JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
CITATION	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE and BUTLER [2023] WASAT 124
MEMBER	**:**	JUDGE K GLANCY, DEPUTY PRESIDENT MR J O'SULLIVAN, SENIOR MEMBER MS R LAVERY, MEMBER
HEARD	**:**	6, 7 SEPTEMBER 2023 AND 16 NOVEMBER 2023
DELIVERED	**:**	13 DECEMBER 2023
FILE NO/S	**:**	VR 114 of 2022
BETWEEN	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE Applicant AND JOHN WESLEY BUTLER Respondent

Catchwords:

Vocational regulation - Legal practitioner - Allegations of professional misconduct - Allegation of invoicing and receiving payment for legal services from client who the practitioner knew, or ought to have known, lacked capacity to understand costs agreement, the invoices and her rights in relation to the invoices, or in circumstances where the practitioner had real doubt about the client's capacity to understand those matters - Finding of professional misconduct

Legislation:

Interpretation Act 1984 (WA), s 37
Legal Profession Act 2008 (WA), s 5(a), s 198, s 295, s 295(1), s 295(4), s 295(6), s 296(7), s 402, s 403, s 403(1)(a), s 404, s 428, s 438, s 438(1), s 438(2), s 439, s 440, s 441, s 442
Legal Profession Uniform Law Application Act 2022 (WA), s 6, s 260(a)

Result:

The Practitioner is guilty of professional misconduct

Category: B

Representation:

Counsel:

Applicant	:	P Cahill SC & CR Bailey
Respondent	:	S Penglis SC & B Tariq

Solicitors:

Applicant	:	Legal Services and Complaints Committee
Respondent	:	Fletcher Law

Cases referred to in decision(s):
Borchert v Terry [2009] WASC 322
Briginshaw v Briginshaw (1938) 60 CLR 336
Fradgley v Pocklington (No 2) [2011] QSC 355
Gibbons v Wright [1954] HCA 17; (1954) 91 CLR 423
Goddard Elliott (firm) v Fritsch [2012] VSC 87
Hakuna Matata Corporation Pty Ltd v McDonald Pynt Lawyers [No 2] [2012] WASC 513
Kyle v Legal Professionals' Complaints Committee [1999] WASCA 115
Legal Profession Complaints Committee and Goldsmith [2022] WASAT 43
Legal Services and Complaints Committee and Goldsmith [2022] WASAT 43 (S)
Legal Services and Complaints Committee and Lourey [No 2] [2023] WASAT 77
Legal Services Commissioner v Pennisi [2023] QCAT 118
Palmer v Dolman [2005] NSWCA 361

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction and outcome

1 By application dated 22 December 2022, the Legal Services and Complaints Committee (**Applicant**) referred to the State Administrative Tribunal for determination a complaint that Mr John Wesley Butler (**Practitioner**) had engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) (**LP Act**). The Practitioner was the principal of the Australasian Lawyers' Group Pty Ltd, trading as Butler's Lawyers and Notaries in Nedlands (**Firm**).

2 On 6 September 2023, we gave leave to the Applicant to amend the Ground and the Statement of Facts and Contentions in accordance with its Minute of Second Further Amended Annexure A. On 16 November 2023, we gave the Applicant leave to make a further amendment to the Minute of Second Further Amended Annexure A to correct what was clearly an accidental omission of a word from that document.[1]

3 The only Ground alleged against the Practitioner is that he caused his firm to receive fees (or did not take steps to stop it from receiving fees) in circumstances where he knew, or ought to have known, that the client (to whom we refer throughout these reasons for decision as MT) lacked capacity to make complex financial decisions or to understand any detailed or complex legal or financial matters, including the Firm's costs agreement pursuant to which the fees were charged or, alternatively, where there existed in his mind a real doubt as to her capacity to do so.

4 For the reasons set out below we have found the Practitioner guilty of professional misconduct.

The issues

5 The primary issues to be determined in this case are:

1. Did the Practitioner know, or ought to have known, that MT lacked capacity to understand the Firm's costs agreements, invoices and her rights in relation to the invoices at the time

[1] The amendment was the insertion of the word 'diligent' after the word 'competent' in line 4 of the introductory paragraph.

when his Firm received payment for invoices rendered for legal work performed for her?

2. If not, was there in the Practitioner's mind a real doubt as to MT's capacity to understand the Firm's costs agreements, invoices and her rights in relation to the invoices at the time when his Firm received payment for invoices rendered for legal work performed for her?

3. If the answer to 1 or 2 is yes, did receiving the payments in those circumstances amount to a breach of the Practitioner's professional obligations; and

4. If so, does that conduct amount to professional misconduct or unsatisfactory professional conduct?

6 Before we can determine those issues, we must also determine whether this matter is to be resolved pursuant to the LP Act or the *Legal Profession Uniform Law Application Act 2022* (WA) (**Application Act**). That issue arises because, although the conduct and the complaint about it occurred before the commencement of the Application Act, the complaint was referred to the Tribunal after the commencement of the Application Act.

The applicable law

7 On 23 February 2022, the LPCC informed the Practitioner that it had resolved that, pursuant to s 428 of the LP Act, to refer certain matters concerning the Practitioner's conduct in regard to MT's matter to the Tribunal.[2] The application was filed in the Tribunal on 22 December 2022.

8 Because the LP Act was repealed on 1 July 2022 by s 260(a) of the Application Act which also, by s 6, provides that the *Legal Profession Uniform Law* (WA) (**Uniform Law**) applies as a law of Western Australia on and from 1 July 2022, we must consider the issue of which legislation governs this proceeding.[3]

9 The Applicant submits that the matter is to be determined under the LP Act because s 37 of the *Interpretation Act 1984* (WA)

[2] Exhibit 1.68.
[3] The Practitioner does not challenge the Tribunal's jurisdiction: Practitioner's written closing submissions in reply dated 9 November 2023, para 1.

(**Interpretation Act**) applies, with the result that the LP Act continues to apply to the proceeding.

10 Section 37 of the Interpretation Act provides as follows:

> **37. General savings on repeal**
>
> (1) Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears –
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect;
>
> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under the enactment;
>
> (c) affect any right, interest, title, power or privilege created, acquired accrued, established or exercisable or any status or capacity existing prior to the repeal;
>
> (d) affect any duty, obligation, liability, or burden of proof imposed, created, or incurred prior to the repeal;
>
> (e) subject to section 11 of the Criminal Code and section 10 of the Sentencing Act 1995, affect any penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against that enactment;
>
> (f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligations, liability, burden of proof, penalty or forfeiture,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made.
>
> (2) The inclusion in the repealing provisions of an enactment of any express saving with respect to the repeals effected thereby shall not be taken to prejudice the operations of this section with respect to those repeals.

11 In our view, s 37 of the Interpretation Act operates to preserve the operation of the LP Act in respect of this proceeding.

12 We note that in ***Legal Services and Complaints Committee and Goldsmith*** [2022] WASAT 43 (S) (***Goldsmith***), the Tribunal held that the LP Act continued to apply to those proceedings which concerned

conduct that had occurred prior to 1 July 2022. That matter was not on all fours with this one because, in that case, the conduct had been referred to the Tribunal and had been the subject of findings by the Tribunal before 1 July 2022. Nevertheless, it is a case where the Tribunal analysed the Application Act and found:

(a) there was nothing in the Application Act which gave rise to a 'contrary intention' for the purposes of s 37 of the Interpretation Act;

(b) those proceedings dealt with an inchoate liability of Mr Goldsmith which arose under the terms of the LP Act; and

(c) by reason of s 37, the referral must continue to be dealt with pursuant to the terms of the LP Act, including questions of penalty, costs and compensation.

13 We find that the analysis in that case provides support for our conclusion in relation to the operation of s 37 of the Interpretation Act in this case.

14 Section 438(1) of the LP Act provides that the Tribunal has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct. Section 438(2) provides that if, after it has completed a hearing in relation to a referral under Part 13, the Tribunal is satisfied that the practitioner is guilty of misconduct, the Tribunal may –

(a) make and transmit a report on the finding to the Supreme Court (full bench); or

(b) make any one or more of the orders specified in ss 439, 440 and 441 of the LP Act.

15 It is not presently necessary to set out the orders which can be made pursuant to ss 439, 440 and 441 because we are presently only dealing with the liability aspect of the proceeding. A separate hearing will be held in relation to penalty in the event that the Applicant's allegations are made out and the Practitioner is found guilty of unsatisfactory professional conduct or professional misconduct.

16 While the Applicant in this matter is the LSCC, where we refer to things which were, as a matter of fact, done by the LPCC before the Application Act commenced, we will refer to it as the LPCC, and

where we refer to provisions of the LP Act we will do so in the present tense for the sake of convenience.

Meaning of 'professional misconduct' and 'unsatisfactory professional conduct'

17 The expression 'professional misconduct' is defined in s 403 of the LP Act as follows:

> **403. Professional Misconduct**
>
> (1) For the purposes of this Act —
>
> ***professional misconduct*** includes —
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
>
> (2) For the purposes of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an Applicant for admission or for the grant or renewal of a local practising certificate.

18 It is apparent from its terms that the definition is inclusive rather than exhaustive.

19 The expression 'unsatisfactory professional conduct', is defined in s 402 of the LP Act as follows:

> **403. Unsatisfactory professional conduct**
>
> For the purposes of this Act —
>
> ***unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

20 Again, the definition is expressed to be inclusive rather than exhaustive. That this is the case is reinforced by the terms of s 404 of the LP Act which identifies particular conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct. Those examples are said to be given 'without limiting section 402 or 403'. None of the conduct identified in s 404 is relevant in this case.

21 The position in Western Australia is that the two limbs of the common law test of professional misconduct, which were articulated in ***Kyle v Legal Practitioners' Complaints Committee*** [1999] WASCA 115 (***Kyle***),[4] but with reference to 'unprofessional conduct' (which we now call professional misconduct) still apply as separate bases for a finding of professional misconduct. That position was recently explained in detail by the Tribunal in ***Legal Services and Complaints Committee and Lourey***.[5] We adopt that reasoning without repeating it.

22 The two limbs of professional misconduct identified in ***Kyle*** are:

1. conduct which would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence (the first limb); and

2. conduct which involved a substantial or consistent failure to reach a reasonable standard of competence and diligence (the second limb).

23 Section 442 of the LP Act permits the Tribunal to make a finding that a practitioner has engaged in unsatisfactory professional conduct even though the referral to it alleged professional misconduct.

The allegation

24 We next set out in full the Ground upon which the Applicant says we can find the Practitioner guilty of professional misconduct.[6]

> Between about 7 October 2016 and 3 October 2017 (**the period**), the practitioner, John Wesley Butler (**Practitioner**), engaged in professional misconduct within the meaning of sections 403 and 438 of the L*egal Profession Act 2008* (WA), as made applicable by section 37

[4] ***Kyle v Legal Professionals' Complaints Committee*** [1999] WASCA 115.
[5] ***Legal Services and Complaints Committee and Lourey*** *[No 2]* [2023] WASAT 77.
[6] See Minute of Second Further Amended Annexure A as amended with leave of the Tribunal on 16 November 2023.

of the *Interpretation Act 1994* (WA), in that his conduct involved a substantial and/or consistent failure to reach or maintain a reasonable standard of competence and, and/or would reasonably be regarded as disgraceful or dishonourable to practitioners of good repute and competence, in that the practitioner caused his firm to receive payment of legal fees, alternatively as legal practice director of the firm, did not take any steps to prevent his firm from receiving payment of legal fees:

(a) in respect of invoices that he rendered, or caused his firm to render, to MT (**client**) invoices for fees and disbursements totalling $97,747.19, of which $13,986.06 was billed after 18 September 2017;

(b) which invoices included fees:

  (i) for work which was properly characterised as relating to detailed or complex legal and financial matters; and

  (ii) rendered in accordance with the terms of one or more costs agreements provided by the firm to the client;

(c) [deleted]

in circumstances where the practitioner knew or ought to have known that the client lacked capacity, alternatively, that there was a real doubt about the capacity of the client to make complex financial decisions or understand any detailed or complex legal or financial matters, including the Firm's cost agreements, in that the practitioner knew the following on about the following dates:

(d) during the period, the client had no extant attorney appointed to manage her financial affairs;

(e) on 31 August 2016, Dr Tracy Ryan, consultant older adult psychiatrist, had opined that

  (i) the client did not have capacity to understand any detailed or complex legal or financial matters regarding her affairs, which included understanding the Practitioner's firm's cost agreement; and

  (ii) an attorney should be appointed with immediate effect;

(f) on about 28 December 2016, and an employee of his firm had made an application (**Application**) to the SAT:

  (i) pursuant to section 40(1) of the *Guardianship and Administration Act 1990* (WA) for an administrator to be appointed to the client's estate; and

  (ii) which raised the issue of the client's capacity;

(g) on about 7 March 2017, a member of the SAT stated that they considered there were serious matters to be determined as to the client's capacity and the application should continue in the SAT;

(h) on about 18 September 2017, the practitioner conceded there was evidence upon which the SAT could make an administration order; and

(i) on about 10 October 2017, the SAT appointed an administrator to the client's estate as it held that the client was unable to make reasonable judgments in respect of matters relating to all or any part of her estate.

25 At this point it is important to note that the Applicant does not seek any finding of professional misconduct or unsatisfactory professional conduct against the Practitioner based on the performance of the work for MT, or on the amounts charged for the work or by the issuing of the invoices to MT. We are not required to make any findings about those matters. To determine the application, we are not required to, indeed nor could we, make any finding about MT's actual capacity at any point in time.

Onus and standard of proof and inferences

26 As the Tribunal recently restated in ***Goldsmith***,[7] the procedure in disciplinary proceedings is in substance, adversarial. Accordingly, it is 'appropriate to apply rules relating to the standard of proof that would apply to the proof of matters in civil proceedings'.[8] That is, the LSCC has the onus of proving the allegations against the Practitioner to the civil standard (i.e. on the balance of probabilities).

27 Further, as the allegations against the Practitioner are serious, the Tribunal must have regard to the nature and consequences of the facts sought to be established, the seriousness of the allegations made against the Practitioner, the inherent unlikelihood of an experienced practitioner behaving in the manner alleged and the gravity of the consequences that might flow from a finding of professional misconduct in determining whether that standard has been met.[9]

28 The Applicant's case relies significantly on inferences which it says we can draw in particular from the actions of the Practitioner. In

[7] ***Legal Profession Complaints Committee and Goldsmith*** [2022] WASAT 43 (***Goldsmith***) at [30] Allanson SP, Jackson DP, Povey OM).
[8] ***Goldsmith*** at [30] (Allanson SP, Jackson DP, Povey OM).
[9] ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 (***Briginshaw***).

the case of ***Palmer v Dolman***,[10] Ipp JA set out principles that are now well established in determining whether an inference of fraud or other serious misconduct may be drawn from circumstantial evidence in civil proceedings.[11] In ***Goldsmith***, the Tribunal identified those principles as they applied in that matter saying the Tribunal must:

1. consider the weight to be given to the united force of all of the circumstances taken together;

2. apply the standard of proof at the final stage in the reasoning process;

3. weigh the inference to be drawn from the proved facts against realistic possibilities as distinct from possibilities that might be regarded as fanciful; and

4. find the allegation is not proved where there are competing possibilities of equal likelihood or where the choice between them can only be resolved by conjecture.[12]

29 We will need to apply the ***Briginshaw*** principles in determining whether, in all of the circumstances, we should draw the inferences which would lead to findings of misconduct.

30 In these reasons, when we express ourselves to be satisfied, and make a finding, we do so on the balance of probabilities and on the basis of evidence which we regard as clear and cogent, having regard to what was said in ***Briginshaw***.

The hearing and the evidence

31 The hearing took place on 6 and 7 September 2023. Oral closing submissions were made on 16 November 2023.

32 The Applicant's case was a documentary one.

33 The Practitioner's witness statement dated 10 July 2023 was tendered as his evidence in chief.[13] He gave oral evidence in cross-examination and re-examination.

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[10] ***Palmer v Dolman*** [2005] NSWCA 361 (***Palmer v Dolman***).
[11] ***Palmer v Dolman*** at [41].
[12] ***Goldsmith*** at [31].
[13] Exhibit 11, witness statement of John Wesley Butler sworn 10 July 2023.

34 Mr Richard Ellis also gave evidence in the Practitioner's case. His witness statement, dated 7 July 2023, was admitted into evidence as an exhibit[14] and he was cross-examined and re-examined.

35 The Practitioner also tendered various documents in his case.

36 Unless we have identified to the contrary in our factual findings, we accept the truth of the contents of all of the documentary evidence.

The Practitioner

37 We are satisfied and make the following findings of fact in relation to the Practitioner and his practice as a lawyer.

38 The Practitioner was admitted to legal practice in Western Australia on 2 March 1978.[15]

39 At all material times the Practitioner;

1. was an Australian legal practitioner within the meaning of s 5(a) of the LP Act;
2. practised as the sole legal practice director of The Australasian Lawyers' Group Pty Ltd, trading as Butler's Lawyers and Notaries in Nedlands;[16]
3. held himself out as practising as a solicitor specialising in, among other things, the areas of wills, estates and guardianship and administration;[17] and
4. held equity in the Firm.[18]

Credibility of witnesses

The Practitioner

40 We accept that the Practitioner gave truthful evidence about many uncontentious and independently verifiable issues.

41 In particular, we accept the Practitioner's evidence that, and find that, he had little or no independent recollection as to key events and as to his state of mind at relevant times.[19]

[14] Exhibit 12, witness statement of Richard Hilton Ellis sworn 7 July 2023.
[15] Exhibit 11, para 1.
[16] Exhibit 11, para 2 and at ts 59 – 60, 6 September 2023.
[17] Exhibit 11, para 3.
[18] ts 58 – 59, 6 September 2023.

42 We also accept that the Practitioner gave truthful evidence that, and we find that, despite this lack of independent recollection he had not recently read almost any of the key documents referred to in this case.[20] It was his evidence that re-reading the documents during the hearing in cross-examination as questions about particular documents were put to him did not refresh his memory. While it was frustrating that the Practitioner was having to spend time reading documents before questions about them could be asked by the Applicant in the course of the hearing, we did not find that his failure to read them in advance of the hearing affected our view of his credibility.

43 Nevertheless, for reasons we set out in detail below, we did not accept some of the Practitioner's evidence. Individually and in combination, those matters have caused us to find that the Practitioner's evidence that he did not turn his mind to the question of MT's capacity to understand the Firm's costs agreements and invoices in the course of dealing with MT's matters was not credible.

44 We find that the Practitioner on occasions sought to disassociate himself from conduct or statements made at the time of the events the subject of this proceeding which were damaging to his case. For example, where the documents reveal that the Firm took certain decisions or steps that were unhelpful to his case the Practitioner tried to cast responsibility for those decisions or steps on others, particularly Ms Motroni, who was a junior solicitor employed in the Firm who had specifically asked the Practitioner to become involved in MT's matter because he had a great deal more experience than she did in dealing with capacity issues.

45 The example we set out in [47(3)] below is one such example of that type of evidence given by the Practitioner. Another is seen in the answers which the Practitioner gave in cross-examination to questions about an invoice which was sent to MT on 7 October 2016 in relation to the wills and estate planning advice and assistance which the Firm was giving to MT where the following exchange took place:[21]

> Yes, but you charged [MT] pursuant to the costs agreement even though Ms Motroni had reported Dr Ryan's opinion that she didn't understand the costs agreement?---That's what has happened, yes.

---

[19] ts 65, 67 – 74, 78 – 104, 6 September 2023.
[20] ts 64, 65, 70, 71, 75, 84, 6 September 2023 and 120, 7 September 2023.
[21] ts 91, 6 September 2023.

> Well that's what you've done?---I didn't do it. It has happened – my firm did it.
>
> Well, you're responsible for it?---Yes. I'm responsible.

46 The repeated attempts which the Practitioner made to avoid responsibility for decisions or actions in which we find he was clearly involved at the time caused us to doubt the credibility of the Practitioner's evidence as to his state of mind or beliefs.

47 It was apparent to us that the Practitioner was also most reluctant to make concessions about his state of mind or knowledge which were obviously appropriate given the contents of contemporaneous documents. We refer to the following by way of examples:

1. The Practitioner agreed that he had settled a letter to MT dated 2 September 2016,[22] in which MT was informed that the Firm could no longer act for her because Dr Ryan had expressed the opinion that MT could not understand the Firm's costs agreements and which informed MT that the next step should be to have the Public Trustee appointed as her administrator. Yet, despite having settled the letter, the Practitioner did not accept that the letter expressed the views which he held at the time.[23]

   We simply did not accept his evidence that it was Ms Motroni's decision and that the settling of the letter by him did not mean that he agreed with its contents and that he had held the views expressed in it. We rejected that evidence as implausible, particularly in circumstances where he was the principal of the Firm, had become involved in MT's matter specifically because of his experience in dealing with issues of capacity and professional responsibility and where there was no evidence that he had expressed any contrary view at the time.

2, Although the Practitioner accepted that the application made to the Tribunal pursuant to the *Guardianship and Administration Act 1990* (WA) (**GA Act**) was not made for the purposes of resolving MT's capacity to execute an enduring power of guardianship (**EPG**) or an enduring power of attorney (**EPA**),[24] the Practitioner did not agree that the application must

[22] Exhibit 1.17.
[23] ts 70 – 72, 6 September 2023.
[24] ts 128, 7 September 2023.

therefore have been made for the purpose of resolving concerns about MT's capacity in relation to more complex matters.[25] We have found that to have been the only other possible reason for making the application and we find the Practitioner's unwillingness to accept that proposition both unreasonable and a matter which caused us to doubt his credibility as to his state of mind at the time.

3. The Practitioner did not accept that, despite resuming work for the client, the reason that his Firm had temporarily ceased to invoice MT for that work for a period of time in about September 2016 was because Dr Ryan had expressed an opinion that MT did not have the capacity to understand complex legal and financial matters and because he and Ms Motroni had decided to cease invoicing MT while they obtained a second medical opinion.[26] Rather, in his evidence the Practitioner maintained that he had no recollection of why the Firm ceased invoicing MT at that time and could not offer an explanation for doing so.[27] Yet, from the documents created at that time,[28] we find that the very reason the Firm had decided that it should not invoice MT was because a second opinion was to be obtained and considered.

48 Those matters caused us to form the view that, in determining the Practitioner's knowledge or state of mind at the relevant time, where his evidence was inconsistent with the documentary evidence or an inference to be drawn from the documents, we prefer the contemporaneous documents or the inference to be drawn from those documents.

49 We do not believe the Practitioner's evidence which was to the effect that he was only concerned with:

(a) MT's capacity to provide instructions, and that he was satisfied that she had capacity to provide him with the instructions which she gave;

(b) that he considered that if the client had capacity to provide instructions, a practitioner is entitled to then be paid for the work carried out in accordance with those instructions; and

[25] ts 127, 128 and 130, 7 September 2023.
[26] ts 140 – 142, 7 September 2023.
[27] ts 82 – 84, 6 September 2023.
[28] Exhibit 1.22; Exhibit 1.23; and Exhibit 1.25.

(c) that he never separately turned his mind to the issue of whether MT had the capacity to understand the Firm's costs agreements or invoices and therefore his entitlement to be paid.

50 There are several reasons for coming to that conclusion.

1. **First**, and importantly as we have already explained, we do not find him to be an entirely credible witness, particular in relation to his state of mind.

2. **Secondly**, his evidence that he did not turn his mind to the question of MT's capacity to understand the Firm's costs agreements and invoices is directly contradicted by the evidence he gave in cross-examination that it was his position that he ceased to continue acting for MT for a period of time in September 2016 because of concerns that she did not understand the Firm's costs agreement.[29]

3. **Thirdly**, it is implausible that the Practitioner did not turn his mind to any doubt as to MT's capacity in circumstances where he was party to the Firm's decision to cease to render invoices to her because of concerns about her capacity and to seek a second opinion from Dr Yew as to her capacity.

4. **Fourthly**, it is inherently implausible that, the Practitioner would not have informed Ms Motroni and other members of his Firm that he had satisfied himself as to her capacity to understand the costs agreements and invoices had he in fact done so, particularly in light of the repeated concerns expressed by them about her capacity to understand the costs agreement and their entitlement to invoice her and receive payment in those circumstances.

5. **Fifthly**, it is implausible that the Practitioner held no doubt as to MT's capacity to understand complex legal and financial matters including the Firm's costs agreements in circumstances where he was party to the decision to apply to the Tribunal for the appointment of an administrator or a declaration of capacity.

6. **Finally**, that the Practitioner could have held those beliefs is inconsistent with the evidence that he had resolved with Mr Ellis that documents held by the Firm for MT would be

[29] ts 72, 6 September 2023.

collected by Mr Ellis who would go through them with her and had provided instructions to his staff to that effect.

Mr Ellis

51 Mr Ellis is an accountant. He accepted appointment as MT's attorney under an Enduring Power of Attorney in March 2017. His evidence, which we accept, was that he has never exercised any power under that document[30] although he did provide her with some assistance in relation to her bills after her husband died.

52 We find that Mr Ellis gave his evidence honestly and was a reliable witness.

Factual findings relevant to the issues to be determined

53 We are satisfied of and make the following findings of fact in relation to this matter, most of which were not in dispute. The dispute in this matter being essentially as to what inferences we should draw as to the Practitioner's state of mind from the facts.

54 On or around 26 April 2017, MT, who was 89 years of age at the time, telephoned the Firm seeking legal advice.

55 At that time, MT had an existing EPA (**2010 EPA**) and an EPG, both of which were dated 24 August 2010, in which she appointed her husband, RT, as her attorney and guardian respectively.

56 On 2 May 2016, a junior solicitor employed in the Firm, Ms Motroni, and a law clerk at the Firm, Ms Wilkes, met with MT at her home. The file note of the meeting written by Ms Wilkes[31] records, and we find, that MT provided instructions to prepare a new EPA and a new EPG appointing someone other than RT as attorney and guardian respectively. MT informed them that she wanted to appoint a new guardian and attorney because her relationship with her husband had become strained and he had become physically disabled.

57 On 4 May 2016, Ms Motroni wrote to MT.[32] In that letter she attached a costs agreement. It identified the scope of work as:[33]

[30] ts 170, 7 September 2023.
[31] Exhibit 3.4.
[32] Exhibit 5.
[33] Exhibit 5, page 74.

> To prepare your Enduring Power of Attorney, to prepare your Enduring power of Guardianship and to attend with you at the meeting with Janene Bon from HHG Legal.

58 The costs agreement also estimated the cost of that work to be $800 – $1,000 plus GST and included a credit card authority for the client to sign which authorised the Firm to use the credit card to pay its costs.[34]

59 The 4 May 2016 letter also records that MT had expressed to Ms Motroni and Ms Wilkes her concerns that RT had been withdrawing funds from their joint bank account and suggested that she make an appointment to meet with a family lawyer from the Firm. Ms Motroni wrote that the appointment would be charged at a flat fee of $400, inclusive of GST and informed MT that she estimated that it would cost $400 – $600 for the family lawyer to write a letter to RT's solicitors and to attend to further correspondence about the matter.[35]

60 On 11 July 2016, MT's doctor, Dr Mitchell performed a Mini Mental State Examination (**MMSE**) on MT. The doctor's report of the results of that MMSE indicates, and we find, that MT scored 30 out of 30.[36]

61 A new EPA[37] and a new EPG[38] was prepared by the Firm and on 26 July 2016, they, together with a revocation of the 2010 EPA,[39] were signed by MT.

62 The new EPA appointed Mr Ellis as MT's attorney and her son, IT, as her substitute attorney. Its terms provided that it would only come into effect upon the Tribunal declaring, pursuant to s 106 of the GA Act, that she did not have legal capacity.

63 The new EPA never came into effect because MT revoked her instructions to appoint IT as the substitute attorney before he signed it.

64 MT's husband, RT, died on 5 August 2016.[40]

65 On 31 August 2016, Ms Motroni sent an email to the Practitioner[41] in which she gave him a summary of a telephone conversation which

[34] Exhibit 5, page 54.
[35] Exhibit 5.
[36] Exhibit 1.7.
[37] Exhibit 1.9a.
[38] Exhibit 1.9.
[39] Exhibit 1.8.
[40] Exhibit 1.60.

she had had with Dr Tracy Ryan, who is an older adult psychiatrist at City Lower West Older Adult Mental Health Services. In the email, Ms Motroni informed the Practitioner that Dr Ryan had made an assessment of MT's capacity and determined that:

1. MT had capacity to understand and make minor financial decisions, including signing an EPA if the Firm was satisfied that she understood it;

2. MT had capacity to make a simple will provided that the Firm went through it in detail with MT and were satisfied that she understood it; and

3. MT did not have capacity to understand any detailed or complex legal or financial matters including the Firm's costs agreement.

66 In that email Ms Motroni also:

1. informed the Practitioner that Dr Ryan had recommended that an attorney be appointed;

2. informed the Practitioner that MT continued to believe that a trustee had been appointed to manage her affairs even though Ms Motroni and Dr Ryan had explained to her that that was not correct; and

3. raised with the Practitioner the possibility of applying to the Tribunal for the Public Trustee to be appointed MT's administrator and for Public Advocate to be appointed as her guardian.

67 Also on 31 August 2016, Dr Ryan sent an email to Ms Motroni[42] in which Dr Ryan said that, in the course of conducting her psychiatric assessment of MT, she had:

1. developed concerns about whether MT was capable of managing her finances independently because, while she appeared to understand and remember simple things, her ability to make and express complex decisions was less clear; and

[41] Exhibit 1.16.
[42] Exhibit 1.15.

2. formed the view that the appropriate thing to do was to refer the matter to the Tribunal so that, if necessary, an administrator and or guardian could be appointed.

68 On 6 September 2016, the Practitioner received a copy of Dr Ryan's email of 31 August 2016 because he was blind copied Ms Motroni's reply to Dr Ryan and the original email was part of the email chain.[43]

69 On 1 September 2016, Ms Motroni sent an email to the Practitioner in which she informed him that she thought the Firm should make an application to the Tribunal seeking the appointment of the Public Trustee as MT's administrator and the Public Advocate as MT's guardian.[44] In that email, Ms Motroni also informed the Practitioner that:

1. she agreed with Dr Ryan that, although MT appeared to understand the legal advice which the Firm was providing to her, MT was unable to retain the information and did not understand it in the long term;

2. she did not think that the Firm could ask MT to enter into any further costs agreements or ask her to sign the costs agreement for preparing the deed necessary to resolve the issue of the severance of the joint tenancy which they had already sent to her; and

3. she thought that MT might have the testamentary capacity to understand a very simple will.

70 On 2 September 2016, Ms Motroni and the Practitioner sent a letter to MT[45] which said, relevantly:

1. that as a result of Dr Ryan's assessment, the Firm could not continue to act for her under the existing costs agreements;

2. she did not have a valid enduring power of attorney;

3. they were going to write to Dr Ryan inviting her to apply to the Tribunal for guardianship and administration orders; and

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[43] Exhibit 1.19.
[44] Exhibit 1.16.
[45] Exhibit 1.17.

4. they could continue to act for her in the event that the Tribunal was of the view that she did not need an administrator or guardian.

71 On 9 September 2016, Mr Motroni sent an email to a number of people, including the Practitioner, in which she said that the Firm could not represent the client from 9 September 2016.[46]

72 Ms Motroni's file note of 9 September 2016[47] records that, on that date, she and the Practitioner met with MT. The file note records that during the meeting Ms Motroni had a phone call with Dr Ryan in which Dr Ryan said that she would not retract her opinion about MT's capacity. The file note also records that it was agreed at the meeting that the Firm would arrange for a second opinion to be obtained as to MT's capacity. We find that the file note is an accurate record of what occurred in the course of that the meeting of 9 September 2016.

73 On 12 September 2016, Ms Motroni sent an email to members of the Firm, including the Practitioner, in which she said:[48]

> 1. until we know whether [MT] has capacity or not we will have to rely on Dr Ryan's assessment stating that she does not;

and

> 2. For this reason, I will record all of my time and [the Practitioner] will as well but we cannot charge it to her yet … . At the end of the day, we may have to heavily discount our invoice or not charge her for the time spent at all. On the other hand, if she has capacity, we may well be able to bill for everything we have done.

74 On 16 September 2016, Dr Ryan wrote a discharge summary upon her discharging MT from her care.[49] In the discharge summary, Dr Ryan said:

1. MT did not have a formal mental illness.
2. MT nevertheless had persistent and extreme circumstantiality of thought and tangentiality of thought.
3. She had concerns about MT's ability in relation to complex financial matters.

[46] Exhibit 1.18.
[47] Exhibit 1.21.
[48] Exhibit 1.23.
[49] Exhibit 1.24.

4. MT was otherwise independent in her daily living.

75 On 5 October 2016, Ms Motroni sent an email to the Practitioner and Ms Lothian stating that she had spoken to MT, who had informed her that she did not want to pay to have another capacity assessment undertaken. In the email she said that, due to Dr Ryan's assessment, the Firm nevertheless needed to get a second opinion about MT's capacity or to apply to the Tribunal to make an assessment regarding MT's capacity.[50]

76 On 10 October 2016, Ms Lothian sent an email to the Practitioner and Ms Motroni.[51] In that email she raised concerns about whether the Firm was doing what was best for the client particularly in light of having been told 'quite clearly' that MT did not have capacity to sign the Firm's costs agreements. She also said that in their last conversation the Practitioner had said that the Firm should help MT to obtain orders from the Tribunal but that since that time the Firm had 'continued pressing the capacity route' which the client was obviously not happy about and would not pay for. She expressed her opinion that the Firm should assist the client to obtain a 'case guardian order'.[52]

77 On 10 October 2016, Ms Motroni sent an email in reply to Ms Lothian's email which was also sent to the Practitioner.[53] In it, she said that even if MT were to pay for a further report it would not negate Dr Ryan's opinion and therefore it would remain necessary to apply to the Tribunal for a determination of MT's capacity. She also recommended that the Firm bill the client at scale rates and then refer her to another solicitor to make the application to the Tribunal.

78 On 18 October 2016, Ms Motroni drafted a letter to Dr Tek Yew, an aged care physician and asked him to meet with MT for the purposes of providing an assessment as to her capacity to understand simple and complex financial and legal matters, including a new will, a new EPA, a new EPG and a costs agreement with the Firm.[54] In part, the letter stated:

> In order for us to act for [MT], she must also enter into a number of Costs Agreements with us.

[50] Exhibit 1.25.
[51] Exhibit 1.26.
[52] Which we understand to be a reference to an administrator and a guardian.
[53] Exhibit 1.26.
[54] Exhibit 1.28.

> However, before she does so, we would appreciate confirmation that she has capacity to understand the nature and consequences of the Estate Agreement, our Costs Agreements and that she is able to act in her own best interests.
>
> We also require a general assessment of her capacity to understand simple and complex financial and legal matters.
>
> Specifically, in relation to the Estate Agreement and our Costs Agreements, [MT] must be able to understand the nature of these Agreements, as well as her obligations and rights under these Agreements.
>
> …
>
> Would you please advise us as to whether, in your opinion, [MT] has the capacity to:
>
> (a) Understand and enter into our Costs Agreements;
>
> …
>
> (f) Understand simple and complex legal and financial matters.

79 The Practitioner at least discussed the contents of the letter to Dr Yew with Ms Motroni in the course of its preparation.[55]

80 The letter of 18 October 2016 was not sent to Dr Yew.

81 On 18 November 2016, the Firm sent a costs agreement to Mr Ellis on behalf of MT.[56] At that time Mr Ellis had no legal authority to act as MT's attorney. The costs agreement:

1. provided that the scope of work was advising MT in relation to 'an application to the SAT in relation to administration of her estate; and

2. provided an estimate for that scope of work in the amount of $2,000 – $4,000 plus GST.

82 In November 2016, the Firm opened a file entitled 'Guardianship and Administration'.

83 On 29 November 2016, the Firm wrote to MT informing her that they had revised their fee estimate for the Guardianship and Administration matter noting that fees and disbursements of $17,218.65

[55] ts 94, 6 September 2023.
[56] Exhibit 1.29.

incl GST had been incurred and that further work which had already been performed had not yet been billed. The Firm estimated that their further fees and disbursements for additional work was likely to be in the range of $4,000 – $6,000.[57]

84 On 28 December 2016, an application was made to the Tribunal pursuant to s 40 of the GA Act.[58] Ms Motroni was named as the Applicant. The application was said to be for:

1. an order appointing Mr Ellis as MT's administrator; and

2. a declaration as to whether MT has capacity 'so that we can continue with her legal work, including drafting her will, EPA, EPG and the Deed'.[59]

85 The hearing of the Guardianship and Administration Act application (**GAA Application)** was listed for 7 March 2017. The Practitioner was to appear as counsel at the hearing. In preparation, on 3 March 2017, Ms Motroni wrote the Practitioner a briefing note[60] in which she confirmed that the application was for Mr Ellis to be appointed MT's administrator. She also referred to a medical report from Dr Mitchell and Dr Ryan's report stating that the MT's capacity was unclear. She also wrote that her view was that MT's capacity was fluctuating and that there were days when she clearly lacked the capacity to understand the complex legal situation she was in.

86 On 7 March 2017, the Practitioner appeared at the hearing of the GAA Application. He informed the Tribunal that he was not seeking to have an administrator appointed but rather a declaration that MT had capacity. Ms Motroni informed the Tribunal that MT 'doesn't understand what has happened with the severing of the joint tenancy' (a reference to an action taken by her husband RT before he died about which the Firm was providing legal advice to MT) and that she did not know whether MT had capacity to understand that that has happened'.[61]

[57] Exhibit 1.30.
[58] Exhibit 1.33.
[59] Of course, the Tribunal does not make declarations as to capacity but rather may appoint an administrator for all or any part of a person's estate when it is satisfied that by reason of mental disability, a person is unable to make reasonable judgments in relation to all or any part of their estate. The Deed being a reference to the deed which was intended to settle the matters arsing as a result of RT's unilateral severing of the joint tenancy of their property.
[60] Exhibit 1.40.
[61] Exhibit 1.41.

87 The Tribunal Member hearing the matter informed the Practitioner that the Tribunal did not have jurisdiction to make a declaration of capacity following which the Practitioner sought to have the application dismissed.[62]

88 The Member refused to dismiss the application because she had formed the view, on the basis of the documents available, that there were serious matters to be considered about MT's capacity.[63]

89 During a break in the proceedings in the Tribunal, or at the end of the hearing but while they were still at the Tribunal, the Practitioner and Ms Motroni caused MT to execute a new EPA in which she appointed Mr Ellis as her attorney.

90 On 17 March 2017, the Firm wrote to the Tribunal seeking to have the GA Act proceeding (which had then been relisted to 22 March 2017) vacated and to discontinue Ms Motroni's application.[64] The letter said that the Firm had had MT sign an EPA because the Practitioner and Ms Motroni had formed the view that MT had capacity to understand the effect of the EPA. The letter also stated that MT had been examined by her general practitioner, Dr Mitchell, on 8 March 2017 at which time MT had scored 30/30 on her Mini Mental State Examination and that Dr Mitchell had certified MT as having capacity to sign the EPA.

91 At some time before 22 March 2017, the Firm sought advice from a barrister, Mr Eric Heenan, in relation to the GAA Application. On 5 April 2017, Ms Motroni sent an email to the Practitioner in which she referred to a discussion she had had that day with Mr Heenan regarding the brief which the Firm had provided him in relation to the GA Act proceeding.[65] She concluded the email saying:

> … [Mr Heenan] closed the call by saying that there is enough evidence there to cast doubt as to [MT]'s capacity but if we are convinced that she has capacity there is no harm in letting her be assessed.

92 On 7 April 2017, two days after Mr Heenan's views were conveyed to the Practitioner by Ms Motroni, invoices were rendered to MT.

[62] Exhibit 1.41.
[63] Exhibit 1.41.
[64] Exhibit 1.44.
[65] Exhibit 1.47.

93 On 18 April 2017, a letter was sent from the Firm to Dr Yew.[66] The Practitioner settled the letter.[67] The letter says, relevantly:

> …
>
> We thank you for your willingness to assist us and our client [MT].
>
> [MT]'s current involvement in proceedings with the State Administrative Tribunal prevents her from making a decision as to whether to contest the severance of the joint tenancy, at this point in time.
>
> …
>
> At the time of [RT]'s death [MT] was very traumatised, particularly due to the loss of her husband of 66 years and the severance of the joint tenancy of their home, which was done without her knowledge. As a result of [MT's] behaviour at the time, her son [IT] … rang [MT's] GP on a number of occasions to the extent that the GP felt compelled to arrange a psychiatric assessment of our client. Dr Tracey (sic) Ryan prepared a report which indicated that [MT] did not have capacity to deal with complex legal issues, effectively placing us in a position where we were unable to take instructions and act on those instructions, although we were confident that [MT] had capacity.
>
> As a result we commenced proceedings in SAT in an endeavour to obtain a ruling that MT had capacity… .
>
> Following the last appearance in SAT we were satisfied that MT had capacity and had her sign an EPA appointing Richard Ellis, with immediate effect. MT's capacity as confirmed by her GP who conducted a mini mental state examination in which she achieved a perfect score.
>
> The Office of the Public Advocate is not happy with the appointment of Richard Ellis and has sought to replace us and to continue with the application in SAT in relation to MT. Further, SAT has ordered that MT undergo a further medical examination.
>
> …
>
> MT has indicated to us that she would like to update her current Will.
> …
>
> We understand from your discussions with Ronelia Motroni that you will contact MT directly to schedule an appointment for her to come and see you.

[66] Exhibit 1.48.
[67] ts 139, 7 September 2023 and Exhibit 1.71.

…

94 The terms of that letter and the original letter to Dr Yew of 18 October 2016 were very different. The earlier unsent letter specifically asked for an assessment of MT's capacity to understand the costs agreement.

95 On 21 April 2017, the Firm received Dr Yew's report.[68] He expressed the view that MT had no cognitive impairment.

96 On 28 April 2017, the Firm received another report from Dr Yew.[69] In this report Dr Yew concluded that MT had a good understanding of the purpose and functions of an EPA and EPG and that, based on his prior cognitive assessment done that day, he had formed the opinion that MT had testamentary capacity. That opinion did not deal with the questions of her capacity to understand complex legal or financial matters generally or the Firm's costs agreements in particular.

97 On 26 April 2017, Mr Ellis and the Practitioner agreed that correspondence for MT would be left at reception and collected by Mr Ellis. The Practitioner's file note of the relevant discussion[70] says:

> Re Teck Yew
>
> Re cost
>
> Re [MT]
>
> Re confusion
>
> We to hold all copies for [MT]
>
> [Mr Ellis] will collect and do through with her once a fortnight
>
> I am happy with this.

98 On 27 April 2017, Ms Swan, a senior law clerk at the Firm, sent an email to the Firm's 'support team' and 'lawyers' informing the recipients of the email of the arrangements which were being put in place for the provision of documents to MT.[71] The email was in slightly different terms to those recorded in the Practitioner's file note.

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[68] Exhibit 1.50.
[69] Exhibit 1.51.
[70] Exhibit 3.36.
[71] Exhibit 3.38.

99 The register kept by the Firm reveals that there were only three occasions on which Mr Ellis collected correspondence meant for MT.[72]

100 The register also records against particular documents the notation 'JWB TOOK' and 'JWB visited client' on a number of occasions, all of which were after Mr Ellis had collected the document on the three occasions on which he did so. The initials JWB refer to the Practitioner.[73] From that evidence we find that despite the agreement which the Practitioner had with Mr Ellis that documents were to go to MT via Mr Ellis, and the instructions which were issued to staff about it,[74] some correspondence, including invoices, were still provided directly to MT by the Practitioner.

101 On 13 June 2017, the Practitioner and his wife had lunch at the University Club of Western Australia with MT.[75] MT was a member of the club.

102 Following their luncheon, although the Practitioner made his own decision about MT's capacity, he sought his wife's view as to MT's capacity because he believed that his wife had more experience with elderly people and he valued his wife's second opinion.[76] He asked her, in substance, if she had any reservations about MT's capacity. His wife told him she had no reservations at all and remarked that MT's knowledge of current affairs was more up-to-date than theirs.[77] In cross-examination, the Practitioner accepted that they did not discuss the Firm's costs agreement or invoices over lunch.[78]

103 The Practitioner's evidence was that in about late July 2017, after he visited MT in hospital after she had had a fall, he began to doubt her capacity. He explained that he meant by that that he considered 'something significant had happened' and 'there was a difference' although he could not explain in cross-examination in what sense things were different for MT.[79]

104 The Public Advocate obtained a report from Dr Lee dated 23 August 2017 for use in the GA Act proceeding.[80] In that report,

[72] Exhibit 3,56.
[73] ts 90, 6 September 2023.
[74] Exhibit 3.38.
[75] Exhibit 11 para 98.
[76] Exhibit 11 para 98 and ts 156, 7 September 2023.
[77] Exhibit 11 para 98.
[78] ts 156, 7 September 2023.
[79] Exhibit 11 paras 102 – 103 and ts 156 – 157, 7 September 2023.
[80] Exhibit 1.55.

Dr Lee concluded that MT likely suffered from mild cognitive impairment which would have implications for complex financial matters.

105 Dr Lee provided a second report dated 2 September 2017.[81] In that second report, Dr Lee expressed the opinion that MT had the capacity to make a will but lacked the in-depth understanding required to manage more complex financial matters. He also stated that it was possible that MT had never had the capacity to manage more complex matters. He also noted that MT had expressed dismay at having to pay her lawyer thousands of dollars per month for services for which she could not account.

106 On 10 October 2017, the Tribunal delivered its decision in relation to the GAA Application. The Tribunal made orders appointing the Public Trustee as MT's plenary administrator and appointed the Public Advocate as MT's limited guardian to make decisions in relation to MT's accommodation, the services to which she should have access and her medical treatment.[82] The Tribunal also made an order revoking the EPA dated 7 March 2017 by which MT appointed Richard Ellis as her attorney and the EPG dated 24 August 2010 by which she had appointed her son as her substitute enduring guardian.

107 After being appointed administrator, the Public Trustee did not challenge any of the bills issued by the Firm for work done prior to 16 October 2017. However, the Public Trustee refused to pay the Firm's invoice for work which had been done by the Firm after its appointment as administrator.

108 In cross-examination, the Practitioner accepted, and we find, that despite informing the LPCC that when concerns about MT's capacity arose, the Firm charged her at scale rates, it had in fact charged pursuant to the costs agreement.[83]

Fees billed and payments received

We are satisfied and find that MT entered into a number of costs agreements with the Firm over the course of the Firm's engagement with her. There was a separate costs agreement for each of the Wills and Estate matter, the Estate of RT matter and the Guardianship and Administration Act matter.

[81] Exhibit 1.57.
[82] Exhibit 1.61.
[83] ts 166, 7 September 2023.

109 We are satisfied and find that invoices were rendered to and payments received from MT in relation to those three matters after 31 August 2016 are as set out in the following table.[84]

Invoice Date	Invoice No	Amount Paid	Date of Payment
Wills and Estate File			
07.10.16	17502	$3346.11	11.10.16
21.10.16	17544	$1596.23	24.10.16
04.11.16	17650	$1473.53	07.11.16
25.11.16	17776	$3318.37	28.11.16
16.12.16	17876	$784.25	19.12.16
06.01.17	17968	$1040.33	09.01.17
20.01.17	18089	$1265.46	23.01.17
03.02.17	18169	$374.52	06.02.17
10.03.17	18409	$316.90	27.03.17
24.03.17	18533	$1317.39	27.03.17
07.04.17	18631	$452.41	10.04.17
21.04.17	18712	$208.07	24.04.17
12.05.17	18832	$3541.37	15.05.17
26.05.17	18944	$600.72	29.05.17
16.06.17	19090	$511.09	19.06.17
30.06.17	19190	$400.13	03.07.17
28.07.17	19439	$410.80	01.08.17
11.08.17	19560	$1061.67	14.08.17
25.08.17	19622	$1773.35	28.08.17
08.09.17	19740	$3107.10	11.09.17
29.09.17	19954	$3358.74	03.10.17
SUBTOTAL		**$30,258.54**	
Estate of RT file			
07.10.16	17501	$845.90	13.10.16
16.12.16	17882	$320.10	19.12.16
06.01.17	17970	$320.10	09.01.17
12.05.17	18834	$554.84	15.05.17
SUBTOTAL		**$2040.94**	
GAA file			
25.11.16	17782	$747.74	28.11.16
16.12.16	17887	$213.40	19.12.16

[84] See invoices and credit card slip at Exhibit 3.55; Exhibit 1.69; Exhibit 1.70; and Exhibit 1.71.

06.01.17	17973	$810.92	09.01.17
20.01.17	18082	$499.36	Unclear - receipt not in evidence
17.02.17	18301	$1591.86	20.02.17
10.03.17	18410	$9786.52	27.03.17
24.03.17	18534	$$3220.21	27.03.17
07.04.17	18653	$3627.87	10.04.17
21.04.17	18707	$1965.42	24.04.17
12.05.17	18837	$2587.71	15.05.17
26.05.17	18940	$3122.04	29.05.17
16.06.17	19094	$5356.34	19.06.17
30.06.17	19195	$7609.84	03.07.17
14.07.17	19307	$1370.03	01.08.17
28.07.17	19441	$3305.56	01.08.17
11.08.17	19563	$1970.40	14.08.17
25.08.17	19621	$4246.66	20.08.17
08.09.17	19743	$277.42	11.09.17
29.09.17	19959	$10627.32	03.10.17
SUBTOTAL		**$62, 936.61**	
TOTAL		**$95,236.09**	

110 We also find that the Firm sent a further bill to the Public Trustee in respect of work undertaken after the Tribunal's decision of 10 October 2017. That was later written off.

111 In total, between 7 October 2016 and 3 October 2017 across the three files the Firm billed and received payment of in excess of $90,000 for work performed after 31 August 2016.

112 The Firm billed and received payment of around $13,986.06 after 18 September 2017.

113 Each payment was received because the Firm charged MT's credit cards using details which the Firm held on file.

114 The debits of MT's card routinely occurred approximately three days after the invoice was issued.

115 This evidence also demonstrates that on occasions when Mr Ellis did collect documents for MT which included an invoice the payment had already been taken from MT. For example, the invoice of 26 May 2017 was paid on 29 May 2017 and collected by Mr Ellis on 20 June

2017.[85] From that we conclude that the Practitioner's evidence that he thought Mr Ellis was assisting MT with the bills cannot be understood to mean that he understood that Mr Ellis was assisting her to understand the bills before they were paid such that she could have decided not to pay them.

Mr Ellis' evidence

116 We next deal briefly with the evidence of Mr Ellis and the findings we make from his evidence. Mr Ellis' evidence was neither disputed nor contentious. We have already found that Mr Ellis was an honest and reliable witness. We accept all of Mr Ellis' evidence and we make findings of fact in accordance with that evidence.

117 Mr Ellis is a chartered accountant and a member of the Associate of the Institute of Chartered Accountants and works as a tax accountant although he is now semi-retired.[86]

118 Mr Ellis has a number of elderly clients who have appointed him as their attorney and guardian under enduring powers of attorney and enduring powers of guardianship. He has accepted those appointments. He is also the executor or co-executor of those clients' wills. Although he had acted as an executor of a will on four occasions, at the time he gave evidence he had not acted as an attorney for any client.[87]

119 Although Mr Ellis had been engaged as MT's accountant since 1999, he only met her in person in 2004. From that time until RT's death he met with MT and RT either annually or biannually.[88]

120 He found MT to be very opinionated, old fashioned in her views and firm about what she wanted.

121 After RT died, Mr Ellis met with MT nearly every week at her home. He was assisting her with tax matters relating to a US pension and some complex US investments and other issues including the change in the title to the property which she had held jointly with RT and monies in a joint bank account.[89]

122 He also assisted her with day-to-day matters such as collecting medicine from the chemist and going through her mail, organising her

[85] Exhibit 3.56.
[86] Exhibit 12, paras 1 and 2.
[87] Exhibit 12, paras 3 – 5.
[88] Exhibit 12, paras 7 – 9.
[89] Exhibit 12, paras 10 and 12.

paperwork, and even, on one occasion, organising respite care for her after she had a fall.[90]

123 Mr Ellis saw most, if not all, of the mail sent to MT from the Firm including their invoices but he did not study in detail the attachments to the invoices.[91]

124 MT complained to Mr Ellis about the Firm's fees being very expensive. He mentioned to her that she could change Firms.[92]

125 Mr Ellis observed that MT dealt with her own finances. While he provided her any help she needed, she did not really need much assistance and she paid her own bills.[93]

126 From his dealing with MT, Mr Ellis believed that she knew exactly what was going on with her own affairs although she may not have been across each and every detail. There was never a time that he had any doubt about her capacity.[94]

127 Mr Ellis did not recall receiving the Firm's costs agreement dated 18 November 2016 and did not understand why it was addressed to him. He did not recall what he did with it and does not recall executing any credit card authority in relation to the Firm's fees.[95]

128 Mr Ellis attended the first hearing at the Tribunal with MT on 7 March 2017. Either before, after, or during a break in that hearing (he could not recall precisely which) MT executed a Power of Attorney. That took place in one of the Tribunal meeting rooms. Mr Ellis was not present while that occurred.[96]

129 Mr Ellis accepted the appointment as MT's attorney by signing the EPA on 7 March 2017, but the management of MT's affairs did not change and he never exercised any power under the EPA.[97]

130 Mr Ellis never explained to MT how much each of the Firm's invoices were for and did not explain to her the work which was described in the bills.[98]

[90] Exhibit 12, para 13.
[91] Exhibit 12, para 16.
[92] Exhibit 12, para 18.
[93] Exhibit 12, para 19.
[94] Exhibit 12, para 23.
[95] Exhibit 12, para 26.
[96] Exhibit 12, para 28.
[97] ts 170, 7 September 2023.

131 When MT complained to Mr Ellis about the amount being invoiced by the Firm he said to her words to the effect: lawyers are very expensive and you could always change lawyers.[99] He never discussed with her whether the costs agreements she had with the Firm were valid, they never had a discussion about whether the Firm was entitled to charge at the rates set out in their invoices, and he never considered or discussed with MT her right to have their reasonableness assessed via a taxation, or the possibility that she could complain to the LPCC about the fees and whether she should do so.[100]

132 Mr Ellis recalled attending the Firm and collecting MT's mail and documents from them 'at least once' around 21 May 2017.[101] While that was his evidence, we find that the register which was maintained by the Firm at the time is the best evidence of the number of times he collected correspondence for MT at the Firm. As we have already found, the Firm's register records that Mr Ellis collected correspondence which was left at reception for MT on three occasions.

133 Although Mr Ellis thought that MT had the capacity to manage her own affairs, he never read any medical reports about her.[102]

134 Mr Ellis' evidence does not greatly assist us to determine what the Practitioner understood in relation to MT's capacity to understand the Firm's costs agreements, invoices or rights in relation to the invoices at any time. It does however, allow us to conclude that it would not have been reasonable for the Practitioner to form that view that, with Mr Ellis' assistance, MT understood all of those things because there is no evidence that the Mr Ellis ever indicated to the Practitioner that he was assisting her to understand those matters and that he was satisfied that she did in fact understand those matters.

The Practitioner's evidence and our findings about his state of knowledge as to MT's capacity

135 The Practitioner's evidence was that he did not review for accuracy the file notes which were written by others at the time they were made.[103] He also gave evidence to the effect that he had little independent recollection of the events recorded in the file notes but had

[98] ts 170 – 171, 7 September 2023.
[99] Exhibit 12, para 18.
[100] ts 171, 7 September 2023.
[101] Exhibit 12, para 14 and ts 172, 7 September 2023.
[102] ts 172, 7 September 2023.
[103] E.g. ts 65 and 75, 6 September 2023.

no reason to doubt the accuracy of what was recorded in the file notes.[104]

136 The Practitioner's evidence was that in 2016 and 2017 he understood the concept of fluctuating capacity and the fact that an individual may have capacity in one respect but lack capacity in another respect.[105]

137 The Practitioner's evidence was that to the best of his recollection he had not taken any steps to ascertain MT's capacity to understand the Firm's costs agreement or her capacity to make decisions about complex legal and financial matters prior to the receipt of Dr Ryan's opinion, which he saw some time soon after 31 August 2016.[106] He also gave evidence that he had no reason to doubt Dr Ryan's assessment of MT's capacity.[107]

138 The Practitioner gave evidence that he did not disagree at the time with Ms Motroni's statement in her email of 1 September 2016 that she agreed with Dr Ryan that MT appears to understand advice but was unable to retain it and for that reason Ms Motroni thought the Firm could not ask her to enter into any further costs agreements for preparing the deed.[108]

139 The Practitioner accepted that he reviewed a draft of the letter of 2 September 2016, in which MT was advised that the Firm could not act for her under the costs agreement because they accepted Dr Ryan's opinion that MT did not have capacity to understand the costs agreement.[109] And yet, in cross-examination the Practitioner impressed us as trying to say that despite reviewing the draft, what was expressed was really Ms Motroni's conservative and cautious approach and that it did not reflect his own views. That is reflected in the following exchange with the Applicant's counsel:[110]

> All right. Thank you, Mr Butler. Now with reference to the last sentence on the first page – that is on page 80 – it is the case, isn't it, that you accepted at this point that you could not act for MT under the costs agreement because you accepted Dr Ryan's opinion that MT did not have the capacity to understand the costs agreement?---That is what

[104] E.g. ts 65, 6 September 2023.
[105] ts 67, 6 September 2023.
[106] ts 69, 6 September 2023.
[107] ts 69, 6 September 2023.
[108] ts 70, 6 September 2023.
[109] ts 71, 6 September 2023.
[110] ts 71 – 73, 7 September 2023.

the letter says. And the letter was sent out. There were many occasions when Ms Motroni and I debated our assessments of capacity. Sometimes we agreed. Sometimes we didn't. This was her letter that I settled. It was a cautious and conservative approach. And I do remember MT on a number of occasions becoming upset that the suggestion that anybody other than of her choosing would manage her affairs.

…

You say in this letter – the second last paragraph:

> Dr Ryan has explained to us that you don't have capacity to understand our costs agreement, on the basis that it's a complex legal document.

?---Yes.

You accepted that, didn't you, at the time? You accepted the correctness of that opinion?---I settled the letter.

Just answer the question please, Mr Butler?---I don't know. I can't remember.

Well, I suggest to you that you must have, because in the very next paragraph you say "it is with regret that we advise you that we can't continue to represent you under our existing costs agreement." And if you look over the page – in fact, if you go to 82 you will see that you're effectively ending your representation of her, bringing the mater to a conclusion?---Yes.

Because you accepted Dr Ryan's opinion about her incapacity to understand the costs agreement; isn't that so? -–– I can't remember whether that was the specific – we had a number of concerns about her, and they varied from meeting to meeting. I can't remember now what happened when – on which day, on which occasion – but yes, this letter was effectively ending our acting for her.

Yes. Yes?---But then again we resumed acting for her not all that long afterwards.

There's nothing in this letter that's incorrect, is there?---No.

You see at 81, the fourth paragraph, "In our view, it would be appropriate for the Pubic Trustee and the Public Advocate to be appointed ---?---Yes.

- - - on the basis of the medical opinion of Dr Ryan." That was your opinion that you held at the time, wasn't it?---No, it was Ms Motroni's view. I accepted the letter, but – and I don't remember I had conversations with [MT], but given the conversation I had with her at about this time I didn't believe that it would be best for her to have the Public Trustee and the Public Advocate act for her.

Yet you - - - ?---And I can't remember when. I can't remember which day.

…

The letter was settled by you, and says:

> In our view it would be appropriate for the Public Trustee and the Public Advocate to be appointed to act for you in those roles, on the basis of the medical opinion of Dr Ryan. This appears to be a good outcome for you, because you wanted the Public Trustee and the Public Advocate to act for you.

Those are beliefs that you held at the time aren't they?---That's not consistent with my memory. I don't ever remember her saying that she was happy with the Public Trustee and the Public Advocate. I don't remember that. My memory is to the contrary.

Can I take you to paragraph 50 of your witness statement?---Yes.

You say, "At that time" – which is 31 August 2016?---Yes.

So, that just a day or two prior to this letter?---Yes.

So, "I noted that Dr Ryan raised some concerns. However, those concerns were not so significant that I doubted MT's capacity for so long as I was satisfied," etcetera, "the firm explained things fully and she understood the nature and effect of the instructions." But two days later, Mr Butler, you wrote to her and said you could not act any longer?---Yes my firm wrote to her.

Well, you wrote to her, because you settled the letter?---I settled the letter, yes.

Yes. It was actually you adopting that position, that you couldn't act for her any longer; isn't that so?---That's what the letter sent from my firm, sent with my knowledge, said.

140 We regard the Practitioner to have taken an unreasonable position in endeavouring, in that exchange, to distinguish his own opinion from that of his Firm in relation to the contents of the letter which he accepted he had settled. Despite his reluctance to admit it, we find that at the time the letter was sent to MT the Practitioner had come to the view, consistent with that set out in the letter, that it was inappropriate to continue to act for MT pursuant to the costs agreement because Dr Ryan had formed the view that MT did not have capacity to

understand complex legal and financial matters, which included the terms of the costs agreement.

141 We find that even if the Practitioner did not agree with Dr Ryan's opinion, it must have caused him to have at that time real doubts as to MT's capacity to understand complex legal and financial matters including the Firm's costs agreements given that the Firm informed MT that, on the basis of Dr Ryan's opinion, they could no longer act for her until a second opinion had been obtained.

142 That finding is inconsistent with the Practitioner's evidence at paragraph 59 of his witness statement:[111]

> While I don't have any independent recollection of the meeting, at the time, my personal belief was that MT had capacity, but I was aware that Dr Ryan had doubts as to MT's capacity and, as a consequence, the option of obtaining a second opinion was discussed.

143 When in cross-examination it was suggested to the Practitioner that, despite what he said in his witness statement, he in fact accepted Dr Ryan's opinion that MT did not have capacity to understand a costs agreement, the Practitioner said 'I don't know that I accepted that. I have no memory of that.'[112]

144 We do not accept the Practitioner's evidence that, after becoming aware of Dr Ryan's opinion, he did not have a doubt as to MT's capacity. It is directly contradicted by the contents of the letter which he settled which was sent to MT and it is simply not plausible in light of the Practitioner's evidence that he had made no assessment of MT's capacity to understand the Firm's costs agreement.

145 The Practitioner's evidence was that when consideration was being given to obtaining a second opinion as to her capacity, in his mind the second opinion was concerned with her ability to provide instructions in relation to the legal matters the Firm was assisting her with and that he never contemplated the second opinion being concerned with MT's capacity to understand their costs agreements, even though one of the reasons for ceasing to act for her only a short time earlier was because Dr Ryan had expressed the opinion that she did not understand the costs agreement.[113]

[111] Exhibit 11, para 59.
[112] ts 77, 6 September 2023.
[113] ts 79, 6 September 2023.

146 For the following reasons, we simply do not accept the Practitioner's evidence on that point.

147 **First**, it is not consistent with the fact that the Firm had ceased to act for MT in early September 2016 because Dr Ryan had expressed the view that MT lacked capacity to understand complex legal and financial matters including the Firm's costs agreements.

148 We reject the Practitioner's evidence that he was not involved in that decision. It is said by the Practitioner that the contents of the 2 September 2016 correspondence represented a cautious and conservative approach proposed by Ms Motroni, who had significantly less experience in assessing capacity, which the Practitioner merely implemented.[114] We find that evidence implausible in light of the evidence he gave that he settled the relevant letter to MT, that he was the most senior person at the Firm and had become involved in MT's case at Ms Motroni's request because of the capacity issues that had arisen including the capacity to understand the costs agreements.[115] We also reject it because of the view we have formed as to his credibility in relation to his beliefs as to her capacity.

149 Even accepting the Practitioner's evidence that he cannot now recall why the decision to cease to bill MT was taken,[116] we find that it can only have been because Dr Ryan's opinion that MT did not have capacity to understand the costs agreement caused the Practitioner and Ms Motroni to consider that it would be inappropriate to receive funds from her where she did not have capacity, or where real doubts existed as to her capacity, to understand the costs agreement and given that only days earlier Ms Lothian had sent him an email stating that it was her view that the Firm needed to assist MT by obtaining a 'case guardian'.

150 **Secondly**, the Practitioner accepted that despite having no independent recollection of it, the email of 12 September 2016[117] correctly records that a decision had been taken that the Firm would resume working for MT but would not charge her or send invoices pending a second opinion being obtained. His evidence is inconsistent with that decision.

[114] ts 70 – 71, 6 September 2023.
[115] ts 83, 6 September 2023.
[116] ts 83, 6 September 2023.
[117] Exhibit 1.23.

151 The Practitioner gave evidence in cross-examination that at the time, he held the view that if he was satisfied that a client had capacity to give instructions in relation to the matters in relation to which she was instructing the Firm, and the Firm undertook work for a client on that basis, then the Firm was entitled to invoice the client for the work.[118] He was then asked whether he also thought that if he was entitled to invoice for the work he was entitled to receive payment for it. He answered that he did not remember what he thought at the time about that, but that the Firm did start invoicing and receiving payment from MT.[119] The Practitioner's evidence was that he did know that he turned his mind to that question because his 'focus was the client and the client's issues'.[120]

152 We reject that evidence. First, we do not accept that the Practitioner can recall that he thought he was entitled to invoice for work for which the client had capacity to provide instructions but cannot recall what he thought about receiving payment on such an invoice at that same time. Secondly, it is implausible that he did not turn his mind to the issue of the Firm's entitlement to receive payment because he was squarely on notice about that issue given, after being specifically told of Dr Ryan's opinion that MT lacked capacity to understand the costs agreement, he was a party to the Firm's decision to cease to bill MT while the second opinion was being obtained and given that Ms Lothian had only days earlier sent him an email stating that it was her view that the firm needed to assist her to obtain a 'case guardian'.

153 **Thirdly**, it is not consistent with the only reasonable inference to be drawn from the contents of the first (unsent) draft of the Firm's letter to Dr Yew, which he was involved in preparing, in which an opinion as to MT's capacity to understand the Firm's costs agreements was specifically requested.

154 The Practitioner was asked numerous questions in cross-examination about the initial letter to Dr Yew in which the second opinion as to MT's capacity was being sought. When he was asked whether it was his position at the time that he needed to be satisfied that MT had the capacity to understand the costs agreement because that was one of the issues raised in the draft letter to Dr Yew, the Practitioner initially gave evidence that he did not draft or settle

[118] ts 89, 6 September 2023.
[119] ts 89, 6 September 2023.
[120] ts 89, 6 September 2023.

the letter saying 'it came from our firm',[121] but he ultimately accepted that even though he did not draft or settle the letter he would have been aware of the approach being taken that was reflected in the letter and also that he billed for conferring with Ms Motroni about the draft letter to Dr Yew.[122] From that evidence we find that the Practitioner was involved in drafting the letter to Dr Yew and that it reflected the questions about which he wished Dr Yew to opine.[123]

155 His evidence was that the firm continued to invoice MT for work done and to receive payment for it even though they were going to obtain a second opinion from Dr Yew about her capacity to understand complex legal and financial matters.[124] When cross-examined about that issue, the Practitioner's evidence was that he was aware of Dr Ryan's opinion as to MT's capacity to understand the Firm's costs agreements by then and had made no assessment of her capacity himself at that time, but said that he did not recall turning his mind to the question of her capacity to understand a costs agreement and that it did not occur to him that he should stop receiving payment for invoices rendered pending receipt of Dr Yew's opinion.[125]

156 We do not accept the Practitioner's evidence that at about the time the first letter to Dr Yew was written on 18 October 2016, he had not turned his mind to the question of MT's capacity to understand the Firm's costs agreements. It is inconsistent with the fact that he was involved in the preparation of the letter and the fact that that issue was one of the specific questions posed in the letter to Dr Yew.

157 Given the information of which the Practitioner was aware and actions taken by the Firm up to this point, decisions about which the Practitioner was involved in making, and about which he expressed no dissent at the time, and given that the Practitioner had done no assessment of MT's capacity to understand the costs agreement himself, we find that he did, at that time, have real doubts about that aspect of her capacity.

158 The Practitioner accepted that three days after the letter to Dr Yew of 12 October 2016 was prepared seeking Dr Yew's opinion in relation

[121] ts 94, 6 September 2023.
[122] ts 94, 6 September 2023.
[123] ts 95, 6 September 2023.
[124] ts 95, 6 September 2023.
[125] ts 95, 6 September 2023.

to her ability to understand a costs agreement, MT was invoiced for work.[126]

159 The Practitioner gave evidence that he could not recall why the costs agreement for work to be performed in connection with the application to the Tribunal was sent to Mr Ellis, although he accepted that the letter accompanying the costs agreement indicated that the Firm wanted Mr Ellis to sign the costs agreement on MT's behalf.[127] We accept that the Practitioner does not recall the reason for that. Further, given that there is no indication in the invoices for the period that the Practitioner was involved in the preparation of that letter, we do not draw any inference adverse to the Practitioner from the fact that the costs agreement was sent to Mr Ellis together with the request that he sign it on her behalf.

160 In relation to the making of the application to the Tribunal under the GA Act, the Practitioner's evidence in cross-examination was that despite the application form stating that a declaration as to MT's capacity was needed so that the Firm could continue with her legal work, he did not accept that that was his opinion at the time.[128]

161 He did accept though that it was his opinion at the time that it was unclear whether MT was able to instruct lawyers and agree a costs agreement.[129] But only a very short time after that evidence was given, the following exchange took place:

> You say 'the SAT application was commenced as a mechanism to obtain certainty - - -?---That's right.
>
> About capacity because you weren't certain?---Well I say to you I believe that she had capacity.
>
> …
>
> It wouldn't have been necessary to bring an application if you already had certainty; correct?---Correct.
>
> All right. So you were certain that she had capacity?---I've just stated that it depended on the day. And when I took instructions, from time to time, I believed she had capacity; otherwise I wouldn't have taken them.

[126] ts 96, 6 September 2023.
[127] ts 97, 6 September 2023.
[128] ts 101, 6 September 2023.
[129] ts 102, 6 September 2023.

> Or, otherwise, you wouldn't have taken instructions? But you can't remember whether you were taking instructions or not?---I can't.
>
> - - - at that time?---I can't remember.
>
> All right. But this capacity that you're taking about it capacity in relation to taking instructions of a deed of family arrangement, an EPA, an EPG and a will; Yes?---Yes. They were amongst the things. Yes.
>
> Not about capacity in relation to understanding a costs agreement - - - ?---No.
>
> - - - or an invoice?---No.
>
> - - - or rights under the LPA '08?---They weren't things I was thinking about, as far as I can remember.

162 We do not accept the Practitioner's evidence that despite the fact that the Firm had commenced the GA Act proceeding, he believed that MT had capacity and that, by that, he meant only that he thought she had capacity to provide instructions in relation to her specific legal matters because he had not turned his mind to the question of her capacity to understand the Firm's costs agreements. That evidence is inconsistent with all of the surrounding factual circumstances and implausible in light of those circumstances.

163 As to the letter dated 17 March 2017, in which the Firm sought to have the GAA Application dismissed, the Practitioner said he was involved in the preparation of the letter but that his initials appearing on it did not signal that he had settled it.[130]

164 The Practitioner was asked whether the letter referred to the executed EPA in order to demonstrate to the Tribunal that, where MT lacks capacity, the attorney could step in and make decisions on her behalf. The Practitioner's evidence was that he did not know what the thinking was. He said:[131]

> I don't know. We informed the Tribunal of what had happened. I don't know what the thinking was at the time.

165 When it was suggested to him that that had to be his thinking because he had overall responsibility for the matter, his response was:[132]

[130] ts 60 – 61, 6 September 2023.
[131] ts 133, 7 September 2023.
[132] ts 133, 7 September 2023.

> Ms Motroni had a high level of independent function. I had the ultimate responsibility.

166 We accept the evidence that the Practitioner did not settle the contents of the letter to the Tribunal. But it is not necessary for us to find that he settled it in order to find, as we do, that having been involved in its preparation and having the ultimate responsibility as the principal of the Firm, he was in agreement with its contents.

167 When it was suggested to the Practitioner in cross-examination that the EPA had been signed because the Practitioner appreciated that MT lacked capacity in certain areas, he rejected that suggestion, saying that he only knew that there were 'issues about it'.[133] We accept the Practitioner's evidence that he knew there were issues about MT's capacity. But we find, in light of all of the factual circumstances that existed at the time that the Practitioner knew that those issues included concerns about her capacity to understand the Firm's costs agreements and invoices.

168 We find that, in light of all of the factual circumstances that existed at the time, the only reasonable inference to be drawn from that letter is that the EPA was entered into because the Practitioner had doubts about MT's capacity including her capacity to understand complex legal and financial matters including the Firm's costs agreements although, at the time it was executed, he was satisfied she had capacity to make the EPA.

169 When the Practitioner was cross-examined about whether he accepted Mr Heenan's view that enough evidence existed to cast doubt as to MT's capacity (at around the time he expressed the opinion on 5 April 2017 about which the Practitioner was informed by Ms Motroni in her email to him of 5 April 2017), the Practitioner said he had no memory of what he thought at the time.[134] The following questions were then asked and answers given:

> You weren't convinced of her capacity in all respects at this time; were you?---As I said, it fluctuated, There were days when I didn't believe she had capacity and days when I believed she did. It wasn't a consistent thing.
>
> But there was also the question of whether she had capacity to make complex decisions?---Yes.

[133] ts 134, 7 September 2023.
[134] ts 138, 7 September 2023.

As opposed to simple ones?---Yes.

And you clearly had doubt about that; didn't you?---I don't remember.

170 Even accepting the Practitioner's evidence that he cannot now recall whether he had doubts about MT's capacity to make complex decisions the surrounding factual circumstances which existed at the time which we have found, including from the contemporaneous records, lead us to find that he must have had real doubts about that issue.

171 The Practitioner was also cross-examined about the letter to Dr Yew dated 18 April 2017 (i.e. the letter which as actually sent to Dr Yew). He agreed he had settled the letter but disputed that it should be understood as indicating that he thought at that time that MT lacked capacity to give instructions in relation to the question of whether to challenge the severance of the joint tenancy and enter into a deed of family arrangement to resolve that issue. He did, however, accept that at the time there was 'a real issue' about her capacity[135] but gave evidence that he was confident that MT had capacity although he knew that Dr Ryan held a different view. He said that they had applied to the Tribunal to get a ruling.[136]

172 The Practitioner did not accept that in the letter to Dr Yew of 18 April 2017 he had refrained from asking Dr Yew about MT's capacity in relation to complex legal and financial matters because he accepted at that point that she did not have that capacity.[137]

173 In his evidence-in-chief, the Practitioner said that he made an arrangement with Mr Ellis that all documents for MT were to be held at the Firm's reception and that he would collect them once per fortnight and go through them with her.[138] His evidence about that in cross-examination was that he had no independent recollection of the discussion during which that arrangement was made but relied on his handwritten file note of 26 April 2017[139] in giving that evidence.[140] That file note records that the arrangement was that all 'incoming documents' for MT were to be kept at reception for collection by Mr Ellis.

[135] ts 140, 7 September 2023.
[136] ts 141, 7 September 2023.
[137] ts 143, 7 September 2023.
[138] Exhibit 12, paras 89 – 91.
[139] Exhibit 3.36.
[140] ts 144 – 145, 7 September 2023.

174 In his evidence-in-chief, the Practitioner said that an instruction was then issued to staff about the agreed arrangement. The instruction was actually sent by another staff member, Ms Swan, via email to everyone who may have been affected, including the Practitioner.[141] That email said: [142]

> JWB has asked that all incoming documents, correspondence etc for [MT] …
>
> – NOT be forwarded to her; and
>
> – Be kept in a folder at FO, which Richard Ellis will pick up once every fortnight.
>
> Would FO please ensure the outgoing mail is updated with each document for the date that Mr Ellis will pick up the folder?
>
> I will put warnings on her 3 files now.
>
> Basically we want to minimise any stress or confusion for the client given her age.

175 Despite the Practitioner giving evidence he had no recollection of what his understanding about the provision of invoices to MT or Mr Ellis was after their discussion, when asked if it was a possibility, based on reading the file note and the email, that the invoices could have been left out for him, he said:[143]

> My instruction – my understanding – my intention was that everything went to her through Mr Ellis by being collected by him. And that was my understanding of what was happening from then.

176 It seems impossible to us that the Practitioner could simultaneously have no recollection of his intention and then be able to give evidence of that intention. We therefore do not accept the evidence he gave of his intention in relation to the instruction although we find that it is reasonable to infer from the file note and the email, that the intention was that nothing was to go directly from the Firm to MT from that time onward.

177 We nevertheless reject the Practitioner's evidence that it was his understanding that, after that time, all correspondence for MT was to be collected by Mr Ellis. It is inconsistent with the notation in the register that at a time after the instruction was issued, the Practitioner took

[141] ts 153 – 154, 7 September 2023.
[142] Exhibit 3.38.
[143] ts 153, 7 September 2023.

documents to MT when visiting her.[144] While he may, by the time he came to give evidence, have forgotten having done so, at the time he cannot have had that understanding given he was taking documents to MT himself.

178 When asked whether, after receipt of Dr Lee's second report in which it noted that MT did not understand why she was paying her lawyer thousands of dollars per month, the Practitioner appreciated that MT did not understand the invoices she was paying. The Practitioner gave evidence that 'she clearly did not understand what had been done for her'.[145] He said:[146]

> I accepted, by this stage, her mental state had deteriorated to the point where she spent – had – she was aware she had spent thousands of dollars but didn't understand the reason for it.

But he gave evidence that he did not accept that MT did not understand the invoices because he didn't know whether they were being explained to her by Mr Ellis as he thought they were.

179 We find that, having taken some invoices directly to her, he can have had no basis for thinking that they were being explained to her by Mr Ellis. Further, there is no evidence that any inquiries were made of Mr Ellis by any number of the Firm to establish that either MT had understood the invoice and agreed to their payment or that she did not and that Mr Ellis as her attorney had agreed to their payment. Having regard to that fact, this together with all of the information the Practitioner had received by then about MT lacking capacity to understand complex legal and financial matters, including the Firm's costs agreements and the things he had done as a consequence, which had led us to conclude that he already had a real doubt about her capacity to understand those matters, we find that, at the time of receiving Dr Lee's second report, the Practitioner must have continued to have a real doubt about her capacity to understand those matters.

180 The Practitioner's evidence was that neither before invoicing MT nor receiving any payment did he turn his mind to whether MT:

1. then had capacity to understand the costs agreement;

2. that she understood the contents of the bill; and

[144] Exhibit 3.56.
[145] ts 160, 7 September 2023.
[146] ts 160, 7 September 2023.

3. whether the firm had explained to her and that she understood her rights in relation to the bill.[147]

181 We do not accept that the Practitioner never turned his mind to these issues before invoicing MT or receiving payment from her. While he may not have turned his mind ever to the question of her ability to understand her rights in relation to the invoices, or even to have turned his mind to the issues of her capacity to understand the costs agreements and the invoices on every occasion on which an invoice was rendered and payment was made, we find that it was certainly an issue to which he had turned his mind more generally after receiving Dr Ryan's report.

Conclusion regarding the Practitioner's state of knowledge about MT's capacity to understand the Firm's costs agreements, invoices and rights in relation to the invoices

182 From the evidence given in this case and the findings we have made based on that evidence, we find after being informed that Dr Ryan had expressed the opinion that MT did not have capacity to understand complex legal and financial matters, even if the Practitioner did not share Dr Ryan's opinion or understand the basis for it, the Practitioner knew that there were concerns about her capacity to do those things which had been raised by a professional whose opinion he could not merely discount.

183 The fact that Ms Motroni's account of Dr Ryan's opinion which was conveyed to the Practitioner by email on 31 August 2016,[148] differed in some respects from what was recorded in Ms Motroni's contemporaneous note of the discussion she had with Dr Ryan[149] does not change our view. The fact is that the Practitioner was told that Dr Ryan had expressed certain views. He expressed no different view after receiving that account. Nor does the fact that Dr Ryan's view, as expressed in her subsequent email to Ms Motroni of 31 August 2016,[150] differed in some respects from that which she had conveyed to Ms Motroni by phone earlier in that day.

184 We find, from the following facts:

[147] See for example ts pages 74 – 75.
[148] Exhibit 1.16.
[149] Exhibit 3.13.
[150] Exhibit 1.15.

1. that the Firm ceased to bill MT and receive fees from 31 August 2016 until 11 October 2016, after receiving Dr Ryan's opinion about MT's capacity;

2. that the Practitioner was the legal director of the Firm and did not express any disagreement with the decision in which he was involved to cease to bill MT and to cease to act for her and until the capacity concern was resolved and that he was involved in the preparation of the letter of 2 September 2017 informing her of the Firm's decision; and

3. that the Practitioner had at least a real doubt about MT's capacity to understand the costs agreement and the propriety of receiving fees for legal work undertaken on her behalf.

185 We find that the only reasonable inference open from the evidence that the Practitioner did not indicate any dissent after receiving copies of the emails from Ms Motroni:

1. to Dr Ryan dated 6 September 2016 informing her that the Firm could not act for MT because it was unclear whether she had capacity to understand among other things, the costs agreement and would resume acting if the Tribunal found that she did not lack capacity; and

2. to the Practitioner dated 12 September 2016, to the effect that the Firm was obliged to accept Dr Ryan's assessment that MT lacked capacity until the matter was determined by the Tribunal and therefore would record time but not bill her for work until the capacity issue was determined,

is that the Practitioner, at that time, had a real doubt as to MT's capacity to understand complex legal and financial matters including the Firm's costs agreement and held the view that it was not appropriate to bill her for work while that real doubt existed.

186 We find that the only reasonable inference to be drawn from the fact that the Firm, with the Practitioner's knowledge and involvement, made an application to the Tribunal for orders under the GA Act (even if it was misconceived), was that the Practitioner held real doubt as to MT's capacity to understand complex legal and financial matters at the time the application was made and wanted the matter resolved by the Tribunal.

187 We find that that doubt was not dispelled upon receipt of Dr Mitchell's report of 23 January 2017, which said that Dr Mitchell was unsure of her capacity with respect to complex financial decisions and legal matters, or by Dr Ryan's communications with the Tribunal on 25 January 2017 and 3 February 2017 both of which can only have reinforced that doubt in the Practitioner's mind.

188 We find that when regard is had to all of the surrounding facts, the only reasonable inference to be drawn from the fact that on 7 March 2017 the Practitioner had MT execute an EPA and then informed the Tribunal that the application that Ms Motroni had made should be dismissed, was that the Practitioner considered that complex legal and financial matters could now be decided by the attorney.

189 We find that there was nothing that occurred between 31 August 2016 and 11 October 2017 that would have justified the Practitioner being satisfied that MT did not lack capacity to understand the costs agreements and invoices or that would have reduced the level of doubt he had about that matter.

190 The social lunch with MT and his wife and consideration of his wife's assessment of MT's capacity, which she reached over a lunch at which, the Practitioner gave evidence that complex legal and financial matters were not discussed and at which the Firm's costs agreements were not discussed[151] could not have altered the Practitioner's views about MT's capacity to understand the Firm's costs agreement, invoices and rights in relation to the invoices.

191 Finally, we find that after 6 September 2016, on each occasion when an invoice for work was issued to MT and payment was received by the Firm, the Practitioner had real doubt as to MT's capacity to understand the Firm's cost agreements and invoices and her rights in relation to the invoices.

The Applicant's submission

192 The Applicant submits that the professional misconduct in this case is the charging of and receipt of payment of fees rather than the accepting of instructions.

193 The Applicant says that the majority of the work charged for was done in connection with the SAT applications for guardianship and administration and that, by their very nature proceedings under the

[151] ts 156, 7 September 2023.

GA Act can be and are usually brought absent of instructions or the consent of the proposed represented person. The Applicant says that it does not contend that a practitioner may not invoice for such work and that it is often appropriate for a practitioner to do so in order to keep relevant persons (who may include the proposed represented person) appraised of the charges on an ongoing basis. The Applicant says, however, that where a practitioner knows, or ought to know that a client lacks capacity to understand a costs agreement, invoice and/or rights in relation to an invoice, or where a practitioner has real doubts as to a client's capacity to understand those matters, the practitioner cannot receive or retain payment for such invoices until there is a person with requisite capacity and authority to consider the invoices and make a decision about payment or exercise rights in relation to them, or both.

194 The Applicant submits that the Practitioner was entitled to apply for administration orders with or without instructions from MT but that he was not entitled to receive payment for the work prior to the determination of the Tribunal proceeding where either;

1. the work was inherently complex, such that there was at least a real doubt, if not it was fact, that the client could not understand what she was being charged for; or

2. when the work was billed pursuant to a cost agreement in respect of which there was at least a real doubt, if not it was fact, that the client could not understand it.

The Respondent's submissions

195 The Practitioner submits that Dr Ryan provided no basis for her opinion and that, taken at its highest, it expressed uncertainty as to MT's capacity to make complex decisions and that it is unknown whether Dr Ryan considered MT's capacity to make decisions independently of others or with assistance and explanation where needed.

196 The Practitioner submits that in the absence of clear statement of the basis of Dr Ryan's opinion, it was not unreasonable for him to rely on his own knowledge and experience in assessing MT's mental capacity and that is what he did when he resumed acting for her on about 9 September 2016.

197 The Practitioner submits that we should find that being experienced in dealing with issues of capacity, he had formed the view

that MT had capacity to provide instructions in relation to the legal matters and the capacity to understand the Firm's costs agreement and bills, he did not have a doubt about MT's capacity.

198 The Practitioner submits that in circumstances where no complaint is made about the Practitioner accepting MT's instructions, or about the work he did, and where we make no finding that MT in fact lacked capacity at any relevant time, we should not find that he engaged in professional misconduct or unsatisfactory professional conduct by receiving funds from MT where there existed concerns about her lack of capacity.

Has the Applicant established a breach of any professional standard

199 The Applicant submits that we should find the conduct amounted to professional misconduct in the following senses:

1. the meaning set out in s 403(1)(a) of the LP Act, being that it is unsatisfactory professional conduct of an Australian legal practitioner where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

2. the first limb of the common law test articulated in ***Kyle*** in that the conduct would reasonably be regarded as disgraceful and dishonourable by practitioners of good repute and competence; and

3. the Practitioner submits that if we find that in 2016/2017, legal practitioners in the position of the Respondent ought to have turned their minds to the issues of a client's capacity to understand a costs agreement, invoices and rights in relation to the invoices at or before the time when an invoice is to be issued and payment received, the Practitioner's failure to do so cannot be on any basis described as professional misconduct; and

4. the second limb of the common law test articulated in ***Kyle***, in that the conduct involved a substantial and consistent failure to reach a reasonable standard of competence and diligence.

200 As we have already identified, where an allegation of professional misconduct has been made the Tribunal can make a finding in the

alternative that the conduct amounted to unsatisfactory professional conduct.

201 To resolve the question of whether the Practitioner's conduct, as we have found it, amounted to unsatisfactory professional conduct or professional misconduct we must first determine whether there was, at the time, a standard of competence and diligence observed within the profession by practitioners of good repute and competence that required a practitioner who has knowledge that their client lacks capacity to understand their costs agreement, invoices and their rights in relation to the invoices, or real doubt as to those matters, to cease to receive payments from the client until satisfied that the client has capacity in relation to those matters or there is in place a person with authority to make decisions about the payment of the invoices on the client's behalf.

202 The Practitioner says that at most, if we find that practitioners should have regard to the matter of a client's capacity to understand the basis upon which an invoice is to be rendered, the client's capacity to understand the invoice and to understand their rights in relation to the invoice, we can make that clear in this decision and set a standard for the future.

203 The Practitioner says no obligation of the kind contended for by the Applicant has been recognised in any legislation, professional conduct rules, or the common law. Nor has the possibility that a Practitioner might have a professional obligation to turn their mind to the issues of a client's capacity to understand a costs agreement and invoices and rights in relation to them prior to receiving payment of an invoice been considered in any learned articles. He submits that those matters support his position that no standard existed in 2016/2017 or exists today.

204 The Practitioner also submits that no expert evidence has been adduced to establish any such practice, usage or custom within the profession.

205 The Practitioner also says the principle in ***Legal Services Commissioner v Pennisi***[152] so far as it relates to testamentary capacity should be extended to the circumstances present in this case. We will return to this issue later in these reasons.

[152] ***Legal Services Commissioner v Pennisi*** [2023] QCAT 118 (***Pennisi***).

206 The Practitioner submits that it therefore follows that his conduct could not amount to:

1. professional misconduct in the sense that the expression is used in s 403(1)(a) or the second limb of ***Kyle*** (each of which requires the establishment of a standard of competence and diligence that the public is entitled to expect of a reasonably competent Australian legal practitioner); or

2. unsatisfactory professional conduct, which also requires the establishment of a standard of competence and diligence that the public is entitled to expect of a reasonably competent Australian legal practitioner; or

3. conduct which could be regarded as disgraceful or dishonourable by practitioners of good repute and competence.

207 The Practitioner submits that the requirement contended for by the Applicant, that a practitioner is required to satisfy themselves that the client understand the costs agreement, the invoice and their rights in relation to the invoice each time payment is to be received raises practical difficulties for practitioners and ought not be imposed upon the profession. He asks, rhetorically by way of example, how would a practitioner go about satisfying themself as to whether the client understands the costs agreement, the invoice and their rights in relation to the invoice?

208 The Practitioner submits that if a practitioner knows, or ought to know, of competency issues with respect to a client, it may well be that any failure to properly render an account or to overcharge would be more egregious than otherwise. He submits that public policy considerations are protected in that regard because:

1. section 295 of the LP Act and now s 198 of the Uniform Law (which is the equivalent provision under that later Act) provide that a client (which is defined in s 295(1) to include an executor or administrator of a client) may apply for a costs assessment within 12 months, which in WA is accepted as being 12 months from the date when the final bill is rendered;[153]

2. application for costs assessment may be made out of time in the exercise of the discretion in s 295(6) and s 295(7); and

[153] ***Hakuna Matata Corporation Pty Ltd v McDonald Pynt Lawyers [No 2]*** [2012] WASC 513 at [12] – [13] and the authorities referred to at [12].

3. section 295(4) provides that an application for an assessment of costs may be made even though the costs have been fully or partially paid.

209 The Practitioner submits that to impose a 'consumer protection' obligation of the nature that is contended for by the Applicant is a step too far and will create significant difficulties for legal practitioners.

210 Further, the Practitioner submits that the existence of a standard contended for by the Applicant may result in firms having to carry significant debt as a consequence of acting for a person from whom they cannot receive payment for work done. That risk may cause solicitors to cease to accept instructions or to cease to act for clients where they are reasonably satisfied of the client's capacity to give instructions but there is real doubt about the client's capacity to understand the costs agreement, invoices and rights in relation to those invoices and, hence, a risk the firm may not be paid.

211 The Practitioner submits that, in light of the practical difficulties identified and risks to clients and given the safeguards already existing, we should not find that such a standard existed then or now, nor should one be established for the future.

212 The Applicant submits that, contrary to the Practitioner's position, its case and the law in relation to it is not novel. Rather, it says that the matter turns on the following well established and basic principles:

1. a party to a transaction (whether it be a will, an EPA or some form of contract) must have the requisite capacity to understand <u>that particular transaction</u>; and

2. where a solicitor acting for a client is put on notice that the client may lack the capacity to understand the particular transaction, they are required to take steps to positively and reasonably satisfy themselves as to the client's capacity before proceeding.

213 The Applicant says that the fact that the transaction is a costs agreement in this case, does not make the matter novel or lead to it being distinguishable from other transactions.

Resolution

214 A presumption of legal capacity exists for all legal activities except the making of a will, where testamentary capacity needs to be

proved.[154] For all other legal activities the relevant issue is whether the client has the mental capacity to understand the nature of the legal activity.[155]

215 ***Goddart Elliot (firm) v Fritsch***[156] establishes that a lawyer must be reasonably satisfied that the client has the mental capacity to give instructions and, if not so satisfied, must not act for or represent the client as a direct legal representative.[157]

216 In ***Pennisi***, the Queensland Civil and Administrative Tribunal stated that the position expressed in ***Goddard Elliot*** was the 'starting point' for considering a lawyer's responsibility in relation to a client's capacity.[158] The recognised qualification to that position, referred to in the case, is that if the solicitor is satisfied that the client has the capacity to give instructions, even if there is doubt about the client's testamentary capacity, the solicitor must act on the client's instructions. The qualification was explained by Mullins J in ***Fradgley v Pocklington (No 2)***[159] where her Honour said:

> There was a dilemma facing the [plaintiff solicitor] when he received instructions directly from Miss Drake that she wished to change her will. It is the dilemma that is faced by any solicitor whose elderly client who resides in a nursing home seeks to make a new will. It is not practical or appropriate for the solicitor to undertake all the inquiries that are made for the purpose of proof of a will in solemn form. The solicitor may be excused from acting on the client's instructions, if it is patently clear that the client does not have testamentary capacity. If the solicitor is satisfied that the client is capable of giving instructions, even if the circumstances are such that there may be a doubt as to testamentary capacity, the solicitor must act on the client's instructions to make the will. Although there are authorities that suggest that it would be prudent for a solicitor to obtain supporting medical opinion before making a new will for an elderly client where there is a doubt about testamentary capacity, the solicitor is constrained by the client's instructions: *Public Trustee v Till* [2001] 2 NZLR 508 at [19], [25] - [28].

217 In such a case, the rationale for the exception is that such a client may in fact have testamentary capacity and to be deprived of the opportunity to make a will because a practitioner has doubts as to that

[154] ***Gibbons v Wright*** [1954] HCA 17; (1954) 91 CLR 423.
[155] ***Gibbons v Wright*** [1954] HCA 17; (1954) 91 CLR 423.
[156] ***Goddard Elliott (firm) v Fritsch*** [2012] VSC 87 (***Goddard Elliott***).
[157] See also ***Borchert v Terry*** [2009] WASC 322 at [69] which was cited with approval in ***Goddart Elliott*** at [549].
[158] ***Pennisi*** at [21].
[159] ***Fradgley v Pocklington (No 2)*** [2011] QSC 355 at [28].

capacity would deprive the client of what is understood to be an individual's important right to determine their legacies.

218 The Practitioner submits that there is no reason not to extend the propositions stated in ***Pennisi*** to a position which says that where a client is reasonably satisfied about the mental capacity of a client to give instructions, even if the solicitor has some doubt about capacity, the solicitor must act on the client's instructions unless it is (or become patently clear that the client does not have capacity) because if not, a client may be deprived of their rights or severely disadvantaged where doubts as to their capacity exist but they are ultimately found to have had capacity. That is, the same rationale supports the extension of that proposition to the situation which faced the Practitioner in this case.

219 The Applicant submits that there is no reason to do so and ***Pensisi*** is not authority for that broader proposition.

220 We do not need to determine that question because we have found that the Practitioner had real doubts about MT's capacity despite his assertion to the contrary.

221 The Applicant led no evidence from any member of the profession to establish that members of the profession of good repute and competence would not take payment for an invoice issued for work done in circumstances where they knew that their client lacked the capacity to understand the costs agreement pursuant to which the invoice has been rendered, the invoice or their rights in relation to the invoice, or where they had real doubt about those issues. Nor did the Applicant point to any Conduct Rule which applies in relation to the issue or to any prior cases where practitioners have been disciplined in similar circumstances or to any learned writings dealing with the issue or expressing the alleged standard of conduct formulated by the Applicant in this case.

222 We accept that Conduct Rules are an important aspect of regulation of the profession for many reasons. As Dal Pont identified they serve as a standard of conduct in disciplinary proceedings and as a guide to practitioners as to action in a specific case and serve as a demonstration of the profession's commitment to integrity and public service.[160]

[160] GE Dal Pont, *Lawyers Professional Responsibility*, (7th ed, 2021) at [1.25].

223 For that reason, Conduct Rules are a reliable and important indicator of the accepted opinion of members of the profession and accordingly are of assistance in determining matters of misconduct.[161]

224 But that, of course, is not where the matter either begins or ends because as Dal Pont notes, Conduct Rules 'cannot be viewed as exhaustive of lawyers' ethical responsibilities, and so the absence of a rule directed at a specific form of (mis)conduct does not preclude a disciplinary finding'.[162]

225 As Dal Pont cautions:[163]

> The tendency to "legalise" professional ethics by reducing it to precise rules should not prompt an ethos within which a lawyers' first thought, instead of being whether a particular act would be unprofessional, is one whether the rules prohibit it. In this regard, Sir Gerard Brennan, in a conference address, said that "[if] ethics were reduced merely to rules a spiritless compliance would soon be replaced by skilful evasion". In a similar vein, a Singaporean judge has stressed that it is:
>
>> … axiomatic that it is the spirit and intent, rather than the plain letter, of the professional ethical rules that breath life and legitimacy into the standards that are relevant in assessing whether a lawyer has discharged his professional obligations, and…that a rigid and formalistic adherence to the codes of practice without a proper appreciation of their spirit, purport and intent may from time to time lead to ethical blindness.

226 To determine this matter, we do not need to decide certain aspects of the contentions advanced by the Applicant. We do not need to determine whether it is always, or even ever, appropriate for a practitioner to render bills (in order to keep a client informed of the debt accumulating for work performed) where the practitioner is not entitled to receive funds in payment of those bills. That said, we have concerns about being seen to endorse that as a general position because a client who lacks capacity to understand a costs agreement or a practitioner's invoice, or whose capacity is in issue, may not understand that they are not required to pay the bill and providing an invoice for the purpose of keeping the client informed might be apt to confuse.

227 We also do not necessarily accept that a solution to a lack of capacity to understand a costs agreement would be to charge at scale or via a fixed fee. A client may still lack the capacity to consider whether

[161] GE Dal Pont, *Lawyers Professional Responsibility*, (7th ed, 2021) at [1.25].
[162] GE Dal Pont, *Lawyers Professional Responsibility*, (7th ed, 2021) at [1.13].
[163] GE Dal Pont, *Lawyers Professional Responsibility*, (7th ed, 2021) at [1.13].

the work is being performed in accordance with their instructions or whether the scale fee charged reflects work actually performed or whether to terminate the firm's retainer. What is appropriate to be done where a client lacks capacity will depend on a client's individual circumstances and consideration of what the client lacks the capacity to do may need to be determined on a case-by-case basis.

228 In our view, it does not require expert evidence or a Conduct Rule, or learned writing on the subject, for reasonably competent and diligent practitioners to appreciate that they may not debit a client's credit card in reliance upon a previously signed authorisation and to receive payment in that way for work performed by them in circumstances where they know that the client lacks the capacity to understand the costs agreement pursuant to which the work was charged or the invoice rendered, or their rights in relation to the invoice or where the practitioner has a real doubt about the client's capacity to understand those matters. To do so is to enter into a transaction with the client which the client cannot understand or which the practitioner doubts the client can understand.

229 Ethics and a regard for the conduct necessary to ensure the protection of the public and the special position that practitioners occupy must ultimately dictate the appropriate standards of conduct within the profession. In our view, the public is entitled to expect, and was entitled in 2016 and 2017 to expect, that a reasonably competent and diligent legal practitioner would not receive funds for work performed in circumstances where they had knowledge of, or a real doubt existed in their mind about, a client's lack of capacity to understand the basis upon which legal fees were charged, the invoice issued for the fees and their rights to challenge the bill.

230 It does not follow that because a practitioner is justified in acting on a client's instructions that they are entitled to payment for doing so. The question of capacity to give instructions and capacity to determine whether it is appropriate to pay an invoice rendered by a practitioner or to challenge the invoice are related but conceptually distinct matters.

231 We also do not accept the proposition put by the Practitioner that finding that reasonably competent and diligent members of the profession would understand that they must not receive from a client a payment for work are performed in circumstances where the practitioner knows, or ought to have known, that at the time the payment was received, the client lacked capacity to understand the

basis upon which the fees were charged, the bill and their rights in relation to it, or in circumstances where the practitioner had a real doubt as to those matters will (to summarise the Practitioner's argument with a colloquial expression) set the cat among the pigeons within the profession.

232 We anticipate that for most practitioners the case will never arise where there will be a reason not to issue the bill and receive payment. For we are not identifying the existence of a standard that requires a practitioner to positively establish that such a capacity exists before an invoice can be rendered and payment received. Rather, given the presumption of capacity and the need only to be reasonably satisfied as to capacity identified in ***Goddard Elliott***, it will only be where a practitioner knows that the client lacks capacity to understand the basis upon which fees were charged, the invoices rendered and their rights in respect of those invoices, or where there exists a factual basis which causes the practitioner to have real doubts about those issues, that the obligation arises to take steps to ensure that they do not receive funds from the client until the client's capacity in those respects is established or a substitute decision maker who agrees to the payment is in place.

233 We do not accept the Practitioner's submission that the public policy concern, the protection of a vulnerable person, is adequately addressed by the existence of an entitlement that the client (including a client's administrator or attorney) has to tax the bill.

234 The protection of the public should not rest on a client who lacks capacity to understand the bill (or their legal representative, if one happens to have been appointed) having to take steps (which may never be taken), after the payment has been made. In our view, the public should first be protected by practitioners acting in their client's best interests.

235 The possibility that, on occasions, practitioners may have to carry debt is not a reason to find that it is appropriate for a practitioner to receive payment from a person in circumstances where that practitioner knows, or ought to know, that that person's lacks the capacity to understand the basis upon which the invoice is rendered, and to consider their rights in relation to the bill and the payment thereof, or where a real doubt about those matters exists in the practitioner's mind. Where a practitioner has a real doubt about a client's capacity to understand those matters or where they have actual knowledge that their client lacks that capacity, there are ways in which they can be

addressed that are likely to facilitate the payment of appropriate bills. For example, an EPA may exist pursuant to which the attorney can make decisions about payment, or the practitioner may seek to have an administrator appointed who may then make decisions about the bills. The matter may even be able to be resolved simply by requesting the client to undergo an assessment by a relevant specialist in order to assist the practitioner to be satisfied that the client does have the requisite capacity.

236 Practical difficulties of the kinds identified by the Practitioner may well arise in circumstance where capacity fluctuates. But that fact should not mean that practitioners should be absolved of an overarching obligation to ensure that they do not take payment for services when they are on notice that the client does not understand the way the bill was arrived at, to assess it and consider their rights in relation to it or where real doubt about a client's capacity to understand those issues exists in the practitioner's mind. This is the case even where the client had been found to have the capacity to give the instructions to the practitioner in relation to the legal work.

237 No hard and fast rules about how to proceed can be derived from this case beyond the finding we make that, in circumstances where the Practitioner had at least real doubts about his client's capacity to understand complex legal and financial matters including his Firm's costs agreements, it was not appropriate for him to receive funds for that work in the way that he did.

Characterisation of the conduct

238 The Applicant says we can come to that view that the Practitioner's conduct amounted to professional misconduct having regard to the following matters:

1. the capacity concerns were raised by Dr Ryan in unambiguous terms and this is not merely a case of the Practitioner failing to notice or act on subtle signs exhibited by the client herself;
2. the conduct was directed at a highly vulnerable client;
3. the Practitioner personally benefited from the decision to recommence billing in October 2016;
4. the billing persisted over a significant period of time;

5. the billing persisted in the face of his colleagues, counsel and the Tribunal expressing concerns about her capacity to understand complex legal and financial matters including the Firm's costs agreements;

6. the amounts billed and paid by the client were significant for an individual; and

7. the Practitioner was made aware that the client was concerned that she did not understand the nature of the work being done and was concerned about the charges.

239 The Practitioner submits that even if we find (as we have) that the conduct was a departure from the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, it did not amount to professional misconduct having regard to the following factors:

1. the conduct was a single course of conduct in relation to a single client;

2. the Practitioner was not taking advantage of a vulnerable client, there is no allegation that he overserviced or overcharged her or billed for work he did not do;

3. Dr Ryan's concerns were raised in ambiguous terms;

4. the conduct was the product of an unintentional mistake given the novelty of the case and the fact that the standard of conduct required was not obvious because there were no published statutory or other requirement or judicial authority setting out the standard;

5. there is no evidence that the client raised any concerns about the legal work or charges directly with the Practitioner; and

6. after the receipt of Dr Lee's report the issue of MT's capacity had still not been conclusively determined.

240 The Applicant submitted that if we find that the Practitioner never turned his mind to the question of whether he had a responsibility to cease to receive payment from MT when he had real doubts about her capacity to understand the costs agreement pursuant to which bills were rendered, the invoices and her rights in relation to the invoices, we should find that the Practitioner's conduct involved a failure of

competence. Given that we have found that he did in fact turn his mind to that question we do not find the Practitioner's conduct involved a failure of meet the standard of competence which the public is entitled to expect of a reasonably competent practitioner.

241 The Applicant submitted that if we were to find that the Practitioner did turn his mind to the implications of his doubts about her capacity to understand the costs agreements, invoices and rights in relation to the invoices before the Firm received each payment for the invoice in the way that they did, we would find that his conduct involved a failure to meet the standard of diligence which the public is entitled to expect of a reasonably competent and diligent practitioner.

242 In our view, in receiving payment of fees or in not preventing his Firm from receiving payment for fees when the Practitioner had a real doubt about his client's capacity to understand the costs agreements, invoices and rights in relation to the invoices, his conduct lacked the diligence that the public is entitled to expect of a reasonable and competent legal practitioner.

243 Having considered all of the matters raised by the parties we have come to the view that the conduct amounted to a substantial and consistent failure to reach or maintain the reasonable standard of competence and diligence expected of an Australian legal practitioner. We therefore find that it amounts to professional misconduct in terms used in s 403(1)(a) of the LP Act and in the sense used in the second limb of the ***Kyle*** test. We have come to this conclusion because:

1. the conduct occurred repeatedly over an extended period of time;

2. MT's capacity to understand complex legal and financial matters, including the Firm's costs agreement, had been raised with the Practitioner, by an appropriately qualified medical practitioner and other member of the Firm and that the Practitioner was aware of those concerns; and

3. the implications for billing and the receipt of payment in light of those concerns had been considered by the Practitioner and, as the most experienced practitioner and principal of the Firm, he was party to the decision that the Firm could no longer act for her and the decision that it could not bill MT when the Firm recommenced acting for her, decisions which were subsequently superseded by the recommencement of work and later the recommencement of billing and the receipt of payment.

244 In coming to this decision, we acknowledge that it was not said, and we have not found, that the Firm did not carry out the work for which MT was billed and for which she paid or that she was overcharged for the work. For those reasons we do not find the Practitioner's conduct is to be regarded as disgraceful and dishonourable. We do not find his conduct to have been professional misconduct which meets the common law test as described in the first limb of ***Kyle***.

Orders

245 Having set out our reasons for concluding that the Practitioner is guilty of professional misconduct we make the following orders:

The Tribunal orders:

1. Pursuant to s 438 of the *Legal Profession Act 2008* (WA), the Practitioner is guilty of professional misconduct as defined in s 403(1)(a) of the *Legal Profession Act 2008* (WA) and which conduct involved a substantial and/or consistent failure to reach a reasonable standard of competence and diligence.

2. The parties are to confer in relation to orders that should be made to programme the matter to a hearing in relation to penalty and costs and to provide the Tribunal with an agreed Minute by 24 January 2024.

3. If the parties cannot agree on the terms of an agreed Minute, then each party is to file their own Minute of Proposed Orders programming the matter to a hearing of penalty and costs by 24 January 2024.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS
Associate to Judge Glancy

13 DECEMBER 2023