



IN THE MATTER OF:
THE LEGAL PRACTITIONERS ACT 1981

ACTION Nos. 5 & 16 of 2017

and

IN THE MATTER OF:
KIEREN MOORE

REASONS FOR DECISION

1. There are two separate actions before the Tribunal. By agreement, both actions have been heard together.

Action No. 5 of 2017 (“the Cassoudakis complaint”) concerns the practitioner’s conduct arising out of instructions to act for Ms Argiro (Sylvia) Cassoudakis (“Ms Cassoudakis”). The practitioner agreed to act for Ms Cassoudakis in relation to the estates of her parents and to advise her generally.

2. The second action, No. 16 of 2017 (“the Lucia complaint”) relates to the conduct of the practitioner with respect to instructions received from his client, Ms Meredith Lucia (“Ms Lucia”) with respect to the estate of Peter Pearson. The practitioner and Ms Lucia were appointed executors and trustees of the last will and testament of Peter Pearson.

3. The nature of the charge in each of the actions is quite different. We will deal with each action separately. The health of the practitioner is relevant to both matters and we propose to deal with that as a separate topic.
4. Before considering the charges however, we will deal with some background to the actions generally.
5. Both actions came on for hearing on 12 February 2019. The practitioner, who was self-represented, appeared on that date.
6. On 8 February 2019 the Legal Profession Conduct Commissioner's Written Opening ("the Commissioner's opening") was filed (Exhibit 2).
7. The practitioner, at the commencement of the hearing on 12 February 2019, made an oral application for an adjournment of the hearing. The practitioner considered that he was at a disadvantage because of what he termed "the late filing" of the Commissioner's opening. That Application was opposed by Mr Barnett, Counsel for the Commissioner.
8. The Tribunal gave reasons for its decision refusing to grant the adjournment.¹

The matter has had a long and in many ways unsatisfactory progress through the Tribunal. The proceedings were commenced in Action No. 5 of 2017 on 20 March 2017 and in Action No. 17 of 2017 in November 2017.

9. The practitioner was represented at various times during the course of the proceedings by legal representatives. At other times the practitioner represented himself. The practitioner as we have indicated, was self-represented at the commencement of the hearing on 12 February 2019.

¹ T 12/2/19 48-52

10. At his request (unopposed by Counsel for the Commissioner), the practitioner was assisted at the Bar Table by his mother, Ms Alison Moore (Ms Moore).

11. The Book of Documents (BOD) comprising four volumes was tendered and marked Exhibit 3.

Exhibit 1, a medical report from Dr Chris Gilles dated 5 February 2019, referred to the practitioner developing a depressive illness 4 years ago which has continued. The practitioner had been attending Chris Hamilton (a Psychologist) on and off ever since. Dr Gilles noted that the practitioner was not keen on medication.

12. The Commissioner's opening detailed a summary of the practitioner's health issues.²

13. The Commissioner's submissions described those health issues as "sketchy;" however it is basically uncontroverted that the practitioner has had, during the period of the inquiry, significant mental health issues. He has been referred variously to a Psychologist, Dr Christopher Hamilton, and Psychiatrist, Dr Ivan Siklich³. The practitioner has also been treated for Multiple Sclerosis⁴

Over the course of the years the practitioner was hospitalised on a number of occasions with respect to mental and physical health issues.

As a result, and for other reasons also, directions hearings in the matter were adjourned on multiple occasions.

14. Orders were made granting the practitioner an extension of time within which to file any documents upon which he sought to rely including a Response to the charges.

² Exhibit 2 [11-16]

³ BOD 4/2455 and 4/2461

⁴ BOD 4/2448 and 4/2451

15. The practitioner, at the commencement of the hearing, had not filed any documents in response to either of the actions. No applications for interim orders or directions had been made by the practitioner in either action. The practitioner's communications with the Tribunal were generally by email.

Notwithstanding the extensive leniency afforded to the practitioner by the Tribunal over a substantial period of time, no documents were ever filed on behalf of the practitioner, even at times when the practitioner had legal representation.

16. The practitioner had a number of meetings with the Commissioner's solicitor. The Commissioner's submissions,⁵ refer to a meeting between the practitioner, Ms Moore, and the Commissioner's solicitor where various matters were discussed.⁶

Ms Moore provided a written response to the complaint.⁷ The Commissioner's Submissions reference that response⁸

17. The practitioner was invited by the Tribunal to consider the Commissioner's opening and the material referred to in the Commissioner's opening including affidavits of the proposed witnesses Mr Graeme Arnold, Ms Meredith Lucia, Mr Constantine Marcou, Mr Ignazio Corsaro and Ms Sharon Hurren. Those affidavits had been filed on 5 June 2018, some 8 months prior to the hearing.

⁵ Exhibit 2 [63]

⁶ BOD 3/1530-32

⁷ BOD3/1772

⁸ Exhibit2 [19]

18. The practitioner was invited by the Tribunal to consider which of those witnesses he required for cross examination. The Tribunal indicated to the practitioner that during the period of any adjournment, the practitioner could still obtain legal advice with respect to the proceedings and any matters raised in the Commissioner's opening.

19. Most of the first day of the hearing was occupied by the tendering of some documents, some by consent, and some were marked for identification as the practitioner indicated that he may wish to cross examine the witness. The hearing of the matter was adjourned and resumed on 8 April 2019.

Mr Moore did not appear upon the resumed hearing of the matter. Mr Moore was called outside the Court and there was no appearance.⁹

20. Counsel for the Commissioner, very fairly and in our view appropriately, informed the Tribunal that whilst Mr Moore was not present, Ms Moore was present. Counsel indicated that Ms Moore may have some information about Mr Moore's non-appearance.

Ms Moore indicated¹⁰ that Mr Moore had been threatened by someone who had a gun. Ms Moore informed the Tribunal that Mr Moore was quite unstable and had reported the matter to the police. He was currently in New South Wales. She had not seen Mr Moore for a couple of weeks.

21. Without opposition from counsel for the Commissioner, Ms Moore informed the Tribunal at some length about some emails that may be relevant to the proceedings.

⁹ T 8/4/2019 p.90

¹⁰ *ibid*

We were referred to the Commissioner's submissions and the participation of Ms Moore as detailed in paragraph 16 of these Reasons.

22. We have considered the matters raised by Ms Moore and referred to in the Commissioner's Opening as part of our deliberations in this matter.

The hearing of both actions proceeded in the absence of the practitioner. Ms Moore remained in the body of the Courtroom during the course of the proceedings.

THE CHARGES

ACTION NO. 5 OF 2017 ("the Cassoudakis complaint")

23. By leave granted on 12 February 2019 the Commissioner filed an amended charge in Action No. 5 of 2017 on 13 February 2019.

24. The practitioner was charged with unprofessional conduct (in relation to conduct that occurred before 1 July 2014) and with professional misconduct (in relation to conduct that occurred on or after 1 July 2014).

The charge is summarised hereunder.

Conduct Prior to 1 July 2014

- Between 21 March 2014 and 30 June 2014, the practitioner breached Section 31(1) of the Legal Practitioners Act 1981 (the Act) as it was prior to its amendment on 1 July

2014, in that the practitioner received and retained trust money in the course of practice and failed to deposit the trust money into a trust account.

- The practitioner received for Ms Cassoudakis by electronic funds transfer on 21 March 2014 the sum of \$141,495.76 from Paul Denny & Associates on behalf of Eastwood Securities Pty Ltd. Those monies were paid to the practitioner's personal account with Bank West Account No. 122-044747-2. ("the 747-2 account").
- The practitioner failed to deposit those funds into a trust account thereafter.
- The practitioner caused to be paid from that account certain funds for and on behalf of the client.
- On 7 April 2014 the balance of the client's funds/trust money in the sum of \$95,011.47 was transferred to a second personal account of the practitioner with Bank West Account No. 122-044749-8. ("the 749-8 account").
- Between 21 March 2014 to 30 June 2014 the practitioner breached Sections 31(6)(a) and (b) of the Act in that he caused or permitted trust money to be intermixed with other money.
 - The practitioner misappropriated trust moneys.
 - Monies were withdrawn or applied from one or other of the practitioner's personal accounts at a time when those accounts held the client's trust money and there were insufficient personal funds of the practitioner in those accounts available for the practitioner to make the withdrawal.
 - He failed to keep detailed accounts of all trust money received and of any disbursement or other dealings with the money in a manner that enabled the receipt and disposition of trust money to be conveniently and properly audited.

- The practitioner breached Regulations 12, 13 and 15 of the Legal Practitioners Regulations 2009 (“the Regulations”).
- He failed to issue trust account receipts.
- The practitioner caused or permitted cash withdrawals to be made.
- The practitioner failed to maintain a trust ledger and failed to provide trust account statements.

Conduct after 1 July 2014

25. Between the 1 July 2014 and 13 November 2014, the practitioner failed to comply with the requirements of Part 2 of Schedule 2 of the Act in relation to the receipt and holding of the client’s trust money.
- The practitioner held trust monies for the client in the 749-8 account until the account was reduced to a Nil balance. The practitioner caused the trust monies to be transferred from the 749-8 account to his account 747-2. Neither account was a trust account.
 - The practitioner mixed the client’s trust money with other money including deposits from unknown sources and cash deposits which were not the client’s funds.
 - The practitioner misappropriated trust money belonging to the client. The practitioner withdrew funds from the 747-2 account when the only funds were the client’s trust money and the practitioner did not have his own funds in that account.
 - The practitioner failed to comply with R 19 and 40(6)(b) of the Regulations.
 - He held trust money for the client in the 749-8 account and failed to establish a general trust account.

- The practitioner failed to provide a trust account statement to the client notwithstanding the termination of the practitioner's instructions and despite requests from the client's accountants for a full accounting of the client's trust money.
- The practitioner failed to account to the client for trust money.

Characterisation of the Conduct by the Charge:

- The conduct alleged prior to 30/6/14 separately constituted unprofessional conduct, in the alternative, that the conduct together constituted a course of conduct which amounts to unprofessional conduct.
- That conduct alleged after 30/6/14 separately constituted professional misconduct alternatively the conduct together constituted a course of conduct which amounted to professional misconduct.

26. As we have noted earlier, the practitioner has failed to file any documents in the proceedings including a Response to the charge.

27. It became apparent however during the course of the proceedings including directions hearings and the various exchanges between the practitioner, his legal representatives, the Commissioner and the Tribunal, that the position adopted by the practitioner was, in essence, that the charge is misconstrued and that the monies received by the practitioner from Eastwood on behalf of the client were not trust monies but were monies received as a result of mortgage financing. As a consequence, those funds are not caught by or subject to the Act.

28. The background to the charge is summarised in the recitals, affidavits filed in the proceedings and documents contained in the Books of Documents tendered¹¹

29. The practitioner was retained to act for Ms Cassoudakis in relation to the estate of her late parents. Those instructions included the transfer of properties devised pursuant to the wills of the client's parents.

30. The practitioner agreed to act. A Retainer letter dated 6 September 2013 was signed by Ms Cassoudakis on 19 September 2013¹²

Paragraph 23.4 of the Retainer Agreement provided under the heading "MONIES IN TRUST"

"We may ... require payments to be made into our trust account ... we will first render you an account and trust statement showing our funds in trust are to be applied towards our fees and/disbursements".

31. Paragraph 23.5 under the heading "AUTHORISATION" the Retainer provided:

"Should we receive any money on your behalf ... we are at liberty to apply that money in payment of our fees and/or disbursements."

32. Recital H of the retainer agreement provided that the practitioner could act on instructions given either by the client or by the client's accountants, CMA Chartered Accountants. Mr Con Markou and Mr Ivan Corsario associated with that firm were thus authorised to give instructions or by such other persons that may be authorised by the client to provide instructions.

¹¹ Exhibits 3 and 5

¹² BOD 2/582

33. During the course of acting for the client, the practitioner assisted the client to secure financing by Eastwood Securities Pty Ltd ("Eastwood") secured by way of mortgage over properties at Ridley Grove Woodville Gardens which the practitioner had already arranged to be transferred to Ms Cassoudakis from the estate of her late father. It was necessary for Ms Cassoudakis to arrange finance in order for her to discharge debts.¹³
34. The settlement date was initially proposed for 13 March 2014, later changed to 21 March 2014. The practitioner confirmed to Mr Markou that CMA and other creditors of Ms Cassoudakis would receive payment.¹⁴
35. In due course the practitioner received \$141,495.78 on behalf of Ms Cassoudakis from Paul Denny & Associates on behalf of Eastwood Securities Pty Ltd.
- Those monies were received into the practitioner's personal account with Bank West 122-044747-2 ("747-2") account. Thereafter monies were expended from that account as particularised in the Charge and supported by the statements.¹⁵
36. Ultimately the sum of \$95,001.47 from the 747-2 account, was transferred to the further Bank West Account 122-044749-8 ("749-8 account") a personal account in the name of the practitioner.
37. The Commissioner asserted that the monies deposited to the 747-2 account were trust money within the meaning of Section 5 of the Act.
38. S. 5 of the Act at that time relevantly provided –

¹³ Exhibit 7 Affidavit Con Markou 5.06.2018 [7]

¹⁴ BOD 2/1147-9

¹⁵ BOD 3/1942-3,1946-8

"Trust money means money received by a legal practitioner to which the practitioner is not wholly entitled both at law and in equity, but does not include money received by a practitioner in the course of mortgage financing..."

It is this latter part of the definition of trust money that the practitioner has seized upon as his defence to the proceedings, as articulated to the Commissioner and to the Tribunal.

39. On 21 March 2014 the practitioner received for the client by electronic funds transfer the sum of \$141,495.76 from Paul Denny & Associates on behalf of Eastwood.
40. By email dated 1 April 2015 to the Commissioner¹⁶ the practitioner stated, inter alia,

"...would suggest that (as per my own understanding) the relevant funds (from mortgage financing) would not constitute "trust monies" to begin with... Is your understanding of this different?"
41. The Commissioner at that stage had not formally commenced the investigation. The Commissioner referred the practitioner to the definition of "mortgage financing" and Section 95BA of the Act.
42. In the Commissioner's submissions, we were referred to the definition of "mortgage financing" in Section 5 of the Act:

"Mortgage Financing means facilitating a loan secured by mortgage by

–

- a. Acting as an intermediary to match a prospective lender and borrower; and*
- b. Subsequently arranging the loan; and*
- c. Receiving or dealing with payments for the purpose of or under the loan;*

but does not include the provision of legal advice or the preparation of an instrument."

43. The Commissioner also referred us to ASCR 41 which provides:

¹⁶ BOD 3/1539

“A solicitor must not conduct a managed investment scheme or engage in mortgage financing as part of their law practice except under a scheme administered by the relevant professional association and when no claim may be made against a fidelity fund.”

44. In the oral submissions made by counsel for the Commissioner,¹⁷ it was submitted that the Tribunal needs to have regard to the definitions in Section 5 of the Act for conduct both before and after the 2014 amendments to the Act.
45. In essence, the definition of trust money is money received by a practitioner in which the practitioner has no interest at law and in equity.
46. The monies received by the practitioner were trust monies because they were monies received by the practitioner to which he was not wholly entitled at law and in equity. That is, that they were funds received by him for his client and for her purposes.
47. Mr Barnett submitted, correctly in our view, that the practitioner bears the onus of establishing that it was indeed mortgage financing.
48. The funds received by the practitioner were monies received from a financier by the practitioner for his client for the purposes of refinancing her property. Arguably, what the practitioner was doing was acting as an intermediary to match a prospective lender and borrower.
49. The practitioner, subsequent to arranging the loan, received the proceeds of the loan and made payments from those proceeds.

¹⁷ T107 et seq

50. It is the following part of the definition in section 5 of the Act that counsel for the Commissioner took issue with, ie. *"for the purposes of or under the loan"*.
51. We find that the practitioner received the money from a financier, put it into his 747-2 and 749-8 accounts and subsequently dealt with it. Whilst some of the purposes that the practitioner dealt with that money were for his client's benefit, undoubtedly however, some of the payments and disbursements the practitioner made from those monies were for purposes other than his client's and were payments made for his own purposes.
52. The practitioner was not engaged in mortgage financing in respect of those dealings because he was not dealing with payments *"for the purpose of or under the loan"*.
53. We accept the submission of counsel for the Commissioner that if it were established that the practitioner was engaged in mortgage finance, then the initial receipt of funds would not fall within the definition of trust monies. The practitioner's subsequent dealings which were not for his client's purposes, changed the character of those monies to trust monies and at that point the practitioner's obligations under the Act in respect of trust monies were enlivened.
54. The Commissioner took no issue with monies that were used for the purposes of the client.
55. With respect to the cash withdrawals, there was no evidence that they were for client purposes. At times they amounted to thousands of dollars. The practitioner bore the onus of establishing that they were used for client purposes. He failed to do so. As such they should be regarded as trust monies which he has misappropriated. Client

funds applied to the practitioner's home loan, his mortgage, were plainly for the practitioner's own purposes and were a misappropriation.

56. The practitioner asserted that he was entitled to some of the money received for his fees. Effectively there should be some offset on account of those fees against the funds that the practitioner used for his own purposes.
57. To establish an entitlement to some sort of offset for the practitioner's fees with respect to mortgage financing, the practitioner's retainer agreement for the provision of legal services-which the practitioner strenuously asserted he was not performing- and thus his entitlement to legal fees were not relevant to whatever contractual arrangements the practitioner had with the client about commission or payment for his services as a mortgage financier.
58. Section 95 BA (2) of the Act provides that the practitioner needs to inform each prospective person in respect of the transaction, i.e lender or borrower, that this was what the practitioner was doing (engaging in mortgage financing).
59. The retainer agreement¹⁸ does not refer to or suggest that the practitioner is engaged to act for the client with respect to mortgage financing.
60. The practitioner would be required to render a fee and disbursement account before he could take his client's fees pursuant to the retainer agreement.¹⁹

¹⁸ BOD 2/ 583

¹⁹ BOD 2/587

61. Counsel for the Commissioner submitted that the reference to mortgage financing was made by the practitioner after the event, an invention or creation by him to explain why the monies did not go into the practitioner's trust account.

62. There was no evidence of the client, the borrower or the lender being informed pursuant to Section 95 BA of the Act that the practitioner was engaged in mortgage financing.

63. Ms Burke deposed²⁰ that to her knowledge, there is no such scheme for mortgage financing administered by the Law Society, as required by ASCR 41.

Even if the practitioner was engaged in mortgage financing, he was not permitted to do so unless it was conducted as part of a relevant scheme.

64. In summary, the Commissioner submits that approximately \$130,000 went into the practitioner's personal account, not his trust account, from which there were disbursements of some of those monies for his client's purposes, but some were either unexplained or for the practitioner's purposes.

65. The estimate of the Commissioner is that approximately \$40,000 of the funds received cannot be said to be for client purposes.

66. An assessment of the practitioner's costs on the file for legal services, as reconstructed by Mr Arnold, would be an entitlement of the practitioner to approximately \$25,000²¹

²⁰ Exhibit 9 Affidavit Rosalind Burke 7/2/2019 [10]

²¹ Exhibit 4 Affidavit Graeme Peter Arnold 5/6/18 "GPA 2" p.3.

There would still have been a shortfall between that amount and the sum in excess of \$40,000 that the practitioner utilised for his own purposes. The practitioner of course never rendered any account.

68. It was submitted on behalf of the Commissioner that the misconduct was serious and there was no attempt by the practitioner to ever address the repeated requests for an accounting of what had become of the monies.

General Submissions.

69. Counsel for the Commissioner submitted that:
70. To the extent to which there was any explanation proffered by the practitioner for either the conduct the subject of the charge in Cassoudakis, or the conduct the subject of the Charge in Lucia, which we deal with later in these reasons, such explanation relates to the medical evidence the practitioner has proffered from time to time as set out in the Commissioner's opening²².
71. The medical evidence suggests a diagnosis of multiple sclerosis. There is evidence that the practitioner has a psychiatric or psychological condition variously diagnosed as anxiety or severe anxiety and depression or adjustment disorder.
72. The earliest point at which the Commissioner was aware of a diagnosis of a mental health condition was January 2015.

²² Exhibit 2[11-16]

The medical conditions do not provide any explanation that would excuse misappropriating the client's money or failing to account to her and the gross delay.

73. Counsel for the Commissioner submits that the conduct of the practitioner throughout that period up to and including the hearing before the Tribunal indicates plainly that the practitioner was not currently fit to practice.

CONCLUSION

74. We find that the practitioner received the funds from Paul Denny & Associates on behalf of Eastwood Securities for Ms Cassoudakis as trust funds.
75. In making that finding we refer to the evidentiary matters and findings we have made in the preceding paragraphs and take into account the following:
- The purported role of the practitioner obtaining mortgage finance was first raised in the course of the practitioner's communications with the Commissioner.
 - The terms of the practitioner's retainer agreement with the client were for the provision of legal services.
 - There was no communication or documentation provided by the practitioner which indicated that he acted in any way as a mortgage broker.
 - There was no agreement in place between the practitioner and the client with respect to charging any fee or commission as a mortgage broker.
 - The practitioner did not notify or inform the lender or the borrower Ms Cassoudakis that he was acting as a mortgage broker.

- There was no approved scheme for conducting such mortgage financing.
 - Funds were utilised by the practitioner for purposes other than the purposes of the client.
76. We are satisfied and find that the practitioner received the funds into his personal 747-2 account, and later deposited that into his personal 749-8 account.
77. Whilst some sums were utilised for the benefit of the client, the evidence clearly establishes that the practitioner used funds for his own purposes including loan repayments with respect to his mortgage. Additionally, there were cash withdrawals.
78. Whilst the practitioner may have been entitled to render an account for his legal services and disbursements and, in accordance with his retainer agreement, receive payment for such account, the practitioner never rendered any account.
79. There was no fee or commission agreement with respect to the practitioner charging any fee for the provision of mortgage financing services.
80. We find that the practitioner had no entitlement to apply any part of the monies received to the payment of legal fees and disbursements or for there to be any offset on account of such fees against the monies retained by the practitioner for his own purposes.

Even if there was such an entitlement it would be about \$25,000 and still leave an unexplained shortfall

81. We do not overlook however that the Practitioner performed work and incurred disbursements for a not insignificant sum for which he may well have been entitled to charge the client.
82. As we have determined that the funds are trust funds, we find that the practitioner was in breach of his responsibilities under the Regulations, in particular, Regulations 12, 13, 15 and 19 as charged.
83. We find that the practitioner's conduct breached Sections 31(6)(a) and (b) of the Act for conduct up to the 30 June 2014 and breached Part 2 Schedule 2 of the Act and regulations 19 and 40(6)(b) of the Regulations.
84. In the event that we are wrong in concluding that the receipt by the practitioner of the funds was trust monies, we find that he was in breach of the Act and Rules.
85. Even if the practitioner was engaged in mortgage financing, to the extent to which the practitioner utilised such funds for his own purposes and not for the purposes of or under the loan, such funds were to that extent trust moneys.
86. The practitioner did not inform the client nor the lender that he was engaging in mortgage financing and was therefore in breach of Section 95BA (2) of the Act.
87. In the event that the practitioner was engaged in mortgage financing, there was no such scheme administered by the Law Society as required by ASCR 41.

Characterisation of the Conduct

88. The Commissioner submitted:

With respect to the conduct prior to 30 June 2014, the conduct either separately constituted unprofessional conduct or in the alternative, the conduct together constituted a course of conduct which amounts to the unprofessional conduct.

89. With respect to the conduct alleged after 30 June 2014, the conduct either separately constituted professional misconduct or in the alternative, the conduct together constituted a course of conduct which amounted to professional misconduct.

90. Given the manner in which the practitioner received and dealt with the funds over a period of time, we find that it is more appropriate to deal with the matter by considering the practitioner's conduct as a course of conduct.

91. Section 68 of the Act defines "unsatisfactory professional conduct" as including conduct of a legal practitioner occurring in connection with a practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

92. Section 69 of the Act defines "professional misconduct", which relevantly includes –

- (a) Unsatisfactory professional conduct of a legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

93. In defining what conduct may be capable of constituting unsatisfactory professional conduct or professional misconduct, Section 70(a) includes:

“Conduct consisting of a contravention of this Act, the Regulations or the Legal Professional Rules.

94. Clause 2.2 of the Rules states:

“In considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the Rules apply in addition to the common law.”

95. Clause 2.3 of the Rules provides that a breach of the Rules is capable of constituting unsatisfactory professional conduct or professional misconduct and may give rise to disciplinary action by the relevant regulatory authority.

96. We view the conduct of the practitioner as a course of conduct which involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

97. The practitioner either in ignorance or deliberately used the client’s funds for his own purposes and dealt with those funds in contravention of the Act, Rules and Regulations with respect to the application of trust funds.

98. It is particularly concerning to the Tribunal that the practitioner, after the event, maintained and has consistently maintained that he was engaging in mortgage financing and thus not subject to the provisions of the Act, Rules and Regulations with respect to trust monies.

99. As we have indicated, even if we found that the practitioner was engaged in mortgage financing he was in breach of the Act and the Regulations with respect to mortgage financing.

The practitioner appeared to have no insight that, in whatever way he conducted his practice with respect to the client, he was in substantial breach of his professional obligations.

100. The Tribunal has no confidence that the practitioner is cognisant of the nature and extent of his duties and obligations as a solicitor when dealing with client funds.

In forming that view and coming to that conclusion, we do not overlook the serious and significant mental health and physical health issues suffered by the practitioner from time to time.

101. Whilst that does provide some explanation for the practitioner's behaviour, it does not ameliorate the seriousness of the practitioner's failure to discharge his duties as a practitioner. His conduct involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

Action No. LPDT 16 of 2017 ("the Lucia complaint")

102. The background to the charge is contained in the recitals to the charge²³
103. The practitioner was appointed by the late Peter Pearson ("the deceased") to be one of two executors and trustees of his will dated 12 November 2014 ("the will").
104. The deceased's daughter, Meredith Lucia, was the other joint executor and trustee.

²³ BOD 1/17

105. The practitioner had prepared the will. The will provided for the residuary estate to be held in trust by the practitioner and Ms Lucia to establish a testamentary trust (“the testamentary trust”).
106. The will contained a charging clause permitting the practitioner to be paid professional fees including for work not necessarily requiring the services of a solicitor (Clause 9.1).
- The will recorded the deceased’s wish for the practitioner to act as the legal adviser and attorney in proving the deceased’s will.
107. The deceased died on 17 December 2014.
108. On or before 26 March 2015 the practitioner accepted instructions from Ms Lucia, who resided in New South Wales, to act for her in the administration of the estate of the deceased.
109. On 5 August 2016, a Grant of Probate was granted to Ms Lucia with leave reserved to the practitioner to apply for Probate.
110. The Charge asserts (in summary):
- That the practitioner failed to comply with Ms Lucia’s instructions and to perform his duties as executor and trustee of the deceased’s estate by failing to apply for a Grant of Probate and failing to take the necessary steps to administer the estate.
 - The practitioner received funds in the sum of \$4,530.72 being proceeds of an insurance policy from Ms Lucia. On about 26 March 2015 the funds were deposited into a BankWest Account.

- Despite inquiry from Ms Lucia, the practitioner did not respond to inquiries from her including with respect to payment of an outstanding funeral account. Ultimately Ms Lucia paid part of the account from her own funds and the balance in the sum of \$4,495.15 from the BankWest Account.
- On 2 February 2016 Ms Lucia wrote to the practitioner advising that she would seek assistance to remove the practitioner as acting in the estate and have the deceased's original documents returned to her. Contemporaneously, Ms Lucia made a complaint to the Commissioner.
- On 3 and 4 February 2016 the practitioner's mother (Ms Moore) who was not employed by nor connected with the practitioner's firm, contacted Ms Lucia by email and telephone.
- The practitioner attended at the offices of the Commissioner on 16 March 2016 providing certain documents including in relation to the BankWest Account and also advised that he would be prepared to renounce his right to a Grant of Probate in relation to the estate of the deceased and would sign the necessary document if provided to him.
- The practitioner failed to take the necessary steps to remove himself as an executor of the estate of the deceased or as a trustee of the testamentary trust and/or to perform his duties as an executor to preserve and/or administer the estate of the deceased.
- Ms Lucia instructed David Hopkins of Brown & Associates, to assist her in the administration of the estate of the deceased on a date sometime between 16 March 2016 and 18 May 2016. Thereafter David Hopkins made numerous

attempts to contact the practitioner by letter, telephone or email, and also by personal attendance at the practitioner's address.

- On 9 September 2016 the Commissioner caused a letter to be sent to the practitioner confirming that David Hopkins had been instructed to assist Ms Lucia in the administration of the estate and that Mr Hopkins had been trying to contact him. The Commissioner provided Mr Hopkins' email address.
- Between 13 September 2016 and 21 December 2016, the Commissioner made attempts to communicate with the practitioner including by email and telephone call and messages, asking for the practitioner to attend at the Commissioner's office and execute certain documents.

111. On 22 September 2016 the practitioner telephoned the Commissioner's offices and spoke with the investigating officer, indicating that he would sign whatever was necessary and asked for draft documents to be provided to him for consideration.
112. On that same day the Commissioner forwarded same to the practitioner and asked if the practitioner could attend a meeting the following day. On that same day, the practitioner communicated with the Commissioner seeking to have the Deed amended as he considered it deficient with respect to the provision of indemnities for the outgoing trustee.
113. The practitioner was advised to contact David Hopkins. Thereafter the practitioner did not contact Mr Hopkins until 14 December 2016 after further communications from the Commissioner on 17 November 2016 and 9 December 2016. The practitioner communicated his suggestions and requirements with respect to the amendments to the draft Deed.

114. The Commissioner charged the practitioner with professional misconduct.

As we have previously indicated, the practitioner has filed no Response with respect to these charges.

115. The practitioner does not appear to have taken issue with the substance of the complaint. It is substantially supported by the documents in BOD 2.

116. During the course of the investigation by the Commissioner, the subject of the practitioner's health was raised by him on a number of occasions.

117. On 10 March 2016 the practitioner emailed the Commissioner advising that he was "not at all well yesterday"²⁴

118. On 18 May 2016 the Commissioner's solicitor received advice from the practitioner's uncle, Mr Norm Cooper, that "Kieren had gone back into his shell".²⁵

119. On 16 September 2018 (in response to a query by the Commissioner as to the practitioner's current health as the practitioner had not responded to previous communications) Norm Cooper advised that the practitioner "was in a very good place, probably the best he has been mentally in the past 12-14 months".

120. On 7 December 2016 in an email confirming receipt of the Commissioner's letter of 17 November 2016 requesting an extension of time within which to respond until 15

²⁴ BOD3/1857

²⁵ BOD 4/2205

December 2016 on account of being "... particularly unwell for the last 2 weeks and have not been able to deal with anything"²⁶

121. On 9 December 2016 the Commissioner wrote to the practitioner noting ".to date you have not produced any medical evidence to this office" and inquiring of the practitioner whether he was able ".. produce a report detailing the nature of your illness and the effect on your functioning if that is the case"²⁷

An extension of time was granted until 15 December 2016.

122. On 15 December 2016 the practitioner emailed the Commissioner providing a response to the letter of 17 November and advised that he was suffering from "PTSD/Severe Depression due to certain past events" and that he would "forward a copy of my current medical certificate/report".

123. On 27 September 2017 the Commissioner wrote to the practitioner advising of the Commissioner's "preliminary view as to your conduct" advising that there was "evidence that you have engaged in professional misconduct".

124. The practitioner was invited to make submissions or provide information to the Commissioner within 14 days of the date of the letter.

125. The Commissioner provided a summary of the evidence and findings of fact.²⁸

²⁶ ibid

²⁷ BOD 4/2207

²⁸ BOD 4/2262

126. In his oral submissions Mr Barnett²⁹ characterised the conduct the subject of the Lucia charge as delay or gross delay.
127. The Commissioner asserted effectively 2 periods of delay, the first between about 26 March 2015 when Ms Lucia provided the cheque in the amount of \$4,530.72 to the practitioner through to early 2016.
128. The second period of delay was between 3 February 2016 and thereafter until the practitioner actually renounced his executorship.
129. The practitioner failed to communicate with both the Commissioner and Ms Lucia's solicitors.
130. The practitioner has filed no response to the Lucia charge. Other than the issue of health referred to in paragraph # of these Reasons the practitioner has proffered no explanation for the delays nor any other information about the charge.
131. The sequence of events is uncontroversial and supported by the documents contained in Exhibit 3.
132. We find:
- Prior to 26 March 2015 the practitioner received instructions to act in the administration of the Estate of the deceased, Ms Lucia.
 - On 5 August 2016, a Grant of Probate was granted to Ms Lucia.
 - There was therefore a period of some 17 months from the time of instructions to obtaining Probate.

²⁹ T119

- On 26 March 2015 the practitioner received \$4,530.72 being the proceeds of an insurance policy which were deposited into a BankWest account.
- Thereafter and despite numerous communications from Ms Lucia to which the practitioner did not respond, Ms Lucia was required to pay the funeral account from her own funds and the balance from the BankWest account.
- The practitioner was advised in writing by Ms Lucia on 2 February 2016 that she would seek assistance to remove the practitioner as acting in the Estate and have the deceased's original documents returned to her.
- Thereafter despite multiple communications and attempts by Ms Lucia, her solicitors and the Commissioner, it was not until December 2016 that the practitioner executed appropriate documents.

133. We determine that the delay of the practitioner both in the period March 2015 to early 2016 and the period from March 2016 until December 2016 both individually and collectively, amounted to gross delay.

134. We refer to paragraphs 91-95 of these Reasons with respect to the Cassoudakis Charge and our discussion about what constitutes professional misconduct

135. We find that the delay occasioned by the practitioner constitutes professional misconduct.

DETERMINATION

136. We find that the practitioners conduct the subject of the Cassoudakis charge constitutes Unprofessional Conduct for conduct prior to 30 June 2014 and Professional Misconduct for conduct after 1 July 2014.

137. We find that the practitioner's conduct the subject of the Lucia charge constitutes Professional Misconduct.

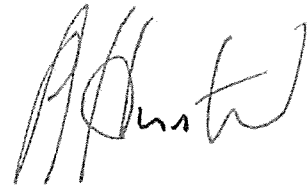
138. We will hear the parties as to penalty.



Professor G Davis



Ms M Pyke QC



Ms L Hastwell

