

**IN THE LEGAL PRACTITIONERS
DISCIPLINARY TRIBUNAL**

**ACTION NOS. 17 of 2013, 25 of 2013 and 3 of
2014**

IN THE MATTER OF:

THE LEGAL PRACTITIONERS ACT 1981

and

ROBERT NEIL BROOK

REPORT OF THE TRIBUNAL'S REASONS AND FINDINGS

BACKGROUND

1. Mr Robert Neil Brook ('the practitioner') admits that his conduct constitutes unprofessional conduct as particularized in all counts in proceedings numbered 17 of 2013, 25 of 2013 and 3 of 2014. The hearing before the Tribunal was confined primarily to one area of contest between the Legal Practitioners' Conduct Board ('the Conduct Board') and the practitioner. This contest was in respect of count 1 in proceeding no. 17 of 2013 as to whether the practitioner knowingly made the alleged false and misleading representation to Treloar & Treloar as to the amount of the costs that had been incurred by the practitioner's clients (the contested issue).
2. The parties requested that the Tribunal determine the contested issue first and then deal with the issue of penalty. The Tribunal acquiesced to this course.

3. The conduct which is the subject of the charges spans from February 2008 through to July 2011, a substantial period involving some 17 months. All the charges in all proceedings relate generally to instructions that the practitioner took to prepare a will for Zophia Golanski ('the testatrix').
4. The following background is extracted from the particulars of the charge in proceeding no 17 of 2013, which were admitted by the practitioner. At all relevant times, the practitioner carried on legal practice as director of the company Robert Brook Pty Ltd trading as Robert Brook Solicitor. At all relevant times the practitioner did not maintain a solicitor's trust account.
5. In June 1995 the testatrix executed a will ('the 1995 will') which appointed two of her daughters, Krystyna Milne ('Krystyna') and Theresa Hay ('Theresa'), as joint executrixes and trustees and provided for the equal distribution of her estate amongst her seven children.
6. In about February 2008 the practitioner took instructions from Barbara Jones ('Barbara') to prepare a will for her mother, the testatrix, on the basis of Barbara's statement that she was acting with the testatrix's authority ('the instructions').
7. The testatrix was elderly and a resident in a nursing home at the time the practitioner received the instructions.
8. In February 2008 the practitioner prepared a will for the testatrix which provided for the distribution of her estate and named her son Edward Golanski ('Edward') and her daughter Rita Golanski ('Rita') joint executors and trustees in the will ('the 2008 will').
9. The testatrix died on 30 March 2008 leaving seven living children: Edward, Krystyna, Wanda Goldberg (Wanda), Vincent Golanski (Vincent), Theresa, Barbara and Rita.
10. At no time did the practitioner take instructions directly from or speak to or meet with the testatrix before the 2008 will was executed on 18 February 2008.
11. On or about 22 April 2008 the practitioner received instructions from Barbara, Edward, Vincent and Rita to apply for a grant of probate of the 2008 will.

12. The remaining three children of the testatrix, Krystyna, Theresa and Wanda, lodged a caveat over the testatrix's estate on the grounds that the testatrix had lacked testamentary capacity when she executed the 2008 will.
13. On 2 August 2008 the practitioner instituted proceedings being proceeding no 1219 of 2008 in the Supreme Court of South Australia ('the Supreme Court proceedings') naming Edward as plaintiff. The defendants were Krystyna, Theresa and Wanda. The Supreme Court proceedings arose as a result of issues concerning the testamentary capacity of the testatrix when she executed the will in 2008 and related issues.
14. At all relevant times, the law firm Treloar & Treloar acted for the first, second and third defendants, namely Krystyna, Theresa and Wanda. In July 2009 three further defendants were added to the proceedings, namely Vincent, Barbara and Rita.
15. Krystyna, Wanda and Theresa instructed Treloar & Treloar to contest the validity of the 2008 will, alleging that the testatrix at the time of its execution lacked the necessary testamentary capacity, and to seek to prove the 1995 will for a grant of probate. The 2008 will was less advantageous to Krystyna and more advantageous to the remaining beneficiaries than the 1995 will.
16. The Supreme Court proceedings settled between the parties on 17 November 2009, the day of trial.
17. On the day of trial the parties agreed to settle the matter because it was agreed the legal costs and disbursements incurred by all parties to the litigation exceeded the net assets of the estate.
18. On 2 December 2009 and pursuant to the settlement, the Supreme Court in the Supreme court proceedings ordered that the costs of all parties to the litigation be agreed or adjudicated as between solicitor and own client and paid out of the estate of the testatrix ('the costs order').
19. The proceedings before the Tribunal were heard on 13 May 2014 and then resumed on 23 June 2014 for further short evidence and submissions. The Conduct Board was represented by Mr Michael Roder SC of counsel. The practitioner was represented by

Mr Martin Hoile of counsel. The parties tendered by consent an Agreed Book of Documents (Exhibit B) and some documents including handwritten and transcribed notes from the practitioner's files relating to the relevant period.

LEGISLATIVE SCHEME and RELEVANT AUTHORITIES

20. The Tribunal refers to the *Legal Practitioners Act* 1981 (SA) ("the Act") as it applied at all material times prior to 1 July 2014. Section 82 (1) of the Act enables a charge to be laid alleging unprofessional or unsatisfactory conduct by a practitioner. "[U]nprofessional conduct" was defined in s 5(1) of the Act to mean:

- (a) An offence of a dishonest or infamous nature committed by the legal practitioner in respect of which punishment by imprisonment is prescribed or authorised by law; or
- (b) Any conduct in the course of, or in connection with, practice by the legal practitioner that involves substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute.

The practitioner admits that his conduct involves a substantial and recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute but in relation to the conduct alleged in count 1 of proceeding no. 17 of 2013, he denies that his conduct was dishonest.

Dishonesty

21. Dishonesty is not defined in the Act, however, it is mentioned as one of the constituents of one species of unprofessional conduct defined in s 5(1) of the Act. It is therefore necessary to consider what dishonesty means bearing in mind the civil context. The Victorian Court of Appeal examined the concept of dishonesty in *Harle v Legal Practitioners Liability Committee* [2003] VSCA 133; (2004) 13 ANZ Insurance Cases 61 – 605. At issue was whether a solicitor was entitled to indemnity under an insurance policy which did not cover 'dishonesty or fraudulent act or omission of any insured'. Chernov JA (with Callaway and Buchanan JJA agreeing) stated the following about the concept of dishonesty (footnotes removed):

It seems clear enough that where, as here, dishonesty is not used in a special sense in relation to statutory offences, it is not a term of art and is to be given its ordinary meaning. It embraces deliberate conduct which is considered to be dishonest by the standard of ordinary decent people, or, put another way, the ordinary standards of reasonable and honest people. Whether particular conduct amounts to dishonesty involves the consideration of the mental state – the knowledge, belief or intention – of the person whose conduct is impugned.

22. In *Brereton v Legal Services Commissioner* [2010] VSC 378 Bell J considered the concept of dishonesty when construing the term "misappropriation" in the context of an allegation by the Commissioner that Mr Brereton while practicing as a lawyer committed misconduct at common law as he had "misappropriated trust moneys". Bell J said regarding the term dishonesty (footnotes removed):

52 While an allegation of dishonesty requires consideration of the person's mental state, in neither the criminal nor the civil context is it necessary to establish that the person subjectively knew or believed that the actions concerned were dishonest. What must be established is that the person subjectively intended to do the acts which are said to be objectively dishonest by the ordinary standards of reasonable and honest people. Thus the course to be adopted in determining whether conduct is dishonest was explained by Toohey and Gaudron JJ in *Peters v R* as follows:

53 In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest ... If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people.

54 The steps involved in this formulation are: (1) identify the knowledge, belief or intent which is said to render the acts dishonest; (2) determine whether the accused (or defendant in the civil context) subjectively had that knowledge, belief or intent; and (3) determine whether, on that account, the acts were objectively dishonest according to the standards of ordinary and decent (that is reasonable and honest) people.

55 When applying these principles in a civil case, the civil standard of proof on the balance of probabilities applies. Of course, where the allegation in a civil case is of misappropriation, a high standard of probability is required, due to the gravity of the allegation. In a criminal case, the criminal standard of proof beyond reasonable doubt applies.

23. The Tribunal adopts the approach of Chernov JA and Bell J when considering the issue of whether the practitioner's conduct was dishonest. Chernov JA's approach to the concept of dishonesty was applied by the Supreme Court of South Australia in *Legal Practitioners Conduct Board v Jones* [2009] SASC 347, [25]-[26]. The state of mind will ordinarily be proved by inferences from conduct and the plausibility of any explanation for the conduct as well as the Tribunal's assessment of credit: see generally *Kural v The Queen* (1987) 162 CLR 502 at [3]. The specific finding of dishonesty made against the practitioner in respect of count 1 in proceeding no 17 of 2013 is discussed below.

Onus of proof

24. The onus of proof in such proceedings rests on the Conduct Board. The standard of proof that applies is that usually referred to as the *Briginshaw*¹ standard, namely, proof on the balance of probabilities but with due regard to the seriousness of the allegations: *Kerin v Legal Practitioners' Complaints Committee*.² In the matter of the *Legal Practitioners Conduct Board v Ardalich*³ the Court referred to *Briginshaw* and stated

it seems to us that the standard of proof remains proof on the balance of probabilities but the strength and quality of the evidence required to discharge the standard of proof having regard to the seriousness of the charges and the presumption of innocence will be much greater.

The Tribunal has applied this standard of proof where applicable with due regard to the seriousness of the allegations in question. The charges against the practitioner are very serious and therefore the Tribunal needs to be positively satisfied to a very high degree of probability if it is to find the practitioner guilty of unprofessional conduct as charged especially the allegation of dishonesty in count 1 in proceeding no 17 of 2013. For the reasons noted below, we are so satisfied.

25. Each count should be the subject of a separate finding.⁴

HEARING BEFORE THE TRIBUNAL

¹ *Briginshaw v Briginshaw & Or* 1938 60 CLR 336.

² (1996) 67 SASR 149. See also the approach of the Court in *Prescott v Legal Practitioners Conduct Board* [2012] SASCF 145 at [100].

³ 2005 SASC 478.

⁴ *Legal Practitioners' Conduct Board v Kerin* [2006] SASC 393.

26. The following facts were stated by the practitioner's counsel with no contest from the Conduct Board. The practitioner obtained his Bachelor of Laws from the University of Adelaide in 1980, and after a break completed a Graduate Diploma of Legal Practice in 1982. From 1983-1990 the practitioner was employed as a solicitor in Sydney with various legal firms doing some insolvency, taxation, superannuation funds related and company incorporation work. He then returned to Adelaide where in 1991 he worked briefly at Low & Partners before performing 18 months work as executive director of a company, during which time he maintained his practising certificate.
27. In 1993, he was employed with Nyland Haines in Adelaide as a solicitor for some six to eight months. In 1994 he worked with Hynd and Company as a solicitor for approximately eight months. In 1995 the practitioner commenced his own legal firm and has since then practiced as a sole practitioner to the date of the hearing. He says he predominantly receives instructions from accountants for the preparation of trust deeds, and issues relating to trustees powers and taxation of trustees. The practitioner said he did mostly advising work and that only a small part of his work involved litigation work.

Proceeding no 25 of 2013

28. Proceeding no 25 of 2013 filed on 29 October 2013 charged the practitioner with one count of unprofessional conduct pursuant to s82(2) of the Act, alleging that between 14 and 18 February 2008 he failed in his duty to satisfy himself as to the testamentary capacity of the testatrix when he accepted instructions and provided to her a will for execution.
29. The practitioner admitted the particulars alleged but denied that the testatrix did not have testamentary capacity. The practitioner said that it had not been alleged otherwise against him. He further said that while he did not personally contact the testatrix, he said the relevant instructions were relayed to him through the testatrix's daughter Barbara and who did not allege any lack of capacity on the part of the testatrix.
30. The practitioner was instructed by one of the children of the testatrix, Barbara to prepare a will for the testatrix (her mother) which would exclude her sister (Krystyna) as a beneficiary. The practitioner never spoke to or met the testatrix. The first set of

instructions that he received from Barbara in February are at page 38 of the Exhibit B1. The practitioner generally relied upon the instructions of Barbara Jones (a beneficiary in the will) as to her mother's capacity and her mother's testamentary wishes.

31. The practitioner said he asked Barbara as to whether there was any issue about the testamentary capacity of the mother, and Barbara had replied, "none whatsoever". Barbara further said that the practitioner could, if he so wished, speak about this issue to a Tim Wilson who was the director of nursing at Miromar Nursing Home where the mother resided. The practitioner said the mother's instructions were clear-she wanted her money back from Krystyna which had been loaned to her, and that loaned money once returned would be payable to Wanda and Teresa and the balance of the estate would be distributed to herself, Edward, Rita, and Vince under the will.⁵
32. The practitioner said he eventually (precise date is unclear) spoke to Tim Wilson, the director of the nursing home, shortly after he received instructions, and had a conversation with him about the capacity of the testatrix. He said the director advised him that the testatrix had scored 13 out of 30 on a mini-mental test that had been conducted, and on this basis in his assessment she had testamentary capacity on the day that Barbara came to see the practitioner to give instructions for the preparation of the will.⁶
33. The practitioner gave oral evidence that while he had not personally met the testatrix, the manager had assured him on the basis of reliable medical evidence on his file that the testatrix appeared to have good mental and physical health considering her age.
34. The Conduct Board submits that the practitioner should have assessed and advised the testatrix personally and satisfied himself as to the instructions and her capacity to give them. The fact that one of the daughters gave the instructions does not excuse him from his duty to satisfy himself of the above matters.
35. The practitioner said that he had offered to Barbara to visit the testatrix at the nursing home because the testatrix appeared to be elderly and he had stairs up to his office which he thought the testatrix would have difficulty navigating. However, Barbara had told him that the testatrix was reticent about receiving visitors in her nursing home.

⁵ T21.

⁶ T22.

36. The practitioner had a duty to personally and independently assess and advise the testatrix especially given the circumstances, including her age and the fact that instructions for the drawing of the 1998 Will came from a potential beneficiary of the said will and excluded one child of the testatrix. The practitioner's responsibilities in this regard are well established by authority.⁷ The failure of the practitioner to discharge his professional duties properly in this regard, in turn largely led to messy and expensive litigation between the children of the testatrix contesting the testamentary capacity of the of the testatrix and the terms of the will in question.
37. The Tribunal finds the practitioner guilty of unprofessional conduct as charged on the basis that his conduct involves a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute within the meaning of s 5 of the Act.

Proceeding no 17 of 2013

38. In proceeding no 17 of 2013, filed on 28 June 2013, the practitioner is charged with six counts of unprofessional conduct pursuant to s82(2) of the Act.

Count 1

39. Count 1 alleges that the practitioner on 7 December 2009 "knowingly, falsely and misleadingly represented to another practitioner the amount of the costs that had been incurred by his clients".
40. The practitioner admits the particulars alleged in respect of count 1 but denies that he did so "knowingly," and says that he was then unaware that a solicitor could not claim on a party/party basis higher costs than his or her clients were obliged to pay him on a solicitor/client basis. The practitioner now accepts the state of affairs alleged in count 1 reflected such a serious departure from the standard of conduct to be observed by practitioners that it constitutes unprofessional conduct, however, he disputes that he had the dishonest state of mind at the time of the subject conduct as alleged in the count. This is the contested issue.

⁷ In the *Estate of Tucker deceased* [1962] SASR 99 at [102]; *Woodley –Page v Simmonds* BC 8701133.

41. At the resumed hearing on 25 June 2014 the practitioner sought to amend his response to count 1 in the following terms:

- (a) The Practitioner admits that his letter dated 7 December 2009 effectively represented to a fellow practitioner that he intended to charge his clients the legal costs incurred which were set out in that letter.
- (b) The Practitioner says that it was his intention at that time to charge his clients costs and that he believed he was entitled to these costs.
- (c) The Practitioner says that on or about 26 May 2010 he agreed with his clients that he would accept as his costs a lesser amount than he believed he was entitled to.
- (d) The Practitioner did not inform his fellow practitioner of this agreement because he did not believe that he was obliged to.
- (e) The Practitioner admits by not so informing his fellow practitioner his conduct after 26 May 2010 had the effect of misleading his fellow practitioner into believing that the Practitioner continued to be entitled to claim against the estate the full amount of the costs set out in the letter of 7 December 2009.
- (f) The Practitioner says that he did not intentionally mislead his fellow practitioner, because the practitioner was unaware at the time that he could not continue to claim as costs from the estate more than he had agreed with his clients he would actually charge them.

42. The Conduct Board did not oppose the amendment subject to leave being given to it to put further matters in cross examination to the practitioner arising from the amendment. Leave was given by the Tribunal on the terms sought by the Board.

43. The trial of the Supreme Court proceedings out of which count 1 arises commenced in November 2009. It became apparent that the legal fees would completely erode the estate. The matter was settled on the first day it was listed for trial on the following terms:

1.1 allegations of lack of capacity were withdrawn;

1.2 the earlier will was to be admitted to probate;

1.3 each party's costs would be paid from the estate.

44. The practitioner's clients reluctantly but eventually accepted that the agreement reflected in the third order noted above extended to solicitor and client costs with the likely consequence that there was a reduced return to the practitioner's clients.
45. Pursuant the third court order noted above, Treloar & Treloar wrote to the practitioner on 3 December 2009 (B1 172) requesting the practitioner to provide his clients' tax invoice.
46. The practitioner had not entered into a fee agreement to charge above scale fees. He was therefore entitled to charge at scale. On 7 December 2009 the practitioner responded (B1 178-179) and stated that his charge out rate was \$300 per hour and that his clients had "incurred a constant charge of \$300 per hour plus disbursements". A bill of costs was enclosed with this response. The practitioner went on to state that the bill of costs had been maintained as a long form bill for taxation purposes at slightly less than scale rates. He stated that it had been adjusted to allow for the practitioner's charge out rate of \$300 per hour. The total amount of \$49,038 plus disbursements in the sum of \$16,811.18 was charged by the practitioner in the bill sent to Treloars when the total amount of the bills in fact sent to the practitioner's clients including GST for legal costs was only \$27,395.50.

On the basis of the above representations of the practitioner, Treloar & Treloar engaged in a pro rata calculation with the outcome that each party was to bear a shortfall of approximately 18% of the costs incurred by them. The effect of the practitioner's actions ultimately enriched his clients at the expense of Treloar & Treloar's clients. The practitioner's clients received a distribution from the estate, while the other parties experienced a shortfall.

47. The practitioner now admits that he misrepresented to Treloar & Treloar the amount of the legal costs which his clients had incurred but maintains that he believed at the time that he made the said representation that he could claim costs which exceeded the costs that his clients were obliged to pay him (B1 11). The practitioner contends that if it were not for the "discounts" he gave to his clients, he would have been entitled to charge the amount of \$49,038.00.

48. The practitioner states that he reduced his fees “often substantially” in the bills sent to his clients by reason of the expense involved and the small value of the estate.
49. The practitioner raised various matters including the following two matters which he said demonstrated that he did not act knowingly, falsely and misleadingly as alleged in count 1. First, he said that at the time of his letter to Treloar & Treloar, he believed that he was entitled to recover from the estate more than the amounts in the bills of costs that he rendered to his clients because he used the words “but say” to indicate that the bills had been “discounted”.⁸ Second, the practitioner contended in his amended response to count 1 that after 26 May 2010 he did not inform Treloar & Treloar that he had agreed not to charge his clients the amount claimed because he was unaware that he could not claim more from the estate than he had agreed to charge his clients.
50. The practitioner admitted that he did not have an arrangement with the clients which permitted him to recover more than \$27,395.50.⁹
51. The practitioner maintained that he believed he had reserved an entitlement to recover the sum of \$49,038.00 claimed in his letter to Treloar & Treloar because he had set out the full WIP in the bills of costs that he had rendered to his clients and had also used the words “but say” in reference to the amounts charged in the bills of costs. The practitioner said by using the words “but say” he had reserved the right to recover the full WIP from his clients in the future at his discretion.¹⁰ The practitioner also pointed to his letter at p135 of the Agreed Book of Documents as supporting his claim that in spite of his discounting of the bills to his clients he had reserved his right to claim higher costs later on.
52. Counsel for the practitioner submitted that the practitioner now accepted that more could not be recovered than what the clients were obliged to pay but that the practitioner had made a “mistake [which was] honest, albeit unreasonable” when he claimed for his costs more than the bills rendered to his clients. He submitted that the practitioner was of the view that the higher costs “were owned by him” which he could claim from the estate on the basis on which he had originally agreed to charge his clients and that when he subsequently agreed to write down the costs to the clients he

⁸ T 54 L 19-22.

⁹ AB 59.

¹⁰ T32 L21-30; T59 L 10-15, T58 L 15.

was not obliged to advise the other stakeholders in the estate of this and reduce the return to his clients as he saw the higher costs [billed to the estate] as "his property, which he could deal with as he saw fit."

53. The Tribunal has difficulties with the practitioner's explanations on several fronts. The practitioner asserted that he could still claim the "full amount" in spite of the fact that he admitted that the words "but say" in effect amounted to him giving a discount to his clients in relation to the legal costs, and in spite of the fact that this contention is inconsistent with the ordinary meaning of the word "discount".¹¹
54. The practitioner did not have a satisfactory explanation for why the use of the words "but say" involved a reservation of rights.¹² The practitioner's difficulties were compounded by the fact the words "but say" were used in respect of one account in which there was no "discount" and where the practitioner admitted there were no reservation of rights.¹³
55. The Tribunal had an overall difficulty accepting the practitioner's evidence that the expression "but say" which he admitted was akin to him discounting his legal fees was merely supposed to be a "deferral" of his fees which he could claim later from the estate. The practitioner's evidence on why he had reserved his rights by "discounting" in the manner alleged, namely, that the deferral had been made because the husband of one of his clients did not want costs being carried over from one bill to another made little logical sense.¹⁴ The Tribunal finds the practitioner's asserted belief that he could claim legal costs from the estate which were more than he had agreed to charge the clients unconvincing. The practitioner gave confusing and contradictory evidence on this issue.¹⁵ Further, contrary to the oral evidence of the practitioner, his letter (at paragraph 5) to Treloars at page 178 of the Agreed Book of Documents appears to evidence an understanding on the part of the practitioner by use of the words "...as I do not charge my clients for photocopying.....no claim can be made notwithstanding that these charges would be allowable on taxation...", that a claim could not be made on taxation for costs that had not been charged to his clients. This letter at paragraph 4 appears to paint a misleading picture to Treloars that the practitioner's clients had in

¹¹ T58 L3-30.

¹² T 112 L17-23

¹³ T 73 L30, 74, L 17.

¹⁴ T 58 L13-30.

¹⁵ T 87 L19-88, page 88 L 32-36, page 90 L 33-91. See also T 86 to 90.

fact "incurred" the higher non discounted costs, when this was not the reality. The practitioner did not at any relevant time disclose to Treloars the fact that he had in fact rendered bills to his clients for discounted amounts in respect of work that he now sent bills to Treloars for at non discounted costs.

56. The Tribunal finds the evidence of the practitioner about his letter at p135 of the Agreed Book of Documents confusing and contradictory. While this letter seems on its face to reserve some right to the practitioner to claim higher costs from another in the event a costs order was made against Krystyna, the practitioner was unable to explain satisfactorily the basis on which he could charge his clients a discounted amount for his fees but later seek to recover a higher undiscounted amount from other parties without disclosing the true state of affairs about the discounted fees to the parties adversely affected by the higher undiscounted charge. The practitioner's admitted non disclosure to the parties adversely affected by the higher undiscounted charge, of the lower discounted costs in fact charged to his clients, involves an element of dishonesty on the part of the practitioner.
57. The practitioner's reliance on various authorities about practitioner's liens were unhelpful and not to the point.
58. The Tribunal found the overall evidence of the practitioner on the contested issue confusing, contradictory, lacking in logicity and contrary to the majority of the objective evidence before the Tribunal. The Tribunal did not find the practitioner's evidence credible. The Tribunal rejects the explanations given by the practitioner and accepts that the state of mind of the practitioner is as alleged in count 1 at the time of the relevant conduct.
59. The Tribunal finds in accord with the *Briginshaw* standard of proof that the practitioner knowingly, falsely and misleadingly represented to Treloar & Treloar the amount of the costs that had been incurred by his clients.
60. The Tribunal finds the practitioner guilty of unprofessional conduct as charged on the basis that he held a dishonest intent in the terms alleged in count 1, and that his conduct involved a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute within the meaning of s5 of the Act.

Counts 2 to 6

Counts 2 and 3

61. The practitioner admits the particulars alleged in respect of counts 2 to 6 with the qualifications/additions noted below. As the particulars alleged are not controverted by the practitioner the Tribunal does not see the need to recite the allegations particularised in these counts.
62. Counts 2 and 3 relate to two failures with respect to the practitioner's trust account and moneys received from Treloar & Treloar. Count 2 alleges that on 11 June 2010 the practitioner misappropriated a portion of moneys received from Treloar & Treloar, namely the sum of \$49,416.93 contrary to s 31 of the Act. Count 3 alleges that sometime in June 2010 the practitioner failed to deposit trust moneys in the sum of \$54,410.93 into a trust account contrary to s 31(1) of the Act.
63. On 9 June 2010 the practitioner received a cheque from Treloar & Treloar in the sum of \$54,410.93. The cheque for \$54,410.93 represented money to which the practitioner was not wholly entitled at law or in equity with the exception of the amount of \$4,994.00 which was the amount outstanding to the practitioner for fees at the time he received this cheque.
64. The practitioner was aware that he had to apply part of the proceeds to the payment of counsel and the surplus was to be paid to the clients.
65. It is not contended that the practitioner benefited personally from this conduct.
66. The practitioner gave oral evidence that he did not have any trust accounts in his practice and he was under the impression that the monies he received from Treloar & Treloar belonged to him. He said that he had subsequently been prevailed upon by Barbara to hand the remaining funds (\$47,080.43) over to her which he thought she received on behalf of herself and the other clients.
67. The Tribunal finds that the practitioner's failure to deposit the sum of \$54,410.93 into a trust account in contravention of s 31(1) of the Act and the misappropriation of \$49,416.93 contrary to s 31 of the Act as constituting unprofessional conduct within the

meaning of s5 of the Act on the basis that said the conduct involved a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute. It is well established that practitioners who do not abide by the strict regulatory regime that applies to the handling of trust moneys, especially when the conduct was deliberate, as was the case here, are involved in a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute. On this basis the Tribunal finds the practitioner guilty of unprofessional conduct within the meaning of s 5 of the Act.

Count 4

68. Count 4 alleges that between June and August 2010 the practitioner failed to respond to requests for information from his client Edward.
69. Following the resolution of the Supreme Court proceedings, the practitioner was asked on several occasions by Edward to provide him with information about the amount of the costs settlement monies received from Treloar & Treloar and the distribution to Barbara.
70. The practitioner failed to respond to Edward's requests for information. At one stage the practitioner told him that there was no "share" of the estate which would be subject to distribution as costs exceeded the estate. The practitioner failed to provide Edward the information requested by him or the information that he had provided to Barbara.
71. Edward was clearly a client of the practitioner and the moneys that had been received from Treloar & Treloar were trust moneys held on behalf of all the clients. The practitioner was obliged to account to his client Edward about these moneys and respond to his requests for information.
72. The Tribunal is of the view that there was no basis upon which the practitioner should have refused to provide Edward at least with the information he had given to his client Barbara about the distribution of the funds.
73. The Tribunal finds unsatisfactory the practitioner's explanation that he failed to respond to Edward's request for information because he was under the impression that Barbara was acting for all the siblings, and that he had struck an agreement with Barbara that

she would distribute monies received from Treloar & Treloar equally amongst the siblings. The responsibility for distribution of the trust monies at all times rested upon the practitioner. He was in no position to abrogate that responsibility by striking a deal with one client regarding the distribution of monies without the consent of the other clients. Nor was he entitled to assume in the absence of satisfactory agreement from his other clients that he was absolved from his responsibility of reporting to them directly by reporting to one.

74. The Tribunal finds that the practitioner either failed or refused to respond to Edward's queries relating to the accounting of moneys received from the Supreme Court proceedings. It was the refusal and/or the failure of the practitioner to discharge his obligation to report to Edward that led to the issuance of the Magistrates Court proceedings involving an allegation by Edward that the practitioner and Barbara had failed to account to Edward in respect of moneys received from Treloar & Treloar.
75. The practitioner's obligation to report about a matter especially in the face of legitimate repeated requests for information from a client, and a practitioner's obligation to promptly and honestly account for trust moneys that may have been received on behalf of a client are a cornerstone of a practitioner's practice. The conduct of the practitioner which is the subject of count 4 constitutes unprofessional conduct within the meaning of s5 of the Act as it involves a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute.

Count 5

76. Count 5 alleges that between September 2008 and June 2011 the practitioner acted in breach of his fiduciary duty to his clients by seeking and obtaining an agreement by virtue of which Barbara would indemnify him.¹⁶
77. The Conduct Board submits that the practitioner's perceived need to obtain the said indemnity from his client ought to have made the conflict absolutely clear to the practitioner.

¹⁶ Relevant correspondence with the clients regarding the issue of indemnification are at Agreed Book of Documents at pages 87, 100, and 132.

78. The Conduct Board submits that the relevant indemnity agreements were a clear and obvious manifestation of the conflict. The correspondence reveals an inability or unwillingness on the part of the practitioner to understand his obligations as a legal practitioner. The Conduct Board submits that in particular the arrangements are:

78.1 Inconsistent with the practitioner's fiduciary obligations to his clients;

78.2 Inconsistent with the statutory scheme as to professional indemnity;

78.3 Inconsistent with the purpose and intent or orders made by the Supreme Court for the payment of costs personally by a practitioner.

79. The Tribunal finds the practitioner's conduct in obtaining and seeking an agreement pursuant to which Barbara would indemnify him in the sum of \$3,000.00 in the event (a) he was required to make a notification and claim against his professional indemnity insurance policy, and (b) a court order was made that the practitioner personally pay any costs in relation to the Supreme Court proceedings, as constituting unprofessional conduct, on the basis that it involves a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute the meaning of s5 of the Act. This is especially so as the practitioner appears to have been fully aware of the extent of the conflict of interest and the potential adverse consequences for his clients of this conflict. In spite of this awareness the practitioner deliberately placed himself and his clients in the said position of conflict of interest with all the attendant risks for his clients.

Count 6

80. Count 6 alleges that between July 2008 and November 2009 in the course of the Supreme Court proceedings (which arose as a result of issues concerning the testamentary capacity of the testatrix when she executed the will in 2008 and related issues) the practitioner acted for Edward (the plaintiff) as well as three of the defendants (Rita, Vincent and Barbara) in circumstances where he was in a position of conflict. It is alleged that the practitioner preferred his own interests over the interests of his clients. It is also alleged that the practitioner was in a conflict of interest situation because one of the central issues in the Supreme Court proceedings related to the

practitioner's failure or alleged failure to properly assess the testamentary capacity of the testatrix.

81. The practitioner stated in his Reply, first, that he was unaware at the relevant time that he was in a position of conflict between his client's interests and his own interests. Secondly, he believed that the testatrix had testamentary capacity and that the will was in accordance with her intentions; he was unaware at the relevant times that he had fallen short of performance regarding the duties set out in subparagraphs 6.2, 6.3 and 6.4 of the charge.
82. The practitioner said he initially acted for two joint executors and trustees, Rita and Edward. He then acted for the four siblings (Edward, Rita, Vincent and Barbara) in relation to the Supreme Court proceedings.¹⁷ He said at the time the instructions were given all four siblings (Edward, Vincent, Rita and Barbara) attended his office to give instructions shortly after the death of the testatrix.¹⁸ The initial instructions were in relation to the obtaining of probate.
83. The Conduct Board accepts that the practitioner did not recognise the conflict even though the Conduct Board submits that the conflict should have been readily apparent to him. In spite of this submission of the Conduct Board, the Tribunal finds it difficult to believe that the practitioner was not aware at least as the proceedings unfolded and nature of the dispute became clear (the testamentary capacity of the testatrix was an issue and the practitioner's role on this issue was critical), of his conflicted situation.
84. Given the clear nature of the issues that were being litigated in the Supreme Court proceedings it should have been apparent to the practitioner that he was conflicted. It is a serious matter when practitioners put themselves in a conflicted situation either knowingly or because of gross incompetence.
85. The Tribunal finds in the circumstances of this case, especially when the practitioner had failed to assess for himself properly the testamentary capacity of the testatrix who was clearly elderly which in turn led to the instigation of this Supreme Court proceedings involving various siblings, in which the testamentary capacity of the testatrix was an issue, as conduct involving a substantial failure to meet the standard of

¹⁷ T20.

¹⁸ T20.

conduct observed by competent legal practitioners of good repute, and thus unprofessional conduct within the meaning of s 5 of the Act.

Proceeding no 3 of 2014

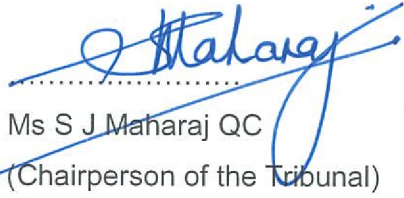
86. In proceeding no 3 of 2014 it was alleged that the practitioner was guilty of unprofessional conduct pursuant to s 82(2) of the Act in that between May and July 2011 while in a position of conflict he acted for one former client (Barbara) against another former client (Edward) in contested proceedings in the Magistrates Court. This was in respect of a dispute arising out of the Supreme Court proceedings relating to the will of the testatrix. While conflicted, he acted for and assisted Barbara in the Magistrates' Court proceedings as particularised in sub-paragraph 1.5 of the charge.
87. Edward and Barbara are siblings and both were former clients of the practitioner in relation to their late mother's estate. Edward was one of the executors of their late mother's estate. The relevant proceedings in respect of which the conflict of interest was alleged related to a claim by Edward that he was entitled to a share of moneys received by the practitioner from Treloars in relation to the Supreme Court proceedings concerning the estate of the testatrix and distributed by the practitioner to Barbara.
88. The practitioner admitted the allegations made against him in the charge including that he performed some legal work for Barbara whilst conflicted.
89. He went on to state, however, regarding a hand written affidavit of Barbara that he had prepared on or about 16 May 2011, that he had "merely copied [this affidavit] out in his better hand writing" from the affidavit previously hand written by Barbara. Further, the practitioner while admitting that he appeared in the Magistrates Court on behalf of Barbara that on 25 May 2011 went on to state that this appearance was because "Barbara Jones was unwell and unable to attend at the proceedings personally". Thirdly, while admitting that he had prepared on or about 27 June 2011 a defence on behalf of Barbara for filing in the proceedings, he said "that he only settled and put [the Defence] into more legalistic terms [a Defence that had] previously [been] drawn by Barbara Jones herself".¹⁹

¹⁹ Practitioner's Reply on pages 22 and 23 of the Agreed Book of Documents.

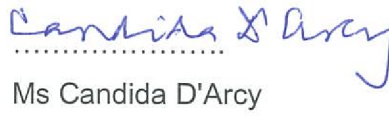
90. The Tribunal finds that the practitioner assisted Barbara as particularised in the charge. The Tribunal further finds that he was aware of his conflicted position when he performed the relevant work and that he deliberately remained behind the scenes and off the official court record while assisting with the litigation in order to ensure that his role went undetected.
91. The practitioner's deliberate conduct in continuing to act behind the scenes when he was clearly aware that he was in a position of conflict of interest constitutes unprofessional conduct within the meaning of s5 of the Act, in that it involves a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute.

CONCLUSION

92. The Tribunal finds each count of unprofessional conduct against the practitioner made out.
93. The practitioner's conduct as charged in proceeding no 3 of 2014, 25 of 2013 and counts 2 to 6 in proceeding no 17 of 2013 constitutes unprofessional conduct within the meaning of s 5(1) of the Act as the alleged conduct involved a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute.
94. The practitioner's conduct which is the subject of the charge in count 1 in proceeding no 17 of 2013 constitutes unprofessional conduct on the basis of the Tribunal's finding that the practitioner acted dishonestly when he knowingly, falsely and misleadingly misrepresented to another practitioner the amount of costs that had been incurred by his clients and that this conduct involves a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute within the meaning of s 5 of the Act
95. As requested by the parties, the Tribunal will now hear the parties as to the appropriate penalty to be imposed.



Ms S J Maharaj QC
(Chairperson of the Tribunal)



Ms Candida D'Arcy



Mr G Brown

8 October 2014