

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Conradie* [2018] QCAT
170

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
ERICH HEIN CONRADIE
(respondent)

APPLICATION NO/S: OCR064-16

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 12 June 2018

HEARING DATE: 26 February 2018

HEARD AT: Brisbane

DECISION OF: Hon Peter Lyons QC, Judicial Member

Assisted by:
Mr S Anderson
Mr K Revell

- ORDERS:
- 1. A local practising certificate is not to be granted to the respondent before 6 February 2019.**
 - 2. When he next applies for a local practising certificate, the respondent is to submit with the application a report, from a psychiatrist or a psychologist, seen within 6 months prior to the application, dealing with the respondent's mental health generally, and his management of it, particularly relating to depression.**
 - 3. When the respondent applies for a local practising certificate after he has again been in practice for a period of twelve months, he is to submit with the application a report from a psychiatrist or a psychologist seen within 6 months prior to the application, dealing with the respondent's mental health generally, and his management of it, particularly relating to depression.**
 - 4. The respondent is to pay the applicant's costs of and incidental to the application to be assessed on the standard basis.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS –
COMPLAINTS AND DISCIPLINE – PROFESSIONAL

MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – GENERALLY – falsification of documents and transactions – trust money – solicitor’s costs – where four charges of respondent’s conduct relating to competence and diligence, billing, trust accounting and dishonesty – whether professional misconduct or unsatisfactory professional conduct – whether fit and proper person

EVIDENCE – ADMISSIBILITY – OPINION EVIDENCE – EXPERT OPINION – QUALIFICATIONS OF WITNESS – where expert opinion from psychologist on respondent’s mental state – whether psychologist qualified to give evidence of a diagnosis of depression

Acts Interpretation Act 1954 (Qld), s 49A

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 9, s 10, s 28

Legal Profession Act 2007 (Qld), s 249, s 332, s, 418, s 419, s 456, s 462

Adamson v Queensland Law Society Inc [1990] 1 Qd R 498

Attorney-General v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand [2018] QCA 66

Jensen v Legal Services Commissioner [2017] QCA 189

Legal Profession Complaints Committee v Love [2014] WASC 389

Legal Services Commissioner v Mugford [2016] QCAT 78

Legal Services Commissioner v Shand [2017] QCAT 159

R v Nguyen [2015] QCA 205

Watts v Legal Services Commissioner [2016] QCA 224

APPEARANCES & REPRESENTATION:

Applicant: D A Holliday, instructed by the Legal Services Commission

Respondent: A M Nelson, instructed by Slade Waterhouse Lawyers

REASONS FOR DECISION

- [1] The applicant has brought proceedings seeking disciplinary orders pursuant to s 456 of the *Legal Profession Act 2007 (Qld)* ('LP Act'), and an order for costs.
- [2] The primary issue is whether the Tribunal should recommend the removal of the applicant’s name from the roll of legal practitioners on the ground that he is at present not a fit and proper person to be a legal practitioner.

- [3] The applicant has formulated four charges, contending in respect of each that the respondent engaged in unsatisfactory professional conduct or professional misconduct. The first charge alleges that the respondent failed to act with competence and diligence in his conduct of litigation on behalf of Tenement Administrations Services Pty Ltd ('TAS') ('the *incompetence charge*'). The second charge is that the respondent failed to provide an itemised bill when first requested to do so by his client ('the *itemised bill charge*'). The third charge alleges that, on six occasions, the respondent improperly dealt with his client's trust money for his own benefit, without the authority of the client ('the *trust account charge*'). The fourth charge is that the respondent created false documents and otherwise dishonestly misled the Queensland Law Society ('QLS') ('the *dishonesty charge*'). The charges may be better understood from a recitation of the facts, which are not in issue.

Facts

- [4] The respondent was admitted to practice as a legal practitioner in Queensland on 15 January 2008. At the times relevant to these charges, he carried on the legal practice, Conradie and Associates Solicitors, as a sole practitioner.
- [5] In 2012, TAS was engaged in litigation which it had commenced in the Federal Court. On about 19 June 2012, Ms Jay Evans-Wheeler, the managing director of TAS, retained Mr Conradie to act for the company in that litigation. On 25 July 2012, Ms Evans-Wheeler paid \$10,000 to the trust account of Mr Conradie's law practice on account of costs and outlays for the proceeding.
- [6] On 4 July 2012 the Federal Court made orders including an order that TAS respond to any request for particulars by 16 August 2012, and that it file a notice of discovery by 11 October 2012. TAS failed to comply with these orders.
- [7] On 15 November 2012 the Deputy District Registrar of that Court ('Deputy Registrar') wrote to the respondent pointing out that his client had not taken any step since the order of July 2012. On 26 November 2012 the respondent advised the Deputy Registrar that he proposed to provide further and better particulars by 30 November 2012 and to file a list of documents by 2 December 2012. He did not do so. On 31 December 2012, the Deputy Registrar again wrote to the respondent about these matters, but the respondent did not reply.
- [8] In January 2013 Ms Evans-Wheeler attended at the respondent's office for 10 days to assist in the preparation of the notice of discovery and a list of documents to be provided by TAS. At a directions hearing on 6 February 2013, the respondent apologised for non-compliance with the Court's orders and told the Court that he and his opponent had agreed on orders to be made that day. The orders were thus made by consent, although the respondent did not have his client's instructions to consent to them. They included orders that by 12 February 2013, TAS would respond to the request for further and better particulars, serve a list of documents to be discovered and file and serve a notice of discovery, and, that if TAS failed to comply, the proceeding in the Federal Court would be dismissed with costs.
- [9] At 12:16 AM on 13 February 2013, the respondent sent an email to the solicitors for the other party to the Federal Court proceedings, responding to the request for

further and better particulars. That was non-compliance with the order of 6 February 2013, and it resulted in the dismissal of the proceedings.

- [10] On 25 February 2013, the respondent filed an application to vary the order of 6 February 2013, for the purpose of reinstating the proceedings. A judgement dismissing this application was given on 20 June 2013.
- [11] In 2012 and 2013, the respondent transferred monies from his trust account to his general account on six occasions. Four of these occurred in 2012. The first was for a sum of \$121, and was described in the respondent's trust account ledger as expenditure for the collection of the files of TAS, and filing a notice of change of solicitor. Sums totalling \$8,976 were transferred from the trust account to the respondent's general account in August, September and October 2012. These sums were described in the trust account ledger as payments of accounts, and appear to be charges for services provided by the respondent. A further transfer of \$33 in July 2013 was described in the ledger as the payment of an agent's fee to collect files from a barrister. A final payment of \$870 in October 2013 also appears to be in respect of legal services provided by the respondent. An invoice was prepared for each payment, but none of the invoices was sent to TAS.
- [12] On 29 August 2014, Ms Evans-Wheeler requested the respondent to provide an itemised account for his fees, or the return of the sum of \$10,000 previously paid into his trust account. The respondent did not provide the account.
- [13] Ms Evans-Wheeler had by then lodged a complaint with the Legal Services Commission, which was referred to the QLS for investigation. The Society then requested certain information from the respondent. The respondent replied by letter dated 4 May 2015. In that letter he falsely stated that he had never prepared an invoice, and, he falsely stated that he had not debited the trust account with any amounts relating to the action involving TAS. He said, 'The funds are still in my trust account.'
- [14] The respondent's letter of 4 May 2015 was accompanied by what purported to be a trust account statement dated 3 May 2015. That document recorded the deposit of \$10,000 to the trust account on behalf of TAS. It recorded no withdrawals from the trust account. It thus dishonestly recorded the state of the account.
- [15] By a letter dated 7 May 2015 the Society required the respondent to explain why TAS had not been invoiced for professional fees and outlays or had the trust money returned as requested. The respondent replied by letter dated 15 May 2015. In it, the respondent repeated his earlier statement that he had not invoiced TAS. He gave explanations for not doing so, obviously dishonestly. With the letter, the respondent again included a copy of the trust account statement dated 3 May 2015.
- [16] By letter dated 18 May 2015, the Society required the respondent to provide a copy of his trust account ledger for the TAS matter. The respondent replied by letter dated 21 May 2015, including what purported to be a copy of the ledger for TAS up to 14 May 2015. This recorded a credit trust account balance of \$10,000 and no withdrawals. It, too, dishonestly recorded the state of the account.
- [17] The Society had the benefit of an external examiner's report for the period ending 31 March 2013. This recorded a balance of \$903 in favour of TAS in the

respondent's trust account. A trust account investigation undertaken by the Society on 18 September 2013 recorded a balance of \$870 in the trust account for TAS. The external examiner's report for the period ending 31 March 2014 recorded that no funds were held in the trust account in favour of that company. These matters were communicated to the respondent by letter dated 27 May 2015, and the respondent replied on 17 June 2015.

- [18] In his letter of 17 June 2015, the respondent stated that, between August 2012 and October 2013, he had issued invoices to TAS totalling \$9,846. He also transferred funds from the trust account held on behalf of TAS, to his general account, in satisfaction of those invoices, and \$154 for outlays. When he was informed of the complaint by Mr Evans-Williams, he knew that he was unable to show that invoices had been sent to TAS, and he also knew that an itemised account had not been sent to the client. When he received the letter from Society in March 2015, he panicked. The respondent stated that he drafted trust account documents that made it appear that the client ledger had not been debited, and that the account still held the sum of \$10,000. He then sent these documents to the Society. The respondent's letter of 17 June 2015 included copies of the account documents, which truly recorded the transactions on the trust account, referred to earlier.
- [19] On 19 June 2015 the respondent reinstated the sum of \$10,000 to the trust account in favour of TAS.
- [20] These are the facts on which the four charges are based. The respondent admits them. He also admits that the incompetence charge and the itemised account charge constitute unprofessional conduct, and that the trust account charge and the dishonesty charge constitute professional misconduct. The Commissioner accepts that a finding of unprofessional conduct should be made in respect of the itemised bill charge, but contends that the respondent should be found guilty of professional misconduct in relation to the other three charges. There is also an issue as to the orders to be made. However, it is convenient to record some further facts.
- [21] The respondent gave evidence that, on 13 November 2015, the Society notified him that his practising certificate had been cancelled. Having been given some advance warning of this, the respondent sold his practice for \$50,000, including any work in progress. The respondent continued to be employed by the purchaser, until his attention was drawn to the fact that that was in contravention of s 26 of the LP Act. This employment ceased on 5 February 2016. Thereafter he worked as an Uber driver and a labourer, and undertook a real estate agent's course. He has since worked as an employee of a real estate agency. The respondent also gave evidence that his relationship with his wife experienced difficulties for some years and they have now separated. There is no reason not to accept this evidence.
- [22] The respondent has obtained evidence from a psychologist, Dr Gavan Palk, in relation to his state of mind at the time of the conduct the subject of these charges. Ms Holliday of Counsel who appeared for the Commissioner took objection to some of this evidence. Although the objection was subsequently withdrawn, it is convenient to discuss it.

Objection to Dr Palk's evidence

- [23] Dr Palk's first report is dated 8 June 2014 but was probably written one year later, on 8 June 2015. It recorded that he administered what he described as self-report psychometric measures. One is the Depression Anxiety Stress Scale ('DASS'); another is the Personality Assessment Screener ('PAS'); and the third is the Personality Assessment Inventory ('PAI').
- [24] Dr Palk recorded that the respondent's scores on the DASS 'indicate that he is currently experiencing excessive depression and anxiety as well as severe stress'. Dr Palk later recorded that there were indications that the respondent suffered from a long term depressive and anxiety disorder.
- [25] Dr Palk said that the PAI had been extensively researched and found to be highly reliable in identifying clinical and mental health problems. The PAI results showed depression, anxiety and excessive consumption of alcohol.
- [26] Dr Palk also applied a diagnostic approach known as the DSM-5 which he said has limitations but is accepted in the mental health field for formal diagnosis of mental health concerns. Matters reported by the respondent appear to share many of the DSM-5 features associated with alcohol abuse or substance dependence and a dysthymic disorder (mild chronic depression).
- [27] Dr Palk later stated that the respondent's scores on the DASS indicated that he was currently experiencing excessive depression and anxiety and severe stress. He needed ongoing medical and psychological treatment to assist him to cope appropriately with his depression and anxiety.
- [28] Dr Palk saw the respondent again on 3 November 2016, resulting in a report dated 12 November 2016. He again provided a DSM-5 diagnosis. He reported that the previous depression, anxiety and excessive consumption of alcohol that were noted in June 2015 seemed to have been largely resolved.
- [29] Ms Holliday objected in her written submissions to the evidence from Dr Palk to the extent that it purported to provide an opinion as to a diagnosis of mental illness, relying what was said in *R v Nguyen*.¹ In *Legal Services Commissioner v Mugford*, this Tribunal applied a statement from *Nguyen* to the effect that a psychologist (who is not a medical practitioner) does not have qualifications necessary to provide a diagnosis of depression.²
- [30] Since this Tribunal is not bound by the rules of evidence,³ Ms Holliday orally sought a ruling that evidence from Dr Palk that the respondent suffered from a mental illness be given no weight, on the ground that Dr Palk was not qualified to express such an opinion. In a Court, factual controversies as to the qualifications of an expert are resolved on a *voir dire* hearing.⁴ In the present case, the Tribunal heard evidence relevant to Dr Palk's qualification to give the diagnosis of depression.

¹ [2015] QCA 205, [34].

² [2016] QCAT 78, [55]-[56].

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

⁴ See J.D. Heydon, *Cross on Evidence* (LexisNexis Butterworths, 11th ed, 2017), [29045]; cf. *Fisher v Brown* [1968] SASR 65, 72; *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255, 263-6, referred to in *Cross*, [29060].

- [31] Dr Kirkup, a psychiatrist, gave evidence before Dr Palk was called. Dr Kirkup said that the DSM-5 was the core method in which psychiatrists were trained for making diagnoses of mental illness and that it has been in ongoing use for the last 20 years. He said that in the public health system a different instrument called ICD-10 is used, which overlapped considerably with DSM-5. His own practice principally consisted in diagnosing people with mental health illness.
- [32] Dr Kirkup was asked whether he could comment on the expertise of a psychologist to give evidence of a diagnosis of depression. Dr Kirkup said that for many years a part of his practice was in the public health field, in hospitals. There cases were dealt with by a team of health professionals, including psychologists. ICD-10 was regularly used by psychologists to make a diagnosis of mental illness, including depression. That diagnosis was used as a working diagnosis by the team over the course of the patient's treatment. When a file was closed, it would be reviewed by a psychiatrist as a 'medico-legal thing for taking responsibility for closing the case', but that did not involve reviewing the diagnosis.
- [33] Dr Palk also gave evidence about his qualifications. He said that all psychologists are trained in DSM-5 diagnosis at what he described as the fourth level, as well as at the fifth level, as part of the master's degree; although, they also receive some training in this as part of the undergraduate course. Dr Palk has provided such training to other psychologists and intern psychologists at three universities in Queensland. He had made formal diagnoses of depression over a period of more than 25 years of professional practice, though he had additional experience in doing so for about another 10 years.
- [34] The evidence of Dr Palk amply demonstrates that, as a trained psychologist, he is appropriately qualified to give evidence of a diagnosis of a mental illness such as depression.
- [35] The evidence of Dr Kirkup demonstrates an implied recognition, by those responsible for and working in teams of the kind which he described in public hospitals in the mental health area, of the competence of psychologists to make a diagnosis of a mental illness. No objection was taken to this evidence. Technically, it may be, at least in part, a form of hearsay evidence. However, this Tribunal can accept such evidence, and its content is such as to make it appropriate to do so in the present case. It supports the conclusion to be drawn from Dr Palk's evidence.
- [36] In light of the evidence, Ms Holliday withdrew her application.
- [37] At this point it is convenient to refer to some matters of law relevant to these proceedings.

Legislation relating to Tribunal proceedings

- [38] Section 452 of the LP Act authorises the Commissioner to make an application to this Tribunal for an order against a Queensland solicitor in relation to a complaint. Section 453 requires the Tribunal to hear and decide each allegation made in the application. Section 456 confers on the Tribunal the power to make orders on the

completion of a hearing. These provisions amount to a conferral of jurisdiction on the Tribunal for the purposes of ss 9 and 10 of the QCAT Act.⁵

- [39] Section 598 of the LP Act requires the Tribunal to be constituted either by a Supreme Court Judge, or a former Supreme Court Judge who is nominated by the President, to constitute the Tribunal. The Tribunal is, as provided in s 599(2), to be helped by two panel members chosen by the Tribunal's principal registrar and approved by the Tribunal.
- [40] Under s 656C of the LP Act, the Tribunal may act on an allegation if satisfied of it on the balance of probabilities, but the degree of satisfaction required will vary according to the consequences of the finding for the respondent.
- [41] By s 28 of the QCAT Act, the Tribunal is required to act fairly and according to the substantial merits of the case. It must observe the rules of natural justice. However, as mentioned earlier, it is not bound by the rules of evidence, and may inform itself in any way that it considers appropriate.
- [42] Section 456 of the LP Act, previously referred to, confers powers on the Tribunal, after it has completed a hearing of the application, if it is satisfied that the respondent has engaged in unsatisfactory professional conduct or professional misconduct. In context, the hearing referred to is the hearing required by s 453. These powers are discussed later.

Some matters of law relevant to the respondent's alleged conduct

- [43] The LP Act contains statutory definitions relevant to the conduct allegations against the respondent. Thus s 418 of the Act provides:

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.

- [44] Section 419 of the same Act provides that:

(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 maintain a reasonable standard of competence and diligence;

- [45] Because these definitions are inclusive, and because these expressions were in common use before the LP Act was enacted, common law tests for the assessment of such conduct remain relevant. In *Adamson v Queensland Law Society Inc*,⁶ Thomas J said, with respect to professional misconduct:

...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.

⁵ See also s 49A of the *Acts Interpretation Act 1954* (Qld).

⁶ [1990] 1 Qd R 498, 507.

Such conduct has also been described as conduct that would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency.⁷

- [46] In the attachment to the application, the Commissioner asserted and that the respondent's failure to deliver an itemised account to Ms Evans-Wheeler was contrary to s 332(2) of the LP Act. Subsection (1) states that, if a bill is given by a law practice in the form of a lump sum bill, any person who was entitled to apply for an assessment of legal costs to which the bill relates, may request the law practice to give the person an itemised bill. Subsection (2) then requires the law practice to comply with the request within 28 days. Ms Holliday's submissions did not address the language of s 332, and, no bill having been given by the respondent to TAS, it is not applicable to the present case.
- [47] In the attachment to the application, the Commissioner relied on s 249 of the LP Act, asserting that the respondent had improperly dealt with the client's trust money for his own benefit in breach of that section, because he did not have the client's authority to do so. There is no reason to think that the section does not apply. Section 249 (1)(b) provides that a law practice must disburse trust money only under a direction given by the person on whose behalf the money has been received.

Charge 1

- [48] The material before the Tribunal demonstrates that, over the second half of 2012, the respondent failed to take adequate steps to progress the client's action in the Federal Court, including failure to comply with Court directions. He then consented to an order, without his client's instructions to do so, requiring substantial steps to be taken within the next six days, and providing that non-compliance would result in the dismissal of the client's proceedings. He then failed to comply with this order. It would appear that the proceedings were complex. Nevertheless, taken as a whole, this history demonstrates that the respondent substantially failed to maintain a reasonable standard of competence and diligence in his conduct relating to these proceedings. The allegation of professional misconduct is made it out in this case.

Charge 2

- [49] The only basis identified for the allegation that the respondent's failure to provide an itemised account to his client amounted to unprofessional conduct is that he failed to comply with s 332 (2) of the LP Act. That provision does not apply to the facts relied upon. Accordingly this charge is not made out.

Charge 3

- [50] The respondent has admitted that on six occasions he withdrew money held in his trust account to the credit of TAS and transferred it to his general account, without his client's authority.

⁷ See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; and the discussion in G.E. Dal Pont, *Lawyers' professional responsibility*, (Thomson Reuters, 6th ed, 2017), [23.85].

- [51] Two of the withdrawals were to reimburse outlays. It may be said that they discharged a liability of the client, most likely to the respondent, for payments made on its behalf. These payments may also be regarded as being made for the respondent's benefit, providing him with funds in place of a right to claim reimbursement.
- [52] The respondent obviously did some work for the benefit of the client, notwithstanding the failures previously discussed. It is not possible to reach a firm view on the material available whether and to what extent the payments reflect a potential liability of the client (though the respondent told Dr Palk that the moneys were expended 'legitimately'). Even if they did, they were similarly made for the respondent's benefit.
- [53] The payments were made in breach of s 249 of the LP Act. Since they were made without authority, they were made in breach of the respondent's obligation as trustee.
- [54] 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. The respondent has admitted that the making of these payments amounted to professional misconduct. In this case, there is no reason not to accept this admission.

Charge 4

- [55] The respondent admits that on three occasions in May 2013 he made a number of statements to the Society which were untrue and dishonestly made. He supported the statements with two false documents. There can be no doubt that this amounts to professional misconduct.

Respondent's explanation for his conduct

- [56] The primary explanation for his conduct which was advanced on behalf of the respondent is the combined effect of his mental state and his circumstances at that time. Evidence of the respondent's mental state comes from Dr Palk and Dr Kirkup.
- [57] As previously discussed, Dr Palk formed the view in June 2014 that the respondent was suffering 'excessive depression and anxiety and severe stress', and that the respondent needed ongoing medical and psychological treatment to assist him to cope appropriately with depression and anxiety. In November 2016, Dr Palk concluded that the previous depression, anxiety and excessive consumption of alcohol seemed to have been largely resolved. Orally, Dr Palk stated that he suspected that the respondent had suffered major depression before he saw him, but he had not reached a confident conclusion to that effect. He was confident that, at the time when he saw the respondent, the respondent showed features of chronic alcoholism and features of consistent mild depression.
- [58] Dr Kirkup saw the respondent in December 2016 and in January 2017. He then concluded that in the period from 2011 to 2015, the respondent's symptomatology showed a long episode of anxiety and depression best described as dysthymia (depressive symptoms lasting longer than two years) and a generalised anxiety

disorder. The respondent also met the criteria for alcohol abuse disorder. He stated that, in his professional opinion, the respondent's conduct was 'a direct consequence of an episode of mental illness', and excessive alcohol intake contributed to his mental illness and his impaired decision making. He said also that the respondent, when Dr Kirkup saw him, presented 'free from any significant symptoms of mental illness', and that his alcohol intake was well within acceptable limits. He said that the respondent had developed appropriate psychological strategies to prevent future episodes of such conduct and concluded that the respondent was 'a fit and proper person to resume legal practice'. Dr Kirkup's report of 17 October 2017, after he had re-interviewed the respondent on that date, confirmed the findings of his previous report.

- [59] In cross-examination, Dr Kirkup accepted that the respondent was responsible for his actions, and was not deprived of any of the capacities relevant to criminal responsibility. He stated that the respondent's depressive illness explained his behaviour, but did not excuse it. He stated that the respondent would not have committed the relevant actions 'had he made better choices and had a better mental state at that time.' The respondent's current state was such that the prospect of 'further incidences of behaviour like (that the subject of these proceedings) was extremely low'. He also said that the choices that the respondent had made did not 'appear to be his natural instinct' when the respondent was in a well state. However, he accepted that the respondent had displayed 'some underlying weakness of his personality or lack of awareness of ethics or something like that'. In re-examination he accepted the suggestion that additional protection for the community would be provided if the respondent consulted a psychologist or psychiatrist at six-monthly intervals for a period of time.
- [60] Ultimately the views of Dr Kirk and Dr Palk were not seriously challenged. The conclusion to be reached from their evidence is that at the time of the conduct the subject of these proceedings, the respondent was suffering from a depressive illness and an anxiety condition which to a significant extent explain his conduct. His condition was exacerbated by alcohol abuse, and stress he was experiencing, particularly associated with difficulties in his marriage. He has taken some steps to manage his mental health, and to limit his intake of alcohol. Should he continue to do so, it is unlikely that he would engage in similar conduct in the future.

Outcome of the application

- [61] The applicant contended that the Tribunal should recommend that the respondent's name should be removed from the local roll pursuant to s 456(2)(a) of the LP Act.
- [62] Ms Holliday for the applicant accepted that, if such an order were to be made, there is an onus on the applicant to prove that the respondent is currently not fit to practise as a solicitor. She appeared to accept the evidence of Dr Kirkup and Dr Palk as to the low risk of the respondent engaging in similar conduct in the future. Indeed, she accepted that protection of the community is not a real concern in the present case. However she submitted that the respondent was nevertheless unfit to practise now. She submitted that the order was necessary for the maintenance of professional standards.

- [63] In *Watts v Legal Services Commissioner*,⁸ the Court of Appeal held that an order for the removal of a practitioner's name from the roll should only be made when the probability is that the practitioner is permanently unfit to practise. The applicant has not demonstrated that probability, at least by reference to the question whether the respondent might engage in similar conduct in the future.
- [64] Ms Holliday submitted that the maintenance of professional standards requires a consideration of the conduct of the practitioner, and that some conduct will be so much the antithesis of what it is to be a legal practitioner, that the conduct itself warrants the recommendation for removal from the roll. On that basis she submitted that the recommendation should be made. She did not explain how her submission might be consistent with the proposition just referred to from *Watts*. It could only be so, where the respondent's conduct demonstrated a permanent unfitness to practise, notwithstanding that it was unlikely to be repeated.
- [65] It would not be unusual, and would be consistent with authority, to conclude that the maintenance of professional standards would, in a particular case, require the removal of a practitioner's name from the roll. That would usually be because of the probability that the practitioner would otherwise fail to maintain those standards. But that is akin to saying that the practitioner is unfit to practise, because of the likelihood of such a failure. Ms Holliday did not explain in what other circumstances the maintenance of professional standards would provide a basis for the order she sought, in the exercise of a jurisdiction which is protective rather than punitive.⁹
- [66] In support of her submission that the need to maintain professional standards would warrant the recommendation in the present case, Ms Holliday made reference both to *Watts* and to *Jensen v Legal Services Commissioner*.¹⁰ Beyond a broad statement of principle, *Jensen* is of no real assistance in the present case. *Watts*, like *Jensen*, is a case in which the recommendation was not made. The decision in *Watts* tends to work against Ms Holliday's submission.
- [67] In *Watts* the practitioner had on four occasions made disbursements from his trust account to his general account, before an account for professional costs had issued to the client. The total amount involved was approximately \$142,000. In one case he subsequently issued an account and thus became entitled to retain the disbursement. In the other three cases he subsequently refunded the amounts to the client. In another two cases, the practitioner created false trust account receipts purporting to record the receipt of funds when no monies had been received. He paid an almost equivalent amount from the trust account to the general account, in effect, funded proportionately by all those on whose behalf monies were held in trust at the time of these payments. The sums involved on these occasions amounted to just under \$50,000. They were subsequently restored to the trust account. While there are obvious differences between the conduct under consideration in *Watts* and the conduct of the respondent, both cases involve serious misconduct, and it can be seen

⁸ [2016] QCA 224, [33], [46] (Gotterson JA); see also [1], [55].

⁹ *Clyne v NSW Bar Association* (1960) 104 CLR 186, 20, 202; *NSW Bar Association v Evatt* (1968) 117 CLR 177, [12]; notwithstanding the punitive effect of an order that a practitioner be struck off: see the discussion in G.E. Dal Pont, *Lawyers' professional responsibility*, (Thomson Reuters, 6th ed, 2017), [23.56].

¹⁰ [2017] QCA 189.

that the maintenance of professional standards in *Watts* did not warrant a recommendation that the practitioner's name be removed from the roll.

- [68] Ms Holliday sought to distinguish *Watts* on the basis that the present case involves dishonesty. She also sought to distinguish *Jensen* on the basis that it did not involve dishonesty on the part of the practitioner. While the latter submission is correct, it does not provide positive support for the recommendation sought by Ms Holliday. If the earlier submission were intended to convey that *Watts* did not involve dishonesty, it would not be correct. Plainly, the creation of false receipts was dishonest. So was the unauthorised withdrawal of funds from the trust account.¹¹ While it may be accepted that dishonesty to the Society in the course of an investigation is a particularly serious matter, that does not provide a significant basis for distinguishing *Watts*.
- [69] Some indirect support for the applicant's submission might the thought to be found in the proposition from Dal Pont that evidence of mental illness does not ordinarily carry great weight especially for conduct that involves dishonesty.¹² The author cited in support of this proposition *Legal Profession Complaints Committee v Love*.¹³ However, an examination of the case reveals of that, although the practitioner suffered from a depressive illness, it was not shown to be causally connected to his deliberately misleading conduct.¹⁴ Other significant features which led to the order for striking off were the practitioner's lack of remorse and insight into his wrong doing, and his previous disciplinary history;¹⁵ features not found in the present case.
- [70] No real basis has been established for making the recommendation sought by Ms Holliday once it is accepted that protection of the community is not a real concern in the present case.
- [71] In this context, some other matters should be noted. The most serious aspect of the respondent's conduct was his dishonesty in May 2015. It occurred on three separate occasions, and involved the dishonest production of two documents. Nevertheless, the occasions fell within a brief time span. Given the existence of the external examiner's reports, and the Society's trust account investigation, the respondent's dishonesty was not a particularly clever or sophisticated response to the inquiries from the Society. This seems consistent with the evidence about his mental state. Once confronted with the reports, he appears to have recognised his difficulties and sought appropriate professional assistance. Relatively promptly he then frankly acknowledged his wrongdoing, and expressed remorse. He did not attempt to understate the significance of his conduct, or to provide spurious explanations for it. Throughout these proceedings, he has substantially accepted the case made against him, and the significance of his wrongdoing. These matters are of significance, being relevant to the risk which the respondent would present as a legal practitioner to the general public

¹¹ See *Re a Practitioner* (1982) 30 SASR 27, 31 (King CJ), cited in G.E. Dal Pont, *Lawyers' professional responsibility*, (Thomson Reuters, 6th ed, 2017), [25.50].

¹² G.E. Dal Pont, *Lawyers' professional responsibility*, (Thomson Reuters, 6th ed, 2017), [23.145].

¹³ [2014] WASC 389.

¹⁴ Ibid [64]-[66].

¹⁵ Ibid [31].

- [72] The focus of the hearing was the dishonesty charge. Although both the conduct which was the subject of the incompetence charge and the conduct the subject of the trust account charge are concerning, they occurred in somewhat similar circumstances to the conduct the subject of the dishonesty charge. They do not alter the assessment of the risk to the public should the respondent return to practice as a solicitor, nor the appropriate orders to be made on this application.
- [73] Nevertheless, orders should be made which would provide for some check on the respondent's mental health before he can return to practice. They should also give some recognition to the seriousness of the respondent's conduct, to provide an incentive to the respondent not to neglect his mental health, and to discourage him from engaging in similar conduct in the future. It might be noted that the respondent has already been unable to practice as a solicitor for more than two years, likely to be productive of some financial loss to him; and he has reimbursed TAS notwithstanding that he had done some work for it. These matters too provide some incentive for the respondent to take proper care of his mental health should he return to practice.
- [74] The applicant seeks an order for his costs, under s 462 of the LP Act. The respondent submits that those costs should be fixed at \$1,000, on the basis that the applicant persisted in seeking a recommendation that the respondent's name be removed from the roll, in the face of the evidence of Dr Kirkup and Dr Palk. What amount the applicant might receive pursuant to an order for costs assessed on the standard basis is unknown, but is likely to be more than \$1,000. No attempt was made to demonstrate that an order for part only of the applicant's costs would be consistent with the language of s 462.¹⁶ It was not unreasonable for the applicant to challenge the evidence of Dr Palk and to explore the evidence of Dr Kirkup; and the language of the section is consistent with the view that the applicant should not be discouraged by questions of costs from properly pursuing an application. The applicant should be awarded his costs on the standard basis.

Orders

- [75] The following orders are made:
- (a) A local practising certificate is not to be granted to the respondent before 6 February 2019;
 - (b) When he next applies for a local practising certificate, the respondent is to submit with the application a report, from a psychiatrist or a psychologist, seen within 6 months prior to the application, dealing with the respondent's mental health generally, and his management of it, particularly relating to depression;
 - (c) When the respondent applies for a local practising certificate after he has again been in practice for a period of twelve

¹⁶ Though, that seems implicit in the decision of the Hon J B Thomas in *Legal Services Commissioner v Shand* [2017] QCAT 159, [96]-[108]; see also on appeal *Attorney-General v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand* [2018] QCA 66, [62]-[66].

months, he is to submit with the application a report from a psychiatrist or a psychologist seen within 6 months prior to the application, dealing with the respondent's mental health generally, and his management of it, particularly relating to depression; and

- (d) The respondent is to pay the applicant's costs of and incidental to the application to be assessed on the standard basis.