juliana Black (the **Black Matter**). The particulars of the charge have largely been admitted, save that the respondent in his Response in OCR106-23 identified some correspondence which he could not locate and therefore could not respond to. The Affidavit of Bradley Mark Fitzgerald sworn 1 June 2023 exhibits the correspondence relevant to the particulars and the particulars accurately reflect the content of the correspondence relevant to the charge. The Tribunal is therefore satisfied that the particulars of the charge have been proven by the Commission, including the following.

[146] Ms Black engaged the respondent to assist with a property settlement matter on or about 29 August 2020.

[147] The Commission received a complaint from Ms Black regarding the respondent's conduct in relation to the retainer on or about 8 December 2021. On or about 28 July 2022, the respondent was notified by letter from the Commission issued pursuant to section 437 of the LPA that an investigation was being conducted into the respondent's conduct as raised by Ms Black's complaint. The respondent was required to provide a response by 11 August 2022. The Commission received no response from the respondent.

[148] On or about 16 August 2022, the Commission sent a notice to the respondent pursuant to s 443(1)(a)(i) of the LPA requesting a response to the issues the subject of Ms Black's complaint by 23 August 2021.

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[69] Response to Disciplinary Application filed on 13 April 2023 (**Response in OCR106-23**) at [1.21]–[1.23].

[70] Response at [1.21].

[149] The respondent replied to the Commission on 23 August 2022, 24 August 2022, 29 August 2022 and 1 September 2022 but failed to provide a full explanation as requested by the Commission.

[150] On or about 8 September 2022, the Commission sent to the respondent a notice issued pursuant to s 443(3) of the LPA, requiring a response to the issues the subject of Ms Black's complaint by 22 September 2022. No response was provided by the respondent by that date or subsequently.

[151] It is admitted that the respondent did not provide any submissions in response and the respondent generally accepts that he failed to comply with the notices.[71] However, the respondent notes that his correspondence conceded that the Black Matter was not conducted in an appropriate matter and that he proposed an immediate refund of the monies paid by Ms Black.[72]

[152] The Tribunal is satisfied that the charge is established.

Rawson Matter: Charge 3

[153] Charge 3 relates to the respondent's failure, without reasonable excuse, to comply with a notice issued by the Commission regarding an investigation relating to his representation of Mr Rawson (the **Rawson Matter**) by 2 September 2022 and subsequently. The particulars of the charge have largely been admitted, save that the respondent in his Response in OCR106-23 identified some correspondence which he could not locate and therefore could not respond to. The Affidavit of Bradley Mark Fitzgerald sworn 1 June 2023 exhibits the correspondence relevant to the particulars and the particulars accurately reflect the content of the correspondence relevant to the charge. The Tribunal is therefore satisfied the particulars of the charge have been proven by the Commission, which includes the following.

[154] The correspondence in the particulars establishes that despite correspondence between the Commission and the respondent since 28 January 2022, the respondent failed to provide any substantive response to the matters requested by the Commission. The first notice pursuant to s 443(3) of the LPA was sent by the Commission on 17 March 2022. The respondent responded on 1 April 2022 that he had been unable to respond due to illness. On 8 April 2022, the respondent provided a response to the Commission but not a full explanation of the matters requested.

[155] On 19 August 2022, the Commission sent a letter pursuant to s 443(3) of the LPA to the respondent requiring a response to the issues raised by the Rawson Matter by 2 September 2022. No response was forthcoming from the respondent providing any substantive response despite follow-up correspondence from the Commission including a request to identify any reasonable excuse for not complying with the s 443 notices.

[156] The respondent had not provided an explanation by the date required under s 443(3) of the LPA. No reasonable excuse was or has been provided by the respondent that would excuse his conduct.

[157] The respondent generally accepts that he failed to comply with the notice and admits that he did not provide any submissions as to his failure to respond. He stated in his

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[71] Response at [2.15]–[2.17].
[72] Response at [2.15].

Response in OCR106-23 that his correspondence outlined that the fact that he had recently been served with a notice commencing civil proceedings gives the relevant context to his failure to respond.[73]

[158] The Tribunal is satisfied that the charge is established.

**Characterisation of the Conduct**

[159] In relation to Charges 1, 2 and 3, the respondent failed to respond to notices under s 443(3) of the LPA within the period provided and he either accepts or "generally accepts" that he failed to comply in his Response in OCR106-23. That is supported by the evidence relied upon by the Commissioner in relation to the particulars of each charge. Despite the fact that the respondent did provide some response to the Commission in relation to the Muir and Rawson Matters, those responses did not comply with the Commission's request and he did not then comply with the notices under s 443(3) of the LPA. The respondent has offered no reasonable excuse for his failure to comply despite being given the opportunity by the Commission to do so when the Commission was deciding whether or not to commence a proceeding under s 443(4) of the LPA. No reasonable excuse was offered by the respondent and, under s 443(4)(a) of the LPA, he is taken to have committed professional misconduct. The Tribunal is therefore satisfied that the respondent has engaged in professional misconduct in relation to each of the charges.

**APPROPRIATE SANCTION**

[160] In assessing the question of an appropriate sanction as a result of the Tribunal being satisfied that the respondent has engaged in professional misconduct and unsatisfactory professional conduct in relation to the charges the subject of the two proceedings, the primary role of the proceedings is protective in nature, not punitive.[74] The Tribunal should primarily have regard to the protection of the public and maintenance of proper professional standards.[75] Personal and general deterrence are relevant to the protection of the public.[76]

[161] Section 456 of the LPA provides for a broad range of orders that may be made by the Tribunal.

[162] The Commissioner submits that the appropriate order for the Tribunal to make is an order recommending that the respondent's name be removed from the local roll. It submits that such an order is the only available option that adequately denounces and deters practitioners from similar conduct and protects the public from like conduct in the future. The Commissioner further contends that the respondent's ongoing dealings with clients' trust monies was in circumstances which demonstrated a grave departure from the fundamentals of a solicitor holding trust account monies of the client.

[163] In determining the appropriate sanction, the Court can have regard to conduct subsequent to the events which constituted the offending conduct and any mitigating circumstances. The respondent in his Affidavit explained that he had faced a number of professional and personal stressors in the last five to six years, including that:

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73 Response at [3.17]–[3.19].
74 *Legal Services Commissioner v Madden (No 2)* [2009] 1 Qd R 149 at [122].
75 *Legal Services Commissioner v Madden (No 2)* [2009] 1 Qd R 149 at [122].
76 *Attorney-General v Bax* [1999] 2 Qd R 9 at 22.

(a) his workload had increased "enormously", which he struggled with as a sole practitioner;

(b) he estimated he had been in court some three days per week on average;

(c) he was typically responsible for a half dozen settlements per week;

(d) he was working long hours and most weekends;

(e) he was primarily responsible for the management of the firm and had inadequate administrative support, having only employed two support staff with his wife assisting with the bookkeeping;

(f) since 2016 he had a high turnover of staff, in particular losing his conveyancing clerk which meant that his wife had to assist with the conveyancing files under his supervision;

(g) COVID-19 lockdowns had an enormous impact because he always operated a paper practice and had to manage staff working remotely;

(h) he was not technologically proficient and did not use practice management software such as Leap, although his wife used it for conveyancing files; and

(i) he lost a close family member and had to care for another family member and relocate her to a home.

[164] In his Affidavit, the respondent also stated that:

(a) he has reflected on the proceedings and recognised he was treading water trying to practise in total chaos and is upset his otherwise unblemished career has ended as it has;

(b) the proceedings have caused him great stress, shame and embarrassment;

(c) he has closed his office and is not taking new clients or instructions and would not renew his practising certificate for 2023–2024;

(d) he wants some time away from practising law and has no intention of practising again or being a principal, partner or director of a practice;

(e) he is willing to provide an undertaking never to apply for a principal level practising certificate again;

(f) if he were to seek readmission to practice, he would undertake any course the Tribunal considers appropriate and would welcome referral to the Queensland Law Society's ethics course;

(g) he has not received any trust monies since December 2022; and

(h) he recognises it was his obligation to ensure he upheld his obligations in terms of his trust accounting practices.

[165] The Commissioner submits in response to the matters in paragraph 164(a) and (g) above that the respondent's offending conduct took place over an extended period, that the Queensland Law Society had appointed supervisors of trust money of the law practice in late 2020 pursuant to which investigations are continuing, and that other

complaints had been received which have been the subject of further s 443 notices.[77] There is no suggestion that any findings against the respondent have been made in relation to those complaints, however the Commissioner relies on those matters and the fact that the firm's trust account has been under supervision to place the respondent's statements in the proper context and demonstrate that he has not been fully frank in the statements he has made. While the Commissioner's submissions are not without merit, they are of little weight given the gravity of the respondent's conduct the subject of the charges that have been proven.

[166] The Commissioner also challenged the respondent's suggestion that he had reflected on his behaviour given he had not complied with the s 443 notices, which are now the subject of the 2023 disciplinary charges, after he was served with the 2022 disciplinary application. The Commissioner also submits that the respondent has disengaged from the disciplinary process by ceasing to have solicitors act for him and by informing the Tribunal that he would not further participate in the hearings.

[167] The respondent does not have any previous findings of disciplinary charges against him. He has been in practice for over 30 years.

[168] The assessment of the appropriate orders to be imposed in relation to the professional misconduct, particularly fitness to practise, must be ascertained at the time the Tribunal is making such orders.[78]

[169] An order recommending that a legal practitioner's name be removed from the roll will often only be made when the probability is that the practitioner will be permanently unfit for practise.[79] Removing a practitioner from the roll was described by McMurdo JA in *Shand* as a way of identifying the character of the practitioner as so indelibly marked by the misconduct that he cannot be regarded as a fit and proper person to be upon the roll.[80]

[170] McMurdo JA in *Shand* reiterated that the purpose of imposing sanctions under s 456 of the LPA is not to punish the practitioner but to protect the public. His Honour observed that:

> "The protection of the public, of course, is a purpose also served by an order which affects an existing or future practising certificate. By an order affecting a practising certificate, the public is immediately protected from the risks to which those who would encounter an unfit person would be exposed.
>
> However the removal of the name of an unfit practitioner from the Roll serves the interests of the public in more extensive ways. In *Attorney-General v Bax*, Pincus JA said that the remedies of suspension or striking off are for the protection of the public and of the profession's standing and that further, there is also a deterrent element. And in *De Pardo v Legal Practitioners Complaints Committee*, French J (as he then was and with whom the other Members of the Full Federal Court agreed) said that:
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>> "[The protection of the public] extends beyond protection against further default by the particular practitioner to protection against similar defaults by other practitioners."

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77 Which are the subject of the Affidavit of Kellie Anne Grainger affirmed 17 March 2023.

78 *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301 at [125].

79 *Jensen v Legal Services Commissioner* [2017] QCA 189 at [186]–[190].

80 [2018] QCA 66 at [55] (Morrison JA and Brown J agreeing).

> The reference by Pincus JA in *Bax* to the protection of the profession's standing is important. The community needs to have confidence that only fit and proper persons are able to practise as lawyers and if that standing, and thereby that confidence, is diminished, the effectiveness of the legal profession, in the service of clients, the courts, and the public is prejudiced. The Court's Roll of practitioners is an endorsement of the fitness of those who are enrolled."
>
> (footnotes omitted)

[171] Thus, in *Shand*, McMurdo JA stated that the fact the respondent in that case disavowed any intention to practise was not the end of the matter and found that the respondent having been found not to be a fit and proper person to be a legal practitioner of the Supreme Court should have his name removed from the roll.

[172] The offending conduct in *Shand* was quite different from the respondent's in the present case. However, the Tribunal has found that the charges involving the failure to provide costs disclosures and withdrawal of trust monies without authority to pay legal costs and without exercising proper diligence involved professional misconduct, which was constituted by conduct which occurred on repeated occasions over a number of years up until relatively recently and in relation to a number of clients. The amount of trust monies withdrawn was not insignificant. Several clients were unaware that trust monies held by the respondent, often received in relation to estate matters, had been withdrawn to pay invoices for legal costs for invoices they had never seen. None of the clients had been provided with costs disclosure to inform them of how they would be charged and by what means or mechanisms they could dispute the charges. The trust monies were withdrawn without the clients having any knowledge or opportunity to challenge or indeed agree the charges the subject of the invoices.

[173] While the respondent attributes his conduct to professional and personal stressors, they demonstrate a lack of insight into the primary obligations of a legal practitioner and lack of prioritisation and do not explain, let alone excuse, the level of failure of the respondent over an extended period of time. The continuation of the respondent's conduct over time and without change in failing to exercise proper diligence to ensure that he was addressing fundamental obligations to properly maintain trust accounts, which have been described as being of a "sacrosanct character",[81] demonstrates a complete lack of insight into the importance of the requirements of a principal in professional practice to act in accordance with the provisions of the LPA.

[174] The respondent's explanation in his Affidavit for what occurred in relation to both these categories of charges was vague and largely unaccepted by the Tribunal. He provided no candid or full explanation of his conduct. He has provided no proper explanation as to how the failures occurred or what he has done since then to demonstrate that he has proper insight into what occurred, how the failures have been addressed, or that he has a proper understanding of the requirements of the LPA and LPR 2007/2017 in relation to costs disclosure or the withdrawal of trust monies.

[175] As was stated by Malcolm CJ in *Re Maraj (a legal practitioner)*:[82]

> "Integrity, reliability and an appropriate level of efficiency in the administration of money held on trust are all qualities which any reasonably experienced

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[81] *Legal Services Commissioner v Twohill* [2005] LPT 001 at 4.

[82] (1995) 15 WAR 12 at 25.

> practitioner may be expected to demonstrate, in addition to being professionally competent in pursuing his or her clients' interests."

[176] In the present case, the respondent's conduct shows a failure to demonstrate integrity, reliability, or an appropriate level of efficiency in relation to the administration of trust money to a degree that demonstrates that he was and remains unfit to practise. The respondent has by his conduct shown a failure to understand the most basic but critically important obligations of a solicitor to a client.[83]

[177] The circumstances of the respondent's failure to make costs disclosures and withdrawals of trust monies without authority were of such degree as to show that he was not a fit and proper person to engaged in legal practice and remains unfit to practise.

[178] The respondent's conduct in failing to respond to the Commissioner's s 443 notices as required by the LPA, which is the subject of Charge 14 in OCR111-22 and Charges 1–3 in OCR106-23, further demonstrates his lack of knowledge and regard for his professional obligations under the LPA and the Commissioner's position. No explanation was provided as to his failure to comply with the notices. His conduct only serves to aggravate his conduct further,[84] as does his lack of engagement with these proceedings, which he chose to disengage from well prior to the hearing.

[179] While the respondent engaged with the Commissioner for some time after it corresponded with him about complaints, he then failed to respond to s 443 notices, which he was legally required to do. In doing so, the respondent failed to comply with the law, which is one of the incidents of privilege of legal practice.[85] As was noted by Daubney J in *Legal Services Commissioner v Kurschinsky*,[86] there is a fundamental obligation on legal practitioners to assist the regulator in its inquiries and reply appropriately to its requests for information.

[180] The respondent made some admissions in his responses to the charges which served the administration of justice but his co-operation has been limited without any proper explanation by him of his conduct.

[181] While the respondent has largely admitted his conduct, which is a matter that the Tribunal takes into account in his favour, his Affidavit does not demonstrate any insight into the seriousness of his conduct, the effect on his clients, or the need to make dramatic changes. His acceptance of his failure to maintain due diligence in his management and oversight of his billing practices is a gross understatement, and his belief as to what had been done would have been quickly undermined by a review of the clients' files and checking with his staff.[87] While he may have held such a belief, it was not on any view one reasonably held. The respondent's attempt to defer blame to staff in his Affidavit does not discharge his professional obligations. At best, he made assumptions as to what his staff were doing and failed to carry out basic checks to ensure the LPA and LPR 2007/2017 were complied with in relation to the clients concerned, particularly given the failures were repeated on numerous occasions. He did not appear before the Tribunal so his explanations could be tested.

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83 *QLS v Carberry; A-G v Carberry* [2000] QCA 450 at [37].
84 *Legal Services Commissioner v Kurschinsky* [2020] QCAT 182 at [66].
85 *Legal Services Commissioner v Beatty* [2019] QCAT 45 at [10] and [17].
86 [2020] QCAT 182 at [73] and [75].
87 See, eg, Affidavit at [56]–[57].

[182] The charges which have been found to constitute unsatisfactory professional conduct only further serve to demonstrate the respondent's lack of understanding or preparedness to ensure that he complied with his obligations as a solicitor to his client.

[183] Further, after his initial engagement with these proceeding, the respondent disengaged and demonstrated a level of indifference to his status as a member of the legal profession. While he has indicated that he presently has no intention to practise law again, his Affidavit still leaves that possibility open, even if not in the role as a principal, partner or director of a practice.[88] While he has indicated a willingness to engage in courses in respect of business management or the Queensland Law Society course on ethics, he has taken no steps himself in that regard. To the extent it seeks to provide any explanation of his conduct, the respondent's Affidavit shows a complete lack of insight into his conduct and lack of any real remorse.

[184] Such a significant degree of indifference to the fundamental obligations which rest upon him as a legal practitioner supports the fact that the public needs to be protected from such a person continuing or being able to continue in practice.

[185] In the Tribunal's view, the professional misconduct engaged in by the respondent demonstrates that he is permanently unfit to engage in legal practice and that public protection and confidence require the removal of the respondent's name from the roll.

[186] As to those findings of unsatisfactory professional conduct, the respondent should be reprimanded.

[187] The Commissioner seeks an order that the respondent pay its costs. The Commissioner has proven all charges it brought against the respondent. While it did not succeed in obtaining a finding of dishonesty, the material relied upon in that regard was also relevant to the allegation of a lack of exercise of proper diligence. Thus, the Commissioner has succeeded in establishing all charges.[89] There are no apparent exceptional circumstances which justify any departure from the usual position under s 462(1) of the LPA.

**SEALING OF MATERIAL**

[188] The Commissioner seeks an extension of an order dated 30 January 2023 that an affidavit containing copies of original client files be placed in a container which is not to be opened, other than by order of the Tribunal. That order applies to the Affidavit of Michael Leo Roessler sworn 5 December 2022, which is reproduced in volumes 4 to 10 of the Hearing Book. The order was extended on a temporary basis by Brown J following an urgent application by the Commissioner, alongside an order to file submissions as to the basis upon which the order should be extended.

[189] The files were provided to the Commissioner by the respondent, not the clients. The Tribunal is satisfied that given the material exhibited to Mr Roessler's affidavit contains confidential material of clients, including potentially privileged communications, that material should not be searchable or accessible by anyone not associated with the proceedings. It will therefore make the order sought.

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[88] See, eg, Affidavit at [98]–[99] and [101].

[89] Cf *Pennisi v Legal Services Commissioner* [2023] QCA 234 at [49].

## ORDERS

[190] The Orders of the Tribunal are that:

1. It is recommended that the name of the respondent, Bradley John Munt, be removed from the roll of legal practitioners in Queensland.

2. The respondent be publicly reprimanded.

3. The respondent shall pay the Commissioner's costs of and incidental to the disciplinary applications, such costs to be assessed on the standard basis in the manner in which costs would be assessed if the matter were in the Supreme Court of Queensland.

4. The affidavit of Michael Leo Roessler sworn 5 December 2022 and the reproduction of that affidavit in the Hearing Book contained at Part D – sealed material in folders 4–10 be placed in a container and marked "not to be opened other than by order of the Tribunal".

## CORRIGENDUM

[191] After publication of the Tribunal's reasons, it was noted that there was a typographical error in paragraph 2 of the Orders of the Tribunal in that the Orders provided for the respondent to be publicly "remanded" rather than "reprimanded". That error also appeared at paragraph [190] above. Those errors were corrected pursuant to s 135 of the QCAT Act.