SUPREME COURT OF SOUTH AUSTRALIA

(Court of Appeal: Civil)

LEGAL PROFESSION CONDUCT COMMISSIONER v CLELAND

[2021] SASCA 10

Judgment of the Court of Appeal
(The Honourable President Kelly, the Honourable Justice Livesey and the Honourable Justice Bleby)

17 March 2021

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT - GENERALLY

The Legal Practitioners Disciplinary Tribunal (the Tribunal) found that the practitioner was guilty of professional misconduct in accepting the retainer to prepare two wills and a codicil for his aunt (the testator), despite knowing that he was a major beneficiary under those wills. Following the Tribunal's decision, the Legal Profession Conduct Commissioner (the Commissioner) applied to this Court for orders pursuant to ss 89(1) and 88A of the Legal Practitioners Act 1981 (SA) (the Act) that disciplinary proceedings be commenced and that "appropriate disciplinary action" be taken pursuant to s 89(2) of the Act.

Held, per Livesey JA (Kelly P and Bleby JA agreeing):

1. Given the number and seriousness of the adverse findings made against the practitioner, this is an appropriate case for the exercise of this Court's disciplinary jurisdiction and powers.

2. The purpose of exercising the Court's disciplinary powers is to protect the public from legal practitioners who are ignorant of the basic rules of proper professional practice or who are indifferent to rudimentary professional requirements. The object of protecting the public includes deterring practitioners from wrongdoing and giving notice to all other practitioners that professional misconduct is not acceptable and will not be tolerated.

3. The Court's power to strike off, suspend or impose conditions upon an admitted practitioner is not necessarily dependent on the existence of a current practising certificate.

Applicant: LEGAL PROFESSION CONDUCT COMMISSIONER Counsel: MR J KEEN - Solicitor: LEGAL PROFESSION CONDUCT COMMISSIONER

Respondent: DAVID FULLERTON CLELAND Counsel: MR W.J.N WELLS QC AND MR R ROSS-SMITH - Solicitor: FBR LAW

Hearing Date/s: 22/02/2021

File No/s: CIV-20-5186

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4. Though the practitioner's inexcusable ignorance of his fiduciary and ethical obligations is serious, it is not as a serious as a case where a solicitor is fully aware of the relevant rules but deliberately and flagrantly breaches them.

5. The practitioner's failure to keep appropriate contemporaneous records of his dealings with the testator and his disregard of the need to assess the testator's testamentary capacity were not merely "cavalier" but, together with his misconduct generally, a serious dereliction of the duty to ensure that his client's testamentary intentions were reflected in instruments that were protected from obvious risks and challenge. Observations made about the standard expected of solicitors in these circumstances.

6. This is not a case in which is it necessary to strike the practitioner's name from the roll of practitioners pursuant to the inherent power of this court and s 89(2)(d) of the Legal Practitioners Act 1981 (SA). In this case it is both necessary and appropriate to reprimand the practitioner, impose a substantial fine, impose an agreed prohibition on practice in wills and impose a 6 month period of suspension.

Legal Practitioners Act 1981 (SA) ss 89(1), 89(2), 88A; *Australian Solicitors' Conduct Rules*, referred to.
In Re a Solicitor [1975] QB 475; *Maguire v Makaronis* (1997) 188 CLR 449, discussed.
Bridgewater v Leahy (1998) 194 CLR 457; *Chamberlain v Law Society of the Australian Capital Territory* (1993) 118 ALR 54; *Clyne v New South Wales Bar Association* (1960) 104 CLR 186; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 461; *Council of the Law Society of New South Wales v Beverly* [2008] NSWADT 251; *Council of the Law Society of New South Wales v Jafari* [2020] NSWCA 53; *Fraser v The Council of the Law Society of New South Wales* [1992] NSWCA 72; *Goldsworthy v Brickell* [1987] Ch 378; *In re a Practitioner* (1982) 30 SASR 27; *In re Practitioner of the Supreme Court* [1941] SASR 48; *In Re Vadasz* (Full Court of the Supreme Court of South Australia, King CJ, Jacobs and Von Doussa JJ, 6 October 1988); *Johns v The Law Society of New South Wales* (New South Wales Court of Appeal, Samuels AP, Mahoney and Clarke JJA, 6 June 1991); *Johnson v Buttress* (1936) 56 CLR 113; *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408; *Law Society of South Australia v Jordan* (1998) 198 LSJS 434; *Law Society v Le Poidevin* (1998) 201 LSJS 76; *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736; *Law Society of South Australia v Murphy* (1999) 201 LSJS 456; *Law Society of South Australia v Murphy* [1999] SASC 83; *Law Society of South Australia v Rodda* (2002) 83 SASR 541; *Law Society of New South Wales v Young (No 3)* [2001] NSWADTAP 38; *Legal Practitioners Conduct Board v Boylen* [2003] SASC 241; *Legal Practitioners Complaints Committee v Clark* [2006] WASAT 119; *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43; *Legal Practitioners Conduct Board v Fletcher* [2005] SASC 382; *Legal Services Commissioner v Horak* [2014] VCAT 539; *Legal Practitioners Conduct Board v Kerin* [2006] SASC 393; *Legal Services Commissioner v Lim* [2011] QCAT 291; *Legal Practitioners Conduct Board v Nicholson* [2006] SASC 21; *Legal Services Commissioner v Pierpont* [2018] NSWCATOD 160; *Legal Profession Conduct Commissioner v Thompson* [2018] SASCFC 102; *Legal Services Commissioner v Turner* [2007] VCAT 1986; *Legal Services Commissioner v Veneris* [2002] NSWADT 135; *Legal Practitioners Complaints Committee and Wells* [2014] WASAT 112; *Louth v Diprose* (1992) 175 CLR 261; *Nash v The Law Society of New South Wales* [1988] NSWCA 100; *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279; *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320; *The Council of the Law Society New South Wales v Green (No 2)* [2009] NSWADT 297; *The New South Wales Bar Association v Kalaf* (New South Wales Court of Appeal, Kirby P, Samuels and Mahoney JJA, 11 October 1988); *Thorne v Kennedy* (2017) 263 CLR 85; *Watts v Legal Services Commissioner* [2016] QCA 224; *Wentworth v The New South Wales Bar Association* (1992) 176 CLR 239; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, considered.

LEGAL PROFESSION CONDUCT COMMISSIONER v CLELAND [2021] SASCA 10

Court of Appeal - Civil: Kelly P, Livesey and Bleby JJA

1 **KELLY P:** I agree with the reasons of Livesey JA. I also agree with the additional observations of Bleby JA.

LIVESEY JA:

Introduction

2 The Legal Profession Conduct Commissioner (**the Commissioner**) has applied pursuant to ss 89(1) and 88A of the *Legal Practitioners Act 1981* (SA) (**the Act**) for orders that disciplinary proceedings be commenced in this Court.

3 In addition, the Commissioner applies for "appropriate disciplinary action" pursuant to s 89(2) of the Act following decisions by the Legal Practitioners Disciplinary Tribunal (**the Tribunal**) in which it was found that the respondent (**the practitioner**) is guilty of professional misconduct and that it is appropriate that proceedings be commenced in this Court.[1]

4 The charges of professional misconduct against the practitioner concern his acceptance of a retainer to draw two wills and a codicil for his aunt, Ms Pamela Cleland, when she was 87 years-of-age, knowing that he was the major beneficiary under those wills.[2] Although the practitioner lodged an appeal against the Tribunal's findings, that appeal was abandoned before the hearing in this Court.

5 Accepting the findings made by the Tribunal,[3] particularly, that the practitioner was guilty of professional misconduct and that each of the seven charges laid against him was proved, on 22 February 2021 this Court ordered by way of penalty:

1. The practitioner is reprimanded.

2. The practitioner is suspended from practice as a legal practitioner for a period of 6 months commencing today, Monday 22 February 2021.

3. The practitioner is ordered to pay a fine in the sum of $50,000.00.

4. It will be a condition of any practising certificate issued to the practitioner that he is prohibited from engaging in any legal work involving the drawing or execution of any will or other testamentary instrument.

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1 The Tribunal made findings of professional misconduct on 3 June 2020 and delivered its determination as to penalty on 9 October 2020.

2 The wills were prepared in October and December 2014.

3 Whether pursuant to the power implicit in s 89(1) of the Act or this Court's inherent jurisdiction, see *Law Society of South Australia v Jordan* (1998) 198 LSJS 434, 474-475 (Doyle CJ, with whom Millhouse and Nyland JJ agreed).

6 This is not a case in which it is necessary to strike the practitioner's name from the roll of practitioners pursuant to the inherent power of this Court and s 89(2)(d) of the Act.

7 My reasons for making these orders follow.

The charges and hearing before the Tribunal

8 By amended charges dated 20 November 2017, the Commissioner set out in some detail the circumstances concerning the practitioner's role in drawing the two wills. Seven charges of professional misconduct were laid. Those charges, without their very detailed particulars, were:

1. The practitioner engaged in professional misconduct when he agreed to accept instructions from, and act for, Ms Cleland with respect to the preparation of the October 2014 Will, in circumstances in which there was a conflict between the practitioner's duty to serve the best interests of Ms Cleland, and the interests of the practitioner, and Valerie Cleland [the practitioner's wife] and that by so doing the practitioner preferred his interests over that of Ms Cleland's, and by so acting the practitioner breached rule 12.1 of the *Australian Solicitors Conduct Rules*.

2. The practitioner engaged in professional misconduct when, in taking instructions from Ms Cleland for the preparation of the October 2014 Will, he did not provide any, or any adequate, specific and detailed legal advice to Ms Cleland in relation to the instructions provided by her in relation to the proposed changes to her January 2011 Will. In so doing the practitioner failed to discuss those instructions with Ms Cleland, and failed to provide Ms Cleland with any, or any adequate, advice in respect of the instructions provided to him and in so doing the practitioner fell short of the reasonable standard of competence and diligence that is to be expected of a legal practitioner who accepts an engagement to prepare a will for a client.

3. The practitioner engaged in professional misconduct when he failed to take any, or any adequate, steps to assess the testamentary capacity of Ms Cleland when he took instructions from her for the preparation of the October 2014 Will, in circumstances where the practitioner should have taken steps to ensure Ms Cleland had sufficient testamentary capacity to give him instructions for the making of a new Will. At the time Ms Cleland gave instructions to the practitioner for the making of the October 2014 Will she was then approximately 91 years of age, she orally informed the practitioner that she could not recall what was in her current January 2011 Will, and in so informing the practitioner she placed the practitioner on notice of a matter requiring further enquiry as to the reasons why she could not recall the terms of her January 2011 Will, and raised issues potentially relevant to the question of whether Ms Cleland has the requisite testamentary capacity to make a further Will. The practitioner did not make further enquiries of Ms Cleland on this topic.

4. The practitioner engaged in professional misconduct in relation to the October 2014 Will when the practitioner drafted Clause 9(b) providing that if the practitioner did not survive Ms Cleland, or did not inherit from Ms Cleland for any other reason, then the balance of the Ms Cleland's estate (after payment of her debts, funeral and testamentary expenses) would be left to Valerie [the practitioner's wife]. In drafting this clause the practitioner failed to provide any, or any adequate, advice to Ms Cleland, particularly in circumstances where the practitioner drafted Clause 9(b) without having obtained instructions from Ms Cleland to do so.

5. The practitioner engaged in professional misconduct in or about November and December 2014 when he agreed to accept instructions from, and act for, Ms Cleland with respect to the preparation of the December 2014 Will in circumstances in which there was a conflict between the practitioner's duty to serve the best interests of Ms Cleland, and the interests of the practitioner, and that by so doing the practitioner preferred his interests over that of Ms Cleland's, and by so acting the practitioner breached rule 12.1 of the *Australian Solicitors Conduct Rules*.

6. The practitioner engaged in professional misconduct in taking instructions from Ms Cleland for the preparation of the December 2014 Will, when he did not provide any, or any adequate, specific and detailed legal advice to Ms Cleland in relation to the instructions provided by her in relation to the proposed changes to her October 2014 Will. In so doing the practitioner failed to discuss those instructions with Ms Cleland, and failed to provide Ms Cleland with any, or any adequate, advice in respect of the instructions provided to him and in so doing the practitioner fell short of the reasonable standard of competence and diligence that is to be expected of a legal practitioner who accepts an engagement to prepare a will for a client.

7. The practitioner engaged in professional misconduct when he failed to take any, or any adequate, steps to assess the testamentary capacity of Ms Cleland when he took instructions from her for the preparation of the December 2014 Will, in circumstances where the practitioner should have taken steps to ensure Ms Cleland had sufficient testamentary capacity to give him instructions for the making of a new Will. At the time Ms Cleland gave instructions to the practitioner for the making of the December 2014 Will she was then approximately 92 [sic] years of age, she had prepared a will only a few months earlier (ie the October 2014 Will), and the practitioner knew that Ms Cleland had informed him in or about September and October 2014 that she could not recall the terms of her earlier January 2011 Will, and in so informing the practitioner she placed the practitioner on notice of a matter requiring further enquiry as to the reasons why she could not recall the terms of her January 2011 Will, why she wished to change the terms of the October 2014 [Will], and raised issues potentially relevant to the question of whether Ms Cleland had the requisite testamentary capacity to make a further Will. The practitioner did not make further enquiries of Ms Cleland on this topic.

9 After a hearing before the Tribunal, a decision was published on 3 June 2020, finding the practitioner guilty of professional misconduct as to all seven counts. The Tribunal viewed the practitioner's professional misconduct "extremely seriously", falling "within the upper range of professional misconduct".

10 The Tribunal found that the practitioner misconceived his obligations and did not identify the conflict of interest that arose when preparing the wills in relation to which he was the major beneficiary. As the Tribunal described it:

> [We] can have no confidence that even now, the practitioner has even the most fundamental understanding of his duties and responsibilities as a legal practitioner in taking instructions for any will and in particular a will where he as a substantial beneficiary in addition to being the solicitor preparing the will.

11 The practitioner was also criticised for failing to provide any legal advice to Ms Cleland:

> The reality is that the practitioner made no attempt to give even a base level of legal advice to Ms Cleland and his admission in that regard was particularly serious given the apparent conflict between his legal obligations and duties to give that advice and the very significant personal benefits which Ms Cleland was seeking to bestow upon him.
>
> The practitioner preferred his own interests over his duty to advise his client and the interest Ms Cleland had in receiving proper and independent advice about the dispositions she wished to make.

12 The practitioner admitted to the Tribunal that he was not aware of the Law Society's 2012 Guidelines on Testamentary Capacity and that he did not know the relevant *Australian Solicitors' Conduct Rules* which required that testamentary capacity be considered and addressed in a case such as that of Ms Cleland:

> The practitioner's attitude to his duties and obligations as a solicitor taking instructions for preparing a will can be described as, at best, as cavalier.
>
> The effect of the evidence of the practitioner is that he was substantially uninformed about highly relevant matters with respect to instructions for and preparation of wills.

13 As for inclusion of the practitioner's wife, Ms Valerie Cleland, as a beneficiary in the October 2014 will (in the event the practitioner predeceased Ms Cleland), the Tribunal found that it was "extraordinary" that the practitioner made that inclusion without any instruction at all from Ms Cleland.

14 The Tribunal found that the effect of the October 2014 will was to financially benefit the practitioner to the extent of $730,000.00, and that this was properly described as a financial benefit derived from misconduct.

15 The practitioner initially pursued an appeal against these findings but that appeal was later discontinued.

16 After hearing further submissions, the Tribunal delivered its decision on penalty on 9 October 2020, finding that it was not satisfied that the powers available to it pursuant to s 82(6) of the Act provided "an appropriate range" of penalties to address the practitioner's professional misconduct. The Tribunal recommended that disciplinary proceedings be commenced in the Supreme Court.

17 By an originating application dated 12 November 2020, the Commissioner initiated disciplinary proceedings against the practitioner pursuant to ss 89(1) and 88A of the Act. Soon after, on 9 December 2020, the practitioner applied to have his name removed from the roll of practitioners held by this Court. However just a few months later the practitioner discontinued that application as well.

18 The Commissioner submitted to this Court that it was in the public interest that the Supreme Court exercise its disciplinary jurisdiction in this matter given

the seriousness of the professional misconduct and the Tribunal's adverse findings. These called into question the practitioner's fitness to practice. It was submitted that a formal exercise of the Supreme Court's disciplinary jurisdiction would go some way toward reassuring the public that conduct of this character would not be tolerated within the legal profession.[4]

19 Given the number and seriousness of the adverse findings made against the practitioner, this is an appropriate case for the exercise of this Court's disciplinary jurisdiction and powers.

The practitioner's circumstances

20 The practitioner is 75 years of age and originally graduated as an electrical engineer in 1968. He was conferred a degree in economics in 1972 and then a Master of Business Administration in 1978.

21 Before studying law in the late 1990s, the practitioner worked in South Australia and interstate as an engineer. The practitioner graduated in law in 1999 and in January 2000 commenced employment with a large commercial law firm in Adelaide. The practitioner was formally admitted to legal practice in South Australia on 12 January 2001.

22 The practitioner then specialised in building and construction law, becoming a partner with a recognised building and construction law practitioner in 2002. The practitioner practised as a partner in Black Cleland until 2011, when he joined FBR Law as a consultant. He retired from FBR Law at the end of June 2020. In circumstances which will be discussed, the practitioner did not then renew his practising certificate and remains without a practising certificate.

23 During the course of his 20 years in legal practice the practitioner prepared a handful of wills for family members without charge.

24 Ms Pamela Cleland was a well-known legal practitioner and the sister of the practitioner's father. Although the practitioner had regular contact with Ms Cleland until 1997, during that year his relationship changed. His father became seriously unwell with advanced cancer before dying in July 1997. The practitioner saw Ms Cleland with increasing frequency to the point where during 2014 and 2015 he was meeting with her weekly. From late 2015, the practitioner spent increasingly lengthy periods of time with Ms Cleland, caring for her until she took up residence in a nursing home in May 2017.

25 The practitioner explained that he had a very close relationship with Ms Cleland during the last 20 years of her life. The practitioner believed that Ms Cleland treated him "like a son". Ms Cleland died in December 2018.

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[4] *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, [32] (Spigelman CJ with whom Mason P and Handley JA agreed).

26 During late 2014 and early 2015, the practitioner agreed to draw two wills and a codicil for Ms Cleland. The practitioner says that Ms Cleland told him that he was the "only one" she could trust. The practitioner agreed to undertake these tasks notwithstanding that he became aware that he was the principal beneficiary. According to the practitioner:

> I well recognise now that my close relationship with [Ms Cleland] and care for her blinded me to the fiduciary obligations which I owed to her as her solicitor when giving advice on and drawing the wills. As with all other family members I drew wills for … without any formal retainer and did not charge any fees …
>
> I now realise that it was only through the complaint and the Tribunal hearing that I came at last to appreciate the extent of my shortcomings regarding the wills and my fiduciary obligations to [Ms Cleland]. I regret that I allowed my longstanding and close relationship … to obscure the fiduciary obligations I owed to her as a lawyer when taking instructions from her, drawing her will and attending to its execution.
>
> I cannot excuse these failings, and can only attribute them to my relationship with [Ms Cleland], and my lack of experience in taking instructions for, and drawing a will, which during my entire 20 years in practice I had rarely undertaken …

Further matters raised

27 When this matter was called on, counsel for the Commissioner raised two additional matters.

28 The first matter was the fact that the Commissioner was conducting an enquiry "on his own initiative" into the practitioner's failure to reveal that he had not renewed his practising certificate when proceedings were still before the Tribunal. It was said that this raised issues regarding ss 82(6) and 89(2)(e) of the Act.

29 The second additional matter concerned the practitioner's failure, until only recently, to supply a copy of the codicil dated 22 March 2015 which he had prepared for Ms Cleland. It was said that this represented a breach of rule 43 of the *Australian Solicitors' Conduct Rules*. It was also said that this represented a third occasion, in addition to the October and December 2014 wills, when the practitioner had failed to evaluate Ms Cleland's testamentary capacity.

30 Initially, it appeared that the Commissioner was simply informing the Court about these matters. It soon became clear, however, that the Commissioner wished the Court to take these matters into account when determining the appropriate penalty. These were said to be "aggravating factors".

31 Because these matters were not the subject of distinct charges, and because no findings had been made about them by the Tribunal, the Court inquired whether the preferable course was to defer the hearing until, at least, the "own initiative" enquiry was completed. After a short break, the Court was informed that the "own initiative" enquiry would not be continued. However, as the Commissioner

maintained that he wished to rely on these matters, the practitioner was called to give evidence and was cross-examined by counsel for the Commissioner.

32 The practitioner was taxed on his failure to reveal these matters in a timely way. It was suggested that these exemplified the practitioner's reckless disregard for his professional obligations. It is important to emphasise that no allegation of dishonesty was put to the practitioner. No allegation of dishonesty had been put to the practitioner before the Tribunal, either.

33 In the course of his evidence before this Court, the practitioner explained why he did not reveal the fact that he did not renew his practising certificate before the Tribunal handed down its decision on penalties. As the practitioner explained it in his affidavit:

> The penalty on the conduct charge was heard by the Legal Practitioners Tribunal on 22 July 2020.
>
> I was then 75 years old, and was contemplating retiring from practice.
>
> My practising certificate came up for renewal on 1 July 2020. I did not renew it. That was partly because I then did not know the penalty outcome of the conduct proceedings, and partly because I was contemplating retirement (without deciding) any way. I did not wish to incur the cost of the renewal when I had not finally decided what to do about continuing to practice.
>
> I did not consider that the Tribunal's power to suspend or impose conditions on my practising certificate were dependent on my holding an extant certificate.

34 The Court was taken to the transcript of the hearing on 9 October 2020. Before the Tribunal delivered its decision on penalty, submissions were made by the Commissioner and the practitioner about the fact that the practitioner had not renewed his practising certificate. The Tribunal adjourned for a short time before delivering its decision which, as mentioned, was to the effect that proceedings should be commenced in this Court. Though the Commissioner submitted that this indicated that the Tribunal thought it could do nothing about what it had learned, I do not agree. It was perfectly open to the Tribunal to address the issue if it thought appropriate to do so.

35 In the result, the practitioner's decision to not renew his practising certificate is not of great moment. There is no suggestion that, by not renewing his practising certificate, the practitioner thought that this might advantage him in some way. It was eventually disclosed to the Commissioner and to the Tribunal before the issue of penalty was decided.

36 In my opinion, this Court's power to strike off, suspend or impose conditions is not necessarily dependent on the existence of a current practising certificate. That view is reflected in the orders made at the conclusion to the hearing of this matter on 22 February 2021. Even if it could be said that the powers conferred by

s 89(2) of the Act assume the existence of a current practising certificate,[5] s 88A preserves this Court's inherent jurisdiction. The exercise of that power includes a power to suspend.[6]

37 In my view, and whether under the inherent jurisdiction or s 89(2)(e) of the Act, this Court has the power to specify the conditions applicable to any practising certificate which may be issued to the practitioner.[7]

38 As for the failure to produce a copy of the codicil dated 22 March 2015, the practitioner explained in his evidence to this Court that he had intended to produce that document in response to the Commissioner's request, but simply overlooked doing so. As he explained it, the practitioner conducted a search of his computer records, believing that all relevant documents were held on computer. As it transpired, the codicil was not within the computer records. It was in a paper file. That file was only found after the Tribunal proceedings had completed.

39 I am satisfied that the failure to produce the codicil was a matter of oversight and there was no attempt to keep evidence from the Commissioner or the Tribunal. The fact that it was not produced was a matter known to both the practitioner and the Commissioner. That document was not "hidden" from the Commissioner or the Tribunal.

40 I do not regard either of the two additional matters raised by the Commissioner as particularly serious, though I will of course keep them in mind when addressing the penalty appropriate to the circumstances of this case.

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5 See, for example, s 89(2)(b) of the Act:

> (2) In any disciplinary proceedings against a legal practitioner (whether instituted under this section or not) the Supreme Court may exercise any one or more of the following powers:
> …
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> (b) it may make an order imposing conditions on the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate)—
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> (i) relating to the practitioner's legal practice; or
>
> (ii) requiring that the legal practitioner, within a specified time, complete further education or training, or receive counselling, of a specified type …

6 *Law Society v Le Poidevin* (1998) 201 LSJS 76 (Prior, Lander and Wicks JJ).

7 See, by way of example, *The Council of the Law Society New South Wales v Green (No 2)* [2009] NSWADT 297, [74]; *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320, [32]; *Watts v Legal Services Commissioner* [2016] QCA 224 (Gotterson JA, McMurdo P and Morrison JA agreeing) although the relevant legislation generally referred to certificates whether issued or "to be issued". See also *Nash v The Law Society of New South Wales* [1988] NSWCA 100; *Johns v The Law Society of New South Wales* (New South Wales Court of Appeal, Samuels AP, Mahoney and Clarke JJA, 6 June 1991) and *In Re Vadasz* (Full Court of the Supreme Court of South Australia, King CJ, Jacobs and Von Doussa JJ, 6 October 1988) where undertakings or conditions were imposed upon re-entry into practice. Likewise, see to similar effect, Dal Pont "*Lawyer's Professional Responsibility*" 5th Ed, 2013, at p 66 [2.1.90] where it was accepted that the court may re-admit a removed practitioner subject to the imposition of conditions.

Principles applicable to the exercise of the disciplinary jurisdiction

41 The purpose of exercising the disciplinary powers reposed in this Court is to protect the public rather than to punish a legal practitioner.[8] The object of protecting the public includes deterring a practitioner and, importantly, giving notice to all other practitioners that professional misconduct is not acceptable and will not be tolerated.

42 Accordingly, one object of exercising disciplinary powers is to provide both specific and general deterrence.[9] By deterring professional misconduct, the Court maintains professional standards and public confidence in the legal profession.[10] Indeed, public confidence in the legal profession can only be established and maintained by appropriate professional regulation and enforcement.[11]

43 As might be expected, another important purpose of disciplinary action is to protect the public from legal practitioners who are ignorant of the basic rules of proper professional practice, or who are indifferent to rudimentary professional requirements.[12]

44 Because the Court acts in the public interest, rather than with a view to punishment, the personal circumstances of a legal practitioner and any extenuating circumstances are of comparatively lesser importance.[13]

45 In those cases where an order for removal of the practitioner's name from the roll of practitioners is in contemplation, the ultimate issue is whether the practitioner is fit to remain a member of the legal profession.[14] In *Foreman's* case, it was explained that the orders to be made by the Court will be directed to ensuring

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8 *Wentworth v The New South Wales Bar Association* (1992) 176 CLR 239, 250-251 (Deane, Dawson, Toohey and Gaudron JJ); *Law Society of South Australia v Murphy* (1999) 201 LSJS 456, 460-461 (Doyle CJ, with whom Millhouse and Prior JJ agreed); *Legal Practitioners Conduct Board v Fletcher* [2005] SASC 382, [21] (Debelle J, with whom Besanko and Vanstone JJ agreed).

9 *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408, 471 (Mahoney JA).

10 *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43, [9] (Doyle CJ and Stanley J, Anderson J agreeing).

11 *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, [22] (Spigelman CJ, with whom Mason P and Handley JA agreed).

12 *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43, [8] (Doyle CJ and Stanley J, Anderson J agreeing).

13 *Law Society of South Australia v Murphy* (1999) 201 LSJS 456, 461 (Doyle CJ, with whom Millhouse and Prior JJ agreed); *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43, [7].

14 *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 297-298 (Kitto J); *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 189 (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ); *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408, 441 (Mahoney JA); *Law Society of South Australia v Murphy* (1999) 201 LSJS 456, 461 (Doyle CJ, with whom Millhouse and Prior JJ agreed); *Law Society of South Australia v Rodda* (2002) 83 SASR 541, 545 (Doyle CJ, with whom Williams and Besanko JJ agreed); *Council of the Law Society of New South Wales v Jafari* [2020] NSWCA 53, [31] (Bell P with whom White JA and Emmett AJA agreed).

that, to the extent that the practitioner is not fit to practise, the entitlement to practise is either restricted or denied.[15]

Submissions on the appropriate penalty in this case

46 Whilst accepting that penalty was ultimately a matter for this Court, there was no issue between these parties that this is a proper case for a reprimand, a significant fine and the imposition of a condition on any practising certificate issued to the practitioner that he be prohibited from engaging in any legal work involving the drawing or execution of any will or other testamentary instrument. The practitioner explicitly consented to this last-mentioned condition.

47 The debate between the parties centred on whether this was a proper case for strike off or suspension.

48 The Commissioner conceded that before the Tribunal he had maintained the position that the findings of professional misconduct did not warrant striking the practitioner's name from the roll of practitioners. Nonetheless, without urging strike off, it was submitted that this Court may form a different view because the practitioner's failure to appreciate his basic fiduciary obligations in circumstances of substantial financial gain may call into question the practitioner's fitness to practice. Reference was made to the decision in *In Re a Solicitor*, in which a practitioner was struck off in England for having prepared wills for two different clients under which he was a substantial beneficiary.[16] Before the Tribunal, this decision had been cited by the Commissioner in support of suspension, not strike off.

49 For the practitioner, it was submitted that strike off was not warranted, as the practitioner remained fit to practice (apart from legal work associated with wills or other testamentary dispositions) and the protection of the community and the standing of the legal profession would be appropriately served by a reprimand, a fine and the condition earlier mentioned.

50 When developing these submissions, it was acknowledged that this Court should generally act on the findings made by the Tribunal and that there was no challenge to the proposition that there had been a serious dereliction in professional and fiduciary duty. It was submitted that this misconduct was, however, both aberrant and isolated.[17]

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15 *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408, 441 (Mahoney JA).

16 *In Re a Solicitor* [1975] QB 475.

17 Citing *Legal Services Commissioner v Pierpont* [2018] NSWCATOD 160, [17]; *Legal Profession Conduct Commissioner v Thompson* [2018] SASCFC 102, [113]; *Legal Practitioners Conduct Board v Boylen* [2003] SASC 241; *Chamberlain v Law Society of the Australian Capital Territory* (1993) 118 ALR 54, 62, 73, 79; Cf, *Legal Practitioners Conduct Board v Fletcher* [2005] SASC 382; *Fraser v The Council of the Law Society of New South Wales* [1992] NSWCA 72; Cf, *Legal Services Commissioner v Horak* [2014] VCAT 539, [323], [340]; Cf, *Legal Practitioners Conduct Board v Kerin* [2006] SASC 393; Cf, *Law Society of South Australia v Murphy* [1999] SASC 83, [18], [27]; *Legal Practitioners Conduct Board v Nicholson* [2006] SASC 21, [30]; Cf, *Legal Services Commissioner v Veneris* [2002]

51 The practitioner acknowledged that though his conduct was worthy of censure,[18] he had otherwise been of exemplary character and well regarded within the legal profession. There was positive evidence of good character.[19]

52 The practitioner submitted that his misconduct was explained by his close relationship with his aunt and her desire that he, and no one else, should prepare her wills and codicil. Whilst the decision to include the practitioner's wife and then exclude her from successive wills was not excused, it was contended that the practitioner had genuinely believed that this reflected his aunt's wishes. By then agreeing to prepare these documents he had, it was submitted, allowed himself to be effectively put "into a silo" from which he failed to conform to the expected requirements of a legal practitioner and this extended to failing to keep proper notes and records of his dealings with Ms Cleland. The practitioner pointed to his evidence that he had suggested that another practitioner within his firm should redraft his aunt's will but that she had rejected this suggestion.

53 Whilst the practitioner acknowledged that he had stubbornly resisted recognising his failings during the course of the Tribunal proceedings, he had nonetheless facilitated those proceedings by agreeing facts,[20] and he had now acknowledged his obligations and failings. This belated acknowledgment was reflected in his most recent affidavit evidence and his approach to his discontinued appeal. The practitioner relied upon the decision of the New South Wales Court of Appeal in *Fraser v The Council of the Law Society of New South Wales* as a stark example of a case where a practitioner's acknowledgement, though belated, was recognised as mitigating wrongdoing.[21] In that case, the Court was prepared to find that removal from the roll was, accordingly, not required.

54 The practitioner submitted that this was not a case in which his conduct involved any intentional wrongdoing. It was emphasised that there was no likelihood of repetition of the misconduct.

55 Finally, on the question of strike off, it was submitted that the English decision of *In Re a Solicitor* is distinguishable. The practitioner relied on the solicitor's lack of concern about ensuring independent legal advice to a new client in that case when, "out of the blue", the new client proposed a change to her will

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NSWADT 135, [43]; *Law Society of New South Wales v Young (No 3)* [2001] NSWADTAP 38, [48]-[52].

18 *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736, 740-1 (Hope JA), 754 (Hutley JA); *Legal Services Commissioner v Pierpont* [2018] NSWCATOD 160, [50]-[58].

19 *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320, [24]. See the affidavit of Hamish McRae Appleyard, filed 18 February exhibiting the character references of Barry Jenner, Barrister, Neil Mossop of Mossop Construction + Interiors and David Ash Black, Solicitor.

20 An attitude marked by "honesty and cooperation with the authorities": *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320, [24]; *Council of the Law Society of New South Wales v Beverly* [2008] NSWADT 251, [17]; *Legal Services Commissioner v Lim* [2011] QCAT 291, [12]; *Legal Services Commissioner v Turner* [2007] VCAT 1986, [7].

21 *Fraser v The Council of the Law Society of New South Wales* [1992] NSWCA 72, 5-6 (Kirby P), regarding a belated acknowledgement of fraudulent conduct.

to leave her residuary estate to the solicitor and his law partner. This was aggravated by the solicitor's active role in persuading another client to release a life interest which, whilst ostensibly avoiding estate duty, had the effect of accelerating a reversion which entitled the solicitor's children to the residuary interest "straight away", without making any suggestion that independent legal advice be obtained.[22]

The standard applicable to solicitors

56 The debate about the extent to which *In Re a Solicitor* is distinguishable or of assistance in the determination of penalty highlights a further issue. That concerns the relevant standard applicable to solicitors in these circumstances.

57 As the question was put in *In Re a Solicitor*: "how far the solicitor is bound to see that his client is separately advised, and what are the consequences of a failure in that duty?".[23] In that case, the Disciplinary Committee of the Law Society had held that it was not sufficient for a solicitor to tell his client to be separately advised and to keep a record of that advice, the solicitor must ensure that that is done and, as a corollary, decline to act. Reference was made to texts published during the period between 1960 and 1968 in which it seemed to be accepted that it may have been sufficient to recommend separate advice and to keep a record of having given that advice.[24] Whilst acknowledging that a "stringent rule" may cause "injustice", and that a solicitor's penalty may be affected by whether that solicitor knew of the rule that was broken,[25] in the circumstances of that case strike off was thought appropriate.[26]

58 The starting point in this case is that Rule 12 of the *Australian Solicitors' Conduct Rules* expresses the relevant rule regarding conflicts in broad and stringent terms. By Rule 12.1, a solicitor must not act for a client where there is a conflict "between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule". This type of conflict between duty and personal interest was described in *Maguire v Makaronis* as meaning that the loyalty of the solicitor to the client does not remain undivided, with the result that the solicitor cannot be expected to properly discharge the duty owed to the client.[27]

59 After addressing the proscription against exercising undue influence, intended to "dispose the client to benefit the solicitor in excess of the solicitor's

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22 *In Re a Solicitor* [1975] 1 QB 475, 482 G-H and 486H-487A (Lord Widgery CJ, with whom Milmo and Ackner JJ agreed).
23 *In Re a Solicitor* [1975] 1 QB 475, 483E-F.
24 *In Re a Solicitor* [1975] 1 QB 475, 484F-485H.
25 *In Re a Solicitor* [1975] 1 QB 475, 485H-486A.
26 *In Re a Solicitor* [1975] 1 QB 475, 487A.
27 *Maguire v Makaronis* (1997) 188 CLR 449, 465 (Brennan CJ, Gaudron, McHugh and Gummow JJ), citing the formulation by Richardson J in *Farrington v Rowe McBride & Partners* [1985] I NZLR 83, 90.

fair remuneration for legal services",[28] Rule 12.4 specifies that a solicitor will not have breached this Rule "merely by": [29]

> Drawing a Will or other instrument under which the solicitor (or the solicitor's law practice or associate) will or may receive a substantial benefit … provided the person instructing the solicitor is either:
>
> (i) a member of the solicitor's immediate family; or
>
> (ii) a solicitor, or member of the immediate family of the solicitor, who is a partner, employer, or employee of the solicitor …

60 Ms Cleland was not a member of the practitioner's "immediate family". That term is defined in the Glossary to mean a solicitor's spouse (or *de facto* partner or spouse of the same sex), child, grandchild, sibling, parent or grandparent. Under the heading "Commentary" it is explained:

> Because the relationship between solicitor and client is of a fiduciary character, in dealing with the client the solicitor must not:
>
> 1. engage in situations where his or her own interests do or may conflict with the duty owed to the client except with the latter's fully informed consent;
>
> 2. profit from the position of solicitor except with the client's fully informed consent.
>
> Rule 12 is directed to reflecting the application of fiduciary duties in the solicitor-client context. It also highlights that the relationship between and solicitor and client is one of influence, capable of giving rise to the presumption of undue influence. To this end, it addresses various scenarios where, as between solicitor and client, fiduciary law and the presumption of undue influence can function to constrain solicitor behaviour.

61 Although dealing with a different situation, namely receiving a financial benefit from a third party in relation to a dealing where the solicitor represents a client (such as a third-party commission or benefit), the Commentary also suggests:

> While Rule 12.4.3 does not strictly require it, in addition to making all required disclosures, solicitors are strongly urged to:
>
> - advise of the need for independent advice; and
>
> - obtain in writing the required informed consent to the commission or benefit.

62 The High Court in *Maguire v Makaronis* accepted that compliance with the requirements of applicable conduct rules will not necessarily satisfy the requirements of the fiduciary obligations owed by a solicitor to the client.[30]

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[28] *Australian Solicitors' Conduct Rules,* r. 12.2.
[29] *Australian Solicitors' Conduct Rules,* r. 12.4.2.
[30] *Maguire v Makaronis* (1997) 188 CLR 449, 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

63 The structure of the *Australian Solicitors' Conduct Rules* is to establish a broad proscription against acting in a case of conflict between duty and interest, save in the case of specified exceptions, none of which apply to this case. There is the suggestion, however, that in some instances those Rules accept that it is sufficient to have advised the client about the need for independent advice, and to have obtained "in writing the required informed consent".

64 The requirements for informed consent, however, are not to be under-estimated and "there is no precise formula which will determine in all cases if fully informed consent has been given".[31] In addition, it must be remembered that there is no duty to procure informed consent, rather it is a matter of defence or negation so as to "escape the stigma of an adverse finding of breach of fiduciary duty".[32]

65 The issue of the standard applicable to solicitors in these circumstances was considered in *Legal Practitioners Complaints Committee v Clark*.[33] There a practitioner prepared and arranged for the execution of a codicil to the will of an elderly and vulnerable long-standing client, under which she provided for a gift to the practitioner and his wife of $50,000.00. The practitioner sent her for independent advice, but knew, before arranging for the execution of the codicil, that the independent adviser had not completed the task, and had not been put in possession of all the material information on which to advise. It was not possible for the practitioner to be satisfied that there had been a proper opportunity for independent advice to be received at the time of arranging for the execution of the codicil.

66 In *Legal Practitioners Complaints Committee v Clark* the Tribunal found the practitioner guilty of only unsatisfactory conduct. In the course of an extensive review of the authorities, the Tribunal in that case appeared to accept that it may be permissible for the solicitor to prepare the relevant instruments if the solicitor ensures that independent advice is obtained:[34]

> If a bequest to a solicitor beneficiary is made by the solicitor's client the court "will require affirmative proof (which is most satisfactorily furnished in showing that the will was read over to the testator or is in accordance with instructions proceeding from him) of the testator's knowledge and approval"; *Cordery* at 18; *Barry v Butlin* (1838) 2 Moo PCC 480, 484 and *Wintle v Nye* [1959] 1 All ER 552, HL.
>
> *Barry* and *Wintle* are well known authorities which have often been followed in Australia and were specifically followed in *Re "DDM" File No. 02/0352; Ex parte The Full Board*

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31 *Maguire v Makaronis* (1997) 188 CLR 449, 466-477, citing *Lire Association of Scotland v Siddal* (186 I) 3 De G F & J 58, 73 [45 ER 800, 806]; *In re Pauling's Settlement Trusts* [1962] I WLR 86,108; [1961] 3 All ER 713, 730; *Spellson v George* (1992) 26 NSWLR 666, 669-670, 673-675, 680.

32 *Maguire v Makaronis* (1997) 188 CLR 449, 466-477, citing *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384, 398; Parkinson (ed), *The Principles of Equity* (1996), p 357.

33 *Legal Practitioners Complaints Committee v Clark* [2006] WASAT 119.

34 *Legal Practitioners Complaints Committee v Clark* [2006] WASAT 119, [137]-[139].

> *of the Guardianship and Administrative Board* (2003) 27 WAR 475 which is the report of the case cited for the practitioner as (2003) WASCA 268.
>
> *Cordery* also observes that where, therefore, the client is intending to give a substantial benefit to the solicitor, the latter should insist (because "It is the duty of any man who expects that a will is about to be made in his favour to see that the testatrix had independent advice": *Parker v Duncan* (1890) 62 LT 642, *Re a Solicitor* [1975] QB 475, [1974] 3 All ER 853) on the client receiving independent advice and that the will is prepared by another solicitor, and should endeavour to ensure the preservation of evidence that the will was read to and approved by the testator (as to the value of this evidence, see *Garnett-Botfield v Garnett-Botfield* [1901] P 335; *Fulton v Andrew*, 462, 463, 464) and of the instructions from which the will was prepared (as to the weight of evidence, see *Atter v Atkinson*, at 668), though other evidence may suffice (see *Clearson v Teague* (1851) 15 Jur 1016; and see *Re Austin's Estate* (1929) 73 Sol Jo 545).

67 Where a referral to an independent legal advisor is made, the solicitor must ensure that the independent advisor is in possession of all material facts: [35]

> The person advising must be informed of all material facts and provide advice as to the appropriateness of the transaction: *Permanent Trustee Co of New South Wales Ltd v Bridgewater* [1936] 3 All ER 501, 507, 509 (PC); *Powell v Powell* [1900] 1 Ch 243; *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWLR 30, 35-6 (Street J). In *Powell,* Farwell J said –
>
> > It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other, if the latter impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. The donee must shew (and the onus is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation …

68 These requirements may be seen to be a necessary incident of the fiduciary relationship and the presumed scope for undue influence,[36] because it is "natural to presume that out of … trust and confidence grows influence".[37] The relationship of solicitor and client is one of the well-recognised categories of confidential relationships from which a presumption of undue influence arises.[38]

69 Notwithstanding the potential role for independent advice, Dal Pont and Mackie explain that the professional rules in most Australian jurisdictions now "direct a lawyer to decline to act" in drawing wills or other instruments where what is in contemplation is a benefit to the lawyer or the lawyer's family, or an associate

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35 *Legal Practitioners Complaints Committee v Clark* [2006] WASAT 119, [141].

36 Dal Pont and Mackie "*The Law of Succession*", LexisNexis Butterworths, 2013, p 755 [24.20].

37 *Goldsworthy v Brickell* [1987] Ch 378, 404 (Nourse LJ).

38 *Louth v Diprose* (1992) 175 CLR 621, 626-628 (Brennan J); *Bridgewater v Leahy* (1998) 194 CLR 457 470-472. See generally, Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120(4) *Law Quarterly Review* 617, 628 where the distinction drawn between gifts *inter vivos* and testamentary dispositions is discussed. See also *Johnson v Buttress* (1936) 56 CLR 113, 134 (Dixon J); *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 461 (Mason J); and *Thorne v Kennedy* (2017) 263 CLR 85 where undue influence and unconscionable conduct are distinguished.

or the associate's family, which is, relative to the size of the client's assets, "substantial".[39]

70 In this case, the practitioner made what appears to have been a rather perfunctory attempt to have another member of his firm redraw the December 2014 will. He said that his aunt rebuffed the attempt. The practitioner did not mention this during the investigation, only in his evidence. Whilst the evidence given by the practitioner before the Tribunal was criticised as "merely self-serving", it was not seriously suggested that the practitioner gave false evidence or did not accurately describe what had occurred.

71 Accordingly, this is a case where the practitioner, inexcusably ignorant of his fiduciary and ethical obligations, proceeded to draw testamentary instruments as requested by his aunt notwithstanding the obvious conflict between the duty of undivided loyalty owed to his client and his own personal financial interest. This breach of duty was not addressed by ensuring that the client was advised about getting, still less receiving, competent independent legal advice.

72 On any view, to merely suggest that another practitioner within the same firm might draw a will for the client did not go far enough.

73 Of course, these failings, though serious, are not as serious as a case where a solicitor is fully aware of the relevant conflicts rules but deliberately and flagrantly breaches them. Having said that, the practitioner in this case compounded the consequences of his ignorance about his fiduciary and ethical duties by failing to make an appropriate contemporaneous record of his dealings and by utterly disregarding the need to address the testamentary capacity of his 87-year-old aunt. That was not merely "cavalier" but, together with his misconduct generally, a serious dereliction of the duty to ensure that his client's testamentary intentions were reflected in instruments that were protected from obvious risks and challenge.

74 Finally, it is no answer to say that Ms Cleland intended to make the practitioner her major beneficiary and would have proceeded to benefit the practitioner even if he had observed his fiduciary and ethical duties. This is not a case concerning the recovery of loss suffered as the result of breach of fiduciary duty.[40] It is a case concerned with recognising and upholding proper legal and ethical standards in the legal profession. Whilst the intentions of Ms Cleland are not irrelevant, and certainly assist in understanding how the practitioner's misconduct occurred, what Ms Cleland might have done had proper legal and ethical standards been observed cannot excuse or obviate the findings of serious professional misconduct made in this case.

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[39] Dal Pont and Mackie "*The Law of Succession*", LexisNexis Butterworths, 2013, p 756-757 [24.22].

[40] And so does not raise the issue left by the High Court in *Maguire v Makaronis* (1997) 188 CLR 449, 470-474, being whether the causation test applied in *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 is correct.

Strike off and suspension: Conclusion

75 I am nevertheless satisfied that this is not a case where it is necessary or in the public interest to remove the practitioner's name from the roll of legal practitioners kept by this Court. His wrongdoing was neither deliberate nor dishonest.[41] It was ignorant, cavalier and incompetent. It was, moreover, confined to one client in a six-month period. It occurred in the context of a close family relationship, in an unfamiliar area of practice in an otherwise unblemished and creditable 20-year career as a legal practitioner.

76 When one adds that the practitioner generally assisted in the disciplinary proceedings before the Tribunal, that he belatedly accepted his failings in the course of these proceedings, and willingly consented to a condition prohibiting any legal work involving the drawing of wills, it may be concluded that there is little likelihood of repetition of the misconduct.[42] In addition, I agree that "the practitioner's own moral character is such that the ignominy of the misconduct finding will operate as a deterrent".[43] This is not a case where the practitioner so lacks the requisite qualities, character and trustworthiness expected of a legal practitioner in South Australia that strike off is necessary.[44]

77 When opposing suspension, the practitioner drew on what had been said by King CJ in *In re a Practitioner* when addressing the difference between strike off and suspension. It must be remembered that that was a case of systematic trust account defalcations, where strike off was ordered:[45]

> The proper use of suspension is, in my opinion, for those cases in which a legal practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that he lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner.

78 In the same case Jacobs J explained:[46]

> In the course of his submissions, counsel for the practitioner drew our attention to the consequences of suspension, as an alternative to striking off. In fairness to counsel and his client, it was not suggested that this is a case which ought not to result in the practitioner's name being removed from the roll, but it was pointed out that the main practical difference between suspension and striking off is the element of certainty. A practitioner who is suspended, for however long a period, has the right to resume practice when the period of

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41 Cf *In re Practitioner of the Supreme Court* [1941] SASR 48, 51 and *In re a Practitioner* (1982) 30 SASR 27, 32 (King CJ, with whom Mitchell and White JJ agreed) regarding deliberate misuse of trust account monies and a misleading and untrue explanation given to a Master.

42 Demonstrating, it was said, "an appreciation of, and insight into, the wrong": *Legal Services Commissioner v Pierpont* [2018] NSWCATOD 160; *Legal Practitioners Complaints Committee and Wells* [2014] WASAT 112; *Legal Services Commissioner v Lim* [2011] QCAT 291, [16].

43 *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320, [24]; *The New South Wales Bar Association v Kalaf* (New South Wales Court of Appeal, Kirby P, Samuels and Mahoney JJA, 11 October 1988).

44 *In re a Practitioner* (1984) 36 SASR 590, 592-593 (King CJ, with whom Zelling and Jacobs JJ agreed).

45 *In re a Practitioner* (1984) 36 SASR 590, 593.

46 *In re a Practitioner* (1984) 36 SASR 590, 593 (Jacobs J).

> suspension expires; a practitioner who is struck off must, if he desires to resume practice, apply to be readmitted, with no certainty as to the fate of any such application.
>
> The practitioner in this case is clearly not entitled to the benefit of any such certainty, even though it may be true to say that no member of the public suffered loss by reason of his dishonest dealing with trust monies, and that he was overborne by personal misfortunes unrelated to the practice of his profession. The dishonest course of conduct was planned and surreptitious, and continued over a long time before it was discovered.

79 In my opinion, and with respect, these observations tend to indicate why suspension is, as a matter of the public interest, both necessary and appropriate in the circumstances of this case.

80 The practitioner has, by his serious professional misconduct, fallen well below the high standards expected of legal practitioners in South Australia. Though strike off is not necessary, the sanctions of a reprimand, a substantial fine, a prohibition on drawing testamentary instruments and, importantly, suspension will serve to warn other practitioners and assure the public that this type of conduct is deserving of condemnation and sanction and will not be tolerated.

81 It was for these reasons that I joined in the orders made on 22 February 2021.

82 **BLEBY JA:** I agree, for the reasons given by Livesey JA, that this case does not warrant striking the practitioner's name from the roll of practitioners.

83 The practitioner submitted to the effect that suspension would similarly reflect an unjustified jump from addressing his particular conduct to a generalisation about the practitioner's view about his responsibilities, and was neither necessary nor appropriate. The circumstances of the practitioner's professional misconduct were confined and there was no suggestion that the lapses had extended, or were at risk of extending, to his ordinary practice. However, it is the case, as Livesey JA has explained, that the practitioner was inexcusably ignorant of his fiduciary and ethical obligations.

84 Having regard to the observations by King CJ in *In re a Practitioner*[47] about when suspension will be appropriate, I would emphasise that an aspect of the jurisdiction of this Court is necessarily concerned with maintaining public confidence in the profession. In circumstances where the character and the trustworthiness of the practitioner are not in issue, to prohibit the practitioner from practising in the area of will-making certainly goes some way to maintaining public confidence. However, in this case I do not think that placing this conduct in an effective will-making silo for the purpose of disciplinary proceedings is sufficient to maintain the required public confidence.

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[47] *In re a Practitioner* (1984) 36 SASR 590, 593 (King CJ, Zelling and Jacobs JJ agreeing).

85 The practitioner's lapses, albeit confined, demonstrate a fundamental failure to have understood responsibilities of a legal practitioner that are not confined to will-making. Suspension is a protective response to, and signifies disapproval of, that failure in its full context. In my view, suspension is necessary here to maintain public confidence in the profession's maintenance of core ethical standards and fiduciary obligations.

86 For these reasons, and the reasons expressed by Livesey JA, I joined in making the orders on 22 February 2021.