QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v O'Reilly* [2019] QCAT 28
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **MARK JOSEPH O'REILLY** (respondent)
APPLICATION NO/S:	OCR107/17
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	28 February 2019
HEARING DATE:	13 July 2018; 17 September 2018
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons QC, Judicial Member Assisted by: Mr Michael Meadows Dr Margaret Steinberg
ORDERS:	**1. The respondent is publicly reprimanded;** **2. The respondent is suspended from practising as a legal practitioner for a period of three years;** **3. The respondent's next application for a practising certificate must be accompanied by a copy of these reasons, and the reports of two practising psychiatrists, who have been provided with a copy of these reasons and who have reported independently of each other, on the respondent's mental condition and its effect on his ability to engage in legal practice, the reports to be obtained within six months prior to the application; and** **4. The respondent is to pay the applicant's costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – GENERALLY – where

respondent misappropriated funds while acting under a power of attorney – where respondent misappropriated funds while acting as executor of deceased client's estate – where respondent was suffering from mental illness – whether respondent was permanently unfit for practice warranting a recommendation of removal from the roll of practitioners

Legal Profession Act 2007 (Qld), s 53, s 456, s 656C

Allinson v General Council of Medical Education and Registration [1894] 1 QB 750
Attorney-General v Legal Services Commissioner; Legal Services Commissioner v Shand [2018] QCA 66
Hili v The Queen; Jones v The Queen (2010) 242 CLR 520; [2010] HCA 45
Legal Services Commissioner v Shand [2017] QCAT 159
New South Wales Bar Association v Cummins (2001) 52 NSWLR 279; [2001] NSWCA 284
Prothonotary of the Supreme Court of New South Wales v P [2003] NSWCA 320
Watts v Legal Services Commissioner [2016] QCA 224
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64
Ziems v Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279; [1957] HCA 46

[1] The Commissioner has alleged that the respondent is guilty of professional misconduct and/or unsatisfactory professional conduct ('conduct allegations') and has sought disciplinary orders pursuant to s 456 of the *Legal Profession Act* 2007 (Qld) ('LP Act').

Facts

[2] At relevant times, the respondent was an Australian Legal Practitioner, practising as a partner of a law practice.

[3] Mr Farah Saba was a client of the respondent. Mr Saba appointed the respondent as his attorney by a power of attorney executed in 2007. The power of attorney was activated on about 18 December 2012, on Mr Saba's incapacity. At that time, Mr Saba owned a company, of which he had been the sole director, called Farah Saba Investments Pty Ltd (*FSI*).

[4] On about 18 March 2013, pursuant to the power of attorney, the respondent appointed himself the sole director of FSI, in place of Mr Saba. At least from 1 July 2013 to 31 May 2015, FSI operated a bank account with the Commonwealth Bank of Australia (*CBA account*), which was under the sole control of the respondent.

[5] On 22 August 2013, the respondent cashed a cheque for $5,445 on the CBA account. He had no legitimate reason to do so.

[6] Mr Saba died on 27 November 2014. The respondent and the other partners in the law practice were appointed executors of Mr Saba's estate. By about 2 February 2015, the other partners had renounced their executorships, leaving the respondent as sole executor. The beneficiaries of the estate were Mr Saba's family members.

[7] On 9 February 2015, the respondent drew a cheque on the CBA account for $20,000, which he deposited to his own account. He paid the proceeds to Bluedice Pty Ltd, a company associated with the respondent and another partner of the practice, to discharge a debt which the respondent owed to Bluedice.

[8] On 13 February 2015, the respondent opened an account with Bank of Queensland in the name of FSI (*BOQ account*). It is an agreed fact between the parties that this occurred in the ordinary course of the respondent's executorship. The account was under the sole control of the respondent. The respondent caused all funds then in the CBA account to be transferred to the BOQ account.

[9] On 19 March 2015, the respondent caused payments of $128,000 and $15,000 to be made from the BOQ account to Bluedice, to discharge debts of the respondent to that company which had then become due, but which the respondent could not pay.

[10] Neither the respondent nor Bluedice had any entitlement (as against FSI or Mr Saba's estate) to the moneys which came from FSI and went ultimately to Bluedice.

[11] On 25 March 2015, the respondent caused $50,000 to be transferred from the BOQ account to an entity described as "Normarddy Staffsuper", to discharge debts the respondent then owed to that entity. On the same day, he caused a further sum of $50,000 to be transferred to an entity described as "Taylor Super Fund" for a similar purpose. No allegation has been made about the circumstances in which those debts were incurred. Neither of the entities, nor the respondent, had any entitlement (as against FSI or Mr Saba's estate) to the moneys so transferred.

[12] About the beginning of May 2015, an administrative employee of the law practice became aware of (unspecified) discrepancies in the bank accounts and statements (apparently of the estate and FSI), and notified one of the partners of the practice. The partners queried the respondent about the discrepancies, and he disclosed his conduct.

[13] On 5 May 2015, the respondent made an appointment with Queensland Law Society to report his conduct. On 6 May 2015, the partners of the practice, including the respondent, disclosed the respondent's conduct to the Society. The respondent co-operated in the subsequent investigation and audit.

[14] The respondent's defalcations totalled $268,445. He arranged for repayments, commencing on 11 May 2015, and completed by 21 May 2015, with most of the money being borrowed from Bluedice and his mother.

[15] The respondent ceased working with the legal practice on about 1 June 2015, and did not renew his practising certificate, which lapsed on 30 June 2015. A niece of Mr Saba made a complaint to the Legal Services Commission about the respondent's conduct, it would seem some time in June 2015; and after the respondent had made the repayments.

Characterisation of the respondent's conduct

[16] The respondent's conduct would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency. As such, it can only be characterised as professional misconduct[1]. The respondent did not submit otherwise. It is convenient at this point to record evidence relevant to the consequences of this finding. The evidence is undisputed.

The respondent's background, mental health and other issues

[17] As an employed solicitor with a single teenage staff member, from 1991 the respondent conducted what was then a branch office of another firm. About the beginning of 1994 he took over the branch office and conducted this practice on his own behalf. The practice grew to a point where there were four partners, and more than 40 staff, including six employed solicitors. The respondent gave evidence that he worked long hours, including weekends. He appears to have been responsible for the practice's administration, as well as to have acted for clients.

[18] The respondent invested in property, initially with success. In about 2002, he became involved in what appears to have been a small syndicate which invested in this way. He later learnt that the syndicate's managing partner had misappropriated funds, lied about the status of investment projects, and produced fraudulent documents. The situation was aggravated by the global financial crisis. The respondent estimated that he lost about $1 million as a result.

[19] The respondent also had a keen interest in horse racing, and turned to gambling in times of stress. He estimated that he lost about $200,000 from gambling.

[20] The applicant drank alcohol to excess. He gave evidence that he has long suffered a dependence on alcohol. This problem developed to the point where, in 2000 or 2001, he sought assistance from a psychiatrist, Dr Apel. He attended the inpatient program at Damascus Health Services at the Brisbane Private Hospital. He remained abstinent from alcohol for about six months thereafter, until the breakdown of his first marriage. He then stopped seeing Dr Apel and taking medication, and resumed drinking.

[21] The respondent considered that his consumption of alcohol became a serious problem in about 2007. Previously he drank heavily on weekends, but did not drink during the week. His consumption increased to the point where, by 2012, he would usually drink between 14 and 20 standard drinks a day, and occasionally more.

[22] The respondent had first sought assistance for his mental health after his father's premature death in 1993. He discontinued treatment after a few months. Mention has already been made of his treatment under Dr Apel in about 2001.

[23] The respondent returned to Dr Apel on 11 May 2015. This was shortly after the respondent had substantially progressed a course of conduct intended to result in his own death, described by Dr Apel as "…a suicide attempt…of clearly lethal intent". He was admitted to Brisbane Private Hospital as an inpatient for a week (the respondent's evidence is that the period was two weeks); and was again admitted as an inpatient in

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[1] See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; and the discussion in Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6th ed, 2017), [23.85].

September 2015 (the respondent gave evidence that the period was a week). It appears that these admissions were intended primarily to address the respondent's alcohol dependence, Dr Apel considering it unsafe to attempt detoxification while the respondent was an outpatient. The respondent has seen Dr Apel at least weekly, and usually twice weekly, since then. He also undertakes group therapy at Damascus twice a week. The respondent has been treated with substantial medication, described by Dr Apel as "multiple high-dose antidepressants". In his report of 7 September 2018, Dr Apel said that the "medication has been reduced to a degree in the last few months". In his subsequent oral evidence, Dr Apel said of the respondent, "He's on high dose medication, of multiple agents; attempts to reduce it and he falls to pieces, and I've tried to minimise medication, without success, on a number of occasions". His treatment includes medication to manage alcohol cravings.

[24] The respondent has not been the subject of any other disciplinary proceedings. He has been an active participant in a number of community organisations.

Dr Apel's evidence

[25] Dr Apel is aware of the conduct which is the subject of these proceedings; though he only became aware of the full extent of it at about the time of the hearing. His report records that the respondent had told him that the conduct involved drawing a cheque of about $5,000 and a transfer of about $120,000. He said that his view did not change when he learnt the actual amounts involved.

[26] Dr Apel considered that, in May 2015, the respondent was suffering from a depressive illness of marked severity, which he also described as a major depressive disorder. As a separate diagnosis, he considered that the respondent suffered from alcohol dependency, to the point of physiological dependence with withdrawal symptoms on detoxification. The respondent's judgment "would have been markedly affected by his psychiatric condition" over the year or so prior to May 2015. His condition was not of a delusional severity and he was not deprived of the capacity to know what he was doing, or to control his actions. Dr Apel said that the respondent's condition would have resulted in a significant impairment of his judgment over the period during which the conduct occurred.

[27] Dr Apel considered that the respondent was not of antisocial personality, and did not display antisocial traits. He did not engage in denial, but sought to identify and resolve his problems. With management of his depressive illness and alcohol use, Dr Apel considered that the respondent displayed the capacity for reflection and judgment that would make transgressions of social rules highly unlikely. He considered the respondent's family situation "supportive", including support from his first wife.

[28] Dr Apel reported that the respondent has remained almost completely abstinent from alcohol, apart from what Dr Apel described as "a couple of very minor slippages, without consequences". In his oral evidence, he said that the respondent had become grossly intoxicated a couple of times in the first few months of treatment. Thereafter, he had one to four drinks on occasion, but not to the point of becoming intoxicated or losing control. These occurred initially every two to three months, but the occasions have become less frequent. The most recent appears to have been in the couple of months prior to Dr Apel's oral evidence. However, there has been no occasion to admit the respondent to a

hospital for his intake of alcohol since September 2015. Dr Apel also reported that the respondent had ceased gambling completely.

[29] Nevertheless, the respondent's depressive illness has persisted, to the point of recurrent suicidal ideas. His response to treatment has been "excellent", the respondent having displayed "an extraordinary degree of engagement in treatment". Dr Apel thought that "the degree of personal commitment involved, has led to success in managing severely depressed mood and excesses of alcohol and gambling". The respondent "has consistently presented as genuinely remorseful". Dr Apel considered that the risk of the respondent engaging again in the offending conduct to be very low (elsewhere described as minimal).

[30] The respondent ceased work in 2015 on Dr Apel's direction. Dr Apel considered in October 2017 that a return to work could be contemplated. However, that has not occurred.

[31] In his oral evidence, Dr Apel explained that his treatment of the respondent was carried out at the Damascus Unit; which meant that the respondent would see him and would also engage in programs including group programs, for about five or six hours, usually twice a week. He said that the respondent remains under intensive treatment (he also described the treatment as being "of a quite heavy handed and aggressive manner"), a reflection of the severity of his depression, and the length of time for which it has persisted. Attempts to reduce the level of medication have been unsuccessful. However the respondent was strongly motivated to engage in treatment. Dr Apel has not felt able to encourage the respondent to return to work, even in a role different to his former role. His view expressed in his report of 30 October 2017 that a return to work could be contemplated, he now considered to have been too optimistic. (In late 2017, the respondent had the opportunity to do some casual work as a delivery driver, which was not taken up.)

[32] Dr Apel referred to the fact that a junior colleague detected the respondent's conduct, and the likelihood of its detection. He considered this to be a further indication of the poor judgment the respondent was exercising.

[33] Dr Apel considered that there was an "enormous distance" between the state of the respondent's mental health between 2013 and 2015, and the current state of his mental health. It had plateaued; but was likely to improve with the passage of time. Dr Apel expected to encourage him to return to work at some (indeterminate) time in the future.

[34] In her oral submissions, Ms Holliday of Counsel recognised that Dr Apel was of the opinion that the respondent was suffering from mental illnesses at the time of the conduct; and that he was also of the opinion that the risk of similar conduct in the future was low. She did not seek to controvert Dr Apel's views. In her written submissions she accepted that Dr Apel's evidence was analogous to that given in relation to the practitioner in *Watts*, a case which she sought to distinguish on other grounds.

Submissions as to orders

[35] Ms Holliday of Counsel, who appeared for the applicant, referred to the following matters:-

(a) The amount of money which the respondent misappropriated;

(b) The number of transactions involved, and the period of time over which they occurred;

(c) A significant proportion of the misappropriated moneys were paid directly into the respondent's personal bank account, or the account of a company associated with the respondent;

(d) The respondent was in a particularly important position of trust, as Mr Saba's attorney, and the executor of his will;

(e) The respondent only repaid the moneys when his conduct was discovered.

[36] Ms Holliday submitted that the conduct in this case was worse than that considered in *Watts v Legal Services Commissioner*[2], because in that case the practitioner had used the money to prop up his practice, rather than to pay debts unrelated to the practice; and he had repaid the money before his conduct was detected. She submitted that the respondent's conduct is at the upper end of the range of serious conduct, and it was open for the Tribunal to find that the probability is that the respondent is permanently unfit to practise, so that the appropriate order would recommend that the respondent's name be removed from the local Roll, and would order that he not be granted a local practising certificate for a period of three years. She submitted that the character of the respondent is so "indelibly marked by the misconduct that he cannot be regarded as a fit and proper person to be upon the Roll"[3]. She made reference to passages from *Shand*[4] which stress the importance of the community being confident that only fit and proper persons are able to practise as lawyers, and the need to preserve the good standing of the legal profession. She also made reference to the 10 considerations identified by Young CJ in *Prothonotary of the Supreme Court of New South Wales v P*[5] as relevant to the question whether a practitioner's name should be removed from the roll of practitioners, and 10 factors, the presence of which might constitute compelling mitigating circumstances[6]. She also referred to statements in *New South Wales Bar Association v Cummins*[7] to the effect that clients, fellow practitioners, the judiciary, and members of the public must be able to have confidence in the legal profession.

[37] The respondent's submissions also made reference to the considerations and factors referred to in *P*. It was accepted that, at the time of the conduct, the respondent was not a fit and proper person to remain on the local Roll. However, the question was whether the respondent was now not a fit and proper person for that purpose. Reliance was placed on his remorse and rehabilitation. The submissions referred to the passage from *Watts*[8] to the effect that a recommendation for the removal of a practitioner's name from the Roll should only be made when the probability is that the practitioner is permanently unfit to practise.

[38] The applicant's submissions correctly accepted that the question in the present case is whether the respondent is a fit and proper person to remain on the local Roll at the time

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2 [2016] QCA 224.
3 See *Attorney-General v Legal Services Commissioner; Legal Services Commissioner v Shand* [2018] QCA 66 at [57].
4 At [55] and [58].
5 [2003] NSWCA 320 at [17].
6 At [24].
7 (2001) 52 NSWLR 279, 284.
8 At [46].

of this Tribunal's determination; and that a recommendation for the removal of the respondent's name from the Roll should only be made when the probability is that the respondent is permanently unfit for practice. These propositions emerge from *Watts*, which has some similarities with the present case in that it involved the unauthorised use of trust moneys by a practitioner who had problems relating to his mental health. Inevitably there are differences between the two cases, but the principles just stated are applicable in the present case.

Conclusions relating to the respondent's mental health

[39] There is no reason to doubt Dr Apel's evidence that the respondent at the time of the relevant conduct was suffering from a major depressive disorder, complicated by his extreme degree of alcohol dependence. The evidence demonstrates that the latter led to the respondent's very heavy consumption of alcohol on a daily basis. Nor is there any reason to doubt Dr Apel's view that the respondent's condition had the consequence that his judgment was markedly impaired. Much has been done to address both aspects of his condition. The respondent has been treated by Dr Apel for a long time now. He remains compliant with his medication regime. He has also undertaken regular group therapy at Damascus. Although his depressive illness has persisted, it seems to be adequately managed. He has remained substantially free of alcohol for a period of the order of three years.

[40] Dr Apel considers that the appellant does not have an antisocial personality, nor does he display antisocial traits. He is in a supportive family situation. Dr Apel considers that he shows a capacity for reflection and judgment, and that the risk of a recurrence of the misconduct is very low. This evidence was not challenged, and there is no reason not to accept it.

Is the respondent's character "indelibly marked" as unfit for practice?

[41] In view of the submissions made on behalf of the applicant, it is appropriate to consider whether the respondent's character is so indelibly marked by the misconduct that he cannot be regarded as a fit and proper person to remain on the Roll. The applicant submitted that such a finding should be made, consistent with the finding in *Shand*.

[42] It appeared from Ms Holliday's oral argument that she submitted that the reference to character in the judgment in *Shand* was a reference to reputation, which had been indelibly marked by the respondent's conduct. The point is neatly identified by some definitions of the word "character" from the *Australian Concise Oxford Dictionary*[9]. They are as follows:-

> **1** The collective qualities or characteristics, esp. mental and moral, that distinguish a person or thing. **2 a** moral strength (*has a weak character*). **b** reputation, esp. good reputation.

[43] Definitions 1 and 2a deal with a person's characteristics, while definition 2b refers to public or community perception or opinion. The two are obviously often related, reputation being a consequence of conduct reflecting personal characteristics. The distinction is important in the present case, because wrongful conduct committed at a time when a person is significantly affected by a mental condition may not reflect the

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9 3rd ed 1997.

person's characteristics and moral strength, when not so affected; although the conduct may have severely damaged the person's reputation. The former sense appears to have been what Kitto J was referring to in *Ziems v Prothonotary of the Supreme Court of New South Wales*, when he said, "Conduct may show a defect of character incompatible with membership of a self-respecting profession"[10]. The distinction is also apparent in the eighth proposition stated by Young CJ in Eq in *Prothonotary of the Supreme Court of New South Wales v P*[11], that "The concept of good fame and character has a twofold aspect. Fame refers to a person's reputation in the relevant community, character refers to the person's actual nature" (*citations omitted*). As McMurdo JA observed in *Shand*[12], the summary of which this statement forms part has been extensively followed in other cases, including at appellate level in this State.

[44] It is respectfully concluded that when McMurdo JA concluded in *Shand* that the practitioner's character was "revealed by the offence"[13], his Honour was referring to the practitioner's actual nature or personal characteristics. That is the natural reading of the language used. It is supported by his Honour's earlier reference to *Prothonotary v P*; and his Honour's observation that the practitioner must have recognised the seriousness of the offence[14]. It also finds some support in his Honour's reference to the fact that the practitioner was not suffering from any mental illness which contributed to his offending[15]. It follows that *Shand* does not provide a proper basis for an argument that the respondent's name should be removed from the Roll, because of the effect of his conduct on his reputation.

[45] It is nevertheless necessary to consider whether the conduct the subject of this application demonstrates that the respondent's character is such that he is permanently unfit to practise as a solicitor. It should be noted that the finding in *Shand* that the practitioner's character was so indelibly marked by the offence which he committed that he could not be regarded as a fit and proper person to be upon the Roll, does not mandate a similar finding in the present case. It is a finding of fact, made in the circumstances of that case. The offence was the making of a corrupt payment to a Minister of the Crown. It was described in this Tribunal as "very serious and ultimately inimical to the maintenance of law and order"[16]; and in the Court of Appeal it was said to be "a very serious offence, the nature of which undermined the integrity of government at a Ministerial level"[17]. While the conduct of the respondent is also serious, there are significant differences between the quality of the conduct in each case. In any event, while serious misconduct may demonstrate a flawed character, that conclusion is not inevitable, particularly when factors other than character play a significant role in the conduct.

[46] The fact that the practitioner in *Shand* was not suffering from any psychiatric condition which contributed to his conduct was a matter of some importance. It precluded an explanation for the conduct, other than in the practitioner's character. That is not true in the present case.

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10 (1957) 97 CLR 279, 298.
11 [2003] NSWCA 320 at [17].
12 At [32].
13 *Shand* at [60].
14 *Shand* at [60].
15 *Shand* at [21] and [59].
16 *Legal Services Commissioner v Shand* [2017] QCAT 159 at [77].
17 *Shand* at [60].

[47] A finding that a practitioner is, by reason of his character, permanently unfit to practise should not be lightly made. In *Ziems*, Fullagar J referred to the need to be "very sure of the facts before making so serious a finding"[18]. That is consistent with s 656C of the LP Act.

[48] Dr Apel's evidence shows that the respondent was, at the time of the conduct, suffering from a major depressive disorder, and from a very high degree of alcohol dependence. As a result, his judgment was markedly impaired. The respondent's mental condition provides a plausible basis for thinking that the conduct does not truly identify the respondent's character. Some support for that view may be found in his good conduct, both before and since the misconduct. It also finds some support in Dr Apel's view that the respondent does not have an anti-social personality; and his assessment of the low probability of further similar conduct in the future.

[49] Mention should also be made of the evidence of remorse, which Dr Apel appears to regard as deep and genuine. His view should be accepted. It is confirmed by the respondent's "extraordinary" commitment to treatment designed to deal with his depressive illness and his alcohol addiction. Some support may also be found in the respondent's prompt repayment of the amounts which had been taken, prompt reporting to the Society, and his co-operation with the investigation and these proceedings. There has also been no attempt to deny or minimise the misconduct.

[50] It follows that the applicant has not demonstrated that the respondent's character is such that he is permanently unfit to practise.

Other factors relevant to a removal recommendation

[51] Notwithstanding the concession about the psychiatric evidence, Ms Holliday sought to submit that the conduct in the present case was materially worse than that in *Watts*, and to distinguish the case on that basis. The submission appears to be intended to avoid a determination of the question by the Tribunal simply finding the facts in the two cases to be sufficiently similar to lead to the making of similar orders; or to a conclusion that the differences on which the applicant relies have the consequence that the recommendation would be made. A determination made in that way would be incorrect. The outcome of these proceedings is to be determined by the application of relevant principles to the facts of the case. Consistency in judicial decision making, particularly in the exercise of a discretionary power, means that there should be reasonable consistency in outcomes, not in the sense that they are identical; but in the sense that the application of legal principles is consistent, with the treatment of like cases alike, and different cases differently[19].

[52] In the present case, the relevant principle is whether the applicant has shown, to the requisite standard, that the character of the applicant is such that the applicant is now permanently unfit to practise, a question already discussed. Nevertheless, it is appropriate to consider the applicant's submission in more detail.

[53] In *Watts* the practitioner used money from his trust account to prop up his practice; while the present respondent used money to meet other debts. Ms Holliday submitted that this was a distinction of some importance. That should not be accepted. The unauthorised

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[18] *Ziems* at 296.

[19] Compare *Wong v The Queen* (2001) 207 CLR 584 at 591 [6]; *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520 at 535-536 [47]-[49].

nature of the transaction, and the risk of loss to the beneficial owner of the funds are the major considerations, and do not depend on the purpose for which the money is taken. There is no reason to think that the practitioner has any less personal interest in maintaining the practice, than in meeting unrelated debts.

[54] It is true that the practitioner in *Watts* replaced the funds before detection. That is not without significance in an assessment of the practitioner's conduct, even if the respondent returned the funds which he had taken, promptly after detection. On the other hand, in *Watts*, the practitioner had falsified documents to hide his conduct. That is not a feature of the present case. These factual differences do not show the conduct in one case to be markedly worse than in the other.

[55] Differences in the period over which the conduct occurred and the amounts involved do not appear to be of particular importance. In each case the practitioner was in a position of trust, which he abused.

[56] The differences in the length of time since each practitioner ceased practice may be relevant in determining other orders. They say nothing about whether the respondent's character is indelibly marked by his conduct, nor about whether he is permanently unfit for practice.

[57] Each case turns on its own facts, and requires the application of statutory provisions and established principles to those facts. While the outcome in *Watts* does not determine the outcome in the present case, the differences between the two cases are not sufficiently significant to point to a different result, at least on the question whether a recommendation should be made for the removal of the respondent's name from the Roll.

[58] It is necessary, to make some further observations about *Shand*. McMurdo JA found that the Tribunal erred in not considering all of the purposes served by orders made under s 456 of the LP Act, and in particular, the preservation of the good standing of the legal profession and of the Roll as the Court's endorsement of the fitness to engage in legal practice of those enrolled[20]. Those considerations became relevant because the practitioner had no intention of returning to practise[21]. His Honour found, contrary to the Tribunal, that there was nothing to suggest any likelihood that the practitioner would become a fit and proper person to be on the Roll[22]. His character thus warranted an order that his name be removed from the Roll[23]. As *Watts* shows, not every person who has engaged in serious misconduct should have his or her name removed from the Roll. In the present case it has not been established that the respondent's conduct, serious as it is, is a true reflection of his character. On Dr Apel's evidence, there has been a significant improvement in the respondent's mental state since the time of his misconduct, with the prospect of further improvement, no doubt relevant to the risk that the respondent's mental condition, would deteriorate, and he might engage in similar conduct in the future.

[59] Moreover, Dr Apel was of the opinion that the risk that the respondent would engage in similar conduct in the future was low. That opinion was not challenged. Dr Apel considered that the respondent's mental state had improved markedly since the time of the conduct. He anticipated further improvement with the passage of time. Given the

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20 *Shand* at [58].
21 *Shand* at [15], [56].
22 *Shand* at [59]; see also [42], [60], [61].
23 *Shand* at [61].

respondent's slow progress under intensive treatment, there may be reason for some caution about the last-mentioned view. That caution does not provide a ground for finding that the respondent's character is such that he is unfit for practice; or that the probability is that he is permanently unfit.

[60] The Tribunal's jurisdiction is protective of the public. It is clear that the respondent's condition has not improved to the point where he is able to return to practice. The applicant did not advance a case that the current state of the respondent's mental health warranted a recommendation for the removal of his name from the Roll. Concerns about his condition can be addressed by an order requiring psychiatric evidence in support of a future application for a practising certificate.

[61] When these considerations are weighed up, they do not lead to a conclusion that the probability is that the respondent is permanently unfit to practise law. Accordingly an order recommending the removal of the respondent's name from the local Roll is not warranted.

Other orders under s 456 of the LP Act

[62] It is clear that the respondent's conduct warrants a public reprimand.

[63] The parties appeared to accept that the respondent's conduct warranted an order suspending him from practice. The applicant submitted, in the event that his primary submission was not accepted, that the period of suspension should be three years. The respondent submitted that the order should take account of the time which has passed since the respondent ceased practice in 2015.

[64] It is appropriate to make an order suspending the respondent from practice for three years. While Dr Apel did not identify a time by which the respondent's health might have recovered sufficiently for him to return to work, he expected further improvement in the respondent's condition, and three years is a substantial period of time to allow this to occur. A condition requiring psychiatric reporting (not opposed by the respondent) will provide a safeguard against the risk that the respondent's health does not sufficiently improve. These orders should provide adequate protection for the community.

[65] The order for suspension would also provide some recognition of the seriousness of the respondent's conduct, and contribute to the general deterrence of other practitioners from behaving in a similar fashion.

[66] The applicant's initial submissions filed on 24 November 2017, prepared by Counsel other than Ms Holliday, sought, among other things, an order for suspension, and the imposition of a fine of between $5,000 and $10,000. The alternative orders sought by Ms Holliday did not extend to a fine. Accordingly, it is not appropriate to impose a fine.

[67] The applicant also proposed a condition that, should the respondent return to practice, he be under the supervision of another legal practitioner; and that he not have responsibility for operating a trust account. Given that a substantial period of time will have by then elapsed, it is difficult to say whether such a condition should be imposed. It is a matter

more appropriately considered if and when the respondent applies for a practising certificate[24].

Costs

[68] The applicant has sought his costs. Section 462 mandates such an order unless exceptional circumstances exist.

[69] This matter first came on for hearing on 13 June 2018. By reason of the circumstances in which the matter was then adjourned, a specific order was made that the costs of that day's hearing not be reserved. It has not been suggested that that order should be revisited.

[70] Accordingly, an order should be made that the respondent pay the applicant's costs of these proceedings, excluding the costs of the hearing on 13 June 2018, to be agreed, and failing agreement to be assessed on the standard basis.

Orders

[71] The following orders are made:

(a) The respondent is publicly reprimanded;

(b) The respondent is suspended from practising as a legal practitioner for a period of three years;

(c) The respondent's next application for a practising certificate must be accompanied by a copy of these reasons, and the reports of two practising psychiatrists, who have been provided with a copy of these reasons and who have reported independently of each other, on the respondent's mental condition and its effect on his ability to engage in legal practice, the reports to be obtained within six months prior to the application; and

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

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[24] See s 53 of the LP Act.