

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and REYBURN [2013] WASAT 128

MEMBER : JUDGE D R PARRY (DEPUTY PRESIDENT)
MS R MOORE (MEMBER)
MR S ELLIS (SENIOR SESSIONAL MEMBER)

HEARD : 23 JULY 2013

DELIVERED : 23 JULY 2013

PUBLISHED : 14 AUGUST 2013

FILE NO/S : VR 36 of 2013

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

JOHN HENRY REYBURN
Respondent

Catchwords:

Legal practitioner - Professional misconduct - Unsatisfactory professional conduct - Penalty - Wills and estates - Failure to reach or maintain reasonable standard of competence and diligence - Failure to respond in a timely manner or at all to Supreme Court correspondence - Whether a further condition should be imposed on practitioner's practising certificate

Legislation:

Family Provision Act 1972 (WA)

Inheritance (Family and Dependants Provision) Act 1972 (WA)

Legal Profession Act 2008 (WA), s 438(1)

Result:

Practitioner found guilty of professional misconduct and unsatisfactory professional conduct

Practitioner reprimanded, conditions imposed on practising certificate and compensation order made in respect of professional misconduct

Practitioner reprimanded and ordered to pay a fine in respect of unsatisfactory professional conduct

Practitioner ordered to pay costs

Summary of Tribunal's decision:

The parties agreed that the practitioner had engaged in professional misconduct and unsatisfactory professional conduct. The parties agreed substantially in relation to the penalty regarding the practitioner's professional misconduct and agreed fully in relation to the penalty regarding the practitioner's unsatisfactory professional conduct.

The matter to be determined by the Tribunal was whether a further condition should be imposed on the practitioner's practising certificate, precluding him from accepting instructions related to, or in connection with, applications under the *Family Provision Act 1972 (WA)*.

The Tribunal determined that it is not necessary for the practitioner to be precluded from accepting instructions under the *Family Provision Act 1972 (WA)* to meet the objects of disciplinary proceedings. The Tribunal considered it significant that the practitioner's misconduct occurred in the context of proceedings involving a matter with which he was not familiar and that the practitioner presented character references including one from senior practitioners speaking positively about his capacity and competence to advise a client in the area the subject of the contested condition. However, the Tribunal determined that a condition should be imposed precluding the practitioner from accepting instructions in relation to contested proceedings under the *Family Provision Act 1972 (WA)* unless he has obtained instructions to brief counsel to advise and appear in those proceedings.

Category: B

Representation:

Counsel:

Applicant : Mr PD Yovich with Ms PE Le Miere
Respondent : Mr GD Cobby

Solicitors:

Applicant : Law Complaints Officer
Respondent : Self-represented

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

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The Legal Profession Complaints Committee (Committee) has alleged that there is proper cause for disciplinary action against Mr John Henry Reyburn, a legal practitioner, pursuant to s 438(1) of the *Legal Profession Act 2008* (WA) (LP Act).

2 The application was listed for a contested hearing before the Tribunal on 23 July 2013. However, on 18 July 2013 the parties agreed upon terms for the settlement of the matter, subject to one contested issue. The parties agreed, in particular, that the practitioner has engaged in unsatisfactory professional conduct in one respect and a professional misconduct in another respect. In effect, the parties have agreed that a third allegation in the amended application falls away in consequence of those agreed findings.

3 The parties have provided a statement of agreed facts, dated 18 July 2013, which is appended to these reasons (Appendix A).

Minute of proposed orders

4 The parties also agreed substantially in relation to the penalty in respect of the finding of professional misconduct, and agreed fully in relation to the appropriate penalty in respect of the finding of unsatisfactory professional conduct. The findings proposed by the parties in their minute of proposed orders in relation to professional misconduct and unsatisfactory professional conduct are as follows:

1. JOHN HENRY REYBURN (practitioner) between about 28 April 2008 and 21 April 2010 engaged in professional misconduct while representing his client in respect of the will and estate of the deceased in that he substantially and consistently failed to reach or maintain a reasonable standard of competence and diligence.
2. The practitioner between about 6 May 2008 and May 2009 engaged in unsatisfactory professional conduct by failing to respond in a timely manner or at all to correspondence from the Supreme Court.

5 In relation to the finding of professional misconduct, the minute of proposed orders indicates the agreed position of the parties that the practitioner is to be reprimanded; is to have a condition placed on his practising certificate that he not accept instructions related to or connected with applications for probate in Solemn Form of wills or estates of

deceased persons; is not to appear as counsel or instructing solicitor in relation to such proceedings; and is to pay the client, the subject of these proceedings, the sum of \$21,487.71, being a refund of professional fees and counsel's fees.

- 6 The minute of proposed orders also states that the parties have agreed that in relation to the finding of unsatisfactory professional conduct, the appropriate penalty is for the practitioner to be reprimanded and to pay a fine of \$2,000 to the Legal Practice Board. The parties have also agreed that it is appropriate for the practitioner to pay the Committee's costs, fixed in the sum of \$8,000.

Further condition proposed by the Committee

- 7 The matter in dispute between the parties in the minute of proposed orders is a further condition proposed by the Committee to be imposed on the practitioner's practising certificate as an element of the penalty in relation to the finding of professional misconduct.

- 8 That further condition would preclude the practitioner from accepting instructions related to, or connected with, applications under the *Family Provision Act 1972 (WA)* (FP Act).

Agreed particulars of professional misconduct

- 9 The parties have also, in the form of a minute of consent orders, agreed that the practitioner's professional misconduct, while representing his client in respect of the will and estate of the deceased as set out in the parties' agreed facts, involved a substantial and/or consistent failure to reach or maintain a reasonable standard of competence and diligence, because:

- (a) he did not advise the client that the Medical Evidence, Memory History and Dementia History should be provided to his siblings at the earliest possible opportunity in an endeavour to resolve the issue of the deceased's competence to make the 2000 Will;
- (b) except for generally discussing with and making the client aware of the nature and ramifications of claims under the *Inheritance (Family and Dependents Provision) Act 1972* [Inheritance Act], and discussing making an offer of settlement to his brother William with the client in or about June 2008, the practitioner did not otherwise advise the client to consider making offers to his siblings to settle all and any possible claims his siblings had or may have had on the estate (including claims under the Inheritance Act) when the issue arose as to whether the 1995 Will or the 2000 Will was valid;

- (c) subject to the above, did not, once he was informed of the 2000 Will and was instructed regarding the medical condition of the testatrix when she purported to execute the 2000 Will, seek the client's instructions to enter into settlement negotiations regarding the anticipated Inheritance Act application by the client's siblings before any significant legal proceedings were taken or costs incurred.
- (d) he did not advise his client of William's Settlement Offer;
- (e) he did not keep his client properly informed of correspondence he had received from Virginia and William, or respond adequately to that correspondence;
- (f) he did not request a response from Michael through Eastwood Law Dutton Legal to the offer of settlement made by the client or take any steps to further a possible resolution of the issues between Michael and the client;
- (g) he did not provide counsel in a timely manner with adequate or sufficient instructions to enable him to correctly, advise, draft pleadings and represent the client in the Proceedings;
- (h) he drafted or caused to be drafted the August Writ which sought probate of the 2000 Will in Solemn Form in circumstances where the client had informed the practitioner he did not consider the 2000 Will to be a valid will and had provided credible medical evidence to support that view;
- (i) on or about 25 March 2009 he advised the client and then maintained until about December 2009 that the client was required to seek probate of the 2000 Will;
- (j) between about June 2008 and March 2009 he did not take any, or any adequate, steps to progress his client's application for probate or the administration of the estate.

Findings of professional misconduct and unsatisfactory professional conduct and that agreed penalty is appropriate

10 We are satisfied on the basis of the practitioner's admission and the agreed facts, together with the agreement in relation to the particulars of the practitioner's professional misconduct that we have referred to, that the practitioner engaged in professional misconduct and unsatisfactory professional conduct as agreed by the parties and that the penalty proposed jointly by the parties is within an acceptable range of penalties, having regard to the purpose of professional disciplinary proceedings, namely, the protection of the public, the maintenance of proper standards

in the legal profession, and the maintenance for the reputation of the legal profession.

11 We will now consider the contested matter, namely, whether a further condition should be imposed on the practitioner's practising certificate, precluding him from accepting instructions relating to, or connected with, applications under the FP Act, in consequence of his professional misconduct.

Committee's submissions

12 The Committee submitted, in essence, that the imposition of such a condition is appropriate because the practitioner's misconduct related to his handling of the resolution of all issues arising out of the will and estate of his client's late mother, not merely the grant of probate in solemn form.

13 Mr PD Yovich, counsel appearing for the Committee, emphasised that in August 2008, two of the beneficiaries of the estate, namely, the client's siblings Virginia and William, had foreshadowed applications under the FP Act, or as it was then known, the *Inheritance (Family and Dependants Provision) Act 1972* (WA). Mr Yovich emphasised also that the practitioner has admitted that he did not respond, or respond adequately, to correspondence from those two siblings, did not advise the client in other than the most general terms about the desirability of settling any such claims, and that the practitioner's incompetence in relation to the FP Act aspect of the matter was a significant and essential part of the misconduct generally.

14 Mr Yovich also emphasised the size of the estate and made the point that, to the extent that ultimately the estate may be responsible for costs associated with FP Act proceedings, the client, as the residuary beneficiary under the 1995 Will, would have any benefit to him under the will reduced to that extent.

Practitioner's submissions

15 Mr GD Cobby, counsel appearing on behalf of the practitioner, submitted essentially that the imposition of the disputed condition is not a reasonable and necessary consequence of his client's admitted professional misconduct.

16 Mr Cobby emphasised, and the Committee did not dispute, that the professional misconduct arose in the context of proceedings involving a contested grant of probate and that this is an area in which the practitioner had little experience. Mr Cobby submitted, and it was not disputed by the

Committee, that the practitioner had in fact no experience in a contested probate application involving two wills.

17 Mr Cobby submitted that the practitioner's conduct should be seen in a particular context. The context includes that a settlement offer was made to one of the siblings, Michael, and the client initially provided instructions to make a settlement offer to his sister Virginia, but withdrew those instructions.

18 The context, Mr Cobby submitted, also includes the other siblings having been unrepresented, but being advised by the practitioner to seek their own legal advice. Perhaps, most significantly, the context Mr Cobby submitted includes that the extent of any entitlement under the FP Act was dependent, at least in part, upon the determination of the question of which of the two wills would prevail, which in turn required an assessment of the available medical evidence.

19 Mr Cobby submitted that it is drawing a very long bow to infer from the agreed facts that the practitioner lacks competence in relation to applications under the FP Act generally.

20 He also submitted that because the practitioner has since 2009 worked principally in relation to wills, probate and FP Act matters, the imposition of the contested condition would have a very significant consequence on his livelihood.

21 Finally, Mr Cobby referred to, and relied on, five character references handed to the Tribunal at the commencement of the hearing, including a reference from Mr Daryl Williams QC and Ms Elspeth Hensler of counsel, relating to their involvement in an FP Act matter instructed by the practitioner. They referred in their reference to the practitioner having made an offer of settlement on behalf of his client at mediation prior to either of their involvement and to Ms Hensler's confirmation about the reasonableness and appropriateness of the settlement offer which was then, on her advice, made again formally by letter. Mr Williams and Ms Hensler also referred to the practitioner's capacity to obtain instructions and convey matters related to the proceeding to their client, who suffers from a mental illness. They conclude their reference as follows:

From our observations of Mr Reyburn in the conduct of ... [the] claim, in our view, he properly advised his client about settlement options and the benefits and risks of making, accepting or rejecting settlement offers and

helped his client to consider whether settlement offers should be made and if so, how and on what terms.

22 The character references also include a reference from Mr Wido Peppinck, a lawyer who has on various occasions referred persons to seek legal advice from the practitioner. Mr Peppinck said that 'feedback on my referrals has been positive'. He also described the practitioner as behaving in a 'professional, courteous and ethical' manner. In addition, the character references speak to the practitioner's role in benefiting the Mandurah community by using his legal skills. One character reference from the local member of Parliament refers to the practitioner assisting particularly elderly and disadvantaged persons in the community to resolve their legal issues, while another reference from the Mayor of Mandurah, Ms Paddi Creevey OAM, refers to the practitioner having given free legal advice since the mid 1990s, particularly to senior citizens within the City.

Should a further condition be imposed on the practitioner's practising certificate?

23 In the circumstances of the case the subject of the proceeding before us, the competent resolution of the probate matter and of the foreshadowed FP Act matters was, in our view, inextricably interrelated. The client was propounding the 1995 will and, if that position prevailed, then, as the practitioner concedes at paragraph 91(b) of the agreed facts, there was a likelihood that the siblings would make the foreshadowed applications. Furthermore, given the limited size of the estate and that the client was the residuary beneficiary under the 1995 will, any costs of litigation borne by the estate would be to the client's detriment.

24 In those circumstances, the probate matter could not be reasonably regarded as distinct from the foreshadowed FP Act applications. Furthermore, a number of the conceded particulars of professional misconduct in this case relate specifically and directly to the FP Act matters; in particular, paragraphs (b), (c), (d) and (e).

25 More broadly, it is artificial to seek to treat FP Act matters and contested probate matters as separate and distinct areas of practice. They are likely to be concurrent aspects of the resolution of many testamentary disputes, whether by negotiation or litigation.

26 However, the key question for determination in this proceeding is whether the objects of professional disciplinary proceedings to which we have referred require the imposition of the condition precluding the

practitioner from accepting instructions related to, or connected with, FP Act matters.

27 Ultimately, we have come to the view that provided that the practitioner is required, in order to accept instructions in contested proceedings under the FP Act, to brief counsel to advise and appear, the protection of the public, the maintenance of proper standards and the maintenance of the reputation of the profession does not require that the practitioner be precluded from undertaking such work.

28 Although the practitioner has been shown to have acted incompetently in relation to the matter the subject of this proceeding generally, including the FP Act aspect of it, it is significant, in our view, that that incompetence was demonstrated in the context of proceedings involving a matter with which the practitioner was not familiar. It is also significant, in our view, that there is at least one character reference before the Tribunal from senior members of the profession speaking positively about the practitioner's capacity and competence to advise a client about settlement options and the benefits and risks of making, accepting and rejecting settlement offers in the area the subject of the contested condition.

29 Finally, we also consider it significant that the character references speak of the practitioner's competence in legal practice generally and his willingness over a considerable period to assist less fortunate members of the community with legal issues.

Conclusion

30 In all of those circumstances, we consider that a condition precluding the acceptance of instructions in all FP Act matters is unnecessary and that a condition should be imposed precluding the practitioner from accepting instructions in relation to contested proceedings under the FP Act unless he has obtained instructions to brief counsel to advise and appear in those proceedings.

Orders

31 We therefore make the following orders:

1. JOHN HENRY REYBURN (practitioner) between about 28 April 2008 and 21 April 2010 engaged in professional misconduct while representing his client in respect of the will and estate of the deceased in that he substantially and

consistently failed to reach or maintain a reasonable standard of competence and diligence.

2. The practitioner between about 6 May 2008 and May 2009 engaged in unsatisfactory professional conduct by failing to respond in a timely manner or at all to correspondence from the Supreme Court of Western Australia.
3. In relation to the finding of professional misconduct:
 - (a) the practitioner be reprimanded;
 - (b) the practitioner's practising certificate and any practising certificate to be granted be subject to the following specified conditions 30 days from the making of this order and continuing:
 - (i) the practitioner is not to accept instructions related to or connected with applications for probate in Solemn Form of the wills or estates of deceased persons;
 - (ii) the practitioner is not to accept instructions in relation to contested proceedings under the *Family Provision Act 1972* (WA) unless he is instructed to brief counsel to advise and appear in those proceedings;
 - (iii) the practitioner shall not appear as counsel or instructing solicitor in proceedings in the Supreme Court of Western Australia related to or connected with applications for probate in Solemn Form of the wills or estates of deceased persons.
 - (c) the practitioner pay to the client the sum of \$19,182.11 being a refund of professional fees and counsel fees within 60 days of this order.
4. In relation to the finding of unsatisfactory professional conduct:
 - (a) the practitioner be reprimanded;

- (b) the practitioner pay a fine to the Legal Practice Board of \$2,000 within 60 days of the making of this order unless other terms have been agreed with the applicant.
- 5. The practitioner pay the applicant's costs assessed in the sum of \$8,000 within 60 days of the making of this order unless other terms have been agreed with the applicant.

APPENDIX A: PARTIES' STATEMENT OF AGREED FACTS

32 The Parties Agree the Following Facts:

1. The deceased died on 31 March 2008. She was survived by the client, Michael, Virginia and William, who were her adult children.
2. On about 14 April 2008, the client signed a cost agreement by which he engaged the practitioner's firm to act for him to obtain a grant of probate in respect of the deceased's will dated 5 January 1995 (*1995 Will*) and to assist with the administration of her estate. The cost agreement contained an estimate of \$1,100 including GST as the total legal costs.
3. On 18 April 2008, the practitioner filed his client's application for a grant of probate of the 1995 Will in common form. The value of the deceased's net assets of at the time of her death (*estate*) was about \$337,759.
4. By the terms of the 1995 Will, William would receive \$5,000, Virginia \$5,000, Michael \$50,000 and the client would receive the remainder of the estate which was about \$286,759.
5. On 28 April 2008, William sent the practitioner an email saying that after speaking to his brother Michael, they had both agreed that legal action had to be taken to contest the 1995 Will.
6. On 28 April 2008 the practitioner replied to William's email urging him to get legal advice and forwarded to the client William's email and his response.
7. By a letter dated 29 April 2008 and sent by facsimile, Eastwood Law, on behalf of Michael:
 - (a) provided the practitioner with a copy of a will dated 6 June 2000 (*2000 Will*) which was a copy of a will originally prepared and executed in 1990, altered by hand and purportedly executed by the deceased on 6 June 2000;
 - (b) requested that the practitioner obtain his client's instructions as to whether the client would apply for probate of the 2000 Will.

8. By the terms of the 2000 Will the estate was to be divided equally between William, Virginia, Michael and the client such that each of them would receive about \$84,439.00.
9. On 30 April 2008, the client met the practitioner and:
 - (a) informed him that the deceased was diagnosed with dementia on 23 May 2000, before she had signed the 2000 Will;
 - (b) informed him that he did not believe that the deceased had testamentary capacity at the time of signing the 2000 Will;
 - (c) provided him with a note that included medical information in relation to an 'ACAT assessment by Bentley Health Service' and an application dated 23 June 2000 for a Taxi Users Subsidy, wherein a doctor, who had been the deceased's General Practitioner for ten years, stated that the deceased had severe cognitive/intellectual disability and had been diagnosed with dementia with an approximate onset two years previously; and
 - (d) the practitioner asked the client to obtain the medical records of the deceased from Bentley Hospital and her General Practitioner.
10. On or about 1 May 2008 the practitioner received a letter dated 29 April 2008 from Virginia referring to and enclosing a copy of the 2000 Will, saying that the client was well aware of its existence and saying that Virginia had serious concerns about the lodgement of the 1995 Will for probate. The practitioner sent a copy of this letter to the client, but did not reply to Virginia.
11. By letter dated 1 May 2008, the practitioner provided the Supreme Court of Western Australia (*Court*) with a copy of the letter dated 29 April 2008 from Virginia referred to in paragraph 10 above and stated that it would not be appropriate to proceed further with the 1995 Will and requested that the Court return the will to his office.
12. By letter dated 1 May 2008 the practitioner, among other things, informed Eastwood Law that he had received interim advice that the 2000 Will was not a valid will.

13. By letter dated 6 May 2008, Registrar Rimmer of the Court, raised certain matters with the practitioner and advised the practitioner, among other things, that the Court would retain the 1995 Will pending a response from the practitioner to the matters raised by the Court.
14. By letter dated 12 May 2008 the practitioner informed Eastwood Law the client had informed him (the practitioner) that he did not believe that the deceased had testamentary capacity at the time of the signing of the 2000 Will.
15. On about 30 May 2008 the practitioner rendered to the deceased a tax invoice in the sum of \$1,784.06 for legal services rendered by the practitioner in relation to the 'estate' comprised of:
 - (a) professional fees of \$1,608.00 (exclusive of GST);
 - (b) disbursements of \$13.85 (exclusive of GST); and
 - (c) GST on disbursements and professional fees of \$162.21;
16. By letter sent by facsimile to the practitioner dated 5 June 2008, Eastwood Law:
 - (a) informed the practitioner that Michael was going to bring an application, in solemn form, for a grant of probate of the 2000 Will;
 - (b) requested a copy of the 1995 Will in its original seize; and
 - (c) requested a copy of the accounts prepared by the client in respect of his appointment as administrator of the deceased's estate.
17. On 11 June 2008, the client met the practitioner and at that meeting the practitioner requested the client provide him with a summary of the medical records he had obtained from Bentley Hospital and the deceased's General Practitioner in a '30 dot point' document.
18. Also at the meeting of 11 June 2008, the client instructed the practitioner to make an offer increasing Michael's share of the deceased's estate to \$85,000 and Virginia's share of the estate to \$15,000.

19. By email dated 16 June 2008, the client provided the practitioner with:
 - (a) a document, setting out in chronological order, a summary of the medical reports and finds in relation to the deceased's diagnoses of dementia together with notes of observations by family and friends as to the deceased's cognitive functioning for the period between October 1999 and November 2002 (*Dementia History*);
 - (b) instructions that the offer to increase Michael's share of the deceased's estate should be changed as to '*... approx. \$85,000.00 but less legal fees incurred as a result of submitting the 2000 Will*' and the offer to increase Virginia's share was to be withdrawn.
20. On a date unknown, but between 11 June 2008 and 21 July 2008 during a telephone conversation with Cameron Eastwood of Eastwood Law, the practitioner on behalf of his client offered to increase Michael's share of the deceased's estate to \$75,000.00.
21. The practitioner did not at any time subsequent, seek a response from Eastwood Law or Dutton Legal (who subsequently acted for Michael) regarding the offer made on behalf of the client to increase Michael's share of the deceased's estate.
22. By letter dated 17 June 2008, the Court requested a response to Registrar Rimmer's letter of 6 May 2008.
23. By letter dated 19 June 2008 the practitioner informed the Court that Eastwood Law acted on behalf of Michael and that Eastwood Law held instructions from Michael to seek a grant in solemn form of the 2000 Will which had recently been discovered.
24. By email sent on 21 July 2008 to the practitioner, Eastwood Law among other things requested copies of '*a number of reports that deal with the issue of testamentary capacity that your client would prepared to allow my client to have a copy of those reports (sic).*'
25. By letter dated 11 August 2008, William informed the practitioner that he had received legal advice that suggested it would be possible for him to obtain a greater share of the deceased's estate by making an application under the *Inheritance (Family and Dependents*

Provision) Act 1972 (Inheritance Act) and that he intended to make such an application.

26. The practitioner received letters dated 15 August 2008, 30 August 2008, 6 November 2008, 11 December 2008, 31 March 2009 and 5 August 2009 from Virginia requesting information and expressing concern with regard to the client's application for probate and administration of the deceased's affairs (*Virginia's Correspondence*).
27. The letter of 30 August 2008 also referred to Virginia having received some advice about making a claim under the Inheritance Act.
28. The practitioner received letters from William:
 - (a) dated 16 January 2009 requesting information and expressing concern with regard to the client's application for probate and administration of the deceased's affairs;
 - (b) dated 17 February 2009 again requesting information and expressing concern with regard to the client's application for probate and administration of the deceased's affairs, additionally, an offer to settle all matters with the client by way of a '*document to overrule both of the previous wills ... and that all beneficiaries would receive an equal share ...*'; (*William's Settlement Offer*)
 - (c) dated 19 March 2009 informing the practitioner that as he had received no response to his previous correspondence he would address his complaints (as to the lack of progress in obtaining probate of the deceased's estate) to the probate registry. (Collectively *William's Correspondence*)
29. Apart from a letter to Virginia dated 8 December 2008, in which he urged her to get legal advice, the practitioner did not respond to Virginia's Correspondence. He also did not show any of Virginia's correspondence to the client after 19 August 2008. He did not reply to William's Correspondence, and did not inform the client about William's Settlement Offer.
30. By email to the practitioner dated 4 February 2009 the client expressed concern that there seemed to be no progress in regard to

settlement of the issues relating to the deceased's estate and requested advice on *'the current status and what are the options available to resolve these delays.'*

31. By email to the practitioner dated 6 March 2009 the client expressed concern regarding progress of the settlement of his mother's estate.
32. On or about 6 March 2009 the practitioner sought an opinion from Mr Hawkins (*counsel*) on the validity of the 2000 Will but did not inform counsel of the client's concerns with regard to the deceased's testamentary capacity at the time of making the 2000 Will or provide him with a copy of the Dementia History.
33. On about 23 March 2009, the practitioner received counsel's opinion of that date, which recommended withdrawing the 1995 Will from probate and applying for probate of the 2000 Will.
34. On 25 March 2009, the practitioner forwarded counsel's opinion to the client together with a letter of advice which stated, relevantly:

'... which confirms his [counsel's] view that the last will document, dated 2000 was intended by mother to cancel her 1995 will which in turn cancelled her 1990 will. Accordingly, putting aside the question whether mother had the mental competence in 2000 to make a valid will, the opinion of the barrister is clear that it is the 2000 will which should now be put before the court

However the 2000 will can only be a valid will if at the time mother made it she was of such sound mind as to be able to make a valid will document.

From your notes it is apparent that:

- (a) *Prior to that date (6 June 2000) no-one had officially diagnosed mother with dementia; [and]*
- (b) *on 20 June 2000 Dr Endacott made the diagnosis'*

35. By email to the practitioner dated 26 March 2009, the client referred to the practitioner's letter and expresses concern that the practitioner (wrongly) says that the deceased was not diagnosed with dementia until 20 June 2000 and requested a meeting to discuss this.

36. On about 27 March 2009 the practitioner rendered to the deceased a tax invoice in the sum of \$1,316.75 for legal services rendered by the practitioner in relation to the 'estate' comprised of:
- (a) professional fees of \$1,193 (exclusive of GST);
 - (b) disbursements of \$4.15 (exclusive of GST); and
 - (c) GST on professional fees and disbursements of \$119.60.
37. On about 27 March 2009 the practitioner rendered to the deceased a tax invoice in the sum of \$298.10 for legal services rendered by the practitioner in relation to the 'Inheritance Claim' comprised of:
- (a) professional fees of \$270.00 (exclusive of GST);
 - (b) GST on professional fees of \$27.00;
 - (c) disbursements of \$1.00 (exclusive of GST); and
 - (d) GST on disbursements of \$0.10.
38. On about 27 March 2009 the practitioner rendered to the client a tax invoice in the sum of \$468.61 for legal services rendered by the practitioner in relation to the 'estate administration' comprised of:
- (a) professional fees of \$420 (exclusive of GST);
 - (b) disbursements of \$6.00 (exclusive of GST); and
 - (c) GST on disbursements and professional fees of \$42.61.
39. By letter dated 7 April 2009, the Court enquired of the practitioner as to what his instructions were as to the future conduct of the matter.
40. The practitioner did not respond to the Court's letter of 7 April 2009 at all.
41. At a meeting in the practitioner's office on or about 22 April 2009, the practitioner informed the client that the 1995 Will would be withdrawn from the probate office and the client signed a cost agreement by which he engaged the practitioner to:

'I ... to obtain probate in solemn form

2 and deal with evidence as to capacity, execution, improper pressure

3 conduct court action'.

42. By letter dated 8 May 2009, the Court sought a response from the practitioner to its letter of 7 April 2009.
43. The practitioner did not respond to the Court's letter of 8 May 2009 at all.
44. On a date between about May 2009 and August 2009, the client's application for probate in common form in respect of the 1995 Will was withdrawn.
45. In a letter to counsel dated 30 July 2009, Ms D Morrow of the practitioner's office, referred to the advice provided by counsel in March 2009 and requested counsel settle the draft Writ of Summons with an indorsed Statement of Claim that was enclosed with the letter. The draft Statement of Claim sought a grant of probate in solemn form in respect of the 2000 Will and did not refer to the deceased's testamentary capacity.
46. The practitioner did not provide or cause to be provided any information to counsel other than that which had been provided to him prior to his sending his opinion in March 2009 and in particular did not inform counsel of the client's concerns regarding the deceased's capacity to execute the 2000 Will or provide counsel with the Dementia History.
47. By email dated 14 August 2009 counsel forwarded a settled Writ and endorsed Statement of Claim to the practitioner's office (*August Writ*).
48. The practitioner attempted to or caused to be attempted, to file the August Writ under cover of a letter to the Court dated 28 August 2009. The final form of the indorsed Statement of Claim was consistent with the draft provided by the practitioner's office and sought to propound the 2000 Will.
49. By letter received by the practitioner's office on or about 25 August 2009, the practitioner was informed that the Court would not accept the August Writ.

50. Undercover of letter to the Court dated 4 September 2009 the practitioner again attempted or caused to be attempted to file the August Writ. The August Writ was accepted for filing by the Court and given proceedings number CIV 2604 of 2009 (*the Proceedings*).
51. By email to the practitioner dated 8 September 2009, the client expressed concern that the Statement of Claim contained errors and sought to propound the 2000 Will. By email on the same date, the practitioner informed the client that 'we hv [sic] to ask the court to examine the "last" will and determine, first, whether it is valid.', but did not address the client's concerns regarding the errors in the August Writ.
52. On about 12 October 2009 the practitioner rendered to the deceased a tax invoice in the sum of \$2,005.15 for legal services rendered by the practitioner in relation to the 'Solemn Form Grant' comprised of:
 - (a) professional fees of \$1,113.00 (exclusive of GST);
 - (b) disbursements of \$709.91(exclusive of GST); and
 - (c) GST on professional fees & disbursements of \$182.24.
53. By email dated 22 October 2009 to the practitioner the client provided another document to summarise events relating to the deceased's mental capacity since 1990, which included summaries of the medical reports relating to the diagnosis of dementia.
54. By letter dated 23 November 2009 the practitioner informed the client that Michael, William and Virginia had filed notices of intention to be heard in the Proceedings and that a status conference was listed for hearing in the Court on 2 December 2009 (*2 December 2009 Status Conference*).
55. By letter dated 23 November 2009 to counsel the practitioner requested counsel attend the 2 December 2009 Status Conference on behalf of the client.
56. The client attended the 2 December 2009 Status Conference with counsel and advised counsel of his concerns as to the deceased's testamentary capacity at the time of making the 2000 Will.
57. The 2 December 2009 Status Conference was, in substance, adjourned to a further status conference to be held on 13 January 2010 (*13 January 2010 Status Conference*).

58. On about 3 December 2009 the practitioner rendered to the deceased care of the client a tax invoice in the sum of \$440.55 for legal services rendered by the practitioner in relation to the 'Solemn Form Grant' comprised of:

- (a) disbursement of \$400.50 (exclusive of GST); and
- (b) GST on disbursement of \$40.05.

59. By email on 3 December 2009, at 11:23am the practitioner asked counsel how to amend the Statement of Claim endorsed on the August Writ to:

'- refer to the 1995 will (rather than the 2000 year will).'
By email on the same date at 11:40am, counsel replied: *'Send me instructions regarding lack of competence and I'll draft an amendment to the statement of claim[,]'* and requested *'instructions regarding lack of competence.'*

By further email in reply on the same date at 12:04pm the practitioner informed counsel that he *'will do, next week'*.

60. At a meeting in the practitioner's office on or about 7 December 2009 the client produced to the practitioner the following:

- (a) a medical report dated 27 October 1999 recording that the deceased's CT scan showed frontal lobe atrophic changes indicating Alzheimer's or dementia;
- (b) a report dated 11 November 1999 of a clinical psychologist recording that the deceased had cognitive functioning within the dementia range;
- (c) a letter dated 7 December 1999 from a doctor employed by Bentley Health Services reporting that 'CAMCOG' (a cognitive functioning test for the diagnosis of dementia) showed that her mood fell within the normal range and the assessment's results suggested that she was functioning within the dementia range; and
- (d) an application for respite care from the Aged Care Assessment Team of Bentley Health Services dated 23 May 2000 stating that one of the deceased's diagnoses, as determined by medical specialists, was dementia;

- (e) an application dated 23 June 2000 for a Taxi Users Subsidy, in which a doctor, who had been the deceased's General Practitioner for ten years, stated that the deceased had severe cognitive/intellectual disability and had been diagnosed with dementia with an approximate onset two years previously. (*Medical Evidence*).
61. By email to the practitioner dated 11 December 2009, counsel confirmed that '*... once I have received further instructions regarding the deceased's capacity to make her will, I am to amend the statement of claim*'.
62. By email to the practitioner dated 17 December 2009 the client provided the practitioner with a document entitled 'Activities of Daily Living' which set out the problems the deceased had experienced with her memory.
63. At a meeting in the practitioner's office on or about 29 December 2009 the client provided the practitioner with a document detailing the deceased's memory problems together with notes on doctors' findings in relation to the deceased's memory problems (*Memory History*).
64. By email dated 5 January 2010, the practitioner informed counsel that '*it will take some weeks to put the medical evidence together ... pls amend the claim, now, to show that we seek a grant of the second will, the middle one of the three, from memory dated 1995*' and asked counsel to amend the Statement of Claim without reference to any medical evidence.
65. By email dated 11 January 2010, counsel told the practitioner '*I don't see how I can do it without including an allegation of fact as to why the [2000 Will] is not valid.*'
66. By email dated 11 January 2010, counsel provided the practitioner with an amended Statement of Claim in the Proceedings (*Amended Statement of Claim*) and expressed the view that: '*I'd feel more comfortable with pleadings in the statement of claim directed to why the 3rd document is not a valid will.*'
67. On about 12 January 2010 the practitioner rendered to the deceased a tax invoice in the sum of \$2,334.57 for legal services rendered by the practitioner in relation to the 'Solemn Form Grant' comprised of:

- (a) professional fees of \$2,096.00 (exclusive of GST);
 - (b) disbursements of \$27.20 (exclusive of GST); and
 - (c) GST on professional fees & disbursements of \$211.37.
68. At the 13 January 2010 Status Conference, the Amended Statement of Claim was handed up, programming orders made and the matter adjourned to a further status conference to be held on 10 February 2010 (*10 February 2010 Status Conference*).
69. On or about 22 January 2010, Jackson McDonald commenced acting for Virginia and William and applied, on behalf of its clients, on 27 January 2010 to strike out the Amended Statement of Claim. The application was listed to be heard at the same time as the 10 February 2010 Status Conference.
70. At a meeting in the practitioner's office on or about 9 February 2010 the practitioner instructed the client to make three copies of the Medical Evidence and to bring them to the 10 February 2010 Status Conference to give to Mr Hawkins and the legal representatives of Michael, Virginia and William.
71. By email and facsimile dated 9 February 2010, the practitioner provided counsel, for the first time, with instructions regarding the deceased's testamentary capacity, a copy of the Medical Evidence and a copy of the Affidavit of Scripts filed in the proceeding.
72. At the 10 February 2010 Status Conference, the Amended Statement of Claim was struck out, the client ordered to file and serve a minute of the proposed substituted statement of claim by 19 February 2010 and the matter otherwise adjourned to a further status conference on 24 February 2010 (*24 February 2010 Status Conference No.4*).
73. On 10 February 2010, following the 10 February 2010 Status Conference, the client provided counsel with a copy of the Dementia History and Memory History and Medical Evidence.
74. At or immediately after the 10 February 2010 Status Conference, counsel provided copies of the Medical Evidence to the solicitors for Michael, Virginia and William.
75. By email dated 18 February 2010 to the practitioner, counsel requested urgent *'full instructions, as to the [deceased's]*

testamentary capacity.' By emails in reply on the same date the practitioner provided:

- (a) some instructions with regard to the proposed substituted statement of claim; and
 - (b) particulars as to the deceased's testamentary capacity.
76. On 19 February 2010, the practitioner faxed to Jackson McDonald the client's Proposed Substituted Statement of Claim.
77. By letter dated 22 February 2010, Jackson McDonald informed the practitioner that it considered the Proposed Substituted Statement of Claim to be unclear and requested a revised Proposed Substituted Statement of Claim be provided by the practitioner prior to the 24 February 2010 Status Conference.
78. At the 24 February 2010 Status Conference orders were made by the Court:
- (a) granting leave to the client to file a Substituted Statement of Claim by 26 February 2010 (order 1);
 - (b) that the client file and serve an up to date statement of the accounts of the estate to be verified by affidavit by 26 March 2010 (order 4); and
 - (c) the matter be adjourned to a further Status Conference on 14 April 2010 (***14 April 2010 Status Conference***) (order 6).
79. By letter to the practitioner and sent by email dated 12 March 2010, Jackson McDonald referred to a telephone conversation on 9 March 2010 and confirmed that:
- (a) they had reviewed the Medical Evidence provided by counsel after the 10 February 2010 Status Conference;
 - (b) they had had discussions with a number of witnesses identified in those records;
 - (c) as a result of the matters listed above their clients Virginia and William would not file a defence or counter claim to the Substituted Statement of Claim; [and]

- (d) their clients required their costs of the action, on a solicitor client basis, to be paid out of the residuary estate as they had acted reasonably and in good faith in the genuine belief, on reasonable grounds, that their mother possessed testamentary capacity at the time the 2000 Will was made.
80. By email dated 29 March 2010 the practitioner informed the client of the contents of the 12 March 2010 letter and also that Virginia and William '*wish to make an inheritance claim*'.
81. At the 14 April 2010 Status Conference orders were made by the Court requiring further documents to be filed to enable a judge to grant probate. Additionally the Court ordered: '*The costs of today, and any costs, incurred by the defendants as a result of the failure of the plaintiff to comply with Order 4 (of 24 February 2010) are reserved to be dealt with by the Trial Judge.*'
82. By letter dated 14 April 2010 and sent by email counsel provided a report to the practitioner as to what occurred at the 14 April 2010 Status Conference (*the report*).
83. In the report counsel informed the practitioner that: '*[the client] was rather agitated that the affidavit had not been prepared by the due date because, he says, he provided you with all information well before then.*' Further, counsel drew to the practitioner's attention that the orders set out the information that would need to be provided to the Court to enable a judge to grant probate in solemn form.
84. By email dated 21 April 2010, the client terminated the practitioner's retainer.
85. On about 21 April 2010 the practitioner rendered to the deceased a tax invoice in the sum of \$7,281.82 for legal services rendered by the practitioner in relation to the 'Solemn Form Grant' comprised of:
- (a) professional fees of \$6,510.00 (exclusive of GST);
 - (b) disbursements of \$115.10(exclusive of GST); and
 - (c) GST on professional fees & disbursements of \$656.72.
86. On about 21 April 2010 the practitioner rendered to the deceased a tax invoice in the sum of \$732.50 for legal services rendered by the practitioner in relation to the 'estate administration' comprised of:

- (a) professional fees of \$658.00 (exclusive of GST);
 - (b) disbursements of \$7.95(exclusive of GST); and
 - (c) GST on professional fees & disbursements of \$66.55.
87. On about 27 April 2010 the practitioner rendered to the deceased a tax invoice in the sum of \$2,305.60 for legal services rendered by the practitioner in relation to the 'Solemn Form Grant' comprised of:
- (a) professional fees of \$2,096 (exclusive of GST);and
 - (b) GST on professional fees & disbursements of \$209.60.
88. A further status conference was listed for 5 May 2010 which was adjourned to 9 June 2010, at which time it was agreed the matter would proceed to mediation.
89. At mediation on 9 July 2010, the client reached a settlement with Virginia, William and Michael (*siblings*) with regard to the distribution of the estate to be evidenced by a deed of settlement and that the matter would proceed to hearing on an undefended basis whereby probate of the 1995 Will in solemn form would be granted to the client.
90. The terms of the Deed of Settlement between the siblings and the client included, relevantly, that Michael would receive \$57,500, William \$87,500 and Virginia \$55,000 inclusive of their legal costs which were agreed at \$7,500 each.
91. The practitioner knew or ought to have known that:
- (a) The costs of applying for and obtaining a grant of probate in solemn form that was contested by the client's siblings were likely to be significant;
 - (b) There was a likelihood that, if unsuccessful in contesting the validity of the 1995 Will, the siblings would make applications under the *Inheritance (Family and Dependants Provision) Act 1972* for their proper and adequate provision from the estate of the deceased;
 - (c) There was a real possibility that the cost of all parties in any legal proceedings would be ordered to be paid from the estate; and

- (d) The net asset value of the estate was about \$337,756.

I certify that this and the preceding [32] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE D R PARRY, DEPUTY PRESIDENT