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Supreme Court of New South Wales - Court of Appeal

Berger v Council of the Law Society of New South Wales [2019] NSWCA 119 (23 May 2019)

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Court of Appeal

Supreme Court
New South Wales

Case Name:	Berger v Council of the Law Society of New South Wales
Medium Neutral Citation:	[2019] NSWCA 119
Hearing Date(s):	18 and 19 October 2018
Date of Orders:	23 May 2019
Decision Date:	23 May 2019
Before:	Meagher JA at [1], Payne JA at [2], Simpson AJA at [381]
Decision:	(1) Appeal dismissed. (2) Mr Berger to pay the costs of the Law Society of the appeal
Catchwords:	OCCUPATIONS – legal practitioners – penalty appeal – whethe the Tribunal erred in removing the solicitor's name from the roll failure to make costs disclosures and provide costs agreement clients – causing deficiencies in trust account – misappropriatic of trust monies – applying received monies in breach of the ter of agreement under which they were received – overcharging - purporting to act as executor when no grant of probate – purporting to act as attorney when donor of power was deceas – breach of costs disclosure undertakings given to Legal Services Commissioner – failure to comply with Supreme Cour order – Legal Profession Act 2004 (NSW) – Legal Profession A 1987 (NSW) OCCUPATIONS – legal practitioners – whether a case of dishonesty had been pleaded or conducted – whether findings made by the Tribunal of dishonesty were open – whether findin made by the Tribunal that the appellant knew he was acting dishonestly were open
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), Schs 1, 4, 5

Legal Profession Act 1987 (NSW), s 180

Legal Profession Act 2004 (NSW), ss 254, 255, 259, 309, 310, 311, 312, 316, 317, 328, 368, 370, 372, 393, 496, 497, 562

Legal Profession Uniform Law (NSW), Sch 4

Probate and Administration Act 1898 (NSW), s 61

Supreme Court Act 1970 (NSW), ss 48, 75A

Uniform Civil Procedure Rules 2005 (NSW), rr 51.36, 51.53

Cases Cited:

Achurch v The Queen (2014) 253 CLR 141; [2014] HCA 10

Atwells v Jackson Lalic Lawyers Pty Ltd (2016) 259 CLR 1; [2016] HCA 16

Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34

Council of the Law Society of NSW v Doherty [2010] NSWCA 177

Dupal v The Law Society of New South Wales [1990] NSWCA

Ex parte Lenehan (1948) 77 CLR 403; [1948] HCA 45

Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8

Johns v Law Society of New South Wales [1982] 2 NSWLR 1

Konstantinidis v Council of the Law Society of New South Wale [2018] NSWCA 59

Kumar v Legal Services Commissioner [2015] NSWCA 161

Macleod v The Queen (2003) 214 CLR 230; [2003] HCA 24

New South Wales Bar Association v Cummins (2001) 52 NSWL 279; [2001] NSWCA 284

O'Connor v Fitti [2000] NSWSC 540

Peters v The Queen (1998) 192 CLR 493; [1998] HCA 7

Pham v Legal Services Commissioner [2016] VSCA 256

	Prothonotary of the Supreme Court of NSW v P [2003] NSWCA 320
	R v Ghosh [1982] EWCA Crim 2; [1982] QB 1053
	Smith v New South Wales Bar Association (1992) 176 CLR 256 [1992] HCA 36
Category:	Principal judgment
Parties:	Victor Berger (Appellant)
	Council of the Law Society of New South Wales (Respondent)
Representation:	Counsel:
	D A Lloyd / M Kalyk (Appellant)
	B Tronson / M Nesbeth (Respondent)
	Solicitors:
	Remington & Co (Appellant)
	Law Society of New South Wales (Respondent)
File Number(s):	2018/00035941
Publication Restriction:	None
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Occupational Division
Citation:	[2017] NSWCATOD 137 [2018] NSWCATOD 4
Date of Decision:	21 September 2017
	5 January 2018
Before:	Hon G Mullane ADCJ (Principal Member), M Riordan (Senior Member), E Hayes (General Member)
File Number(s):	2015/00383879
	2016/00378630

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant was found guilty of professional misconduct and unsatisfactory professional conduct and removed from the roll: [2017] NSWCATOD 137; [2018] NSWCATOD 4. Between 2005 and 2013, the appellant failed to make costs disclosures and provide costs agreement to clients, caused deficiencies in a trust account, misappropriated trust monies, applied received monies in breach of the terms of agreement under which they were received, engaged in overcharging, purported to act as executor when there was no grant of probate, purported to act as attorney when the donor of power was deceased, breached costs disclosure undertakings given to the Legal Services Commissioner, and failed to comply with a Supreme Court order.

The issues on appeal were:

(i) whether the Law Society had pleaded or conducted a case alleging dishonesty;

(ii) whether findings made by the Tribunal that the appellant knew he was acting dishonestly were open; and

(iii) whether the appellant's conduct warranted an order that he be removed from the roll.

In relation to (i), Payne JA (Meagher JA and Simpson AJA agreeing) held at [249], [276] and [383]:

Although the Law Society had not sufficiently pleaded a case alleging dishonesty, it was clear that from the beginning it conducted a case of dishonesty in relation to payments of $154,000 and $20,000 the appellant made from the estate of a client to himself or to his benefit.

In relation to (ii), Payne JA (Meagher JA agreeing) held at [263], [282]. [287]-[288], [293]-[294] and [358]:

The Law Society did not conduct a case that the appellant knew he was acting dishonestly. The findings by the Tribunal that the appellant knew his conduct was dishonest must be set aside. The fact that a fraudster subjectively believes that dishonest conduct is not "dishonest" is not relevant to proof of dishonesty.

Peters v The Queen (1998) 192 CLR 493; [1998] HCA 7; *Macleod v The Queen* (2003) 214 CLR 230; [2003] HCA 24; *Council of the Law Society of NSW v Doherty* [2010] NSWCA 177; *Pham v Legal Services Commissioner* [2016] VSCA 256 applied.

In relation to (ii), Simpson AJA held at [384]:

It was open to the Tribunal to reach the conclusion that the appellant's conduct was illegal and dishonest and that the appellant knew that his conduct was illegal and dishonest.

In relation to (iii), the Court (Payne JA, Meagher JA and Simpson AJA agreeing) dismissed the appeal and held at [379] and [385]:

An independent consideration of all the evidence leads to the same conclusion reached by the Tribunal. The appellant's name should be removed from the roll.

JUDGMENT

1. **MEAGHER JA**: I agree with Payne JA.
2. **PAYNE JA**: Mr Victor Berger was admitted as a solicitor in New South Wales in 1969. He practised continuously until his practising certificate was first suspended in 2013. In October 2015, the Law Society commenced proceedings in the NSW Civil and Administrative Tribunal ("the Tribunal") seeking an order that Mr Berger's name be removed from the roll. Mr Berger admitted many of the detailed particulars of the Complaint, but contended that his conduct did not warrant an order removing his name from the roll.
3. On 31 October 2017, the Tribunal found Mr Berger guilty of professional misconduct and unsatisfactory professional conduct on multiple grounds.
4. On 5 January 2018, following a second hearing, the Tribunal ordered that Mr Berger's name be removed from the roll of local lawyers.
5. This appeal from that order is in essence a penalty appeal. Many of the findings of the Tribunal were accepted. The essence of Mr Berger's complaint is that the findings of what was described as "subjective" dishonesty made by the Tribunal were not open. It was submitted that if this Court upheld any of the grounds of appeal it should not remit the matter to the Tribunal. Instead it could and should determine the question of whether Mr Berger was probably permanently unfit to practise law and make appropriate orders.
6. The circumstances giving rise to the Complaint principally involved a Mrs Domabyl, a Mrs Dougall, a Ms Frischer and a company Storey Street Development Pty Limited. For reasons which were never made clear, the Tribunal referred to the individuals involved by pseudonyms. No pseudonym orders were ever made. No such orders were sought in this Court.
7. Despite the limited number of clients involved, there was considerable detail in the particulars of the Complaint. The matter was made more difficult than it should have been because of the way the Law Society framed the Complaint, relying on an overlapping series of particulars in addressing each of the separate subjects of the Complaint.
8. The reasons of the Tribunal were correspondingly difficult to follow because in order to address each of the relevant aspects of the Complaint, the Tribunal found it necessary to deal with the conduct thematically and, as a result, adopted a new numbering system to address the issues in a way that the Tribunal found satisfactory. To enable the essence of the conduct complained of to be understood before considering the grounds of appeal, it is necessary first to set out chronologically, and in some detail, the relevant facts as they appear from the Tribunal's reasons and the primary documents (all typographical errors in the quoted passages are as they appear in those documents), and then to summarise the Tribunal's reasons before addressing each of the grounds of appeal. As will become apparent when addressing the grounds of appeal, the appellant has introduced yet another numbering system to attempt to address in response to the complexity engendered by what had gone before. This is not a criticism of Mr Lloyd, who appeared for Mr Berger in this Court and ably represented his interests but rather a commentary on the way the case was framed and dealt with by the Law Society.

Relevant facts

9. On 14 February 1969, Mr Berger was admitted to the roll of solicitors in NSW. In 1970, he became a partner in the firm JW Milne and Berry.
10. In about February 2005, Mr Berger was introduced to Mrs Domabyl and took instructions from her to prepare her will. No costs disclosure or costs agreement was provided to Mrs Domabyl. As will become apparent, the Tribunal found that Mr Berger was obliged to make a costs disclosure to her at this time and to provide updated costs disclosures thereafter.
11. On 4 June 2006, Mr Berger became a principal of the firm Milne Berry Berger & Freedman ("MBBF"). On 27 November 2007, Mrs Domabyl granted Mr Berger a general power of attorney. Again, no costs disclosure or costs agreement was provided.
12. On or before 6 April 2008, Mr Berger took instructions from Mrs Dougall. On 6 April 2008, Mrs Dougall executed a will nominating Mr Berger as the executor, and granted Mr Berger a power of attorney. No costs disclosure or costs agreement was provided to Mrs Dougall.
13. On 18 March 2009, Mr Berger gave the Office of the Legal Services Commissioner an undertaking ("2009 Disclosure Undertaking") in the following terms:

> "... I am willing to give the undertaking you seek that we will comply with such obligations to disclose the basis of our costs in all matters in that which we are retained."

14. The 2009 Disclosure Undertaking was given in response to a complaint made by a Mrs Treadgold to the Legal Services Commissioner regarding Mr Berger's failure to make a costs disclosure or provide a costs agreement. Notwithstanding the terms of this undertaking, Mr Berger did not make a costs disclosure or provide a costs agreement to Mrs Domabyl, either at this time or at any time before her death.
15. On 13 July 2009, Mrs Domabyl executed a will nominating Mr Berger and Mr Green, an accountant, as executors. The will was drafted by Mr Berger. No costs disclosure or costs agreement was provided to Mrs Domabyl. During 2010, Mr Berger provided services of a general nature to Mrs Domabyl with an increased frequency. Again, no costs disclosure or costs agreement was provided to Mrs Domabyl.
16. On 18 April 2011, Mr Berger prepared the seventh and final codicil to Mrs Domabyl's will. No costs disclosure or costs agreement was provided to Mrs Domabyl.
17. On 25 April 2011, Mr Berger emailed Mrs Domabyl's estranged husband, Mr Jan Domabyl, who resided in the Czech Republic:

> "I am greatly troubled by the state of health of Mrs Domabyl. I have several timed broached her moving to a nursing home. She seems more frequently weak and I worry about her eating and taking her medication. At least at a nursing home that would be assured, to say nothing of any action should she injure herself in any way. kindly let me have your thoughts and if you favour that help me achieve it."

18. In about July 2011, the other partners of MBBF, Mr Freedman and Ms Gopalan, became aware of the very substantial amount of work in progress ("WIP") charged by Mr Berger to Mrs Domabyl's file and sought advice from Mr Gulley, an expert solicitor and costs assessor, in relation to Mr Berger's failure to provide a costs agreement or to make any disclosure about costs or the basis of costs

charged to Mrs Domabyl. Mr Berger was aware of the request and prepared a chronology for Mr Gulley.

19. On 23 September 2011, Mr Freedman and Ms Gopalan sent Mr Berger a letter setting out their concerns about his handling of Mrs Domabyl's matters. This was an important letter. In it, Mr Berger's partners expressed serious concerns about the non-disclosure of costs by Mr Berger to Mrs Domabyl. The letter described Mrs Domabyl, correctly, as a vulnerable client. The letter referred to various of the statutory obligations to disclose costs to a client and pointed out the serious consequences for Mr Berger and the firm of a failure to do so. The letter, signed by Mr Freedman, is sufficiently important to set out at length:

> "For many months now [Ms Gopalan] and I have expressed our real concerns at what is occurring in relation to the affairs of Mrs Domabyl. I attempted to raise this with you informally at some finance meetings however I was not able to deal with my concerns in a meaningful way. When I did try and discuss the matter with you, you repeatedly asserted that you were acting in compliance with our regulations. Putting aside the other issues we discussed that evening, I raised with you my concerns not only at the amount of the unbilled WIP, but the fact that it appeared to me that there had been no costs disclosure whatsoever. On that occasion you responded to me by saying that "the *Legal Profession Act* does not require a Cost Agreement· to be required for each file." I questioned that and you said that you would provide me with a copy of the relevant section. That never occurred.
>
> I was concerned in so many ways in relation to what was happening in the Domabyl file. There was no cost disclosure. You were charging her for numerous activities which I am sure she was not aware that she had been charged for. Having at that time experienced three cost determinations which cost the firm dearly because there had been no costs disclosure by you and also being extremely concerned if any potential liability might fall over me and [Ms Gopalan], we agreed to nominate Mr Richard Gulley to express his opinion as to whether or not there was a requirement [upon] you for a cost disclosure to be made and what the consequences would be in these circumstances where no costs disclosure had been issued. Both you and I knew [Mr Gulley] and clearly felt that he was an appropriate person to express an opinion in this matter. He is well regarded in the profession and also has vast experience not only as a practitioner but having participated on various boards and committees within the Law Society.
>
> I think it is appropriate for the purposes of this letter to set out parts of what [Mr Gulley] has written. You will see at the top of page 2, ...
>
> > *"The effect of non disclosure is set out in **Section 182** of the Act. ... **Section 182(4)** which provides that the failure is capable of being unsatisfactory professional conduct or professional misconduct.*
> >
> > *It is probably more fair to say in the circumstances this matter of disclosure **was even more essential** when you consider the situation of*

> *the testator who could be regarded as more vulnerable than others of younger years. I do not know of any matters where the section has been applied, however that is not to say that it has not. To address the other issues raised by you in respect to disclosure, my view is that the responsibility of disclosure rests with Victor Berger. I see no reason for any responsibility to attach to a partner."*

...

It is reasonable to assume that [Mr Gulley] read all of the material contained in the initial brief and also in your chronology. He has not completely answered all of the specific issues that I raised with him and I have asked him to address those and respond as soon as possible and then to issue an account.

I understand [Mr Gulley]'s letter was forwarded to you whilst you were overseas and you acknowledged having read it in your email to me dated 12 September 2011 in which you state, inter alia, *"I see the attached. In general I leave it to you to inform me what is to follow."*

I found this response to be even more disconcerting. For many months you knew this was a matter which was worrying me significantly. I had raised with you my concerns and I recall at least one email saying I was concerned on your behalf as to the consequences of your behaviour. There was no doubt in my mind when I first became aware that you were charging such significant sums of money with no cost disclosure that this must be a breach of the Legal Professions Act. Yet when I made these claims to you, you consistently denied them as any such breach and stated that the worse that could happen is that we would have the bill assessed and loose some money. On at least three occasions I remember you saying, *I am quite happy to get into the witness box*.

...

We spoke with two members of the Law Society and described to them the basic issues involving this matter which were contained in the observations to [Mr Gulley]. They expressed opinions that they thought the situation was extremely serious and as a consequence we should write this letter to you.

There can no longer be any doubt, ambiguity or possible alterative interpretations to there being clearly a long standing and continuing breach of the Legal Profession Act. The Law Society representatives used the same expression as [Mr Gulley] did in his letter to us in saying that someone in Mrs Domabyl's capacity who is elderly and isolated has an ever greater need to have explained to her the basis upon which the solicitor was being engaged and with respect to which charges were to be made.

...

How can the situation be resolved?

The Law Society suggested two options:-

1. **The first option**: we believe that this is the appropriate action to follow and that is that you agree that the firm waive all charges presently being recorded in this matter and so as to avoid any further criticism you stand aside as her executor. The mental condition is such, as we understand it that a Guardian ought to be appointed and her affairs managed on that basis until her death.

It would also be appropriate that you return any monies that you receive from her, either as a gift or as fees that have been charged and paid for some years ago.

2. **The second option**: arises in the event that you are not prepared to agree for the firm [to] follow the first option. To avoid any liability both professional or financial against us and the impact that it would have on our reputations and relationships with existing and potential clients and to avoid prosecutions and claims, should you not agree to option 1 then we must give notice of our intention to terminate the partnership."

20. On 23 September 2011, Mr Berger met with Mr Freedman and Ms Gopalan to discuss Mrs Domabyl's file. On 25 September 2011, Mr Berger emailed Mr Freedman:

"Our conversation on Friday caused me to see the perception you had about this matter. My perception had been, and my remarks from time to time to you and by email, were based upon the conclusion I drew from what I understood from what you were saying that you primary interest was being compensated for what would not be paid of what I had recorded. I was satisfied on Friday that was not your goal and I apologise that I had previously not concluded that.

I will not engage in how we each view differently my charging Mrs. Domabyl for my time, except to say I have agreed that the likelihood would be that the conclusion would be I had made "inadequate disclosure" and that In my view no action would be taken against me as a result nor would there be any liability to the partners.

...

On reflection it seems to me your concern has been the reasonableness of our charge and the criticism that may attract. You generously seek to avoid that by reversing any claim for fees. I am still unhappy that the estate not pay fees at all. In my view that would ne unreasonable and I believe unexpected by the family."

21. Given the central nature of Mrs Domabyl's matter to the issues before this Court, the significance of this email should be emphasised. It demonstrates that Mr Berger's contemporaneous state of mind was that he accepted that any investigation into his conduct would likely conclude that "I had

made 'inadequate disclosure'". Mr Berger apparently believed, however, that "no action would be taken against me."

22. On 26 September 2011, Mr Freedman emailed Mr Berger. In that email Mr Freedman explained at some length to Mr Berger that his conduct in charging Mrs Domabyl considerable fees without explaining to her that she or her estate would be charged for those attendances was "morally and legally wrong". Mr Freedman records Mr Berger stating his contemporaneous view that if he explained to Mrs Domabyl what he was charging her she would "withdraw instructions":

> "Again, if I understand your comments below correctly, it seems once again that you have not understood what I was addressing to you on Friday. Your charging Mrs Domabyl for all the attendances and other activities without explaining to her that she or her estate will be charged is simply morally and legally wrong. The opportunity to rectify the situation again has passed after both [Ms Gopalan] and I raised this with you many months ago. You asked, "what do you want me to do?" I said you should go and meet with her and tell her what you understood the fee arrangement to be, (or words to that effect). Your reply was, "if I do that she will withdraw instructions, is that what you want?" I said I don't care.
>
> ...
>
> I have had advice from the Law Society to the effect that the intention to charge the estate the time recorded, in the circumstances of there being no proper or meaningful disclosure and taking into account Mrs Domabyl's situation, can be considered to be misconduct and potentially professional misconduct. Unlike [Mr Gulley]'s and your belief, the Law Society could not rule out, that having looked into the Matter, [Ms Gopalan] and I are also potentially liable to a charge of misconduct being aware of the situation and not acting appropriately. Your actions could also be considered to be fraudulent and false and misleading and, it was stated, possibly criminal. There may be civil consequences that follow in the event that any claim for these charges is made and contested."

23. On 27 September 2011, Ms Gopalan emailed Mr Berger, referring to their meeting on 23 September 2011. The email stated, relevantly:

> "I refer to our meeting held on 23/9/2011, during which the concerns relating to this file were raised by [Mr Freedman] and you confirmed the following:
>
> 1. That you will waive all the fees charged to date in this file considering that there is no costs agreement.
>
> 2. Re monies you have received in the sum of $3500 (towards the invoices) and $10,000 that you received as a gift from this client, you confirmed that you didn't see any reasons why you had to return it.
>
> But re the outstanding amount outlined in the WIP (as of to date in file no 7062) in the

sum of $113,486.71 (inclusive of GST), [Mr Freedman] and I were most concerned especially after having received the advice from the Law Society. The Members who advised us clearly stated that both [Mr Freedman] and I might be held responsible, for professional misconduct, fraud and civil claim by continuously breaching the LPA apart from risking the firm's reputation and name being tarnished. It is as a result of the unequivocal guidance from the Law Society, the risk exposure to all the partners and the firm; that we sought an urgent meeting with you, upon your returning from your overseas holiday.

From day one, since I have been concerned with the conduct of this file. You will recall that [Mr Freedman] and I had requested you and your team members not to include a $ value when time was being entered in this file. Though you agreed to attend to correcting the problems in June 2011, to date that was not followed. What is further disturbing is that it appears that more charges have been incurred in this file.

I want to make it clear that it is my opinion that the conduct in this file is totally against my principles, ethics and mode of professional conduct. Being the Managing partner, I do not wish to risk the firm, the employees, my career and most importantly an elderly demented (as you say) client, who has approached our firm to do a POA or Will for $2000 and who simply not aware that she is going to be liable for a bill for $113,486 at the very least, when she dies.

If you wish to continue to charge this client, it is evident that there is a real risk that [Mr Freedman] and I may be liable for Professional misconduct (*Bridges v Law Society of NSW* – (1983) 2 NSWLR and *Mayes* (1974) 1 NSWLR 19) and I am not prepared to take that risk. I do not wish this upon the client, the firm and myself and hence I simply do not agree.

As far as I am concerned, what difference does it make if you charge $450 an hour or $300 an hour?? At the end of the day, you have not provided a disclosure to this old client of ours and hence according to me, it doesn't matter whether you charge a mere $25 an hour or any other amount. As far as [Mr Freedman] and I are concerned, when we met you on 23/9/11, we were quite upfront and asked you to waive the entire WIP amount relating to this file. You immediately agreed to it and it is truly disappointing and disheartening to receive this email since.

...

However, issues like this resulting in threat to the reputation of the firm, the inappropriate build of the WIP and the need for subsequent write offs are clearly out of step with the underlying spirit in which the original agreement was entered into.

I hope that we can work this out and I look forward to receiving your response confirming that you will stand by what you agreed to at the meeting held on 23/9/11."

24. On 27 September 2011, Mr Berger emailed Mr Freedman:

> "While I am willing at any time be of your choosing to discuss and conclude each and every matter you refer to below at a time of your choosing as to Mrs. Domabyl's matter I am motivated by what would be fair to all concerned and if there is reasonable doubt as to flow on to you and [Ms Gopalan] to agree to waive all charges. Neither I nor, do I believe, does [Mr Gulley] have the view that there is any real prospect of liability for you and [Ms Gopalan]. Furthermore inadequate disclosure does not deprive a solicitor from reasonable fees.
>
> I will speak to Gordon Salier who was a leading participant in the creation of assessment, was for a considerable time Chairman of the committee and a very sensible person as to his view on the issues here. I that ok?"

25. On 27 September 2011, Mr Freedman emailed Mr Berger in reply:

> "We agreed to have [Mr Gulley] comment on the matter and as a consequence of his comments I have spoken with the Law Society. They have expressed their view as I have described in our meeting on Friday and in my email yesterday, which is that attempts to charge for your time for what you are doing without telling the client is arguably misconduct and possible much worse
>
> The only relief I feel I would get is if you spoke with the Law Society yourself and got a ruling on the matter. Perhaps the 3 of us should arrange a meeting with the Law Society and bring this argument to an end. We had an agreement on Friday which you are trying to change
>
> I see little point in [Mr Salier] expressing his opinion at this stage, because if he is incorrect and some complaint is laid against me and [Ms Gopalan], we would have no relief against [Mr Salier].
>
> If the Law Society made a ruling contrary to what they told [Ms Gopalan] and me then at least if some compliant were laid against us we could use that ruling in our defence.
>
> Nevertheless the impropriety in continuing to charge Mrs Domabyl when she doesn't know you are doing so is still something that I find unacceptable. I also believe you should have a conversation with her and tell her what you are doing. I don't know her state of mind but at least you will be seen to be trying to bring it to her attention.
>
> In any event I thought we had an agreement on Friday and I don't see why we are having to re-canvass the issue again.
>
> What is being done here is simply wrong, and in my opinion can only be rectified by appointing a guardian."

26. On 29 September 2011, Mr Berger emailed Mr Freedman in reply:

"I am not changing what was agreed on 23 September 2011. I was putting to you, in effect, that I did not believe that we needed to go to the extreme of writing all of the work off. Indeed my not seeking to renegotiate, or however you may have seen the point of my email should have been obvious from my words "if there is reasonable doubt as to flow on to you and [Ms Gopalan] to agree to waive all charges."

I have made no secret of my severe lack of confidence [in the] attitude of most assessors and "regulators" as to the scope of discretion in, uncertainty in and cost to challenge to determinations. Indeed I have written to the president of the law on the subject who informs me the Supreme Court is to shortly announce a review of the process and the society is likely to announce some guidelines. Furthermore, I have yet to have any more than academic speculating by the officers of the Society though in the case of Nelson, I think it was, I was guided as to how to deal with an OLSC invitation to accept a reprimand withdrawn. Indeed I have achieved 2 out of 2. You will never achieve a ruling on anything worthwhile, [on] anything. If you tell me who you spoke to I would be interested to speak to that person. My reference to [Mr Salier] was because I believe he is best informed and frank.

I have put the thought in my earlier email and here simply to see if we are going too far.

As to appointing a guardian, apart from the protestation from Mrs. Domabyl, Mrs Domabyl is very proud of her view of herself, especially her intellect and memory. She has put this to me each time I have sought to have her capacity examined and does become insulted. Indeed she does have great intellect and memory. She has been highly critical of doctors I have had see her and indeed refuses to let me send anyone to her. She would lose confidence in me and I do not believe we need to go that far. I hate to say it but [it] is a great factor in the dilemma and that is, as I see it:

- I expected not to have much to do with her, especially as her son was caring for her;

- My belief when it became apparent my role grew considerably I believed it was likely she did not have capacity and frankly would not have been surprised if it was found not. My notes illustrate that I spoke to her at various times about my need to not benefit from her and to present her with some agreement would likely be seen as such; and

- She has lived longer than expected;

I am willing to act on the agreement and simply for my own interest take opinions. If that is how this should be left I accept that though suggest on her death I see if I can negotiate something for us.

PS. As to the point on compensation for that was clearly my understanding. Indeed one instance was when we discussed having the bill assessed the proposition appeared to be I pay the shortfall. Anyhow nothing turns on that."

27. On 30 September 2011, Mr Berger emailed Ms Gopalan. His email took the form of commentary on Ms Gopalan's earlier email. Mr Berger's responses are in capital letters:

> "I refer to our meeting held on 23/9/2011, during which the concerns relating to this file were raised by [Mr Freedman] and you confirmed the following:
>
> 1. That you will waive all the fees charged to date in this file considering that there is no costs agreement.
>
> THIS IS NOT WHAT I SAID.
>
> 2. Re monies you have received in the sum of $3500 (towards the invoices) and $10,000 that you received as a gift from this client, you confirmed that you didn't see any reasons why you had to return it.
>
> I GAVE NO ANSWER. ON REFLECTION AS TO $10,000 I ANSWERED ON 25 SEPTEMBER AND HAVE DONE SO PREVIOUSLY, AS TO ANY OTHER MONEY SAME HAS BEEN DEPOSITED TO HER ACCOUNT.
>
> But re the outstanding amount outlined in the WIP (as of to date in file no 7062) in the sum of $113,486.71 (inclusive of GST), [Mr Freedman] and I were most concerned especially after having received the advice from the Law Society. The Members who advised us clearly stated that both [Mr Freedman] and I might be responsible, for professional misconduct, fraud and civil claims by continuously breaching the LPA apart from risking the firm's reputation and name being tarnished. It is as a result of the unequivocal guidance from the Law Society, the risk exposure to all the partners and the firm; that we sought an urgent meeting with you, upon your returning from your overseas holiday.
>
> THAT SEEMS EXTRAORDINARY, ESPECIALLY FRAUD. PLEASE NAME THE MEMBER(S)
>
> From day one, since I have been concerned with the conduct of this file. You will recall that [Mr Freedman] and I had requested you and your team members not to include a $ value when time was being entered in this file. Though you agreed to attend to correcting the problems in June 2011, to date that was not followed. What is further disturbing is that it appears that more charges have been incurred in this file.
>
> I HAVE NO SUCH RECOLLECTION
>
> I want to make it clear that it is my opinion that the conduct in this file is totally against my principles, ethics and mode of professional conduct. Being the Managing partner, I do not wish to risk the firm, the employees, my career and most importantly an elderly demented (as you say) client, who has approached our firm to do a POA or Will for $2000 and who is simply not aware that she is going to be liable for a bill for $113,486

at the very least, when she dies.

I THINK I HAVE REMARKED ENOUGH UPON YOUR PRINCIPALS, ETHICS PROFESSIONAL CONDUCT ETHICS, I THINK IT BEST I SAY NO MORE.

If you wish to continue to charge this client, it is evident that there is a real risk that [Mr Freedman] and I may be liable for Professional misconduct (*Bridges v Law Society of NSW* – (1983) 2 NSWLR and *Mayes* (1974) 1 NSWLR 19) and I am not prepared to take that risk. I do not wish this upon the client, the firm and myself and hence I simply do not agree.

I REFER YOU TO MY EMAIL TO [MR FREEDMAN] LAST SENT BEFORE THIS ONE TO YOU.

AS TO THE CASE REFERENCE I WILL ASSUME YOU WERE GIVEN IT BY ANOTHER PERSON AND PERHAPS, EVEN, THAT YOU HAVE NOT READ IT. IT IS, PUTTING IT MILDLY, INAPPROPRIATE FOR IT TO BE PUT FORWARD AS AUTHORITY FOR THE PROPOSITION YOU ASSERT IT SUPPORTS.

INDEED IT REMINDS ME OF A CASE WHERE THE RYDE POLICE THREATENED TO ISSUE PROCEEDINGS AGAINST ME FOR PERVERTING THE COURSE OF JUSTICE WHERE I QUESTIONED THE ACCURACY OF WHAT RECORDED IN THE STATEMENT OF THE COMPLAINANT AND WANTED TO TAKE A STATEMENT FROM HER. I ASKED FOR AUTHORITY AND WHEN I FINALLY GOT SOME AND HAVING READ IT PUT TO THE POLICE THEY WERE WRONG AS IT COULD NOT, FOR INSTANCE, BE EXPECTED I WOULD THREATEN THE COMPLAINANT OF PUSH HER HEAD UNDER WATER. INDEED WE WON THE CASE.

As far as I am concerned, what difference does it make if you charge $450 an hour or $300 an hour?? At the end of the day, you have not provided a disclosure to this old client of ours and hence according to me, it doesn't matter whether you charge a mere $25 an hour or any other amount. As far as [Mr Freedman] and I are concerned, when we met you on 23/9/11, we were quite upfront and asked you to waive the entire WIP amount relating to this file. You immediately agreed to it and it is truly disappointing and disheartening to receive this email since.

YOU SAID VERY LITTLE., INDEED ALMOST NOTHING. YOU ARE MISSING THE POINT OF MY LAST 2 EMAILS AND INDEED WONDER IF YOU READ MY SUBMISSION TO RICHARD GULLEY. IT SEEMED TO ME YOU MAY HAVE NOT READ HIS REPLY OR, AT LEAST, THE MOST IMPORTANT PART OF IT DID NOT REGISTER

I AM UNHAPPY TO ADD AS A GENERAL COMMENT, ON YOUR CHOICES OF EXPRESSION, YOU SHOULD STICK TO FACTS AND NOT SEEK EMPHASIS BY RECORDING HOW YOU FEEL ABOUT THEM. INDEED YOUR DOING SO IS VERY

REVEALING OF WHETHER YOU COME TO A SUBJECT WITH ADEQUATE IMPARTIALITY. I AM CONFIDENT THAT IF [MR FREEDMAN] WAS THE TARGET OF THE ABOVE KIND OF CORRESPONDENCE AND INDEED A NUMBER OF SIMILAR TENOR IN THE PAST HE WOULD BE FAR MORE BLUNT AND AGGRESSIVE THAN I HAVE EVER BEEN.

...

However, issues like this resulting in threat to the reputation of the firm, the inappropriate build of the WIP and the need for subsequent write offs are clearly out of step with the underlying spirit in which the original agreement was entered into.

WHAT DO YOU WISH ME TO SAY? I HAVE WORKED AND DO WORK VERY HARD (I WILL BE REMINDED SO HAVE [MR FREEDMAN] AND YOU). IAM DISAPPOINTED, TO SAY THE LEAST, AT THE TURN OF EVENTS, ESPECIALLY THE EXPERIENCE OF INABILITY TO RELY UPON CLIENTS TO PAY THEIR FEES AND/OR TO APPRECIATE THE INDULGENCES WE EXTEND TO THEM AS IN THE PAST, EVEN THE RECENT PAST. I DO NOT SAY THAT TO TRIVIALISE. IT IMPACTS UPON ALL OF US AND WE MUST WORK AND FOCUS OUR ENERGIES UPON IMPROVEMENT AND LESS TIME ON OTHER PREOCCUPATIONS. I OFTEN HAVE SAID OUR STAFF KNOW MORE THAN AND ARE SMARTER THAN YOU THINK. THEY KNOW OF THE TENSIONS BETWEEN US, KNOW WHAT WE EACH DO AND WHAT WE REALLY THINK OF THEM. THAT SEEEM TO ESCAPE PROPER CONSIDERATION. UNFORTUNATELY IT APPEARS OTHERS OUTSIDE THE OFFICE ARE ACQUAINTED WITH ISSUES WITHIN OUR OFFICE.

I hope that we can work this out and I look forward to receiving your response confirming that you will stand by what you agreed to at the meeting held on 23/9/11.

I DO NOT NEED TO REPEAT MYSELF HAVING NOT CHANEGD MY POSITION SINC 23 SEPTEMBER 2011.

Thank you,

VICTOR BERGER

Ps. IT IS A MATTER FOR YOU IF YOU RESPOND. I DO NOT REQUIRE ONE."

28. On 1 October 2011, Mr Freedman emailed Mr Berger:

"I have read all the recent emails passing between the 3 of us.

I choose not to comment on any issue other than what we have all agreed last Tuesday re Domabyl, and that was the partnership agreed that all billable wip is to be written off and no further billable time is to be recorded

> I record that you did not agree with this personally but accepted that for the concerns that [Ms Gopalan] and I expressed, this was the partners decision
>
> Please confirm so I can maintain a record of this decision"

29. On 1 October 2011, Mr Berger emailed Mr Freedman and Ms Gopalan in reply:

> "Agreed!!"

30. Pausing there, it appeared at least objectively that on 1 October 2011 Mr Berger had agreed in writing with the other partners of MBBF that:

. (1) MBBF would write off all billable work in progress recorded for work done by the firm for Mrs Domabyl – then standing at a figure of $113,486; and

. (2) Mr Berger (and the firm) would not record any further billable time as work in progress in relation to Mrs Domabyl's file.

31. On 1 October 2011, Mr Berger emailed Ms Donovan (his secretary), Mr Freedman and Ms Gopalan:

> "The firm has decided any further work is not to be billed and past work written off. I ask that the time be recorded."

32. On 16 January 2012, Ms Gopalan emailed Mr Berger and Mr Freedman:

> "Any reason, why wip is being recorded in this file in spite of what was agreed? $5752 is the outstanding WIP after having written off $113,000 plus."

33. On 23 January 2012, Mr Berger replied to Ms Gopalan and Mr Freedman, copying in Ms Donovan:

> "Was in error."

34. Pausing there, it is clear that as at 23 January 2012 Mr Berger represented to his partners that work in progress was not being recorded against Mrs Domabyl's file. That is, the 1 October 2011 agreement was being complied with.

35. From 26 January 2012, Mrs Domabyl became unable to provide instructions. On 3 February 2012, Mrs Domabyl's power of attorney in favour of Mr Berger was registered.

36. On 15 March 2012, Mr Berger gave the Office of the Legal Services Commissioner a further undertaking to comply with costs disclosure requirements ("2012 Disclosure Undertaking") as follows:

> "I proffer a further undertaking to ensure compliance with my obligations in the future.
>
> Please note I will be particularly cautious in the future in relation to my disclosure obligations."

37. The 2012 Disclosure Undertaking was given in response to a complaint made by a Mrs Adzioiski to the Commissioner regarding Mr Berger's failure to make a costs disclosure or provide a costs

agreement.

38. On 22 March 2012, Mr Berger issued a Standard Costs Agreement and Costs Disclosure in relation to the sale of Mrs Domabyl's property, being Bougainvillea Retirement Village, 73/260-270 Military Road, Neutral Bay ("the Domabyl Property"). The costs estimate provided was $1,705. Mrs Domabyl, who was by that time mentally incapable, did not sign either document. By this date, Mr Berger's costs and disbursements already recorded in relation to the sale of the Domabyl Property amounted to $1,852.29 inclusive of GST.

39. On 24 May 2012, Mr Berger sent a letter addressed to himself as Mrs Domabyl's attorney, enclosing a copy of an "Activity Ledger Card" in relation to the sale of the Domabyl Property. The letter stated:

> "We have marked with a "tick" in respect of those attendances which in our view are outside of what has been proved for in Clause 1 of the cost agreement. This adds up to $2,307.00, plus GST. What we quoted to you is our usual quote on a sale of property."

40. The letter was purportedly copied by email to Mrs Domabyl's estranged husband, Mr Jan Domabyl, and estranged son, Mr Robert Domabyl, who resided in the Czech Republic.

41. In about May 2012, Ms Frischer retained Mr Berger to prepare her will.

42. On 5 June 2012, and despite the agreement with his partners on 1 October 2011, Mr Berger sent a letter on behalf of MBBF to Mr Jan Domabyl and Mr Robert Domabyl, enclosing a detailed account for MBBF's fees and disbursements for work said to have been done by the firm for Mrs Domabyl amounting to $176,800.94. A tax invoice from MBBF in that amount was provided.

43. On 22 June 2012, and despite the agreement of 1 October 2011, Mr Berger sent a further letter on behalf of MBBF to Mr Robert Domabyl and Mr Jan Domabyl, enclosing an invoice and a more detailed fee schedule which recorded the identity of the person performing each item of work, units of work performed and the unit billing rate ("Revised Fee Schedule"). The Revised Fee Schedule included $90,527.04 in respect of charges for non-legal and power of attorney work, $28,533.52 in respect of charges for work the purpose of which was unclear and $2,432.72 in respect of disbursements the purpose of which was unclear.

44. In about August 2012, Mr Berger was the sole director and shareholder of a company, Storey Street Development Pty Limited ("SSD"). SSD was the vendor of Lot 1 in an off the plan property development on Storey Street, Maroubra. SSD were in negotiations with a Mr and Mrs Ho in relation to the sale of Lot 1. The solicitor for Mr and Mrs Ho was a Mr Paffas of Paffas Lawyers and the solicitor for SSD was Mr Berger. There was correspondence between the parties about Special Condition 12 in the contract for sale.

45. On 8 August 2012, Paffas Lawyers wrote to MBBF, stating: "Delete special condition 12 (release deposit)". On 9 August 2012, Ms Kunhi, a conveyancer at MBBF, emailed Mr Paffas in reply, attaching a draft letter which stated: "The deposit is to be released and special condition 12 may be deleted." That same day, Mr Paffas emailed Ms Kunhi in reply, stating: "Your answer seems to say the the deposit is to be released and that special condition 12 can be deleted. I presume you may have left a word out of your reply and that you meant the deposit does not need to be released. Please confirm."

46. On 10 August 2012, Ms Kunhi emailed Mr Berger confirming a telephone conversation she had with "Elizabeth (secretary) [who] rang for Mr Paffas noting that their latest instructions were: ... 2.

'Not agreed as to issue about release of deposit'". That same day, Mr Berger and Mr Paffas had a telephone conversation about Special Condition 12.

47. On 13 August 2012, Mr Berger emailed Mr Paffas:

> "I have tried to make the amendment myself as secretary had to leave and was unable to other than the way I am sending it to you. She will format in the morning. The deletions agreed to may be done in hand.
>
> ...
>
> SPECIAL CONDITION NO: 12 – RELEASE OF DEPOSIT
>
> Notwithstanding any other provision hereof and in particular Clause 2 hereof should the Vendor require the whole or part of the deposit paid hereunder for use as deposit on the purchase by the Vendor of another property: stamp duty in respect to such property and such other reasonable disbursements in respect of such property and the Vendor shall be entitled to apply the whole or any part of such property and the Vendor shall be entitled to apply the whole or any part of the deposit hereunder for that purpose provided that the Vendor's Solicitor shall advise the Purchaser's solicitors prior to applying the whole or any part of the deposit the following details:-
>
> (a) the address of the property to be purchased by the Vendor;
>
> (b) the amount of the deposit hereunder to be applied to the purchase; and
>
> (c) the manner in which the monies are to be held;
>
> The Purchaser shall if so required provide the Vendor's Solicitors with an authority to the agent to give effect to the provisions of this Clause."

48. On 13 August 2012, Paffas Lawyers wrote to MBBF, stating: "Only 5% shall be released to your client." On 14 August 2012, Paffas Lawyers sent a further letter to MBBF, stating: "Release of deposit to only apply once the plan is registered at the land titles office. Please amend that clause accordingly".

49. On 15 August 2012, Mr Paffas emailed Mrs Ho, stating that SSD had indicated that it was "a deal breaker" if it was not agreed that the deposit be released on exchange of contracts:

> "Release deposit - they said that this is a deal breaker for them ie if you don't agree to release of deposit on exchange of contracts (ie straight away) then there is no deal and they won't exchange with you."

50. On 15 August 2012, Ms Kunhi recorded that a "Rachel" of Paffas Lawyers called her "confirming that 5% deposit is agreed to be released".

51. On 16 August 2012, the contract was executed by Mr Berger for SSD as vendor and by Mr and Mrs Ho as purchasers. Special Condition 12 in the final contract replicated the version proffered by Mr Berger in his email of 13 August 2012. That same day, Mr and Mrs Ho paid the 5% deposit of $57,500 into the MBBF trust account ("Ho Deposit").

52. At some time after 16 August 2012, Mr Berger caused the Ho Deposit to be disbursed from the trust account without notice to the purchasers or their solicitor as required by Special Condition 12.

53. On 31 August 2012, contracts in relation to the sale of the Domabyl Property were exchanged. On 3 October 2012, the purchaser's solicitors, McCourts Solicitors, sent a letter to MBBF enclosing the transfer and requesting it be executed and returned urgently.

54. On 4 October 2012, Mrs Domabyl died. Upon the death of Mrs Domabyl, it is now common ground that the power of attorney executed in favour of Mr Berger was terminated. On 5 October 2012, Mr Berger learned of Mrs Domabyl's death.

55. On 9 October 2012, Mr Berger (on MBBF letterhead) wrote to McCourts Solicitors concerning the sale of the Domabyl Property and enclosed the certificate of title and "the registered power of attorney under which Victor Berger had signed the Transfer".

56. On 10 October 2012, McCourts Solicitors were told that "it was discovered that the Transfer sent by Kathryn Adler and signed by Victor Berger on 4 October 2013 was incorrect as it was not endorsed for signing under power of attorney". That same day, Ms Kunhi noted in her handwriting "See Annexure A" next to Mr Berger's signature and attached Annexure A which stated:

> "ANNEXURE "A"
>
> Certified correct for the purpose of the Real Property Act 1900 by the person named below who signed this instrument pursuant to the power of attorney specified.
>
> Signature of attorney: [Mr Berger's signature]
>
> Attorney's name: Victor Berger
>
> Signing on behalf of: Hilda Domabyl
>
> Power of Attorney: Book 4627 No. 327"

57. On 10 October 2012, Ms Donovan (on Mr Berger's instructions) emailed Ms Kunhi, providing the following cheque directions in relation to the Domabyl Property:

> "... please note the following cheque directions for settlement:-
>
> 1. Payable to MBBF for our fees & disb for acting on the sale $??
>
> 2. Payable to Victor Berger re #7062 $140,000 + GST $154,000.00"

58. On 11 October 2012, Mr Berger (on MBBF letterhead) wrote to McCourts Solicitors with the following cheque directions in respect of the sale of the Domabyl Property:

> "You are hereby authorised and directed to pay the balance of purchase monies as follows:
>
> ...
>
> 5. Bank Cheque in favour of Victor Berger for $154,000.00
>
> 6. Bank Cheque in favour of Milne Berry Berger & Freedman for $6,624.49
>
> ...
>
> 10. Bank Cheque in favour of Milne Berry Berger & Freedman Trust Account for $188,805.72"

59. That same day, Ms Kunhi (on behalf of MBBF) handed over the transfer (with Mr Berger's signature crossed out and Annexure A attached) to McCourts Solicitors' agent.

60. On 12 October 2012, settlement of the sale of the Domabyl Property occurred. As per Mr Berger's directions of 11 October 2012, the settlement cheques included a cheque for $154,000 made out in Mr Berger's name and paid into a bank account in Mr Berger's name (the "First Payment"); a cheque for $6,624.49 made out to MBBF and paid into MBBF office account (the "Second Payment"); and a cheque for $188,805.72 made out to the MBBF trust account, being the remaining proceeds of the sale. These and four other payments were later alleged to constitute breaches of trust account obligations. As at 12 October 2012, probate in respect of Mrs Domabyl's estate had not yet been granted.

61. On 22 October 2012, Mr Berger (on behalf of MBBF) issued a Standard Costs Agreement and Costs Disclosure to Mr Berger and Mr Green as executors in relation to probate for Mrs Domabyl's estate.

62. On 6 December 2012, Mr Berger (on MBBF letterhead) wrote to himself as Mrs Domabyl's attorney, concerning the settlement of the sale of the Domabyl Property. The letter stated:

> "5. A cheque for $150,000 was drawn in respect of our costs and disbursements in relation to File No. 7062 acting for Mrs Domabyl under Power of Attorney and guardianship instructions and covered estimated costs and disbursements to date including payment of our several unpaid Tax Invoices.
>
> 6. We collected a cheque for $6,624.49 which was a pre-settlement estimate of our costs and disbursements to date in respect of the conveyancing sale transaction, our costs and disbursements now having been finalised **totalling $8,165.41** (comprising costs of $6,208 plus GST of $620.80 and disbursements of $1,234.81 and GST of $101.80) leaving a shortfall of $1,540.92 which will be transferred from trust."

63. On 7 December 2012, Mr Berger caused $8,265.41 to be transferred from the MBBF trust account (held on behalf of Mrs Domabyl's estate) to the MBBF office account. The shortfall of $1,540.92 constitutes the "Third Payment". Probate in respect of Mrs Domabyl's estate had not yet been granted.

64. In January 2013, a Mr Sofiak, a trust account investigator for the Law Society, was allocated the task of conducting a routine trust investigation of MBBF's trust account.

65. On 2 January 2013, Mrs Dougall died. It is now common ground that upon the death of Mrs Dougall, the power of attorney executed in favour of Mr Berger was terminated.

66. On 25 January 2013, Mr Berger caused $20,000 to be transferred from the MBBF trust account (held on behalf of Mrs Domabyl's estate) to Mr Berger's son-in-law, Mr Penn, to discharge a debt owed by Mr Berger (the "Fourth Payment"). The reason on the matter ledger stated: "Payment on behalf of Victor Berger from outstanding fees". Probate in respect of Mrs Domabyl's estate had not yet been granted.

67. On 18 February 2013, Mr Berger (on MBBF letterhead) sent a letter to Ms Frischer in which he provided his advice, enclosed two drafts of her will and notified her that a tax invoice would be sent to her "in the coming week".

68. On 19 March 2013, Mr Berger sent a tax invoice for the total of $8,751.90 to Mrs Dougall's niece and nephew for attendances undertaken by him on behalf of Mrs Dougall prior to her death.

69. On 16 April 2013, Mr Berger sent a letter to Mr Jan Domabyl, Mr Robert Domabyl and Mrs Domabyl's daughter, Ms Fudge, in respect of the estimated costs for the administration of Mrs Domabyl's estate. The total estimate was $14,923.73.

70. On 22 April 2013, MBBF issued a tax invoice (Invoice #66078) to Mr Berger and Mr Green as executors of Mrs Domabyl's estate in the amount of $14,341.55 relating to the application for the grant of probate ("Domabyl Probate Invoice").

71. On 23 April 2013, Mr Berger caused $8,751.90 (held on behalf of Mrs Dougall's estate) to be transferred from the MBBF trust account to the MBBF office account "on a/c of costs & disbursements" (the "Fifth Payment"). Probate had not yet been granted.

72. On 2 May 2013, Mr Berger (on MBBF letterhead) sent a letter to himself and Mr Green as executors, Mr Jan Domabyl, Mr Robert Domabyl and Ms Fudge, enclosing the Domabyl Probate Invoice.

73. On 6 May 2013, Mr Berger caused $14,341.55 (held on behalf of Mrs Domabyl's estate) to be transferred from the MBBF trust account to the MBBF office account "Invoice #66078 Trust to Office Transfer" (the "Sixth Payment"). Probate in respect of Mrs Domabyl's estate had not yet been granted.

74. On 11 May 2013, Mr Berger emailed a Mr Hawkins and a Ms Myers, two external examiners conducting an audit of the MBBF trust account, Mr Freedman and Ms Gopalan. The email contained a copy of an email dated 19 April 2013 from Mr Freedman to Mr Berger regarding the review conducted by the external examiners. Mr Freedman expressed his concerns about Mrs Domabyl's file to which Mr Berger replied in uppercase characters:

> "9) **Domabyl**; Mrs Domabyl died, I understand you and Michael Green are her executors. One of her assets was her interest in the retirement home upon which the firm acted on the sale. From the proceeds of sale you directed to yourself a payment of $20,000. You did not inform me and I assume you did not inform [Ms Gopalan] either, as partners of the firm that this was being done, and we would only have been made aware because of Jims audit.
>
> I DID NOT INFORM EITHER [MR FREEDMAN] OR [MS GOPALAN]. THEY LEFT NO DOUBT THEY DID NOT WISH ANY PART OF THE PAYMENT OF FEES MRS

DOMABYL INCURRED THROUGH MY SERVICES HAD INCURRED. INDEED THEY LIBERALLY SUGGESTED MY VALUES WERE ON A STANDARD BENEATH MINE.

I INFORMED:

- [MR FREEDMAN] AT A TIME HE FIRST RAISED AN ISSUE THAT WE SHOULD HAVE THE FEES ASSESSED. HE WAS DID NOT GAREE NOR DISAGREE;

- MUCH LATER AND ON SEVERAL OCCASIONS I WAS PRESSURED BY THEM BUT RESISTED. THEIR PRESSURE WAS ESSENTIALLY FOUNDED ON THEIR CLAIM TO HIGH MORAL GROUND;

- I REPEATEDLY TOLD THEM I HAD FULLY INFORMED THE CO-EXECUTOR MICHAEL GREEN AND THAT HE EXPRESSED THE VIEW THAT THERE WAS NO ISSUE;

- I WAS PERSUADED TO DEFER CLAIMING THE FEES, BUT NEVER SAID I WOULD NOT CLAIM THEM, WHEN [MR FREEDMAN] REFERRED TO HIS COMNCERN FOR MY FAMILY IF THE LEGAL SERVICES COMMISSIONER CHALLENGED OUR CLAIM. INDEED I EXPERIENCED A BARRAGE OF CRITICISM FOR ONLY DEFERRING SAME AND SIMILARLY AN EMAIL BY ME WHICH IN EFFECT INDICATED I ENQUIRED IF [MR FREEDMAN] WOULD NOT ACCEPT ANY PART OF THE MONEY;

- I SENT ITEMISED BILLS TO THE HUSBAND AND SON OF MRS DOMABYL FOR THE MAJOR PART OF THE CLAIM. THEY RAISED NO OBJECTIONS AND INDEED I WAS PRAISED FOR MY WORK. MY CO-EXECUTOR THEY HAVE BEEN INFORMED THAT I HAVE DRAWN FUNDS AGAINST SUCH BILLS.

10) There was no information on the records explaining why this money in trust should be paid to your son in law. Jim asked for instructions to be confirmed in writing explaining why and for what purpose and by whose authority this occurred. You wrote to Juliette on 11/4/13 stating that monies were .. “legal fees due to me and directed to be paid from Mr Penn towards satisfying a sum due by me to him.”

I BORROWED THE SUM FROM MY SON-IN-LAW AND HENCE REPAID HIM.

11) I cannot see any account issued with respect to legal fees being issued. It is my understanding of the trust account requirements that such an account needs to be issued if the monies were paid for legal fees, and in any event the legal services were provided by the firm and therefore ought to be paid to the firm.

I REFER TO THE ABOVE FACTS AS TO:

- BILLS HAVE BEEN ISSUED;

12) This payment occurred after her death; I understand that you and Michael Green are the executors, but the beneficiaries are her grandchildren.

SEE ABOVE.

13) You state that “the family agreed that our fees be paid for the work I did before Mrs Domabyl died”. It seems to me that it is not up to the family but rather those who would be deprived of that amount by you taking it, namely the beneficiaries.

THE BENEFICIARIES ARE JUST SHORT OF 18 YEARS OF AGE. WE WILL BE DICLOSING INCOME AND EXPEDITURE AS WE DO ALWAYS WHEN ACCOUNTING TO BENEFICIARIES.

14) Please confirm that the beneficiaries gave their informed consent. By informed I mean, did you explain to them that you did not issue a proper costs agreement aside from the initial one which Irecall was for $2000 to prepare a will? Did you explain that the estate had the right and entitlement to have any account for legal services assessed?

I HAVE NO DUTY TO DO MORE THAN WHAT APPEARS ON THE ITEMISED BILL HAVE YOU EVER DONE WHAT YOU ASK OF ME HERE TO ANY OF YOUR CLIENTS

And did you inform them that you had no conversation with Mrs Domabyl in which you told her that all your visits and all your phone calls etc were being charged for?

I DID HAVE SUCH CONVERSATIONS.

FURTHERMORE SHE WAS A VERY INTELIGENT AND SOPHISTICATE WOMAN OBVIOUSLY AN EXPERIENCE BUSINESS WOMAN. SHE OFTEN SPOKE PROUDLY ABOUT THAT.

I believe that only if you gave these explanations, or the beneficiaries received independent legal advice that any person, who was entitled to, could give informed consent to you taking the money from the Estate.

I DISAGREE, YOU CANNOT CLAIM TO BE IMPARTIAL ABOUT THIS MATTER

15) You misquote our discussionS when this matter came to a head about what should occur if monies were to be charged by the firm. I raised the same issues then as I raise now. Your failure to make proper or even close disclosure to Mrs Domabyl and to then try and charge her for your legal services would most likely be considered as misconduct. My and [Ms Gopalan’s] concern was that we might be held to have some responsibility for your misconduct and that was what we were raising with you. We

> stated and you eventually and quite reluctantly agreed that the charges would be written off and that you would discuss your assistance given to Mrs Domabyl with the family at the appropriate time. On no occasion did I agree, nor do I recall [Ms Gopalan] agreeing that you could or would charge for legal services. You were not entitled to do so and you should not do so
>
> HOW DOES WHAT YOU SAY DIFFER WITH WHAT I HAVE SAID ABOVE, EXCEPT THAT YOU HAVE BEEN INCOMPLETE. WHAT I HAVE SAID IS LARGELY COORBORATED BY EMAILS BETWEEN US.
>
> EACH OF YOU CANNOT CLAIM TO BE IMPARTIAL ABOUT THIS SUBJECT
>
> 16) You agreed that you would not charge legal fees, and I (and I assume [Ms Gopalan]) relied on that assurance and did not take the matter further, even though I told you that the Law Society had advised us that we may be liable if we did not stop this happening
>
> I DISAGREE AS TO THE POSITION I TOOK OVER THE MATTER. AS TO THE LAW SOCIETY, TO MY BEST RECOLLECTION ONLY [MS GOPALAN] REFERRED TO SOME AUTHORITY AND ON READING IT IT WAS NOT TO THE POINT."

75. Some aspects of Mr Berger's contemporaneous state of mind arising from this email bear emphasis. Mr Berger was aware when acting as he did that the beneficiaries under Mrs Domabyl's will were not yet 18 years old. Mr Berger was denying the existence of his unambiguous agreement made on 1 October 2011 with his partners that the WIP charged to Mrs Domabyl's file would be written off and no further amounts charged to that file. At the same time he sought to recharacterise that correspondence, set out at length above, as demonstrating that what he had agreed was to defer claiming fees from Mrs Domabyl and that he had never said that he would not claim them.

76. In the same email, Mr Freedman expressed concerns about the SSD file to which Mr Berger replied in uppercase characters:

> "In relation to **file 14697**:
>
> 5) I have looked at this file; you have transferred funds from the deposit monies held in trust commencing 12/12/.12; contracts were exchanged on the 6/12/12; special condition 12 provides for the release of the deposit to be used as a deposit by the vendor for another property; I see no correspondence recorded confirming an agreement by the purchaser for their funds to be used to pay for the vendors other expenses; you have used $42,624 from the trust account
>
> 6) When I queried this, your response was, - YES. THAT WAS GTHE PURPOSE OF RELEASE OF DEPOSIT AND THE TRADESMEN ARE FOR WORK AT THE SITE, TOTALLY FOR SATISFYING CONDITIONS OF ACHIEVING SUBDIVION; that response does not address my concerns in any way; that is a very worrying situation

ALL MONIES HAVE BEEN USED, TO THE KNOWLEDGE OF THE PURCHASERS, FOR THE PURPOSE OF ACHIEVING SUBDIVISON OF THE LAND OF WHICH THE SUBJECT PRIPERTIES FORM PART.

7) Please provide the usual particulars of the purchasers agreement to the use of their funds in this manner.

WHAT PARTICULARS? KINDLY ASK THE QUESTIONS AND NOT PRESUME I KNOW WWHAT YOUA RE TALKING ABOUT

8) There is no cost agreement for this matter

MY COMPANY IS THE VENDOR. USUAL RATE APPLY

In relation to **file 14623**;

7) I have looked at this file; the contract was exchanged on 1/8/12; the first withdrawal from the trust monies was made 3/8/12; there is no cost agreement.

MY COMPANY IS THE VENDOR. USUAL COSTS APPLY.

8) Special condition 12 provides for the release of the deposit as set out above.

9) I could find no correspondence between you and the purchaser agreeing for trust monies to be used for payment by the vendor of its expenCes

PLEAS E SEE MY REPLIES ABOVE

10) When I raised this with you your response;- YES. THAT WAS GTHE PURPOSE OF RELEASE OF DEPOSIT AND THE TRADESMEN ARE FOR THE WORK AT THE SITE, TOTALLY FOR SATISFYING CONDITIONS OF ACHIEVING SUBDIVION

PLEASE SEE MY REPLIES ABOVE

11) please provide the usual particulars of the purchasers agreement to use their funds in this manner

PLEASE SEE MY REPLIES ABOVE

12) I am aware that this contract was rescinded, and you have repaid most of the deposit, but you used approximately $40,000 of the trust funds without any apparent written consent or authority.

THESE FUNDS PAID TO THIS PURCHASER HAVE BEEN PROVIDED, TO THE

> BEST I KNOW AS I TYPE AND CAN CHECK LEDGERS, BY ME AND FUNDS RAISED FROM INTERESTED PARTIES FOR THAT PURPOSE."

77. On 13 May 2013, Ms Gopalan emailed Mr Berger:

> "The issues are very serious and I have received advice that I am equally responsible (being a salaried partner) for the serious allegations being currently raised re trust account transactions.
>
> So that I can get proper advice and do the needful, I require the following:
>
> Re Domabyl, I am unsure how [you can] state that you now billed and received the funds, when you clearly **agreed in writing** and gave [Mr Freedman] and I undertaking on 1/10/11 that; pursuant to our urgent meeting specifically called upon on re this file on 27/9/11 (after [Mr Freedman] and myself discovered the amount you have been wrongfully billing in this file without the instructions/consent/knowledge of the family). How could an invoice be issued and more so the payment be transferred to your son-in-law without the same being accounted for in the office account. No file notes or records maintained in the file until the auditors asked for the same on 10/4/13.
>
> Re the other two matters 14697 and 14623, can you kindly provide us with a copy of the written consent provided by the purchasers giving you the authority to use these monies for your personal benefit?"

78. On 7 June 2013, Mr Sofiak interviewed Mr Berger and asked him questions about various transactions involving trust money. On 17 June 2013, Mr Sofiak issued his report to the Law Society, which stated that in his opinion there was a deficiency in the MBBF trust account as a result of the five payments described above made by Mr Berger of trust money on various dates.

79. On 21 June 2013, Mr Berger paid $205,258.86 into the MBBF trust account which he claimed "represented the entirety of the money [he] had received in payment of the Domabyl matters (approximately $174,000.00) plus some other fees".

80. On 21 June 2013, the MBBF partnership was dissolved. On 22 June 2013, Mr Berger commenced as principal of Milne Berry Berger ("MBB").

81. On 1 July 2013, the Law Society resolved to suspend Mr Berger's practising certificate (the "Suspension Decision"). On 5 July 2013, Mr Berger appealed the Suspension Decision to the Supreme Court and applied for a stay. On 9 July 2013, the Supreme Court granted a stay of the Suspension Decision: *A Solicitor v Council of the Law Society of New South Wales* [2013] NSWSC 921.

82. On 11 July 2013, Mr Berger wrote to Ms Frischer informing her of the dissolution of MBBF and seeking authority to transfer her file to MBB. On or about 22 July 2013, Ms Frischer authorised the transfer of her file to MBB.

83. On 12 August 2013, Mr Berger swore an affidavit as the executor of Mrs Dougall's will. On 14 August 2013, the Supreme Court dismissed Mr Berger's appeal from the Suspension Decision: *Berger v Council of the Law Society of NSW* [2013] NSWSC 1080. Mr Berger applied for an extension of the stay.

84. On 15 August 2013, Beech-Jones J granted a further stay of the Suspension Decision subject to conditions, including a condition that, on or before 21 August 2013, Mr Berger notify his clients of the outcome of the principal proceedings, namely the court's decision to dismiss the practitioner's appeal against his suspension ("Condition 6"): *Berger v Council of the Law Society of NSW (No 2)* [2013] NSWSC 1131. That same day, Mr Berger sent letters to clients, but not to Ms Frischer.

85. On 20 August 2013, Ms Frischer emailed Mr Berger "about outstanding issues relating to the drafting of [her] will".

86. On 21 August 2013, probate was granted in Mrs Dougall's estate.

87. On 23 August 2013, Mr Berger emailed Ms Frischer regarding her instructions, stating:

> "I cannot be sure about what time it will takeredraft. If indeed I have made any error, of course, there is no charge for correction.
>
> Please tell me if I am to proceed as your note suggests. I estimate for the will 12 hours of my time an 1 hour for my secretary plus GST. Approximately $1200 less 20%. If I can do better I will certainly try. As to trusts for 1 draft say $1200 plus GST less 20% and a second one say $400 plus, less the same. One commonly finds the fees are considerably greater"

88. The next day, Ms Frischer emailed Mr Berger in reply:

> "I paid the tax invoice but have already indicated fto you in the past my disappointment and recall your assurance that if there were mistakes this would be reflected in a reduction of fees
>
> I would not have thought that I should pay a further fee beyond the $4,217 paid in late June to at least put in place a will even if no trust had been created as yet"

89. On 28 August 2013, this Court granted a further stay of the Suspension Decision: *Berger v Council of the Law Society of New South Wales* [2013] NSWCA 278.

90. On 25 September 2013, Mr Berger made an application for an assessment of his costs as set out in the Revised Fee Schedule.

91. On 3 October 2013, Mr Berger made an application for an assessment of his costs in relation to the Domabyl Probate Invoice.

92. On 8 October 2013, this Court dismissed Mr Berger's application for leave to appeal from the Supreme Court's decision to dismiss his appeal from the Suspension Decision: *Berger v Council of the Law Society of New South Wales* [2013] NSWCA 336.

93. On 8 October 2013, the stay of the Suspension Decision granted by this Court on 28 August 2013 lapsed. Since that date, Mr Berger has not held a practising certificate.

94. On 14 November 2013, the Law Society wrote to Mr Berger regarding a number of matters arising from Mr Sofiak's report.

95. On 20 November 2013, Mr Berger emailed Mr Paffas seeking to make arrangements with Mr and Mrs Ho for the registration of the plan of subdivision of the Storey Street development. In that email, Mr Berger stated regarding the Ho deposit: "I have checked 5% deposit. Was released." On 25 November 2013, Mr Paffas emailed Mr Berger in reply, stating: "I am also instructed that [Mr and Mrs Ho] would require a variation of the contract as follows: ... 2. The vendor is to pay them interest

on their released deposit at the rate of 11% per annum from the date of the contract". On 26 November 2013, Mr Berger emailed Mr Paffas in reply as follows: "not agreed. There has been great capital growth. Interest defeats the purpose of us reaching for capital. It [is] just not possible".

96. On 26 November 2013, the Law Society wrote to Mr Berger regarding the existing issues arising from their letter of 14 November 2013 and an additional complaint regarding Mr Berger's breach of the undertaking he gave to the Supreme Court to undertake a course in Trust Accounting and Ethics.

97. On or about 13 December 2013, SSD was placed into receivership.

98. On 23 January 2014, probate was granted in Mrs Domabyl's estate.

99. On 27 March 2014, a certificate of determination was issued in relation to the assessment of the Domabyl Probate Invoice, allowing total costs of $14,102.30.

100. On 30 April 2014, Rosenblum & Co, solicitors for Mr and Mrs Ho, wrote to MBB in relation to the Ho deposit:

> "Contracts in the above matter were exchanged on 16 August 2012. Please advise whether the deposit was released to the Vendor on 20 August 2012.
>
> Please provide details of why Settlement has not taken place and when settlement can be expected to take place as our client is eager to proceed with this matter."

101. That same day, Rosenblum & Co (on behalf of Mr and Mrs Ho) wrote to Ray White Maroubra:

> "Contracts in the above matter were exchanged on 16 August 2012. Please advise whether the deposit was released to the Vendor on 20 August 2012. If so, was the Agent's commission paid out of the deposit?
>
> Please provide details of when settlement can be expected to take place (if known) as our client is eager to proceed with this matter."

102. That same day, Ray White Maroubra responded:

> "The 5% deposit was paid directly to the vendors solicitor.
>
> Any further information regarding the settlement of this matter should be referred to the vendors solicitor."

103. On or about 8 May 2014, the receivers for SSD ceased to act.

104. On 16 May 2014, Mr Berger emailed Mr Rosenblum of Rosenblum & Co, stating "Please see attached ledger as record of disbursement of 5% deposit released to the Vendor". The ledger enclosed was in the matter of "Sale of 4 Storey Street" for a client "Mr K Hancock, Storey Street Development Pty Limited" and recorded an amount of $57,500 from "Mr K Hancock" on 16 August 2012 for "Deposit on sale". That same day, Mr Rosenblum emailed Mr Berger in reply, requesting a "copy of written consent to the release of the 5% deposit". On 18 May 2014, Mr Rosenblum emailed Mr Berger: "I have just realised the ledger you sent us was for Mr K Hancock. Please provide the trust ledger for our clients, Mr & Mrs Ho." On 19 May 2014, Mr Berger emailed Mr Rosenblum in reply: "I feel dopey. I am certain I sent this attached before. Will have a look later to whom it was sent."

105. On 12 June 2014, a certificate of determination of costs was issued in relation to the assessment of the Revised Fee Schedule. As has earlier been noted, the beneficiaries under Mrs Domabyl's were minors. By the time of the assessment they were represented by separate solicitors who were given notice by Mr Berger of the application for assessment. The beneficiaries apparently chose not to object to the account or otherwise to participate in the assessment.

106. The total amount of costs and disbursements determined to be fair and reasonable was $176,800.74. Relevantly, the reasons for the determination stated:

> "The application for assessment of costs is to be determined in accordance with the requirements of the 1984 legislation. Pursuant to section 367 of the Act I am only empowered to determine the reasonableness of the costs that are expressly disputed in the objections. ***Costs which are not disputed must be allowed*** (*O'Connor Fitti* [2000] NSWSC 540)." (Emphasis added.)

107. On 4 July 2014, Mr Berger sent a letter to Rosenblum & Co enclosing a notice of rescission of the contract between SSD and Mr and Mrs Ho executed on 16 August 2012. The notice stated:

> "4. The Contract was conditional upon the happening of an event, namely registration of the Plan.
>
> 5. Storey Street has done whatever is reasonably necessary to obtain registration of the Plan of Subdivision.
>
> 6. Storey Street has been unable to obtain registration of the Plan.
>
> 7. Storey Street and you are unable to lawfully complete the Contract without registration of the Plan.
>
> ...
>
> TAKE NOTICE THAT
>
> (a) ... Storey Street hereby rescinds the Contract;
>
> ...
>
> (c) Storey Street and you are hereby immediately discharged from further performance of the Contract."

108. On 8 July 2014, Rosenblum & Co (on behalf of Mr and Mrs Ho) wrote to Mr Berger not accepting rescission or, alternatively, claiming return of the Ho deposit. The letter stated:

> "Our clients do not accept that there has been a valid rescission of the Contract. In particular, paragraph 5 of the Notice is incorrect, Storey Street has not done whatever is reasonably necessary to obtain registration of the Plan. Paragraph (c) is rejected.

> We also note that you are the Sole Director and Shareholder of the Vendor Company.
>
> Our clients will give consideration to a mutual rescission of the Contract upon receipt by our clients of a refund of the deposit of $57,500.00. This offer is without prejudice to any of our clients' other rights.
>
> In the event that the Contract is rescinded, and our clients do not accept that this has yet validly occurred, our clients are entitled to a refund of the deposit pursuant to clause 19.
>
> We note no mention or offer has been made in respect of the return of the deposit of $57,500.00 which was released upon Exchange of Contracts to the Vendor Company of which you are the Sole Director and Shareholder."

109. On 25 August 2014, the Law Society sent a letter to Mr Berger regarding a complaint made by Mr Rosenblum on behalf of Mr and Mrs Ho in relation to the release of the Ho Deposit.

110. On 31 October 2014 (although the letter is dated 25 September 2014), Mr Berger responded to the Law Society's letter with the following submissions:

> "As to the consent of the release of the deposit to the vendor I refer to the following:
>
> A. Clause 12 of the contract for sale was not to apply;
>
> ...
>
> As to providing the solicitor for the purchaser particulars of disbursement of the deposit trust ledger was provided to the solicitor on or about 19 May 2014 and I do not believe any further communication was received from such solicitor.
>
> In this instance, the possibility that you may find that having considered the file there is no substance in the complaint namely:
>
> - No misappropriation of trust monies;
>
> - No breach of Section 264 of the *Legal Profession Act 2004*;
>
> Having accounted to the complainants with their solicitor, Rupert Rosenblum, on the providing of the trust ledgers;
>
> - As to accounting for monies received from the complainants I suggested that the occasion had not yet arrived and if there had been completion of the sale such accounting would not be required and properly sought from Mr Rosenblum in the circumstances where it appeared it was likely that there would not be a sale of the property to his clients and;

- As to conduct we conducted the matter in accordance with the terms agreed with the solicitor for the purchasers."

111. On 18 December 2014, the Law Society wrote to Mr Berger:

> "I note from your letter of 31 October 2014 that you have submitted that you provided Mr Rosenblum with requested "*particulars of disbursements of the deposit trust ledger*" of the monies of Mr & Mrs Ho on or about 19 May 2014. However I understand from the documents which Mr Rosenblum included with his complaint, copies of which were forwarded to you, that he sent you an email on 18 June 2014 stating that the trust account statement which you had sent you appeared to relate to monies of a Mr K Hancock and asking you to provide the statement for Mr & Mrs Ho ...
>
> Please provide me with a copy of the "*particulars of disbursement of the deposit trust ledger"* of the monies of Mr & Mrs Ho"

112. On 24 December 2014, Mr Berger emailed the Law Society in reply:

> "I am not sure if I understand your point other than why does the name of K. Hancock appear on the ledger.
>
> Quite correct, his name should not be there. It Is the Trust Ledger of Storey Development Pty. Ltd the Vendor. As a point in history he was initially the intended buyer of the subject property. Ultimately he was not and his name ought not to have been on the ledger.
>
> Of course my focus was to account for the monies received and it was deposited to the correct file and that accorded with the agreement and allpayments fron that money was spent on the project.
>
> I trust the above answers your question.
>
> I regret I did not respond further to the email of Mr. Rosenblum. There was communication within the office about his email however, it seems, my suspension too my focus off the point and in any event I recall my reaction thinking I had not sent the ledger and I found I had."

113. On 8 February 2015, the Law Society wrote to Mr Rosenblum requesting further information "regarding the trust statement produced by Mr Berger and which, he states, refers to your clients' money despite being headed '*K Hancock*'".

114. On 18 February 2015, Rosenblum & Co wrote to the Law Society providing further information:

> "We do not believe the trust account ledger produced by Mr Berger is in relation to our client as K Hancock also had an exchanged Contract with Storey Street and was the project-manager."

Tribunal proceedings

115. On 8 October 2015 and 14 March 2016, the Law Society filed two applications for disciplinary findings and orders in the Tribunal (referred to in these reasons as the Complaint). The first application contained 11 grounds and the second application contained one further ground.
116. The Law Society submitted in the Complaint that Mr Berger was guilty of professional misconduct on the following 12 grounds, namely that Mr Berger:
. (1) misappropriated funds;
. (2) caused a deficiency in a trust account;
. (3) breached s 254 of the *Legal Profession Act 2004*;
. (4) breached s 255 of the *Legal Profession Act 2004*;
. (5) breached s 259 of the *Legal Profession Act 2004*;
. (6) purported to act under a power of attorney after the donor of the power had died;
. (7) purported to act as an executor under a will after the death of the testator but before any grant of probate;
. (8) failed to comply with an order of the Court;
. (9) failed to disclose costs;
. (10) breached an undertaking proffered to the Legal Services Commissioner;
. (11) engaged in unethical conduct in applying received monies in breach of the terms of the agreement under which they were received; and
. (12) engaged in overcharging.
117. As was described at the outset, the Law Society provided a narrative of 140 separate particulars of the Complaint which were referred to in an overlapping way in relation to each of the grounds. For example, the allegation of misappropriation particularised paragraphs 31-38, 41-43, 47, 64-66 and 73 of the narrative of particulars. The allegation that Mr Berger caused a deficiency in a trust account particularised paragraphs 31-38, 41-43, 46, 64-66, 72, 80-82, 85, 87-89 and 92.
118. On 18 March 2016 and then on 1 June 2016, Mr Berger filed replies to the Complaint in the Tribunal. Mr Berger admitted grounds 3, 4, 6, 7, 9 and 10, although he denied a number of the particulars supporting those grounds.
119. On 5 October 2016, the Law Society filed detailed opening submissions. These were served before Mr Berger had filed any evidence. On 31 October 2016, the matter was listed to commence in the Tribunal but was adjourned. On 22 February 2017, the hearing commenced before the Tribunal. On 23 February 2017, there was a second day of substantive hearings before the matter was adjourned to dates in May 2017 which were later vacated.
120. On 28, 29 and 30 June 2017, Mr Berger was cross-examined. On 6 July 2017, the Law Society filed its closing submissions. On 19 July 2017, Mr Berger filed his closing submissions. On 3 August 2017, the Law Society filed its submissions in reply. On 24 August 2017, Mr Berger filed various affidavits in the nature of character references. There were no oral closing submissions.
121. On 21 September 2017, the Tribunal delivered its Stage 1 (Liability) judgment.

The Liability Judgment

122. The Tribunal found Mr Berger guilty of professional misconduct: *Law Society of NSW v Berger (No 1)* [2017] NSWCATOD 137 (“Liability Judgment”). After describing the relevant factual background and the chronology, the Tribunal considered at [44]-[91] the credit of Mr Berger. The Tribunal regarded Mr Berger as an unreliable witness. It described Mr Berger’s claims of ignorance or

misunderstanding of his legal obligations as inconsistent with the extent of his training and experience as a solicitor. Parts of Mr Berger's evidence were described as rambling and unresponsive. The Tribunal found Mr Berger's evidence "often evasive". As Mr Berger's cross-examination proceeded, "the evasiveness became more frequent and included not responding to some questions".

123. The Tribunal disbelieved much of Mr Berger's evidence. In relation to the central issue about whether he had ever given costs estimates to Mrs Domabyl he said "when costs arose I gave her estimates". The Tribunal pointed out that no such evidence was contained in Mr Berger's four affidavits or in Mr Berger's amended reply. There was an allegation in Mr Berger's 5 October 2016 affidavit about costs discussions he said he had with Mrs Domabyl. The Tribunal pointed out that this evidence was quite inconsistent with Mr Berger's amended reply, where he denied an obligation to provide any costs disclosure and the contemporaneous exchanges with his partners which culminated in the 1 October 2011 agreement. The Tribunal regarded Mr Berger's billing Mrs Domabyl for $176,800.74 in the name of the partnership and in the knowledge that his partners did not agree with charging Mrs Domabyl anything as "very damaging to his reliability as a witness".

124. As noted at the outset, the Tribunal found it necessary to develop its own numbering system to address the Complaint in a sensible manner. The Tribunal addressed each of the 12 grounds in the Complaint under the following 14 headings and in the following order:

. (1) "Failure to disclose costs – Mrs [Domabyl]'s will etc" (referred to as ground 9.1);

. (2) "Failure to disclose costs and breach of undertaking to Office of Legal Services Commissioner – Mrs [Domabyl] – Sale of retirement village unit" (referred to as grounds 9.2 and 10.1);

. (3) "Failure to disclose costs and failure to comply with undertaking to Office of Legal Services Commissioner – Mrs [Dougall]" (referred to as grounds 9.3 and 10.2);

. (4) "Failure to comply with an order of the Supreme Court" (referred to as ground 8);

. (5) "Use of Deposit of Mr and Mrs [Ho] – Unethical conduct – applying monies in breach of the terms of an agreement under which they were received" (referred to as ground 11);

. (6) "Purported to act under a Power of Attorney after the donor of the power had died – execution of transfer" (referred to as ground 6.1);

. (7) "Purporting to act under a Power of Attorney after donor of the power had died" (referred to as ground 6.2) and "Purporting to act as executor of her will when there was no grant of probate – Settlement instructions and settlement" (referred to as ground 7.1);

. (8) "First Payment 12/10/12 ... Breach of section 254 of 2004 Act, causing deficiency in Law Practice trust account, purporting to act as executor when no authority because no grant of probate, misappropriation" (referred to as grounds 1.1, 2.1, 3 and 7.1);

. (9) "Second payment 12/10/12" (withdrawn);

. (10) "Third payment 7/12/2012 – Mrs [Domabyl]'s estate ... Breach of Section 255 of the 2004 Act, purporting to act as executor but no authority because no grant of probate" (referred to as grounds 4.1 and 7.2);

. (11) "Fourth payment 25/01/2013 ... Breach of Sections 255 and 259 of the 2004 Act. Purporting to act as executor when no authority because no grant of probate, causing deficiency in trust account, misappropriation" (referred to as grounds 1.2, 2.2, 4.2, 5 and 7.3);

. (12) "Fifth payment 23/4/2013 – Estate of Mrs [Dougall] ... Breach of Section 255 of the Act, purporting to act as executor when no authority because no grant of probate, causing deficiency of $8,751.90 in the trust account of the law practice" (referred to as grounds 4.2, 7.4, 2.3 and 10);

. (13) “Sixth payment 6/5/2013 – Transfer of trust funds to pay costs of acting for Estate of Mrs [Domabyl] ... Breach of Section 255 of the 2004 Act, causing deficiency of [sic] in the trust account of the law practice, purporting to act as executor of deceased estate in circumstances where he had no authority to so act as there had been no grant of probate” (referred to as grounds 2.4, 4.3 and 7.5);
. (14) “Application 1620067 – Overcharging” (referred to as ground 12).

125. Somewhat confusingly, the Tribunal assigned numbering to each of those findings which did not accord, at least in any consistent way, with the 12 separate grounds in the Complaint. For example, the first matter dealt with what was described as “ground 9.1”. Whilst no doubt it addressed, in part, ground 9 of the Complaint, there was no separate “ground 9.1”. Nevertheless, for consistency and to understand the appellant’s ultimate complaints in context, I will attempt to summarise the Tribunal’s findings by reference to the same groupings as just described.

Complaint ground 9.1 – “Failure to disclose costs – Mrs [Domabyl]’s will etc”

126. The Tribunal found that over a seven year period, Mr Berger created seven codicils, a power of attorney and gave some advice about the possible appointment of a guardian for Mrs Domabyl. On 25 June 2012, Mr Berger rendered an itemised bill for $176,800.94 in respect of work done from March 2009 onwards for Mrs Domabyl. He did not send this bill to Mrs Domabyl but to her estranged husband and son in the Czech Republic.

127. Mr Berger submitted that he was not obliged by s 309 of the *Legal Profession Act 2004* to make a costs disclosure because of s 312(1)(a) of the *Legal Profession Act 2004*. He accepted in this Court that the 2004 Act did not apply in February 2005. Instead, the *Legal Profession Act 1987* applied, which fixed reasonableness as the standard for disclosure of costs.

128. The Tribunal found that, because of Mrs Domabyl’s vulnerabilities, it was not unreasonable for Mr Berger to have been required to make written disclosure of the estimated total legal costs for preparing the will before proceeding with the work. The Tribunal considered that he was obliged to make such disclosure but failed to do so. Mr Berger was thereafter required to notify Mrs Domabyl about any significant increase in that estimate of costs.

129. The Tribunal found that conduct constituted professional misconduct. Failing to make costs disclosures at all constituted professional misconduct. Mr Berger’s conduct constituted unsatisfactory professional conduct involving a substantial and consistent failure to maintain a reasonable standard of competence and diligence. In making this finding the Tribunal took into account Mrs Domabyl’s vulnerabilities, Mr Berger’s knowledge of the amount of the work in progress, the advice from his partners and others to waive the fees, his failure to render periodic bills and the length of time from March 2009 until the bill was rendered.

Complaint grounds 9.2 and 10.1 – “Failure to disclose costs and breach of undertaking to Office of Legal Services Commissioner – Mrs [Domabyl] – Sale of retirement village unit”

130. On 22 March 2012, Mr Berger provided a standard costs agreement and disclosure to Mrs Domabyl regarding the sale of her retirement village unit. The estimate of total costs was given at $1,705.00. The Tribunal found that this was not a genuine estimate of total costs likely to be incurred as Mr Berger had already recorded costs of $1,852.29 and was aware that costs would be substantially more.

131. Settlement of the sale occurred on 12 October 2012. The total costs charged by the law practice were $8,165.41, nearly five times the estimate of $1,705.00. The Tribunal found that as at 22 March

2012, Mr Berger was obliged by s 316 of the *Legal Profession Act 2004* to give Mrs Domabyl a revised estimate of total costs. This obligation continued unsatisfied until 7 December 2012, a period of nearly nine months.

132. In doing this, Mr Berger failed to comply with the disclosure requirements of s 309 and s 316 of the *Legal Profession Act 2004*. He also breached the undertaking given by him to the Office of the Legal Services Commissioner on 15 March 2012 to ensure that the legal practice complied with the disclosure requirements.

133. The Tribunal found that each of his failures to comply with the disclosure requirements, and his breach of the undertaking, constituted unsatisfactory professional conduct.

Complaint grounds 9.3 and 10.2 – "Failure to disclose costs and failure to comply with undertaking to Office of Legal Services Commissioner – Mrs [Dougall]"

134. On or before 6 April 2008, Mr Berger prepared a will for Mrs Dougall on her instructions nominating him as her executor and prepared a power of attorney appointing him as her attorney. She executed both documents on 6 April 2008. On 2 January 2013, Mrs Dougall died. On or about 19 March 2013, Mr Berger sent a bill to Mrs Dougall's niece and nephew in the amount of $14,341.55. On or about 22 April 2013, Mr Berger caused a bill for that amount to be given to himself as the executor named in Mrs Dougall's will.

135. At no time prior to 16 April 2013 had Mr Berger made any costs disclosure in accordance with s 309 of the *Legal Profession Act 2004* or otherwise in relation to acting for the estate of Mrs Dougall. The Tribunal found a breach of the disclosure requirements of the 2004 Act and the undertaking given to the Office of the Legal Services Commissioner.

136. The Tribunal found that such conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner and these breaches constituted unsatisfactory professional conduct.

Complaint ground 8 – "Failure to comply with order of the Supreme Court"

137. In about May 2012, Ms Frischer retained Mr Berger, when a partner of MBBF, to prepare her will. The will was not complete by May 2013. In 2013 the Law Society suspended Mr Berger's practising certificate. Mr Berger was granted a stay of the suspension decision, subject to certain undertakings given by him.

138. In mid-July 2013, Ms Frischer received notification from Mr Berger that MBBF had been dissolved and that Mr Berger had established a new law practice. Ms Frischer was invited to sign an authority for her file to be transferred to the new law practice. On 22 July 2013, Ms Frischer signed the file transfer authority and returned it to Mr Berger.

139. On 14 August 2013, the appeal against Mr Berger's suspension was dismissed. On 15 August 2013, Mr Berger was granted a stay of the appeal's dismissal, again subject to certain conditions. Condition 6 of the grant of the stay was that on or before 21 August 2013, Mr Berger notify his clients of the outcome of the principal proceedings, namely, the court's decision to dismiss the practitioner's appeal against his suspension.

140. In August 2013, Mr Berger and Ms Frischer exchanged email correspondence in relation to her will, but he failed to notify her of the outcome of the appeal.

141. The Tribunal found that Ms Frischer was a "client" within the meaning of Condition 6 of the stay and that Mr Berger breached Condition 6 by failing to notify Ms Frischer by 21 August 2013 of the

court's decision dismissing his appeal.

142. The Tribunal found that such conduct was unsatisfactory professional conduct and demonstrated a less than serious respect for orders and conditions imposed on him by the Supreme Court.

Complaint ground 11 – "Use of Deposit of Mr and Mrs [Ho] – Unethical conduct – applying monies in breach of the terms of an agreement under which they were received"

143. As at 16 August 2012, Mr Berger was the sole director and shareholder of a company, Storey Street Development Pty Limited, which was undertaking a residential development in Storey Street, Maroubra. As at 16 August 2012, that development was incomplete. On 16 August 2012, Mr and Mrs Ho entered into a contract for sale of land as purchasers with Storey Street Development Pty Limited as vendor of Lot 1 in the development. The deposit payable pursuant to the contract was $57,500, which was paid into the trust account of the law practice.

144. Contracts were executed and exchanged on 31 August 2012. Special Condition 12 of the contract (set out at [47]) contained qualifications as to how the deposit could be used. No other Special Condition provided for early release of the deposit.

145. At some time after 16 August 2012, Mr Berger caused the deposit to be disbursed from the trust account of the law practice without consultation with, or notice to, the purchasers or their solicitor. Special Condition 12 was not complied with. The disbursement of the deposit was in breach of contract.

146. On 4 July 2014, Storey Street Development Pty Limited, by letter signed by Mr Berger, purported to rescind the Lot 1 contract. On 8 July 2014, Mr and Mrs Ho, through their solicitor, advised Mr Berger that they did not accept the notice of rescission but that if the contract was validly rescinded they were entitled to a refund of their deposit. The Tribunal found that the deposit has not been returned.

147. The Tribunal found that Mr Berger knew that Special Condition 12 applied to the deposit and that it had not been complied with when he caused the deposit to be disbursed from the trust account.

148. The Tribunal found that the conduct of Mr Berger in paying the deposit out of the trust account and to his company was in breach of the sale agreement. The Tribunal described Mr Berger's conduct as dishonest and fraudulent. The Tribunal concluded that Mr Berger's conduct was seriously unethical conduct amounting to professional misconduct.

Complaint ground 6.1 – "Purported to act under a Power of Attorney after the donor of the power had died – execution of transfer"

149. On or about 31 August 2012, Mr Berger exercised the power of attorney of Mrs Domabyl and exchanged contracts for the sale of her retirement village unit. Mrs Domabyl died on 4 October 2012. Mr Berger was notified of her death on 5 October 2012. The sale was not then completed.

150. The solicitor for the purchaser of the unit sent the transfer document to Mr Berger under cover of a letter dated 3 October 2012. Mr Berger (illegibly) signed the transfer which was received by the solicitor for the purchaser under cover of a letter from Mr Berger dated 9 October 2012. The transfer did not refer to a power of attorney or indicate that it was Mr Berger and not Mrs Domabyl who had signed the document.

151. The Tribunal found that Mr Berger was aware the power of attorney ceased to apply upon Mrs Domabyl's death on 4 October 2012 and also knew that, if the purchaser's solicitors became aware of her death, the sale could be aborted or stalled, and for that reason he did not inform the purchasers. The Tribunal found that purporting to make the transfer effective via the power of attorney was dishonest conduct and Mr Berger knew it was dishonest.
152. The Tribunal found that signing the transfer and signing Annexure A to the transfer were both unsatisfactory professional conduct.

Complaint grounds 6.2 and 7.1 – "Purporting to act under a Power of Attorney after donor of the power had died" and "Purporting to act as executor of her will when there was no grant of probate – Settlement instructions and settlement"

153. Mr Berger, on or before 12 October 2012, instructed his staff to give directions to the purchaser's solicitors as to how cheques for the settlement amount of Mrs Domabyl's property were to be drawn. He denied that he did so purportedly as Mrs Domabyl's attorney but admitted he did so purporting to be exercising powers of an executor of Mrs Domabyl's estate. Probate of the will had not yet been granted and he had no such powers.
154. Mr Berger stated that he thought he had power as someone named as executor to deal with the assets of the deceased. The Tribunal found on the basis of Mr Berger's training and experience that such ignorance or mistaken belief was not credible. Mr Berger knew that he had no authority pursuant to the power of attorney and no authority as executor pending the grant of probate. He nonetheless completed the sale of Mrs Domabyl's property.
155. The Tribunal found that Mr Berger's conduct was dishonest. The Tribunal concluded that Mr Berger's conduct amounted to unsatisfactory professional conduct.

Complaint grounds 1.1, 2.1, 3 and 7.1 – First Payment

156. On or about 12 October 2012, on settlement of the sale of Mrs Domabyl's property, the cheque for $154,000 payable to Mr Berger was deposited into a bank account in Mr Berger's name. The Tribunal found that this was trust money belonging to the estate of Mrs Domabyl and that s 254 of the *Legal Profession Act 2004* required the cheque to be deposited into a law practice trust fund.
157. The Tribunal found that Mr Berger knew that: the $154,000 cheque represented trust money belonging to the estate of Mrs Domabyl; he was required to deposit it into the law practice trust account; he had no power to act as executor until a grant of probate; and causing the $154,000 to be paid to him and its deposit in his bank account was unlawful and dishonest.
158. The Tribunal found that, in breaching the *Legal Profession Act 2004* by causing a deficiency in the trust account of the law practice, purporting to act as executor without probate in depositing the money and misappropriating the funds, Mr Berger was guilty of professional misconduct.

Second Payment

159. As noted above, the Law Society withdrew the allegation about the Second Payment.

Complaint grounds 4.1 and 7.2 – Third Payment

160. On 6 December 2012, Mr Berger sent a letter, addressed to Mrs Domabyl, to himself as her attorney which purported to outline the settlement of the sale and stated that there was a shortfall of

$1,540.92 which would be transferred from trust.

161. On or about 7 December 2012, Mr Berger caused $1,540.92 to be debited from the trust monies held on behalf of the estate of Mrs Domabyl and transferred from the trust account of the law practice to the office account of the law practice.

162. As at 7 December 2012, probate had not been granted and thus Mr Berger had no authority to make this payment as executor.

163. The Tribunal found that Mr Berger knew that the money was trust money and that he had no authority as executor until probate had been granted. Mr Berger disbursed the money in breach of s 255 of the *Legal Profession Act 2004*, and he knew his conduct was prohibited by law and dishonest.

164. The Tribunal found that in purporting to act as executor and in causing the transfer of the money from trust Mr Berger's conduct was unsatisfactory professional conduct.

Complaint grounds 1.2, 2.2, 4.2, 5 and 7.3 – Fourth Payment

165. On or about 25 January 2013, Mr Berger caused $20,000 to be paid from trust monies held on behalf of Mrs Domabyl's estate to his son-in-law purportedly "on account of legal fees due to me and directed to be paid to [his son-in-law]."

166. Mr Berger stated that he did not believe that the $20,000 was trust money and had a "mistaken belief and understanding" that he could act as executor without a grant of probate. The Tribunal found that Mr Berger did not have a "mistaken belief and understanding".

167. The Tribunal found that Mr Berger breached s 255 and s 259 of the *Legal Profession Act 2004*, caused a deficiency of $20,000 in the law practice trust account, and purported to act as executor when he had no authority to so act. The Tribunal found that Mr Berger knew that his conduct was illegal and dishonest. The conduct was also objectively dishonest.

168. The Tribunal found that Mr Berger's conduct was fraudulent and dishonest and amounted to unsatisfactory professional conduct.

Complaint grounds 4.2, 7.4, 2.3 and 10 – Fifth Payment

169. On 2 January 2013, upon the death of Mrs Dougall, the power of attorney executed in favour of Mr Berger was terminated. No probate had then been granted. On or about 23 April 2013, Mr Berger caused the sum of $8,751.90 to be paid into the office account of the law practice purportedly for legal fees.

170. The Tribunal found that: Mr Berger knew the money was trust money; he had no authority to make the payment; his conduct was unlawful and dishonest; he breached s 255 of the *Legal Profession Act 2004*; he purported to act as executor with no probate; and he caused a deficiency of $8,751.90 in the trust account of the estate.

171. The Tribunal found that the conduct was dishonest and amounted to unsatisfactory professional conduct.

Complaint grounds 2.4, 4.3 and 7.5 – Sixth Payment

172. On or about 22 April 2013, Mr Berger caused a tax invoice to be prepared in relation to the estate of Mrs Domabyl for a total of $14,341.55. Since he had not made the required costs

disclosures under s 309 of the *Legal Profession Act 2004*, the estate was not obliged to pay the costs unless they had been assessed. They had not been assessed.

173. On about 6 May 2013, Mr Berger caused the sum of $14,341.55 to be paid from trust monies held on behalf of Mrs Domabyl to the office account on account of fees.

174. The Tribunal found that: Mr Berger knew at the time of the payment that the money was trust money; he had no authority under the power of attorney; the payment was not authorised by probate; and the payment would be illegal and dishonest and in breach of s 255 of the *Legal Profession Act 2004*.

175. The Tribunal found that this was unsatisfactory professional conduct.

Complaint ground 12 – Overcharging Mrs Domabyl

176. The Tribunal accepted the evidence of Ms Rosati, a costs assessor, that the actual amount that should have been charged by Mr Berger to Mrs Domabyl was $39,257.03. The difference between that amount and Mr Berger's bill of $176,800.94 was $137,543.91, being the extent of the overcharge.

177. The Tribunal concluded that the overcharging amounted to professional misconduct.

Conclusion of the Tribunal

178. The Tribunal rejected an application that the members constituting the Tribunal disqualify themselves, concluded that Mr Berger was guilty of professional misconduct and set the matter down for a penalty hearing.

The Penalty Judgment

179. On 5 January 2018, the Tribunal ordered the removal of Mr Berger from the roll of local lawyers: *Council of the Law Society of NSW v Berger* [2018] NSWCATOD 4 ("Penalty Judgment").

180. The Tribunal identified a series of antecedent complaints, four of which were highlighted, being those which were investigated and found proved. Seventy other complaints were mentioned and it was noted that not all had been substantiated.

181. The Tribunal considered character evidence and concluded that the professional misconduct and unsatisfactory professional conduct were aspects of Mr Berger's behaviour that he concealed from most of the people he mixed with in the community. No character evidence was given by any solicitor who had worked in the same legal practice as Mr Berger.

182. The Tribunal found that the complaints proved were extensive and extremely serious, and included dishonest and fraudulent behaviour.

183. Mr Berger acknowledged that the findings of the Tribunal in the Stage 1 matter "reveal many failings on my part to meet my professional obligations" but said "I do not believe that I have engaged in dishonesty ...".

184. Taking account of Mr Berger's conduct and "entrenched inadequacies regarding costs disclosures and ... conduct that has been dishonest and sometimes fraudulent ..." the Tribunal was not satisfied he was currently fit to practise as a legal practitioner.

185. The Tribunal was satisfied that the protection of the public required it to make an order that Mr Berger's name be removed from the roll of lawyers. The Tribunal found that there was no evidence supporting a finding that Mr Berger was not likely to remain permanently unfit to practise as a legal practitioner.

Amended notice of appeal

186. The amended notice of appeal filed on 8 October 2016 provided as follows:
. (1) "The Tribunal:
. (a) Erred in finding (at paragraph [220] of its judgment delivered on 21 September 2017 ("liability judgment")) that the Respondent had established the Appellant was guilty of professional misconduct and [sic] alleged in ground 11 of the complaint.
. (b) Instead, should have dismissed ground 11 of the complaint.
. (2) The Tribunal:
. (a) Erred in finding (at paragraph [171] of the liability judgment) that the Appellant's failures to make costs disclosures amounted to professional misconduct.
. (b) Instead, should have found that the failures to make costs disclosures amounted to unsatisfactory professional misconduct.
. (3) The Tribunal:
. (a) Erred in finding (at paragraph [199] of the liability judgment) that the Respondent had established ground 8 of the complaint and that the Appellant was guilty of unsatisfactory professional misconduct.
. (b) Instead, should have dismissed ground 8 of the complaint.
. (4) The Tribunal:
. (a) Erred in finding (at paragraph [270] of the liability judgment) that the Appellant had misappropriated $154,000 and erred in making the related findings at paragraphs [282], [296], [308], and [318].
. (b) Instead should have dismissed grounds 1.1, 2.1, 3 and 7.1 of the complaint.
. (5) The Tribunal:
. (a) Erred in finding (at paragraph [361] of the liability judgment) that ground 12 of the complaint was made out and that the Appellant was guilty of professional misconduct.
. (b) Instead, should have dismissed ground 12 of the complaint.
. (6) The Tribunal:
. (a) Erred in its judgment dated 5 January 2018 (the penalty judgment) making an order striking the Appellant's name off the roll of local lawyers.
. (b) Instead, should have reprimanded the Appellant and ordered appropriate conditions be placed on his practising certificate be imposed.

Particulars

(i) the Appellant repeats the appeal grounds above and further or in the alternative says;

(ii) the Tribunal erred in finding and giving weight to ifs finding (at paragraphs [20] and [39] of the penalty judgment) that there was a list of more than 70 complaints against the Appellant, in circumstances where almost of all of those complaints had not resulted in adverse findings;

(iii) the Tribunal erred (at paragraphs [21]-[26] of the penalty judgment) in not affording any or proper weight to the evidence of the character witnesses relied on by the Appellant.

(iv) the Tribunal erred in failing to address the question of the Appellant's fitness at the time of the order.

(7) The Tribunal erred in finding (at paragraph [44]) of the Liability Judgment) that the Appellant presented as an unreliable witness and (at [52]) of the Liability Judgment that the Appellant was often evasive ... [and] avoided questions and gave unresponsive answers."

187. The factual challenges set out in items (6) and (7) immediately above were added on the morning of the second day of the appeal. The Law Society did not oppose leave being granted to raise them.

The notice of contention

188. The Law Society contended that the decision of the Tribunal should be affirmed on grounds other than those relied on by the Tribunal. I will not set out the terms of the lengthy notice of contention, as I have concluded that it is essentially irrelevant.
189. Mr Lloyd who appeared for Mr Berger in this Court accepted that if the findings of dishonesty made by the Tribunal were not set aside by this Court, the order that Mr Berger should be struck from the roll was inevitable. The Law Society's notice of contention sought to support the striking off order on the basis, in effect, that the findings made were so serious that the appropriate conclusion was that findings of professional misconduct should be made.
190. The notice of contention did not address the critical issue in this case about whether dishonesty was sufficiently clearly alleged by the Law Society, but essentially assumed that a reference to "misappropriation", "deficiency from a trust account" and breach of s 255 and s 259 of the *Legal Profession Act 2004* was sufficient, without more, to establish that Mr Berger's conduct was dishonest. The basis upon which the notice of contention was advanced suffered from the same ambiguity as the Complaint. If the appellant's appeal succeeded there would be no occasion to uphold the Tribunal's decision on the basis of essentially the same reasoning that Mr Berger attacks in his appeal. The notice of contention need not be considered further.

Mr Berger's submissions

191. As mentioned at the outset, faced with the lengthy and confusing attempts to address the critical issues that have characterised this case, Mr Lloyd for Mr Berger addressed in writing his grounds of appeal in the order in which they appeared in the notice of appeal. I will attempt to summarise the submissions made on behalf of Mr Berger here and in the same order. In doing so, however, it is to be noted that in oral submissions Mr Lloyd attempted to characterise the complaints made about the decision of the Tribunal in a different order, by identifying what he submitted were the most important themes of his complaint. It is in that thematic order that I will ultimately address Mr Berger's appeal. However, I will return to the specific grounds of appeal at the conclusion of my consideration of those most important themes.

Ground 1 – The Tribunal erred in finding that the Law Society had established that Mr Berger was guilty of professional misconduct in respect of ground 11 of the Complaint

192. The appellant submitted that the Law Society's case against Mr Berger in ground 11 of the Complaint was that he misused a deposit paid to Storey Street Development Pty Ltd as vendor for the sale of land. It was submitted that the Law Society alleged that this conduct was "unethical", but did not contend that Mr Berger misused the deposit "knowingly" or "dishonestly". It was submitted that the Law Society failed to plead any material facts sufficient to establish dishonesty or a substantial failure to maintain a reasonable standard of diligence and competence, and thus the findings made by the Tribunal were not open. The appellant refined this submission in oral argument. Mr Lloyd accepted that the Law Society had conducted a case from the beginning alleging what was described as "objective dishonesty", but submitted that the Law Society's case was never that Mr Berger was "subjectively dishonest".

193. The appellant submitted that the correct test to establish dishonesty was:

. (1) identify the knowledge, belief or intent which is said to render the acts dishonest;

. (2) determine whether Mr Berger subjectively had that knowledge, belief or intent; and

. (3) prove that the acts were objectively dishonest according to the standards of ordinary and decent people.

194. The appellant submitted that the Tribunal erred in the way in which it applied the onus of proof, which rested at all times upon the Law Society in accordance with the *Briginshaw* principles: *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34. It was submitted that a legal practitioner bears an "evidentiary onus" in respect of certain exculpatory matters, meaning that the practitioner must point to matters worthy of consideration as possible excuses and, once raised, they become matters the Law Society must disprove. It was submitted that the Tribunal did not make findings as to the onus of proof, the application of the *Briginshaw* principle or the principles in *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8, but rather often held against Mr Berger that there was "no evidence" of a certain point in contention. The appellant submitted that the Tribunal's finding of professional misconduct was not open on the evidence as the Law Society elected not to call any witnesses to contradict Mr Berger's evidence regarding the impugned part of the contract.

195. The appellant submitted that, even if the impugned contractual provision was a term of the contract, the Law Society did not establish that the deposit was spent inconsistently with that provision and the Tribunal did not say in its reasons how it was satisfied that the funds had been applied in breach of the provision. It was submitted that the Law Society relied only on the narratives of the trust ledger and Mr Berger's inability to recall the details of the spending during cross-examination.

Ground 2 – The Tribunal erred in finding that the Law Society had established that Mr Berger was guilty of professional misconduct in respect of ground 9 of the Complaint

196. The appellant submitted that the Law Society's case against Mr Berger in ground 9 of the Complaint was that he failed to make adequate costs disclosures to a client. It was submitted that the Law Society did not plead that Mr Berger's failures to disclose were dishonest or allege professional misconduct under s 497(1)(b) of the *Legal Profession Act 2004*.

197. The appellant submitted that the finding of professional misconduct was not open having regard to the manner in which the Law Society's case was conducted. It was submitted that Mr Berger's conduct was not dishonest or improper and that Mr Berger believed he was acting in the best interests of his client and thus entitled to issue an invoice. It was submitted that Mr Berger's genuine belief was never challenged at the hearing.

198. The appellant submitted that the Tribunal did not make any findings in respect of Mr Berger's defence under s 312(1)(a) of the *Legal Profession Act 2004* and instead found that the *Legal Profession Act 1987* applied at the commencement of Mr Berger's work for Mrs Domabyl. It was submitted, therefore, that many of the later alleged failures to disclose were not breaches of the 2004 Act, and the Law Society bore the onus of disproving that any such defence in the 2004 Act applied.

Ground 3 – The Tribunal erred in finding that the Law Society had established that Mr Berger was guilty of unsatisfactory professional conduct in respect of ground 8 of the Complaint

199. The appellant submitted that the Law Society's case against Mr Berger in ground 8 of the Complaint was that Mr Berger failed to comply with a condition of a court order to notify his clients of the outcome of the principal proceedings relating to the suspension of his practising certificate. It was submitted that the Tribunal misconstrued or misapplied the term "client" and Ms Frischer was not a client within the meaning of the court order.
200. The appellant submitted that the Tribunal's finding at [198] impermissibly strayed beyond the Law Society's pleaded case, and that an inadvertent breach of a court order is not a proper basis for a finding of unsatisfactory professional conduct.
201. The appellant submitted that the Tribunal impermissibly reversed the onus of proof. It was submitted that the fact Mr Berger did not disclose in his documents the details of his instructions or explicitly state that he checked the list of clients his staff prepared does not establish that he in fact did not check the list.
202. The appellant submitted that the finding that Ms Frischer was a client and the finding at [198] were not open, on the basis that making such findings would be a denial of procedural fairness because it was not put to Mr Berger that the system he implemented to comply with the court order was inadequate nor was it put to him that he did not check the list prepared by his staff.

Ground 4 – The Tribunal erred in finding that the Law Society had established that Mr Berger was guilty of professional misconduct on the basis of dishonest misappropriation

203. The appellant submitted that the Law Society's case against Mr Berger was that Mr Berger had misappropriated the First Payment of $154,000 dishonestly. It was submitted that the Tribunal's findings at [270] was not open on the pleaded case as the Law Society did not plead any subjective knowledge, belief or intention which was said to render the acts dishonest, and the facts relied upon to establish dishonesty were solely objective facts.
204. The appellant submitted that the findings were not open on the basis that to make such findings, having regard to the manner in which the case was conducted, would be a breach of procedural fairness. The appellant met the allegation of misappropriation by giving evidence that he believed he was entitled to the funds as they were payable towards legal costs owing. It was submitted that Mr Berger was not challenged on this case, and it was not suggested to him that he was dishonest or his belief in his entitlement to the funds was not genuinely held.
205. The appellant submitted that the findings were not open on the evidence because the objective facts and significant unchallenged evidence negate any finding of dishonesty. It was submitted that Mr Berger invoiced his clients and received no objection to the invoice.

Ground 5 – The Tribunal erred in finding that the Law Society had established that Mr Berger was guilty of professional misconduct in respect of ground 12 of the Complaint

206. The appellant submitted that the Law Society's case in ground 12 of the Complaint was that Mr Berger engaged in professional misconduct in overcharging Mrs Domabyl, namely, charging professional rates for non-legal work, charging for work done pursuant to a power of attorney, and charging for work or disbursements where the nature of the work was unknown or unclear.
207. The appellant submitted that the Tribunal failed to address Mr Berger's contention on the principle of finality, namely that controversies, once resolved, are not to be re-opened except in narrowly defined circumstances. In the present case, Mr Berger had his costs in relation to the alleged overcharging assessed in conformity with an undertaking given to the Supreme Court and with the knowledge of the Law Society. The appellant submitted that there was a commonality of issues between the determination of the costs assessor and the determination of the Tribunal since the costs assessor was required to consider the fairness and reasonableness of the amount of costs pursuant to s 328(5) of the *Legal Profession Act 2004*, to report any that are "grossly excessive" pursuant to s 393, and to produce a certificate and reasons pursuant to s 368 and s 370, and this determination was final under s 372. It was submitted that the costs assessor had finally determined that the costs were not grossly excessive and the Law Society was barred from pursuing a different outcome in the Complaint.
208. The appellant alternatively submitted that, even if the principle of finality does not bar the Law Society from pursuing a different outcome in the Complaint, the fact that an independent statutory body has assessed the costs as fair and reasonable is something that ought to be given significant weight.
209. The appellant submitted that the Tribunal erred in finding that the charging of professional fees for non-legal work per se amounts to overcharging. It was submitted that whether a client would expect a solicitor to charge professional rates for non-legal work depends on the circumstances, and in the present case the client was without another in whom she reposed confidence to assist with the management of her affairs.
210. The appellant submitted that the Tribunal erred in finding that there was no agreement in place for Mr Berger to charge for non-legal work and for work performed pursuant to a power of attorney. As Mr Berger gave evidence alleging that the work was being done with the consent and at the direction of the client, the appellant submitted that the Tribunal either impermissibly reversed the onus of proof or made a finding not open on the evidence.
211. The appellant submitted that the Tribunal erred in finding overcharging for professional fees which on the face of the invoice were for an unknown or unclear purpose. It was submitted that the onus of proving overcharging rested on the Law Society and it was impermissible to reverse that onus and say that an unclear bill was per se overcharging unless Mr Berger proved the contrary.
212. The appellant submitted that the Law Society adduced insufficient evidence to establish overcharging, relying solely on the invoice and the interpretation of an expert witness.

Ground 6 – The Tribunal erred in the Penalty Judgment in striking Mr Berger's name off the roll

213. On the basis of appeal grounds 1-5, the appellant submitted that the Tribunal erred in finding Mr Berger was guilty of professional misconduct and in finding that the conduct was dishonest. It was submitted that the highest the Tribunal's findings go are findings of unsatisfactory professional

conduct and professional misconduct, but in circumstances where Mr Berger should not have been found guilty of dishonesty.

214. The appellant submitted that the Tribunal erred in giving weight to the fact that there was a list of more than 70 complaints against Mr Berger, since almost all of the complaints had not resulted in adverse findings.

215. The appellant submitted that the Tribunal erred in not affording any or proper weight to the character references relied upon by Mr Berger. It was submitted that those references which gave evidence of Mr Berger's good character, reputation in the legal profession and contributions to the broader community were not challenged and capable of being relevant.

216. The appellant submitted that the Tribunal erred in failing to address Mr Berger's fitness at the time of the order, and determined the question solely at the time of the relevant issues that were the subject of the Complaint, which occurred in around 2012. It was submitted that many years have passed and the proper time to determine the question is the date of the order.

217. In oral submissions, the appellant submitted that most of the findings of unsatisfactory professional conduct and professional misconduct relate only to Mrs Domabyl who was a difficult client and a very unusual situation. It was submitted that it was necessary to consider mitigating factors and that, even if there was a finding of misappropriation, that finding does not necessarily warrant removal from the roll. The appellant set out 10 factors from *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320, which it submitted may be relevant to whether Mr Berger was fit and proper to engage in legal practice.

Ground 7 – The Tribunal erred in finding that Mr Berger presented as an unreliable witness who was often evasive, avoided questions and gave unresponsive answers

218. The appellant submitted that the Tribunal's findings about Mr Berger's credibility were not open because the allegation was not put or pleaded or the finding was not open on the evidence. It was submitted that Mr Berger's presentation in the witness box was of doubtful relevance because his evidence was largely unchallenged by any competing factual evidence and his state of mind in relation to his conduct was not put into issue.

219. The appellant submitted that, in any event, a fair review of the transcript of Mr Berger's evidence does not support the Tribunal's finding that he was often evasive or appeared at times to be controlling or arrogant or that he avoided questions.

220. The appellant submitted that the Tribunal wrongly formed an adverse view of Mr Berger based on impermissible "concerns" about his reliability before he entered the witness box, at times a misunderstanding of his evidence and an assessment of his conduct in response to what amounted to cross-examination by the Tribunal's members.

221. In oral submissions, the appellant submitted that the Tribunal in making the findings about credibility relied on its "initial concerns" which arose before the hearing commenced and were unsupported by the evidence or went to matters outside the complaints made. It was also submitted that this Court should exercise care in affirming the Tribunal's findings about the way in which Mr Berger gave his evidence since the findings of dishonesty, fraud and illegality made which were not open suggest a degree of lack of care by the Tribunal in making very serious adverse findings.

Challenge to factual findings by the appellant

222. Appended to the appellant's submissions in reply was a challenge to five factual findings pursuant to *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR"), r 51.36(2):

. (1) the factual finding that Special Condition 12 formed part of the contract (Liability Judgment at [217]) was challenged. It was submitted that the Tribunal should have found that Special Condition 12 was not part of the contract;

. (2) the factual finding that Mr Berger knew that Special Condition 12 was part of the contract (Liability Judgment at [218]) was challenged. It was submitted that the Tribunal should have found that he did not believe that Special Condition 12 was part of the contract;

. (3) the factual finding that Ms Frischer was a client of Mr Berger's (Liability Judgment at [197]) was challenged. It was submitted that the Tribunal ought to have found that Ms Frischer was not a client at the relevant time;

. (4) the factual finding that there was no agreement in place with Mrs Domabyl for Mr Berger to charge for non-legal work (Liability Judgment at [337], [349]) was challenged. It was submitted that the Tribunal ought to have found that the work was done as a solicitor with the consent of and at the direction of Mrs Domabyl; and

. (5) the factual finding that Mr Berger had engaged in overcharging (Liability Judgment at [352]) was challenged. It was submitted that the Tribunal ought to have found that Mr Berger did not engage in overcharging.

Relevant legislation

223. A party has a statutory right to appeal to the Supreme Court in respect of a "profession decision" under the *Civil and Administrative Tribunal Act 2013* (NSW), Sch 5, cl 29(2). A "profession decision" includes a decision for the purposes of the *Legal Profession Uniform Law* (NSW): *Civil and Administrative Tribunal Act*, Sch 5, cl 29(1)(e).

224. Under the *Civil and Administrative Tribunal Act*, a reference to the *Legal Profession Uniform Law* includes a reference to the *Legal Profession Act*: *Civil and Administrative Tribunal Act*, Sch 1, cl 21(a). The *Legal Profession Uniform Law*, Sch 4, cl 2 provides, in substance, that things done under provisions of the *Legal Profession Act 2004* that correspond to provisions of the *Legal Profession Uniform Law* that were done before the commencement of the *Legal Profession Uniform Law* continue in effect as if they were done under the *Legal Profession Uniform Law*. Hence an investigation that commenced before 1 July 2015 is taken to have been done under the *Legal Profession Uniform Law*. It is by virtue of the *Legal Profession Uniform Law*, Sch 4 that provisions in the *Legal Profession Act 2004* continue to apply.

225. The matter is assigned to this Court under the *Supreme Court Act 1970* (NSW), s 48(1)(a)(viii): *Konstantinidis v Council of the Law Society of New South Wales* [2018] NSWCA 59 at [15]. The appeal to this Court is by way of rehearing under the Supreme Court Act, s 75A: *Civil and Administrative Tribunal Act*, Sch 5, cl 29(4)(a).

226. It is also desirable to record that in conducting the rehearing, the Court must be astute to ensure that evidence and submissions made by the appellant in this Court, which on one view may have supported the findings of the Tribunal, are not taken into account in reaching any decision adverse to the appellant as to do so, in the absence of a clear warning from the Court, would amount to a denial of procedural fairness: *Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256 at 267-269 (Brennan, Dawson, Toohey and Gaudron JJ); [1992] HCA 36.

227. The relevant provisions of the *Legal Profession Act 1987* (NSW) and the *Legal Profession Act 2004* (NSW) were set out at length by the Tribunal. It is unnecessary to repeat all of those

provisions. The most relevant provisions were as follows.

228. The *Legal Profession Act 1987* made detailed provision for a disclosure of costs, the total amount of costs and the basis of calculating costs. There was no challenge by Mr Berger to the Tribunal's finding that at the outset of his engagement by Mrs Domabyl in February 2005, the relevant exclusion was contained in s 180 of the 1987 Act:

> **180 Exception to disclosure**
>
> A disclosure is not required to be made under this Division when it would not be reasonable to be required to do so.

229. Relevant to the trust account issues, during the relevant period from October 2012 to May 2013 when the First to Sixth Payments were made, the *Legal Profession Act 2004* (version for 8 July 2011 to 2 June 2013) provided:

> **254 Certain trust money to be deposited in general trust account**
>
> (1) Subject to section 258A, as soon as practicable after receiving trust money, a law practice must deposit the money in a general trust account of the practice unless:
>
> (a) the practice has a written direction by an appropriate person to deal with it otherwise than by depositing it in the account, or
>
> (b) the money is controlled money, or
>
> (c) the money is transit money, or
>
> (d) the money is the subject of a power given to the practice or an associate of the practice to deal with the money for or on behalf of another person.
>
> Maximum penalty: 100 penalty units.
>
> (2) Subject to section 258A, a law practice that has received money that is the subject of a written direction mentioned in subsection (1) (a) must deal with the money in accordance with the direction:
>
> (a) within the period (if any) specified in the direction, or
>
> (b) subject to paragraph (a), as soon as practicable after it is received.
>
> Maximum penalty: 100 penalty units.

(3) The law practice must keep a written direction mentioned in subsection (1) (a) for the period prescribed by the regulations.

Maximum penalty: 50 penalty units.

...

(5) A person is an ***appropriate person*** for the purposes of this section if the person is legally entitled to give the law practice directions in respect of dealings with the trust money.

255 Holding, disbursing and accounting for trust money

(1) A law practice must:

(a) hold trust money deposited in a general trust account of the practice exclusively for the person on whose behalf it is received, and

(b) disburse the trust money only in accordance with a direction given by the person.

Maximum penalty: 50 penalty units.

...

259 Protection of trust money

(1) Money standing to the credit of a trust account maintained by a law practice is not available for the payment of debts of the practice or any of its associates.

(2) Money standing to the credit of a trust account maintained by a law practice is not liable to be attached or taken in execution for satisfying a judgment against the practice or any of its associates.

(3) This section does not apply to money to which a law practice or associate is entitled.

230. Relevant to costs disclosure issues in the period after the commencement of the 2004 Act (version for 21 December 2004 to 30 June 2005) are the following provisions:

309 Disclosure of costs to clients[1]

(1) A law practice must disclose to a client or prospective client in accordance with this Division:

(a) the basis on which legal costs will be calculated, including whether a fixed costs provision applies to any of the legal costs, and

(b) the client's or prospective client's right to:

(i) negotiate a costs agreement with the law practice, and

(ii) receive a bill from the law practice, and

(iii) request an itemised bill within 30 days after receipt of a lump sum bill, and

(iv) be notified under section 316 of any substantial change to the matters disclosed under this section, and

(c) an estimate of the total legal costs if reasonably practicable or, if it is not reasonably practicable to estimate the total legal costs, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs, and

(d) details of the intervals (if any) at which the client or prospective client will be billed, and

...

310 Disclosure if another law practice is to be retained

(1) If a law practice intends to retain another law practice on behalf of the client, the first law practice must disclose to the client the details specified in section 309 (1) (a), (c), (d) and (e) in relation to the other law practice, in addition to any information required to be disclosed to the client under section 309.

(2) A law practice retained or to be retained on behalf of a client by another law practice is not required to make disclosure to the client under section 309, but must disclose to the other law practice the information necessary for the other law practice to comply with subsection (1).

(3) This section does not apply if the first law practice ceases to act for the client in the matter when the other law practice is retained.

Note. An example of the operation of this section is where a barrister is retained by a firm of solicitors on behalf of a client of the firm. The barrister must disclose to the firm details of the barrister's legal costs and

billing arrangements, and the firm must disclose those details to the client. The barrister is not required to make a disclosure directly to the client.

311 How and when must disclosure be made?[1]

(1) Disclosure under section 309 must be made in writing before, or as soon as practicable after, the law practice is retained in the matter.

(2) Disclosure under section 310 (1) must be made in writing before the other law practice is retained except in urgent circumstances, in which case it may be made orally before the law practice is retained and confirmed in writing as soon as practicable afterwards.

312 Exceptions to requirement for disclosure[2]

(1) Disclosure under section 309 or 310 (1) is not required to be made in any of the following circumstances:

(a) if the total legal costs in the matter, excluding disbursements, are not likely to exceed $750 or the amount prescribed by the regulations (whichever is higher),

(b) if:

(i) the client has received one or more disclosures under section 309 or 310 (1) from the law practice in the previous 12 months, and

(ii) the client has agreed in writing to waive the right to disclosure, and

(iii) a principal of the law practice decides on reasonable grounds that, having regard to the nature of the previous disclosures and the relevant circumstances, the further disclosure is not warranted,

...

(2) Despite subsection (1) (a), if a law practice becomes aware that the total legal costs are likely to exceed $750 or the amount prescribed by the regulations (whichever is higher), the law practice must disclose the matters in section 309 or 310 (as the case requires) to the client as soon as practicable.

...

316 Ongoing obligation to disclose[3]

A law practice must notify the client in writing of any substantial change to anything included in a disclosure under this Division as soon as is reasonably practicable after the law practice becomes aware of that change.

317 Effect of failure to disclose[4]

(1) If a law practice does not disclose to a client anything required by this Division to be disclosed, the client need not pay the legal costs unless they have been assessed under Division 11.

Note. Under section 369 (Recovery of costs of costs assessment), the costs of an assessment in these circumstances are payable by the law practice.

(2) If a law practice does not disclose to a client anything required by this Division to be disclosed and the client has entered a costs agreement with the law practice, the client may also apply under section 328 for the costs agreement to be set aside.

(3) A law practice that does not disclose to a client anything required by this Division to be disclosed may not maintain proceedings for the recovery of legal costs unless the costs have been assessed under Division 11.

(4) Failure by a law practice to comply with this Division is capable of being unsatisfactory professional conduct or professional misconduct on the part of any Australian legal practitioner or Australian-registered foreign lawyer involved in the failure.

...

231. The meanings of unsatisfactory professional conduct and professional misconduct in the *Legal Profession Act 2004* are as follows:[5]

496 Unsatisfactory professional conduct

For the purposes of this Act:

Unsatisfactory professional conduct includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

497 Professional misconduct

(1) For the purposes of this Act:

professional misconduct includes:

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

(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the matters that would be considered under section 25 or 42 if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate and any other relevant matters.

232. The orders available to the Tribunal were found in *Legal Profession Act 2004* (version for 4 July 2014 to 30 June 2015):

562 Determinations of Tribunal

(1) **Orders generally**

If, after it has completed a hearing under this Part in relation to a complaint against an Australian legal practitioner, the Tribunal is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the Tribunal may make such orders as it thinks fit, including any one or more of the orders specified in this section.

(2) **Orders requiring official implementation in this jurisdiction**

The Tribunal may make the following orders under this subsection:

(a) an order that the name of the practitioner be removed from the local roll,

(b) an order that the practitioner's local practising certificate be suspended for a specified period or cancelled,

(c) an order that a local practising certificate not be issued to the practitioner before the end of a specified period,

(d) an order that:

(i) specified conditions be imposed on the practitioner's practising certificate issued or to be issued under this Act, and

(ii) the conditions be imposed for a specified period, and

(iii) specifies the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed,

(e) an order reprimanding the practitioner,

...

(3) **Orders requiring official implementation in another jurisdiction**

The Tribunal may make the following orders under this subsection:

(a) an order recommending that the name of the practitioner be removed from an interstate roll,

(b) an order recommending that the practitioner's interstate practising certificate be suspended for a specified period or cancelled,

(c) an order recommending that an interstate practising certificate not be granted to the practitioner before the end of a specified period,

(d) an order recommending that:

(i) specified conditions be imposed on the practitioner's interstate practising certificate, and

(ii) the conditions be imposed for a specified period, and

(iii) the conditions specify the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed.

(4) **Orders requiring compliance by practitioner**

The Tribunal may make the following orders under this subsection:

(a) an order that the practitioner pay a fine of a specified amount,

(b) an order that the practitioner undertake and complete a specified course of further legal education,

(c) an order that the practitioner undertake a specified period of practice under supervision,

(d) an order that the practitioner do or refrain from doing something in connection with the practice of law,

(e) an order that the practitioner cease to accept instructions as a public notary in relation to notarial services,

(f) an order that the practitioner's practice, or the financial affairs of the practitioner or of the practitioner's practice, be conducted for a specified period in a specified way or subject to specified conditions,

(g) an order that the practitioner's practice be subject to periodic inspection for a specified period,

(h) an order that the practitioner undergo counselling or medical treatment or act in accordance with medical advice given to the practitioner,

(i) an order that the practitioner use the services of an accountant or other financial specialist in connection with the practitioner's practice,

(j) an order that the practitioner not apply for a local practising certificate before the end of a specified period.

Note.

This subsection is not an exhaustive statement of orders that must be complied with by the practitioner.

...

> (6) **Alternative finding**
>
> The Tribunal may find that a person has engaged in unsatisfactory professional conduct even though the complaint or disciplinary application alleged professional misconduct or may find that a person has engaged in professional misconduct even though the complaint or disciplinary application alleged unsatisfactory professional conduct.

Consideration

233. Before descending into the detail of the various complaints made by Mr Berger about the decision of the Tribunal it is important to recall that counsel for Mr Berger identified the central issue in this case as being whether the conduct proved against Mr Berger was sufficient to warrant an order that his name be removed from the roll of legal practitioners.
234. Although the particulars of that conduct are in a number of respects strongly in contest, the general conclusion, that Mr Berger was guilty of, at least, unsatisfactory professional conduct in multiple respects, is not.
235. Even if entirely successful in the attack made on the judgment of the Tribunal, Mr Berger invited this Court to determine for itself whether his conduct, as found by the Court, is such that an order that he be removed from the roll is warranted.
236. The oral submissions of Mr Lloyd on behalf of Mr Berger addressed 12 thematic issues by reference first to the grounds of the Complaint, next to the findings made by the Tribunal on those grounds of the Complaint, and finally to the challenges in the amended notice of appeal. It is convenient to adopt the same approach here.

Issue 1 – Ground 1 and related portions of grounds 2, 3 and 7 of the Complaint limited to the First Payment of $154,000

237. As is clear from the summary of the facts and the submissions, Mr Berger accepts that he purported to act under a power of attorney granted by Mrs Domabyl where he had no authority because she had died, and that he acted as the executor of her estate without authority because there was no grant of probate.
238. The critical question, as it emerged in the course of oral submissions, is whether certain findings made by the Tribunal were open in circumstances where no allegation of what was described as “subjective” dishonesty was made by the Law Society in the Complaint or the way the case was conducted.
239. The way the parties approached the relevant question, by asking whether dishonesty should be analysed as either “subjective” or “objective” dishonesty, is apt to mislead.
240. The common law of Australia about the meaning of “dishonesty”, unless a specific statutory definition applies, has been clear since *Peters v The Queen* (1998) 192 CLR 493; [1998] HCA 7. There, Toohey and Gaudron JJ said of “dishonesty”:

> “[15] There is a degree of incongruity in the notion that dishonesty is to be determined by reference to the current standards of ordinary, honest persons and the requirement that it be determined by asking whether the act in question was dishonest by those standards and, if so, whether the accused must have known that that was so. That

> incongruity comes about because ordinary, honest persons determine whether a person's act is dishonest by reference to that person's knowledge or belief as to some fact relevant to the act in question or the intention with which the act was done. They do not ask whether he or she must be taken to have realised that the act was dishonest by the standards of ordinary, honest persons. Thus, for example, the ordinary person considers it dishonest to assert as true something that is known to be false. And the ordinary person does so simply because the person making the statement knows it to be false, not because he or she must be taken to have realised that it was dishonest by the current standards of ordinary, honest persons.
>
> ...
>
> [18] In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However, if "dishonest" is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest." (Footnotes omitted.)

241. In the same case McHugh and Gummow JJ determined at [39] and [93] that the Crown does not have to prove dishonesty as an element of conspiracy to defraud at common law or under s 86A of the *Crimes Act 1914* (Cth).

242. In *Macleod v The Queen* (2003) 214 CLR 230; [2003] HCA 24 the plurality, Gleeson CJ, Gummow and Hayne JJ, said:

> "[34] The Court of Criminal Appeal in *Glenister* reviewed the authorities construing s 173 and cognate provisions and concluded that the term "fraudulently" in this context has a meaning interchangeable with "dishonestly". That construction has been adopted in relation to analogous provisions in other Australian jurisdictions. It is consistent with the conclusion of four members of this Court in *Spies v The Queen* concerning the offence created by s 176A of the *Crimes Act*. It was there held that, to establish that a director had "defraud[ed]" any person in his or her dealings with the company in contravention of s 176A, it was necessary to prove that the accused had used "dishonest means" to prejudice the rights or interests of that person.
>
> ...

> [37] In a passage that has significance for the present appeal, Toohey and Gaudron JJ stated [in *Peters v The Queen*]:
>
> > [The passage then quoted is extracted above at [240].]
>
> Their Honours rejected any further requirement, derived from *R v Ghosh* [[1982] QB 1053], that the accused must have realised that the act was dishonest by those standards." (Footnotes omitted.)

243. The appellant accepted in oral submissions that the Law Society had conducted a case of "dishonesty" but submitted that the case was limited to allegations of "objective" dishonesty.
244. That this issue arose at all is regrettable. The principal reason for the issue arising is that the Complaint drafted by the Law Society was ambiguous. The Complaint alleged "misappropriation" but omitted to use the words "dishonest" or "fraudulent" at all. There are many shades of meaning to the term "misappropriation": *Council of the Law Society of NSW v Doherty* [2010] NSWCA 177 at [43]. The allegation of misappropriation without more in this case led to a lengthy and unproductive debate before the Tribunal and in this Court about whether, in context, it included an allegation of dishonesty.
245. The critical question is whether it was open to the Tribunal to find that Mr Berger's conduct was dishonest. I have concluded that, although the Complaint was ambiguous, the manner in which the case was opened by the Law Society in relation to the First Payment of $154,000 made it clear that dishonesty was alleged. As in *Pham v Legal Services Commissioner* [2016] VSCA 256 at [188], while the Complaint did not, in express terms, employ the word "dishonesty", it was necessarily implicit in the manner in which the First Payment of $154,000 was presented to the Tribunal that the Law Society was alleging that Mr Berger's conduct was dishonest.
246. The particulars to the Complaint provided, relevantly:

> "31. On or about 10 October 2012, in relation to the settlement of the sale of the Domabyl Property (Domabyl Settlement), the Solicitor instructed Ms Donovan, to provide cheque directions for:
>
> a. a cheque made payable to the Solicitor in the amount of $154,000; and
>
> b. a cheque made payable to the Law Practice for its fees and disbursements for acting on the sale of the Domabyl Property.
>
> ...
>
> 33. In instructing Ms Donovan to provide the cheque directions referred to in paragraph 31 above, the Solicitor:
>
> a. purported to act pursuant to Mrs Domabyl's power of attorney in circumstances where he had no authority to so act due to Mrs Domabyl's death on 4 October 2012; and/or

b. purported to act as executor of the estate of Mrs Hilda Domabyl (Domabyl Estate) in circumstances where he had no authority to so act as there had not yet been any grant of probate.

34. On 10 October 2012, Ms Donovan instructed Ms Shama Kunhi, conveyancer at the Law Practice, to include in the settlement statement cheque directions as set out in paragraph 31 above.

35. On or about 10 October 2012, purportedly acting under Mrs Domabyl's power of attorney, the Solicitor executed a transfer in relation to the Domabyi Property as part of the Domabyl Settlement. In so doing, the Solicitor purported to act pursuant to Mrs Domabyl's power of attorney in circumstances where he had no authority to so act due to Mrs Domabyl's death on 4 October 2012.

36. By letter dated 11 October 2012, Ms Kunhi provided a settlement statement in respect of the Domabyl Settlement which directed the purchaser to provide:

a. a cheque made payable to the Solicitor for $154,000;

b. a cheque made payable to the Law Practice for $6,624.49 for its fees on the conveyance of the Domabyl Property;

c. a number of other cheques for settlement-related matters; and

d. a cheque made payable to the trust account of the Law Practice in the sum of $188,805.72, being the balance of the purchase price.

37. As at 11 October 2012, probate had not been granted in respect of the Domabyl Estate.

38. On 12 October 2012, settlement occurred in relation to the sale of the Domabyl Property (Domabyl Settlement).

39. As at 12 October 2012, probate had not been granted in respect of the Domabyl Estate.

40. In proceeding with the Domabyl Settlement on 12 October 2012, the Solicitor:

a. purported to act pursuant to Mrs Domabyl's power of attorney in circumstances where he had no authority to so act due to Mrs Domabyl's death on 4 October 2012; and/or

b. purported to act as executor of the Domabyl Estate in circumstances where he had no authority to so act as there had not yet been any grant of probate.

...

42. On or about 12 October 2012, the cheque made payable to the Solicitor for $154,000, which was provided by the purchaser in accordance with the direction in paragraph 36(a), was paid into a bank account in the Solicitor's name (First Payment).

...

47. In failing to deposit the sum of $154,000 referred to in paragraph 42 into a trust account operated by the Law Practice, the Solicitor:

a. purported to act pursuant to Mrs Domabyl's power of attorney in circumstances where he had no authority to so act due to Mrs Domabyl's death on 4 October 2012; and/or

b. purported to act as executor of the Domabyl Estate in circumstances where

he had no authority to so act as there had not yet been any grant of probate; and/or

c. misappropriated funds belonging to the Domabyl Estate."

247. The Complaint did not clearly identify the "knowledge, belief or intent which is said to render that act dishonest". It is not correct, as was submitted on behalf of the Law Society, that what it described in submissions as "objective dishonesty" involves an analysis that proceeds immediately from the identification of conduct – here Mr Berger paying the $154,000 to himself rather than into a trust account for the estate of Mrs Domabyl – to a consideration of whether the conduct was dishonest by the standards of ordinary, decent people. That submission leaves out a step which was at the heart of the reasoning in *Peters* and *Macleod*; namely, identification of the knowledge, belief or intent of the allegedly dishonest person.

248. In *Macleod*, the conduct was causing money belonging to a company which was controlled by Mr Macleod to be paid to his personal benefit. The knowledge, belief or intent alleged was Mr Macleod's knowledge that the funds taken were applied for his own use or benefit and not a use or proper purpose of the company. In examining this critical step the matter litigated was Mr Macleod's assertion that he believed that the money was owed to him by the company for services rendered and/or that he had a claim of right to the money. The jury rejected Mr Macleod's evidence and convicted him. The conviction was not overturned in the Court of Criminal Appeal and the High Court held that the Court was correct so to conclude.

249. In the present case, Mr Berger's relevant knowledge was of his lack of entitlement to take or apply the funds for his own use or benefit. The Complaint was ambiguous about whether such an allegation was made. Despite the ambiguity in the Complaint about the $154,000 payment, it is clear that the Law Society conducted its case from the beginning on the basis that Mr Berger knew that he had no power to make the payment to himself from the sale of Mrs Domabyl's property and that the making of the payment in that state of knowledge was dishonest. As the analysis below shows, Mr Berger was on notice of this allegation and had the opportunity to respond to it.

250. The Law Society's opening written submissions, which were served before Mr Berger was required to file evidence and almost a month before the first hearing day before the Tribunal on 31 October 2016, commenced with an allegation that Mr Berger's conduct was dishonest. The focus was upon dishonesty:

> "36. ... it is necessary to demonstrate that there was some deliberate act which is objectively dishonest, applying the 'ordinary standards of reasonable and honest people', but without the need to demonstrate any intention to misappropriate or to identify any subjective dishonesty...
>
> ..
>
> 38. In those cases, the Tribunal has applied a two-stage test to determine whether there has been misappropriation:
>
> a. first, whether the solicitor intended to do the relevant acts; and
>
> b. secondly, whether ordinary and decent people would regard the acts as dishonest.
>
> ...
>
> 40. The specific payments which form the basis for the misappropriation allegation are:
>
> a. the First Payment, 5 made on 12 October 2012, being a payment of $154,000 made by way of a bank cheque made payable to Mr Berger by the purchaser of the Domabyl Property following directions given by Mr Berger to that effect, and which was paid into a bank account in Mr Berger's name; and
>
> b. the Fourth Payment, made on 25 January 2013, being a payment of $20,000 made from trust monies held on behalf of the Domabyl Estate to Mr Berger's son-in-law (Evan Penn), in circumstances where that payment was made to discharge a debt Mr Berger owed to Mr Penn."

251. The knowledge, belief or intent on Mr Berger's part alleged to make his conduct dishonest was specifically addressed:

> "41. At the time of each of the First Payment and the Fourth Payment:
>
> a. Mrs Domabyl was deceased (having died on 4 October 2012);
>
> b. the total of the sum due to the Domabyl Estate from the proceeds of sale of the Domabyl Property was an asset of the Domabyl Estate and ought to have been treated as such (including by paying that sum into trust, which is the subject of a separate ground);

> c. although Mr Berger was one of the executors of Mrs Domabyl's will, probate had not been granted and so he had no authority to disburse any amount from the assets of the Domabyl Estate; and
>
> d. even had probate been granted in respect of the Domabyl Estate, Mr Berger was not entitled to the payment of his professional fees out of the trust monies which were beneficially owned by the Domabyl Estate until, at the very least, a costs assessment had taken place.
>
> 42. Applying the Tribunal's two-stage test, the first question is whether the relevant acts were intentional.
>
> 43. In relation to the First Payment, the intentional acts on the part of Mr Berger were:
>
> a. instructing Ms Donovan to give a cheque direction to the purchaser of the Domabyl Property to issue a cheque made payable to Mr Berger in the sum of $154,000; and
>
> b. causing that cheque to be paid into a bank account in his own name.
>
> 44. In relation to the Fourth Payment, the intentional act on the part of Mr Berger was causing the sum of $20,000 to be debited from trust monies held on behalf of the Domabyl Estate and transferred to Mr Penn.
>
> 45. Even if the Tribunal accepts that Mr Berger held a genuine belief or understanding that he was presently entitled to those monies, such a belief or understanding does not detract from the deliberate or intentional nature of those actions: see, for example, *Council of the Law Society of NSW v Nicholls* [2012] NSWADT 222 at [35].
>
> 46. In any event ... *given Mr Berger's long experience as a solicitor, he simply could not have been mistaken as to his lack of entitlement to transfer the relevant monies*." (Emphasis added.)

252. That is, in relation to the allegations that Mr Berger misappropriated the payments of $154,000 and $20,000, the Law Society alleged, in terms, that without authority Mr Berger caused the two sums to be paid to himself or at his direction and that in doing so he *could not have been mistaken as to his lack of entitlement to transfer the relevant monies.*

253. Mr Berger understood that this was alleged. He maintained in his amended reply that:

> "44. If it was the case that the sum of $154,000.00 was properly characterised as trust money rather than as a debt due to the Solicitor or the firm of which he was a partner, that was not the Respondent's understanding."

254. Mr Berger swore affidavits outlining his state of mind. In his principal affidavit dated 5 October 2016 served after the Law Society's opening he said:

"74 I was not aware that it was not permissible for an Executor to have recourse to the assets of the Estate for payment of costs and other debts prior to the grant of probate. I was aware that it is common place for some debts of a deceased person to be paid by the Executors named in the Will prior to a grant of probate. That is often necessary to protect the assets of the estate. The doctrine of intermeddling is well recognised.

...

80 As to particulars 41 to 43 [set out at [253] above], *I believed that as the person entitled under the contract and the Will, I was entitled to direct the money as I saw fit*, and that it was not in fact trust money." (Emphasis added.)

255. He was cross-examined about this evidence:

"Mr Berger, if I can ask you to turn to your 5 October affidavit. Do you still have a copy of that with you?---I do.

And if I can ask you to – if I can ask you to turn to page 11, paragraph 80, eight zero?---Yes.

Do you see – you don't need to read it out loud, but do you see what you've said in that paragraph?---Yes.

What's the contract you were referring to there?---I don't know.

The truth is, Mr Berger, there was no contract pursuant to which you were entitled to that money, was there?---Oh, I don't – I'm not – I just don't know what the – well, not that I know of.

And yet you've given that evidence in your affidavit. You need to answer for the transcript, Mr Berger?---Oh, sorry. Yes.

That evidence is not true, is it?---Well, I just have to think about that, because I'm – you know, I've not considered that – that point at this stage. I suppose one could say that if it's a debt of the estate, and therefore it's a liability under the – under the, if you like, distributing the estate. I guess that's the only – as I sit here, that's the only thing I can think of that – which might fit within that description. And I would have to ask the people who – who I had instructed about the pleadings as to what led to that.

Mr Berger, it's your evidence?---I know that. I know that.

And you cannot - - -?---The only thing I can think of as to – as falling within that description would be it was paying a liability of the estate.

> But that's not what you've said in that sentence, is it?---Well, that's how I would react to it."

256. In cross-examination, in a number of passages, Mr Berger was challenged about his stated knowledge or belief:

> "So when you gave Ms Donovan [Mr Berger's secretary] ... when you gave Ms Donovan the instructions, those were instructions that you gave her – were they not - -?---Yes.
>
> - - - without having sought input from Mrs Domabyl because you couldn't?---No. That's correct.
>
> So in other words, you saw yourself as giving those instructions on Mrs Domabyl's behalf. Is that correct?---Yes.
>
> And I suggest to you that you must have thought that you should do that either as exercising your power of attorney or in your role as executor of her will. Do you agree with that – that it must have been one of those - - -?---Well, I – I hadn't thought through the steps of the occurrences in that detail. I was following the procedure that we commonly follow as to cover whatever is due from the sale – maybe a debt by ... party to another party or whatever it is that I've – as – that I've accumulated through the file."

257. Mr Berger was cross-examined extensively about his knowledge or belief as to his entitlement to pay himself the $154,000 from Mrs Domabyl's estate:

> "- - - $154,000 was banked into your personal account?---Member, let me say this: when – as I understood it, when the probate is granted it validates earlier actions of the executor. I took that as being something that I could do. I was paying a – a debt.
>
> HIS HONOUR: It would only validate lawful actions of an executor?---Well, I
>
> would – I would put it's lawful. I mean, I've done – on my understanding, I acted believing I could do the things that I have done, including that payment ---
>
> Well, what did you think about section 317 – sorry – the section of the Legal
>
> Profession Act that says that if you don't make proper disclosure, then the costs are not payable by the client until such time as you have an assessment?---Your Honour, sorry – yes, your Honour, I thought that I could.
>
> Do you not know that?---I thought I could do what I did?
>
> So you didn't know that?---Well, I think that – I – well ---

> You've told us you've been a cost assessor. And you say you did not know the effect, under section 317, of nondisclosure?---I thought I had approval."

258. In his 5 October 2016 affidavit Mr Berger addressed the question of the tax invoice in the name of MBBF issued in respect of legal work said to have been done for Mrs Domabyl:

> "67 In the prevailing circumstances in which Mr Freedman and Ms Gopalan had disavowed any entitlement on the part of MBBF to receipt of the funds, and given my position that we were entitled to receipt of the funds, and given the mutual suspicions between Mr Freedman and myself as to the way funds belonging to MBBF had been appropriated, I believed it was perfectly proper and appropriate and the only practical solution that the costs should be paid to me."

259. Mr Berger's attention was specifically directed to his conduct in issuing an invoice in the name of the firm after MBBF had written off the debt allegedly owed by Mrs Domabyl:

> "And you wished to conceal from Mr Freedman that you were paying yourself that money, didn't you?---I didn't conceal it at all.
>
> Because you knew that it was not the right thing to do, to pay that - - -?---No, I don't agree.
>
> - - - pay yourself that money?---I don't agree."

260. The Law Society conducted a case of dishonesty about the payment by Mr Berger of $154,000 from Mrs Domabyl's estate to himself. Mr Berger addressed that allegation in his evidence and was cross-examined about it.

261. It follows that there was no such denial of procedural fairness. It was open to the Tribunal to find at [270] that Mr Berger, in paying $154,000 from the sale of Mrs Domabyl's property to himself rather than into a trust account, acted dishonestly.

262. The Tribunal found that:

. (1) Mr Berger knew that the $154,000 was money that belonged to the Domabyl estate;

. (2) Mr Berger knew that he was required to deposit the funds into a trust account;

. (3) Mr Berger knew that he had no power to pay the money to himself; and

. (4) by reference to the standards of ordinary honest people, Mr Berger's conduct was dishonest.

263. There is one respect in which the Tribunal made a finding which was outside the Law Society's case. It found at [269] that "[Mr Berger] knew what he was doing was unlawful and dishonest". That allegation was not particularised by the Law Society and not put to Mr Berger. The finding was surplusage in the sense that it was not a necessary ingredient of dishonesty. The fact that a fraudster subjectively believes that dishonest conduct is not "dishonest" is not relevant to proof of dishonesty. That is the requirement that the High Court, by reference to the English *Ghosh* test, rejected in *Peters*.

264. As the Tribunal has made a finding that was not open on the way the Law Society conducted its case, Mr Berger is entitled to succeed in having this finding set aside. It is true, as Mr Lloyd submitted, that Mr Berger is entitled to have such serious allegations determined by reference to the case he was called to meet.

265. As both parties invited the Court itself to determine this matter if error was shown, it is necessary to make findings as to the relevant matters. On all of the evidence, the Law Society's case was overwhelming that:

. (1) Mr Berger knew that the $154,000 was money that belonged to Mrs Domabyl's estate;

. (2) Mr Berger knew that he was required to deposit the funds into a trust account;

. (3) Mr Berger knew that he had no power to pay the money to himself; and

. (4) Mr Berger's conduct in paying the money to himself was dishonest by application of the standards of ordinary honest people.

266. The critical question was as to the third of the matters, namely Mr Berger's knowledge and belief about his entitlement to pay himself $154,000 from Mrs Domabyl's estate.

267. Mr Berger's ultimate explanation of his understanding about his having an "entitlement" to be paid the $154,000 from Mrs Domabyl's estate should not be accepted. Mr Berger knew that he had not made a disclosure to Mrs Domabyl about costs as he was required to do. Mr Berger knew that MBBF had, long prior to paying the money to himself, written off Mrs Domabyl's entire bill. Mr Berger had agreed in writing with his partners to write off Mrs Domabyl's entire bill because, as his partners made clear, they were concerned that they and the firm may be guilty of professional misconduct in charging a vulnerable, elderly woman such a significant sum without any adequate costs disclosure having been made.

268. Despite knowing all of that, Mr Berger caused a tax invoice for $176,800.94 to be issued, *by MBBF*, to Mrs Domabyl's estate. Mr Berger plainly knew that, whatever else he believed, Mrs Domabyl did not have a liability to pay MBBF anything. The suggestion that Mrs Domabyl's estate had a "costs" liability to MBBF was false and must have been known to be false by Mr Berger who had agreed that MBBF would write off Mrs Domabyl's bill and not to charge her further costs.

269. Mr Berger was a long experienced solicitor. He was, for more than 30 years, an accredited Business Law specialist. Although he suggested that he was much less experienced with wills and estate law, he had prepared hundreds of wills and advised executors for decades. He ultimately did not assert that he believed that he had power under the power of attorney (after Mrs Domabyl had died) or as executor (absent a grant of probate) to pay himself anything from Mrs Domabyl's estate. He said that his genuine belief was that he was "paying a liability of the estate". Mr Berger could not explain in his evidence or his cross-examination how it was that he could possibly have believed that Mrs Domabyl's estate had any personal liability to him. The tax invoice from MBBF was known by Mr Berger not to represent a liability of the estate. Despite that, Mr Berger caused the $154,000 to be paid by the estate directly to him.

270. The Tribunal's finding that Mr Berger knew that he had no power to pay the $154,000 to himself was plainly correct. In acting as Mrs Domabyl's estate solicitor, Mr Berger resolved the hopeless conflict of interest he faced in favour of his own interests over those of his client.

271. In *Kumar v Legal Services Commissioner* [2015] NSWCA 161, Leeming JA said:

> "[60] ... there was and is no plausible explanation inconsistent with deliberate dishonesty.
>
> [61] Lest there be any doubt about it, even a temporary use by Mr Kumar of his client's funds without prior approval amounts to serious and deliberate dishonesty. That is precisely the sort of conduct which is antithetical to the trust and confidence which is required by a solicitor with custody of his or her clients' money."

272. The same conclusion follows here. There is no plausible explanation inconsistent with dishonesty for misappropriation of these funds. Mr Berger's payment to himself of $154,000 from Mrs Domabyl's estate was "precisely the sort of conduct which is antithetical to the trust and confidence which is required by a solicitor with custody of his or her clients' money".

Issue 2 – Ground 1 of the Complaint limited to the Second Payment

273. Reliance on the Second Payment was abandoned by the Law Society.

Issue 3 - Ground 1 and related portions of grounds 2, 4, 5 and 7 of the Complaint limited to the Fourth Payment of $20,000

274. The appellant submitted, correctly, that issue 3 almost entirely overlapped with issue 1. Mr Berger accepted that he breached s 255 of the *Legal Profession Act 2004* and accepted that his conduct caused a deficiency in the trust account. Mr Berger accepted that the conduct was intentional, but took issue with the Tribunal's finding at [296] that the conduct was dishonest and fraudulent. Mr Berger accepted that he had no authority as executor or under power of attorney to make the payments and that he was thus guilty of unsatisfactory professional conduct.
275. Mr Berger maintained, however, that it was not open, for essentially the same reasons canvassed in relation to issue 1, to the Tribunal to find at [294] and [296] that his conduct in directing this payment be made was dishonest and fraudulent conduct.
276. For essentially the same reasons as in relation to issue 1, the submission that the Law Society did not conduct a case of dishonesty which Mr Berger understood and had the opportunity properly to meet must be rejected.
277. The written opening by the Law Society specifically alleged that Mr Berger acted dishonestly and without authority in paying the $20,000 from the trust account where it was held for Mrs Domabyl and that Mr Berger "could not have been mistaken as to his lack of entitlement to transfer the relevant monies":

> "40. The specific payments which form the basis for the misappropriation allegation are:
>
> ...
>
> b. the Fourth Payment, made on 25 January 2013, being a payment of $20,000 made from trust monies held on behalf of the Domabyl Estate to Mr Berger's son-in-law (Evan Penn), in circumstances where that payment was made to discharge a debt Mr Berger owed to Mr Penn.
>
> ...
>
> 44. In relation to the Fourth Payment, the intentional act on the part of Mr Berger was causing the sum of $20,000 to be debited from trust monies held on behalf of the Domabyl Estate and transferred to Mr Penn.
>
> 45. Even if the Tribunal accepts that Mr Berger held a genuine belief or understanding

that he was presently entitled to those monies, such a belief or understanding does not detract from the deliberate or intentional nature of those actions: see, for example, *Council of the Law Society of NSW v Nicholls* [2012] NSWADT 222 at [35].

46. In any event ... given Mr Berger's long experience as a solicitor, he simply could not have been mistaken as to his lack of entitlement to transfer the relevant monies."

278. Mr Berger in his 5 October 2016 affidavit asserted that his honestly held belief about the $20,000 payment was "as set out above" which was apparently intended to be a reference to his asserted belief that "as the person entitled under the contract and the Will, I was entitled to direct the money as I saw fit and that it was not in fact trust money". As will be recalled, Mr Berger was cross-examined about the "contract" he says he understood he was acting under and he stated:

"What's the contract you were referring to there?---I don't know.

The truth is, Mr Berger, there was no contract pursuant to which you were entitled to that money, was there?---Oh, I don't – I'm not – I just don't know what the – well, not that I know of."

279. The significance of this answer is that Mr Berger had earlier agreed that he understood that in the absence of a grant of probate he could not disburse trust money belonging to Mrs Domabyl, and that the sole remaining basis he asserted as informing his understanding that he was so entitled, a "contract", was *not* a basis upon which he thought he was entitled to act.

280. Mr Berger was also specifically cross-examined about this payment:

"Mr Berger, I'm now going to continue to ask you questions about the series of payments made from Mrs Domabyl's estate. Now, do you recall the payment of $20,000 which was made to your son-in-law, Mr Penn?---I do.

And that payment, for the record, was made in January 5 2013; is that correct?---Yes.

That payment was made at your direction; is that correct?---Yes.

And is it fair to say that by that point you certainly did not see yourself acting under the power of attorney; is that correct?---Yes.

Did you see yourself giving the instructions or directing that that payment to be made as acting in your position as executor at that stage?---Well, carrying out executorial type of steps in the period between death and probate, yes.

And probate had not yet been granted, correct?---No."

281. There is no plausible explanation inconsistent with dishonesty for misappropriation of these funds. The Tribunal was correct to conclude that Mr Berger did not know or believe that he was entitled to the money. Mr Berger's payment to himself of $20,000 from Mrs Domabyl's estate was

"precisely the sort of conduct which is antithetical to the trust and confidence which is required by a solicitor with custody of his or her clients' money": *Kumar* at [61].

282. It is, however, again correct that no allegation was made that Mr Berger subjectively understood when he made the payment that it was illegal and was dishonest. Accordingly, the finding at [294] must be set aside.

Issue 4 – Grounds 6 and 7 of the Complaint limited to the Third Payment of $1,540.92

283. This issue, too, overlapped with issue 1. It will be recalled that the Third Payment was in the amount of $1,540.92 which Mr Berger caused to be debited from trust monies held on behalf of the estate of Mrs Domabyl and credited to the office account of the law practice.

284. Mr Berger accepted that he purported to act as executor without authority, that he disbursed trust monies otherwise than in accordance with a direction given by the person on whose behalf it was held, and that he was guilty of unsatisfactory professional conduct. Mr Berger challenged the Tribunal's finding that he acted dishonestly or that he knew he was behaving dishonestly and illegally as that case was not put.

285. Mr Berger is correct that a case of dishonesty was not pleaded in the Complaint with sufficient clarity. Unlike the allegations I have already dealt with, it is far from clear that the Law Society conducted a case that Mr Berger acted dishonestly in respect of the Third Payment and that Mr Berger had a proper opportunity to address that case. The Complaint read as follows:

> "85. Each of the Third, Fourth, Fifth and Sixth Payments involved payments out of the trust account of the Law Practice without any authority.
>
> 86. In each case:
>
> a. the monies were beneficially owned by the Domabyl Estate (Third, Fourth and Sixth Payments) and the Dougall Estate (Fifth Payment) respectively, and were plainly trust monies;
>
> b. while Mr Berger was an executor of each of the Domabyl Will and the Dougall Will, probate had not been granted in respect of either estate as at the dates of the relevant payments, and so Mr Berger had no authority to make the payments as executor;
>
> c. Mr Berger had not complied with the process permitted by s 261 of the Act and cl 88 of the *Legal Profession Regulation 2005* (NSW) (Regulation) in respect of legal costs and so was not authorised by that means to withdraw money in respect of legal costs; and
>
> d. Mr Berger held no other authority to debit the monies from the trust account.
>
> *Contravention of s 255 of the Act*
>
> 87. The terms of s 255 of the Act are clear. On that basis, and by reason of the facts outlined above, Mr Berger:

a. failed to hold the relevant monies in a general trust account of the Law Practice exclusively for the persons on whose behalf it was received; and

b. disbursed the trust monies otherwise than in accordance with a direction given by the persons on whose behalf if was held.

88. Mr Berger admits this in respect of the Third Payment, Fifth Payment and Sixth Payment.

89. In respect of the Third and Fifth Payments, Mr Berger attempts to justify this by saying it was not his understanding and belief at the relevant time that he was in breach of s 255 by disbursing the relevant monies. Given his long experience as a solicitor, he can have had no reasonable basis for that belief and his asserted lack of understanding is of concern."

286. Unlike the allegation in relation to the First Payment and Fourth Payment, the Law Society limited itself in opening to the submission that Mr Berger, given his long experience as a solicitor, "can have had no reasonable basis for his belief" that he was not in breach of s 255, and the observation that "his asserted lack of understanding is of concern".
287. That was not a sufficient indication to justify the finding eventually made by the Tribunal at [281] that "[o]n the balance of probabilities the practitioner knew his conduct was prohibited by law and dishonest".
288. That finding at [281] must be set aside. The Tribunal's ultimate finding on this issue at [282], however, was open and correct. The Tribunal found that, in purporting to act as executor and in causing the payment to be made without a valid direction, the conduct of Mr Berger fell short of the standard of competence and diligence that a member of the public was entitled to expect.

Issue 5 – Grounds 2, 4 and 7 of the Complaint limited to the Sixth Payment of $14,000

289. On 22 April 2013, Mr Berger caused MBBF to issue a tax invoice to Mr Berger and Mr Green as executors of Mrs Domabyl's estate in the amount of $14,341.55 relating to the application for the grant of probate. On about 6 May 2013, Mr Berger caused an amount of $14,341.55 to be paid from the trust account for those fees. This was the Sixth Payment.
290. Mr Berger admits that he failed to hold the relevant monies in a trust account and that he disbursed trust monies other than in accordance with a direction given by the person on whose behalf it was held.
291. Precisely what he says his state of mind was in relation the Sixth Payment is unclear, although Mr Berger confirmed in cross-examination that he "thought that the firm was entitled to receive its fees immediately":

"You knew the money was the beneficial property of Mrs Domabyl's estate?---Yes.

And you caused the payment from trust to the office account because you thought that the firm was entitled to receive its fees immediately, didn't you?---Yes.

Rather than to wait for probate?---Correct.

> You held no authority to make that transfer, did you?---No."

292. How it was that he thought that the firm was entitled to fees that the partners had agreed should not be charged was never adequately explained by Mr Berger.
293. The Tribunal found that Mr Berger knew that the money was trust money which was required to be held in trust. He knew that without a grant of probate he could not disburse the funds to himself. He knew that the payment was not otherwise authorised. The Tribunal concluded at [317] that Mr Berger knew at the time of the payment that the "payment would be illegal and dishonest".
294. This last finding cannot stand. In the Complaint and in the opening, the Law Society failed adequately to identify a case of dishonesty in relation to the Sixth Payment. But for an absence of adequate pleading or an opening identifying dishonesty on Mr Berger's part in relation to the Sixth Payment, there was abundant evidence which could have supported such a finding. For example, Mr Berger gave this evidence:

> "And so you knew that it [the Sixth Payment] had to be dealt with as trust money; is that correct?---Yes.
>
> And you knew it was wrong to deal with it [the Sixth Payment] otherwise and in compliance with the requirements for trust money; is that correct?---Yes."

295. The ultimate conclusion of the Tribunal on this issue at [318], however, was that, by reason of causing a deficiency in the trust account and purporting to act as executor without a grant of probate, Mr Berger's conduct fell so far short of the required standard of competence and diligence that it amounted to unsatisfactory professional conduct.
296. In exercising the Court's function under s 75A of the *Supreme Court Act 1970* (NSW) on rehearing, having set aside the finding at [317] that Mr Berger knew at the time of the payment the "payment would be illegal and dishonest", the same conclusion reached by the Tribunal at [318] about unsatisfactory professional conduct should be reached.

Issue 6 – Ground 6 of the Complaint limited to execution of the transfer for sale of Mrs Domabyl's property

297. It will be recalled that, on 9 October 2012, Mr Berger (on MBBF letterhead) wrote to McCourts Solicitors concerning the sale of Mrs Domabyl's property and enclosed the certificate of title and "the registered power of attorney under which Victor Berger had signed the transfer". On 10 October 2012, McCourts Solicitors was told that "it was discovered that the Transfer sent by Kathryn Adler and signed by Victor Berger on 4 October 2013 was incorrect as it was not endorsed for signing under power of attorney". That same day, Ms Kunhi noted in her handwriting "See Annexure A" next to Mr Berger's signature and attached Annexure A which stated:

> "ANNEXURE 'A'
>
> Certified correct for the purpose of the Real Property Act 1900 by the person named below who signed this instrument pursuant to the power of attorney specified.

Signature of attorney: [Mr Berger's signature]

Attorney's name: Victor Berger

Signing on behalf of: Hilda Domabyl

Power of Attorney: Book 4627 No. 327"

298. In his 5 October 2016 affidavit, Mr Berger swore that he was aware that from the date of death the assets of a deceased person vest in the NSW Trustee. In his amended reply filed 18 March 2016, Mr Berger said that he was unaware of s 61 of the *Probate and Administration Act 1898* (NSW) or of any other provision having the effect that until probate or administration the estate of a deceased person vested in the NSW Trustee. The Tribunal rejected this latter explanation as, on all the evidence, it was entitled to do.

299. Mr Berger did not challenge the Tribunal's finding that he signed the annexure to the transfer on 10 October 2012 without proper authority as Mrs Domabyl's attorney because he knew by 5 October 2012 that she had died on 4 October 2012 and that the power of attorney had lapsed.

300. Mr Berger submitted that the Tribunal was not, however, entitled to find that his conduct was dishonest in this respect. I agree.

301. I have little doubt that a case of fraud in relation to Mr Berger's actions in this respect could have been mounted, although it is correct that the Tribunal rejected the submission of the Law Society that Mr Berger signed the transfer after Mrs Domabyl's death. The Law Society did not, however, in the Complaint allege that Mr Berger's conduct was dishonest in this respect or make allegations capable of fairly raising that issue. The written opening of counsel for the Law Society contains no hint that dishonesty was alleged in this respect. As I have earlier found, the Law Society's submission that the Tribunal was entitled to find fraud and dishonesty based on a characterisation of Mr Berger's defence should be rejected. The finding at [244]-[245] of the Tribunal's reasons that Mr Berger's conduct in this respect was dishonest must be set aside.

302. The conclusion of the Tribunal at [245], however, is the one that should be reached and the Tribunal's other findings should not be disturbed. Mr Berger acted to effect the sale of Mrs Domabyl's property under a power of attorney that he knew had expired and in circumstances where he knew that the property had vested in the NSW Trustee. That was conduct which fell far short of the standards of competence and diligence that a member of the public was entitled to expect and amounted to unsatisfactory professional conduct.

Issue 7 – Ground 7 of the Complaint limited to proceeding with the settlement of Mrs Domabyl's property without authority as executor

303. On 12 October 2012, Mr Berger, who knew that Mrs Domabyl had died and that her estate had vested in the NSW Trustee, nevertheless proceeded to effect settlement of the sale of Mrs Domabyl's unit. This is issue 7 which is closely related to issue 6. The issues were actually addressed by the Tribunal together at [238]-[245].

304. For the same reasons as in relation to issue 6, the finding at [244]-[245] of the Tribunal's reasons that Mr Berger's conduct in this respect was dishonest must be set aside.

305. The appellant did not challenge the conclusion that Mr Berger's conduct amounted to unsatisfactory professional conduct for the same reasons as in relation to issue 6. Mr Berger's

conduct fell far short of the standards of competence and diligence that a member of the public was entitled to expect and amounted to unsatisfactory professional conduct.

Issue 8 – Grounds 9 and 10 of the Complaint limited to failure to disclose costs and breach of an undertaking in the Domabyl matter, not including failure to disclose costs in the Dougall matter

306. Despite having acted for Mrs Domabyl since 2005 and preparing a will, seven codicils, a power of attorney and recording $176,800.94 as costs incurred, Mr Berger failed to make a disclosure of costs to Mrs Domabyl until she was no longer mentally competent.
307. The Tribunal found that:
. (1) Mr Berger was obliged in October 2005 by s 180 of the *Legal Profession Act 1987* to make a disclosure to Mrs Domabyl of the total legal costs of the matter; and
. (2) if Mr Berger had made the initial disclosure he was required to make, he would have been liable under s 180(3) of the 1987 Act and then s 316 of the *Legal Profession Act 2004* to disclose any significant increases in that estimate of total costs.
308. There was no challenge to the first of those findings, but in writing Mr Berger challenged the second finding on the basis that he had a "defence" under s 312(1)(a) of the 2004 Act. Little was said about this "defence" in oral submissions for good reason. The defence was not engaged. Mrs Domabyl was a vulnerable client entitled to a costs disclosure.
309. The Tribunal found that Mr Berger's failure to make any disclosure of costs to Mrs Domabyl amounted to professional misconduct as it was unsatisfactory professional conduct involving a substantial and consistent failure to maintain a reasonable standard of competence and diligence.
310. Mr Berger's challenge to this finding was that the finding of professional misconduct regarding a failure to make costs disclosures was not open because there was never a pleading under s 497(1)(a) of the 2004 Act. Mr Berger submitted that he was not on notice that he was required to marshal evidence against a finding of substantial and consistent failure. I do not agree.
311. It is true that the Complaint, in terms, did not address the finding sought of professional misconduct. The Law Society's opening submissions, however, made it abundantly clear that such a finding was sought. At the conclusion of their opening submissions the Law Society stated:

> "256. There are three routes by which the Tribunal may conclude Mr Berger has engaged in professional misconduct:
>
> a. section 497(1)(a) of the Act: unsatisfactory professional conduct involving a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence;
>
> b. section 497(1)(b) of the Act: conduct which demonstrates he is not a fit and
>
> proper person to engage in legal practice; and
>
> c. the common law test."

312. The Law Society's opening, whilst highlighting particular aspects of Mr Berger's conduct, plainly asserted that the individual instances of conduct pleaded could be aggregated and seen as involving

a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence:

> "261. If the Tribunal considers individual instances of conduct, the Applicant contends that each of the breaches outlined above constitutes unsatisfactory professional conduct, and many, even individually, constitute professional misconduct."

313. Those submissions were served in advance of Mr Berger's evidence and he had an adequate opportunity in the months that followed to address this issue. He was on notice that he was required to marshal evidence against a possible finding of professional misconduct on the basis of a substantial and consistent failure to reach or maintain a reasonable standard of competence and diligence in this respect.

314. The Tribunal rejected Mr Berger's evidence that he secured Mrs Domabyl's agreement to costs being charged to her estate and, in any event, pointed out that the agreement asserted by Mr Berger did not comply with his cost disclosure obligations. No reason has been shown to disturb those findings.

315. On the findings of the Tribunal, the conclusion that Mr Berger's failure to make any disclosure of costs to Mrs Domabyl amounted to professional misconduct as it was unsatisfactory professional conduct involving a substantial and consistent failure to maintain a reasonable standard of competence and diligence was unassailable. Those findings were:

. (1) Mrs Domabyl was a vulnerable client. She was elderly, unwell, socially isolated and lacking in family support;

. (2) Mr Berger owed obligations to Mrs Domabyl as her solicitor to act to protect her interests;

. (3) Mr Berger, with his training and long experience as a legal practitioner, was aware of Mrs Domabyl's vulnerability and his cost disclosure obligations;

. (4) Mr Berger knew that the legal costs being incurred by Mrs Domabyl were significant;

. (5) Mr Berger had agreed with his partners in writing that MBBF would write off Mrs Domabyl's entire legal bill and not charge her anymore by reason of the non-disclosure of costs;

. (6) Mr Berger had been told by his partners that the Law Society had advised them that Mrs Domabyl should not be charged by reason of the non-disclosures of costs; and

. (7) Mr Berger knew that, over the course of many years, he had not given Mrs Domabyl even one interim or periodic bill.

316. In performing the task of identifying the appropriate order to be made that the parties invited this Court to do, it is relevant also to reflect on Mr Berger's own significant admissions on this topic.

317. It will be recalled that, on 25 September 2011, Mr Berger agreed with his partners that "the likelihood" was that he had made inadequate disclosure of costs to Mrs Domabyl, but asserted a belief that no action would be taken against him, presumably on the basis that similar complaints in the past had been resolved by the regulators accepting undertakings from Mr Berger. Mr Berger did not at that time "cavell" [sic] with the proposition that Mrs Domabyl would believe that she was not being charged for work Mr Berger was recording and intended to charge her estate. In January 2012, when challenged about recording work in progress in Mrs Domabyl's file, having agreed in October 2011 to cease doing so, he wrote to his partners that this was "in error".

318. Mrs Domabyl was precisely the type of client for whom the statutory regime of cost disclosure was designed. The Tribunal correctly concluded at [171] that Mr Berger's failure to make any

disclosure of costs to Mrs Domabyl involved a substantial and consistent failure to maintain a reasonable standard of competence and diligence which amounted to professional misconduct.

Issue 9 – Ground 12 of the Complaint in relation to overcharging in the Domabyl matter

319. It will be recalled that, on 12 June 2014, a certificate of determination of costs was issued in relation to the assessment of Mr Berger's revised fee schedule. The total amount of costs and disbursements determined to be "fair and reasonable" was $176,800.74. Mr Berger asserted before the Tribunal that this ground in the Complaint was precluded by an estoppel created by the costs determination. The Tribunal rejected that defence and no appeal is brought against that decision.

320. What was the subject of complaint was an alleged failure to address the principle of finality. It is worth reflecting on the breadth of that principle in this context. In *Achurch v The Queen* (2014) 253 CLR 141; [2014] HCA 10 at [14] the High Court said:

> "Absent specific statutory authority, the power of courts to reopen their proceedings and to vary their orders is constrained by the principle of finality. That principle was stated succinctly in *D'Orta-Ekenaike v Victoria Legal Aid* and re-stated by the plurality in *Burrell v The Queen*:
>
> > 'A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.'" (Footnotes omitted.)

321. In *Atwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1; [2016] HCA 16 at [52] the High Court said:

> "As to the argument advanced by the Law Society, the immunity is not attracted simply because its existence might encourage lawyers to advise their clients to settle their claims. While it is no doubt true that there is a public interest in the resolution of disputes [as reflected in the maxim "interest reipublicae ut finis sit litium" (it is in the public interest that there be an end to suits)], the public policy which justifies the immunity is not concerned with the desirability or otherwise of settlements, but with the finality and certainty of judicial decisions. Decisions by the courts, as the judicial organ of the State, are necessary precisely because the parties cannot achieve a compromise of their disputes. The advocate's immunity is grounded in the necessity of ensuring that the certainty and finality of judicial decisions, values at the heart of the rule of law, are not undermined by subsequent collateral attack. The operation of the immunity may incidentally result in lawyers enjoying a degree of privilege in terms of their accountability for the performance of their professional obligations. But this incidental operation is a consequence of, and not the reason for, the immunity. Because this incidental operation of the immunity comes at the expense of equality before the law, the inroad of the immunity upon this important aspect of the rule of law is not to be expanded simply because some social purpose, other than ensuring the certainty and finality of decisions, might arguably be advanced thereby."

322. It is true that, by the time of assessment, the beneficiaries were separately represented, and that the executors gave notice that an assessment was being sought. It is also correct that the assessor was tasked with assessing the fairness and reasonableness of the amount of costs under s 328(5) of the *Legal Profession Act 2004*, reporting any that are "grossly excessive" under s 393, producing a certificate and reasons pursuant to s 368 and s 370, and that this determination was final under s 372.

323. That, however, did not engage the principle of finality. The assessment itself did not resolve any dispute between the Law Society and Mr Berger about whether Mr Berger had engaged in overcharging such that he was guilty of unsatisfactory professional conduct or professional misconduct. Relevantly, the reasons for the determination stated:

> "The application for assessment of costs is to be determined in accordance with the requirements of the 1984 legislation. Pursuant to section 367 of the Act I am only empowered to determine the reasonableness of the costs that are expressly disputed in the objections. ***Costs which are not disputed must be allowed*** (*O'Connor [v] Fitti* [2000] NSWSC 540)." (Emphasis added.)

324. *O'Connor v Fitti* was a decision of Master Malpass under the *Legal Profession Act 1987* which provided, relevantly, that:

> "[22] It seems to me that subsection [208A] (2) prescribes the function of a costs assessor where he is dealing with an application relating to a bill of costs. If he does not determine the application by confirming the bill of costs, his task is to look at the disputed costs and satisfy himself whether or not they are unfair or unreasonable (the expression "unfair or unreasonable" would seem to be a shorthand reference to what is enumerated in subsection [208A] (1)); and if satisfied that disputed costs are unfair or unreasonable he is required to substitute an amount that, in his or her opinion, is a fair and reasonable amount.
>
> ...
>
> [24] There may be cases where an issue will arise as to what falls within the category of "disputed costs". It may be a question which turns on the circumstances of the particular case before the Costs Assessor and has to be dealt with on a case by case basis. As I have said, the expression is not defined. However, that is not a difficulty in this case. In my view, in this case, the disputed costs are those which are the subject of objection in the notice of objection. This may be the position in many cases."

325. This was a case where the assessment was conducted after Mrs Domabyl had died, where Mr Berger as Mrs Domabyl's long-term lawyer and executor of Mrs Domabyl's estate was asserting an entitlement to the costs, and where the beneficiaries under Mrs Domabyl's will were minors.

326. The issues being determined by the assessor on the one hand and the Tribunal on the other were quite different. The determination of the costs assessor was limited to determining the validity of objections made. The question before the Tribunal was whether Mr Berger had engaged in unsatisfactory professional conduct or professional misconduct by reason of overcharging. Whilst the determination of the costs assessor was relevant to that question, it did not engage the principle of

finality. The Law Society's allegation of overcharging amounting to professional misconduct against Mr Berger did not call into question the finality and certainty of a judicial decision.

327. A costs assessment pursuant to the *Legal Profession Act 2004* does not preclude the Tribunal from considering the nature of a practitioner's conduct, including the reasonableness of his or her charges.

328. The Tribunal took into account that the costs assessment determination had been made but was not obliged, in this case, to give that determination significant weight. The heavily qualified decision of the costs assessor could not be dispositive in a case where, as here, the Law Society had led detailed expert evidence on the question of overcharging.

329. The Law Society plainly alleged in its opening submissions the case it was conducting:

> "*Mr Berger engaged in overcharging*
>
> 242. The categories of costs in relation to which the Applicant alleges there has been overcharging are as follows:
>
> a. charging for work which was non-legal in nature and/or which was done
>
> pursuant to the power of attorney Mr Berger held;
>
> b. charging for work the nature of which is unknown or unclear; and
>
> c. charging for disbursements where there was insufficient information as to the purpose of those disbursements."

330. Ms Rosati's expert report addressed, in detail, each of those issues. Mr Berger led no evidence in response to Ms Rosati's report which was detailed, well-reasoned and compelling.

331. The Tribunal found at [361] that Mr Berger engaged in professional misconduct by overcharging.

332. The Tribunal's findings and conclusions on this topic were justified. The amount of Mr Berger's bill was $176,800.94. Mr Berger overcharged Mrs Domabyl $137,543.91. There is no reason to interfere with the Tribunal's findings in this respect. The submission made in writing (but not developed orally) by Mr Berger that the Tribunal was not entitled to find that there was no agreement in place for Mr Berger to charge for non-legal work must be rejected. The Tribunal were entitled to reject Mr Berger's assertion on this topic. The contemporaneous evidence was directly contrary to any such agreement. It will be recalled that, on 25 September 2011, Mr Berger's state of mind was he did not "cavell" [sic] with the proposition that Mrs Domabyl would believe that she was not being charged for work Mr Berger was recording and intending to charge her estate. The Tribunal's approach to this issue did not reverse the onus of proof. The Tribunal was entitled to accept the evidence of Ms Rosati.

333. That overcharging of Mrs Domabyl constituted professional misconduct because of: Mrs Domabyl's vulnerability; the absence of cost disclosures; the absence of regular or periodic bills; the charging for services that were not legal services and at rates for legal services; the absence of any contract to pay for non-legal services; the extent of the items that were not legal services; and the extent of the items in the bill that were not identified for the client as legal services.

Issue 10 – Ground 11 of the Complaint in relation to applying received monies in breach of the terms of the agreement under which they were received in the Ho matter

334. It will be recalled that the Law Society's complaint about this issue related to a deposit paid by Mr and Mrs Ho for a property being developed by a company of which Mr Berger was the sole director and shareholder. Mr Berger caused the deposit to be released to the company for purposes other than those permitted by Special Condition 12 of the contract of sale. It was common ground that there was no other part of the contract of sale permitting release of the deposit to Mr Berger or his company.
335. In this Court Mr Berger accepted that the release of the deposit was in breach of Special Condition 12. He submitted, however, that the deposit was released properly in accordance with a separate agreement made by him and the solicitor for Mr and Mrs Ho.
336. I reject the submission that Mr Berger's account of a "separate agreement" was not properly tested. That "separate agreement" was not actually what Mr Berger asserted in his amended reply nor in his evidence. In his 5 October 2016 affidavit he said:

> "106 As it was a not-negotiable term of the sale from the point of view of [Mr Berger's company] that the deposit be released, for the purposes identified in the emails referred to above, the sale could not proceed unless Mr Ho agreed to [Mr Berger's company]'s terms which ultimately he did.
>
> 107 The Contract then proceeded to exchange."

337. The insurmountable problem for Mr Berger with this version of events is that the terms of Special Condition 12 were drafted by him personally after the alleged agreement he says he struck with the solicitor for Mr and Mrs Ho.
338. The evidence of a "separate agreement" given by Mr Berger for the first time in his 20 February 2017 affidavit was rejected by the Tribunal. It was materially inconsistent with Mr Berger's earlier explanations. No basis has been shown to disturb that finding.
339. As the Tribunal found, even *if* what Mr Berger says in his 20 February 2017 affidavit about the communication with the solicitor for Mr and Mrs Ho is accepted (that Mr and Mrs Ho agreed to the release of the deposit for the purpose of satisfying the Council for the purpose of the development), many of the disbursements to which the released deposit was directed fell outside that description.
340. None of the disbursements of the deposit were made for the purpose set out in Special Condition 12, being various purposes related to the purchase of another property by Mr Berger's company as vendor.
341. Mr Berger accepted in cross-examination that he held no other consent or authority from Mr and Mrs Ho to release the deposit, so there was simply no compliance with Special Condition 12. Thus the Tribunal found:

> "[212] For these reasons, the deposit was disbursed:
>
> a. in a manner which did not comply with Special Condition No 12; and
>
> b. even on Mr Berger's own case, for purposes other than the purpose on which he relies."

342. No basis was shown to disturb that finding. The Tribunal did not misapply the onus of proof, which rested at all times upon the Law Society, in accordance with the *Briginshaw* principles.
343. The Tribunal concluded that Mr Berger's conduct was "unethical in all the circumstances" based on the following factors: Mr Berger prepared the contract and took responsibility for its drafting and communication to Mr and Mrs Ho via their solicitor, and in fact sent the special conditions (including Special Condition 12) to the solicitor for Mr and Mrs Ho himself; Mr Berger was both principal (in the sense of being the directing mind of his company) and solicitor for his company and so had a greater degree of control over a deposit than either a vendor (who would not normally hold the deposit) or a solicitor (who would need to account to his or her client) would normally have; Mr Berger did not make any attempt to provide the deposit to the "deposit holder" under the contract, being the vendor's agent, not the vendor's solicitor; and the purposes for which the deposit was in fact used, particularly given Mr Berger's evidence in cross-examination which revealed he simply did not turn his mind to that question.
344. The Tribunal was satisfied that Mr Berger's conduct in removing the deposit from the trust account and providing it to his company was conduct whereby he applied received monies in breach of the terms of the agreement under which they were received. The Tribunal concluded:

> "[220] The practitioner's conduct was seriously unethical conduct. It was dishonest and fraudulent. It was conduct that was a substantial failure to maintain a reasonable standard of competence and a substantial failure to maintain a reasonable standard of diligence. The Tribunal therefore finds that it was professional misconduct."

345. There is no difficulty in the finding that Mr Berger's conduct was seriously unethical conduct. That allegation was made in the Complaint and repeated in the Law Society's opening.
346. There was, however, no sufficiently clear allegation of dishonesty about Mr Berger's conduct in this aspect of the case. The Tribunal was not entitled to find that Mr Berger behaved dishonestly and with any intention to defraud Mr and Mrs Ho. That finding at [220] must be set aside.
347. I am satisfied, however, for the reasons given at [343] that Mr Berger's conduct in relation to the deposit demonstrated a substantial failure to maintain a reasonable standard of competence and diligence and warranted a finding of professional misconduct.

Issue 11 – Ground 8 of the Complaint in relation to failure to comply with a court order in the Frischer matter

348. It will be recalled that, as a condition of a stay granted by Beech-Jones J on 15 August 2013, Mr Berger was required to notify all of his clients about the suspension issued by the Law Society and the orders made by the court. Ms Frischer, who had instructed Mr Berger to prepare a will, was not so notified.
349. Mr Berger submitted that his not giving notice to Ms Frischer was not enough to warrant a finding of unsatisfactory professional conduct or professional misconduct.
350. Mr Berger submitted that his trusted paralegal was asked to prepare a list of clients to notify and Ms Frischer was omitted, and that the fact that the paralegal did a less than effective job does not support a misconduct finding.
351. The Tribunal found that Ms Frischer's initial instructions were given on about May 2012 and she remained a client at the relevant time. That finding was plainly correct. In his email to Ms Frischer on

1 January 2014, Mr Berger referred to his letter of 18 February 2013 to Ms Frischer. Mr Berger confirmed in cross-examination that Ms Frischer's matter was not concluded at 18 February 2013:

> "That was an indication that you were sending an invoice for work done to date; correct?---Yes. But with the expectation that there would be further invoices - - -?---Yes. - - - for further work?---Yes. So the fact that a tax invoice had been sent in this matter didn't mean the matter was concluded, did it?---No. At that point."

352. Mr Berger recognised Ms Frischer as his client by that letter when he provided his advice, enclosed two draft wills, invited further instructions and notified her that a tax invoice would be sent "in the coming week". Mr Berger also recognised Ms Frischer as his client on 11 July 2013 for the purposes of informing her of his move and having her sign an authority to his former partners to release her documents and files to him. On 20 August 2013, Ms Frischer sent an email to Mr Berger about outstanding issues relating to the drafting of her will.

353. The Tribunal rejected Mr Berger's submission that his failure to notify Ms Frischer of the outcome of the principal proceedings, namely the court's decision to dismiss the practitioner's appeal against his suspension, did not constitute a breach of Condition 6 of the stay granted on 15 August 2013. The Tribunal also rejected Mr Berger's evidence that the failure to notify Ms Frischer was inadvertent. The Tribunal was plainly unimpressed with the evasive and unhelpful answers Mr Berger gave on this topic. In cross-examination on 29 June 2017, when it was put to Mr Berger that Ms Frischer was a client of his when the order was made, he avoided the question. When the presiding member repeated the question he answered, "no". He was asked if he now conceded she was. He avoided the question. When it was repeated, he answered, "no". The Tribunal was entitled to reject Mr Berger's claim that his failure was inadvertent given this evidence and given his failure to disclose in any detail the instructions he gave his staff about how to identify his "clients".

354. The Tribunal's ultimate conclusion on this issue was as follows:

> "[199] The Tribunal finds that such conduct fell short of the standard of competence and the standard of diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. It also demonstrates a less than serious respect for orders and conditions imposed on him by the Supreme Court. It is unsatisfactory professional conduct."

355. I reject Mr Berger's submission that he did not have a cavalier attitude towards compliance. The order of Beech-Jones J required punctilious compliance. A competent practitioner would clearly have understood that compliance was a matter of critical importance. To delegate the identification and communication task to a paralegal without checking what was done, if that is in truth what happened, demonstrates a less than serious respect for orders and conditions imposed on him by the Supreme Court. The Tribunal's finding at [199] of unsatisfactory professional conduct in relation to Ms Frischer was justified. No reason has been shown to overturn it.

Issue 12 – Grounds 2, 4, 6, 7, 9 and 10 of the Complaint limited to causing a deficiency in a trust account in relation to the Fifth Payment of $8,751.90, purporting to act under a power of attorney without authority, purporting to act as an executor without authority, breach of s 255 of the Legal Profession Act 2004, failure to disclose costs and breach of an undertaking in the Dougall matter

356. Mr Berger accepted that the finding of unsatisfactory professional conduct in relation to Mrs Dougall was available and does not challenge it. It was submitted that the findings that Mr Berger was dishonest and behaved unlawfully could not stand.

357. I accept that the Law Society did not identify, with sufficient clarity, that an allegation of dishonesty was made about Mr Berger's dealings with Mrs Dougall. I am also not satisfied that the Law Society in the Complaint and the opening made clear that dishonesty was being alleged. What was said was as follows:

> "56. The facts relevant to Ground 2 are set out at [1]-[98] of the Statement of Agreed Facts. In addition to the summary set out at paragraph 39 above, the following facts are relevant:
>
> a. Mrs Greta Dougall, another of Mr Berger's clients, had granted a power of attorney to Mr Berger and executed a will naming him as executor on 6 April 2008;
>
> ...
>
> 64. In relation to the Fourth, Fifth and Sixth Payments, Mr Berger makes no attempt to provide any positive defence – he merely asserts a denial that he caused a deficiency in the trust account.
>
> 65. None of Mr Berger's denials in relation to the deficiency caused in the trust account can stand in the face of objective fact. In each case, for the reasons set out below, the monies should have been paid into, or left in, the trust account. They were not, and so there was a deficiency in the trust account in each case. The reason for that deficiency in each case was Mr Berger's actions. Accordingly, in relation to each payment, Mr Berger caused a deficiency in the trust account.
>
> ...
>
> 137. Similarly, in relation to the Fifth Payment, the trust matter ledger which contains a record of that payment, printed on 3 June 2013, is headed in such a way as to suggest Mrs Dougall's power of attorney remained on foot. While it is true that, by that time, it appeared there had also been a trust matter ledger created for the Dougall Estate, it was not that ledger from which the Fifth Payment was made.
>
> 138. Accordingly, there is a strong inference that Mr Berger was purporting to act as attorney pursuant to Mrs Dougall's power of attorney in respect of the Fifth Payment, and the Tribunal will be satisfied on the balance of probabilities that this is the appropriate conclusion to draw.
>
> ...
>
> 151. The particulars of Ground 7 concern the administration of each of the Domabyl Estate and the Dougall Estate.

152. It is an agreed fact that Mr Berger was appointed executor of each of those estates, solely in relation to the Dougall Estate and jointly with Mr Michael Green in relation to the Domabyl Estate.

153. It is also an agreed fact that:

a. by 6 May 2013, probate had not been granted in respect of the Domabyl Estate; and

b. by 23 April 2013, probate had not been granted in respect of the Dougall Estate.

154. The acts the Applicant says were done, or purportedly done, as executor prior to the grant of probate were:

a. the execution of the transfer in relation to the Domabyl Property on or about 10 October 2012;

b. proceeding with the Domabyl Settlement on 12 October 2012;

c. failing to deposit the $154,000 which constituted the First Payment into the trust account of the Law Practice;

d. making the Second Payment, and/or failing to deposit the amount of $6,642.49 into the trust account of the Law Practice;

e. making the Third Payment;

f. making the Fourth Payment;

g. making the Fifth Payment; and

h. making the Sixth Payment."

358. As a result, the findings that Mr Berger knew he behaved dishonestly in relation to Mrs Dougall at [306] and [308] must be set aside. The findings of unsatisfactory professional conduct at [307]-[308] were correctly made.

Miscellaneous issues

359. Three matters in Mr Berger's written submissions were not addressed as part of the thematic issues nor addressed orally by Mr Berger's counsel. They each related to the Penalty Judgment and were:

. (1) the finding and giving weight to the finding of prior complaints made about Mr Berger's conduct;
. (2) the failure to afford any or proper weight to the evidence of Mr Berger's character witnesses; and
. (3) the failure to address the question of Mr Berger's fitness at the time of the order.

360. Given that I am proposing that this Court should accept the joint invitation of the parties to itself determine the appropriate penalty, it is unnecessary to determine these separate complaints.

361. A final matter not addressed as part of the thematic issues and only faintly pressed in oral argument by Mr Berger's counsel was the characterisation of Mr Berger's evidence. I reject the submission made by Mr Berger that the Tribunal erred in finding at [44] and [52] that the appellant presented as an unreliable witness who was often evasive, avoided questions and gave unresponsive answers. I have read the transcript of the appellant's evidence in the context of the detailed contemporaneous written evidence which I have set out at [9]-[114] above. I agree with the characterisation of Mr Berger's evidence by the Tribunal as unreliable. Mr Berger's claims of ignorance or misunderstanding of his legal obligations are inconsistent with the extent of his training and experience as a solicitor. Parts of Mr Berger's evidence were rambling and unresponsive and his evidence was often evasive. On a consideration of the whole of the evidence and having regard to the terms of s 75A of the *Supreme Court Act*, the Tribunal's findings about Mr Berger's evidence were plainly correct.

Effect of these findings on the grounds of the Complaint

362. Given the confusing way in which all parties presented the issues to be determined I will summarise, first, the effect of my findings on the grounds in the Complaint and, then, the effect of my findings on the grounds of appeal.

363. It follows from the consideration of the thematic issues advanced by Mr Berger orally that the Tribunal's findings on:

. (1) issue 1 – ground 1 and related portions of grounds 2, 3 and 7 of the Complaint limited to the First Payment of $154,000 should be upheld in part and the finding made at [269] by the Tribunal must be set aside. It is clear, however, that Mr Berger's conduct in making the First Payment to himself was dishonest;

. (2) issue 3 – ground 1 and related portions of grounds 2, 4, 5 and 7 of the Complaint limited to the Fourth Payment of $20,000 should be upheld in part and the finding at [294]-[296] that it was dishonest and fraudulent conduct must be set aside. It is clear, however, that Mr Berger's conduct in making the Fourth Payment was dishonest;

. (3) issue 4 – grounds 6 and 7 of the Complaint limited to the Third Payment of $1,540.92 should be upheld in part and the finding made at [281] by the Tribunal must be set aside;

. (4) issue 5 – grounds 2, 4 and 7 of the Complaint limited to the Sixth Payment of $14,000 should be upheld in part and the finding made at [317] by the Tribunal must be set aside;

. (5) issue 6 – ground 6 of the Complaint limited to execution of the transfer for sale of Mrs Domabyl's property should be upheld in part and the finding made at [244]-[245] by the Tribunal must be set aside;

. (6) issue 7 – ground 7 of the Complaint limited to proceeding with the settlement of Mrs Domabyl's Property without authority as executor should be upheld in part and the finding made at [244]-[245] by the Tribunal must be set aside;

. (7) issue 10 – ground 11 of the Complaint in relation to applying received monies in breach of the terms of the agreement under which they were received in the Ho matter should be upheld in part and the findings made at [220] by the Tribunal must be set aside; and

. (8) issue 12 – grounds 2, 4, 6, 7, 9 and 10 of the Complaint limited to causing a deficiency in a trust account in relation to the Fifth Payment of $8,751.90, breach of s 255 of the *Legal Profession Act 2004*, purporting to act under a power of attorney without authority, purporting to act as an executor

without authority, failure to disclose costs, and breach of an undertaking in the Dougall matter should be upheld in part and the finding made at [306] and [308] by the Tribunal must be set aside.

364. The Tribunal's treatment of the following aspects of the Complaint should be upheld:

. (1) issue 8 – grounds 9 and 10 of the Complaint limited to failure to disclose costs and breach of an undertaking in the Domabyl matter, not including failure to disclose costs in the Dougall matter;

. (2) issue 9 – ground 12 of the Complaint in relation to overcharging in the Domabyl matter; and

. (3) issue 11 – ground 8 of the Complaint in relation to failure to comply with a court order in the Frischer matter.

Effect of these findings on grounds of appeal

365. It follows that the conclusions I have reached about each of the grounds of appeal are:

. (1) appeal ground 1 – the finding at [220] that Mr Berger's conduct was dishonest and fraudulent must be set aside. On all of the evidence, however, Mr Berger was guilty of professional misconduct in relation to applying received monies in breach of the terms of the agreement under which they were received in the Ho matter;

. (2) appeal ground 2 – the Tribunal did not err in finding at [171] that Mr Berger was guilty of professional misconduct in relation to his failure to disclose costs in the Domabyl matter;

. (3) appeal ground 3 – the Tribunal did not err in finding at [199] that Mr Berger was guilty of unsatisfactory professional conduct in relation to his failure to comply with a court order in the Frischer matter;

. (4) appeal ground 4 –

. (a) First Payment – the Tribunal did not err in finding at [270] that misappropriation in relation to the First Payment of $154,000 was "seriously dishonest and fraudulent conduct". However, the finding at [269] that "[Mr Berger] knew what he was doing was unlawful and dishonest" must be set aside;

. (b) Third Payment – the Tribunal did not err in finding at [282] that Mr Berger was guilty of unsatisfactory professional misconduct in purporting to act as executor without authority and causing a transfer of money from a trust account in relation to the Third Payment of $1,540.92. However, the finding at [281] that "[o]n the balance of probabilities the practitioner knew his conduct was prohibited by law and dishonest" must be set aside;

. (c) Fourth Payment – the Tribunal did not err in finding at [296] that Mr Berger was guilty of unsatisfactory professional misconduct for breaching s 255 and s 259 of the *Legal Profession Act 2004*, causing a deficiency in a trust account, purporting to act as executor without authority and misappropriation in relation to the Fourth Payment of $20,000. The Tribunal did not err in finding at [296] that misappropriation in relation to the Fourth Payment of $20,000 was "dishonest and fraudulent conduct". However, the finding at [294] that "[o]n the balance of probabilities the practitioner knew when he made the payment that ... his conduct making the payment was illegal and dishonest" must be set aside;

. (d) Fifth Payment – the Tribunal did not err in finding at [307]-[308] that Mr Berger was guilty of unsatisfactory professional misconduct in breaching s 255 of the *Legal Profession Act 2004*, purporting to act as executor without authority, causing a deficiency in a trust account in relation to the Fifth Payment of $8,751.90. However, the finding at [306] that "on the balance of probabilities that the practitioner knew that ... [h]is conduct was unlawful and dishonest" and at [308] that this conduct was dishonest must be set aside;

. (e) Sixth Payment – the Tribunal did not err in finding at [318] that Mr Berger was guilty of unsatisfactory professional misconduct in breaching s 255 of the *Legal Profession Act 2004*,

purporting to act as executor without authority and causing a deficiency in a trust account in relation to the Sixth Payment of $14,341.55. However, the finding at [317] that "[o]n the balance of probabilities the practitioner knew at the time of the payment ... [t]he payment would be illegal and dishonest" must be set aside;

. (5) appeal ground 5 – the Tribunal did not err in finding at [361] that Mr Berger was guilty of professional misconduct for gross overcharging in the Domabyl matter;

. (6) appeal ground 6 – given that this Court is itself to determine the appropriate order it is unnecessary to determine whether the Tribunal erred;

. (a) in finding and giving weight to its finding at [20] and [39] of the Penalty Judgment that there was a list of more than 70 complaints against Mr Berger;

. (b) at [21]-[26] of the Penalty Judgment in not affording any or proper weight to the evidence of the character witnesses relied on by Mr Berger;

. (c) in failing to address the question of Mr Berger's fitness at the time of the order; and

. (7) appeal ground 7 – the Tribunal did not err in finding at [44] that Mr Berger presented as an unreliable witness and at [52] that Mr Berger was often evasive, avoided questions and gave unresponsive answers.

Conclusion – The appropriate order

366. Error, in part, in the decision of the Tribunal has been established by Mr Berger. I accept the joint submission of the parties that this Court should itself consider the appropriate order based on the findings it has independently made following a rehearing under s 75A of the *Supreme Court Act*.

367. The critical question is whether the proved conduct warrants an order that Mr Berger be struck off the roll. There was no controversy about the legal test to be applied in making that determination. It must be demonstrated that Mr Berger is probably permanently unfit to practise law: *Ex parte Lenehan* (1948) 77 CLR 403; [1948] HCA 45.

368. The findings I have made at [237]-[361] above disclose that Mr Berger has engaged in professional misconduct:

. (1) in engaging in unsatisfactory professional conduct involving a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence: *Legal Profession Act 2004*, s 497(1)(a); and

. (2) in engaging in conduct which demonstrates he is not a fit and proper person to engage in legal practice: *Legal Profession Act 2004*, s 497(1)(b).

369. The most significant of the findings are those of misappropriation and dishonesty. Mr Berger's defalcations in relation to Mrs Domabyl's estate were intentional. He intended to use clients' entrusted monies without authority to further his own ends. In *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279; [2001] NSWCA 284, Spigelman CJ stated:

> "[19] Honesty and integrity are important in many spheres of conduct. However, in some spheres significant public interests are involved in the conduct of particular persons and the state regulates and restricts those who are entitled to engage in those activities and acquire the privileges associated with a particular status. The legal profession has long required the highest standards of integrity.
>
> [20] There are four interrelated interests involved. Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners

must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people."

370. The Court was taken by both parties to many authorities which had considered "misappropriation". It is unnecessary to address those authorities separately. The relevant principles are clear and were explained sufficiently in *Dupal v Law Society of New South Wales* [1990] NSWCA 56. The principles in *Dupal* were explained by Leeming JA in *Kumar* as follows:

> "[114] Moreover, the severity of the orders made wholly accords with authority. Mr Kumar's circumstances were not dissimilar from those in *Dupal v The Law Society of New South Wales* [1990] NSWCA 56. In that case, Kirby P said:
>
> > "In an appeal such as the present, the Court disposes of the case before it by reference to criteria of general application. These should be clear and simple. They should be such as to leave no doubt in the mind of a practitioner in financial difficulties, exposed to the temptation of using without clear authority the funds of another, the consequences that will flow for the right to practise when such misuse of funds is discovered."
>
> [115] Handley JA, with whom Priestley JA agreed, said:
>
> > "This Court would be departing from a long course of authority if it were to allow the appeal and substitute a period of suspension for the order of the Tribunal removing the appellant from the roll. Counsel were not able to refer us to any case where a solicitor found guilty of misappropriation or wilful contraventions of s 41(1) has not been struck off the roll. Any decision to the contrary would signal to the profession and the community that this Court was no longer insisting on solicitors maintaining the highest standards of personal honesty and integrity in their dealings with clients and the public and in the handling of monies entrusted to their charge. The maintenance of those standards and the public interest require, in my judgment, that this appeal be dismissed. It is well established that the jurisdiction being exercised in this case is not penal but disciplinary and that it must be exercised for the benefit of the public. Sympathy for the appellant and for the tragedy that he has brought on himself and his family by his inability to live up to the high standards which this Court and the profession demand of solicitors cannot be allowed to deflect this Court from doing its duty."

Finally, there is nothing in the claimed double punishment for grounds 1 and 3. A man or woman who takes his or her client's funds for his or her own benefit, and who demonstrates no remorse or understanding of the gravity of his or her misconduct, is prima facie not fit to remain on the Roll. The findings in relation to Mr Malik's $12,000

> by themselves warranted the orders made. The Tribunal correctly regarded them at [93] not as "in the nature of technical or procedural rules or practices" but as "the very basic obligations of honesty and trustworthiness discussed in the major cases" and "fundamental principles of honesty and fair dealing"."

371. To the findings of dishonest misappropriation of client funds must be added the many other aspects of the Complaint here proven. Mr Berger's proven overcharging is serious. It may properly be described as "gross overcharging". As I have found, it amounts to professional misconduct.
372. Mr Berger's breaches of undertakings to the Office of Legal Services Commissioner are also serious. Breach of an undertaking to a professional body or to the Legal Services Commissioner amounts to professional misconduct. The failure to comply with the condition imposed by Beech-Jones J is also serious. The order concerned Mr Berger directly. It is a serious matter for Mr Berger to have failed to comply with the condition of the stay granted by the court.
373. Mr Berger's conduct also demonstrates a consistent failure on his part to maintain a reasonable standard of competence and diligence. The sheer number of breaches across a range of different categories of conduct must be taken into account. In particular, the saga of Mr Berger's abject failure over many years (despite the urgings of his partners) to make any costs disclosures to Mrs Domabyl amounts to professional misconduct. Mr Berger's failure to make any disclosure of costs to Mrs Domabyl was, in the circumstances, conduct falling far short of that expected of a legal practitioner. Mr Berger's unethical conduct in relation to the deposit paid by Mr and Mrs Ho is also serious.
374. Other than the occasions that Mr Berger has given undertakings to the Office of the Legal Services Commissioner recorded in the facts above at [13]-[14] and [36]-[37], I have not taken into account the record of complaints against Mr Berger recited before the Tribunal. There is simply not enough information to draw any reliable conclusions from that material.
375. I have taken the character evidence into account in Mr Berger's favour. Those references, however, do not address, in any detail, the repeated and entrenched nature of the conduct disclosed by the evidence.
376. I have given consideration to whether Mr Berger is probably permanently unfit to practise as at today's date. Regrettably, there is no evidence to suggest that Mr Berger understands the true gravity of his wrongful conduct. Whilst a number of findings made by the Tribunal have been set aside, I have rejected Mr Berger's submission that his conduct was, in any way, unintentional or inadvertent. In critical respects it was dishonest. The Tribunal found that there was no evidence that the appellant had "learned and changed so much from his mistakes and his suspension that he is not likely to engage in further professional misconduct or unsatisfactory professional conduct if he is permitted to resume legal practice". I agree. That remains the case today.
377. Mr Berger's name should be removed from the roll for the purposes of protecting the public. That conclusion is reinforced given the unacceptable conduct involved, the necessity of maintaining proper standards, and the need to maintain public confidence in the profession.
378. Since this appeal is by way of rehearing and having regard to the provisions of s 75A of the *Supreme Court Act*, the evidence amply discloses, for the purposes of s 496 and s 497 of the *Legal Profession Act 2004*, that the appellant's conduct in the practice of law fell short of the standard of competence and diligence expected, and justifies a finding that he is not a fit and proper person to engage in legal practice.

379. Although the Tribunal erred in the respects I have described in these reasons, an independent consideration of all the evidence leads to the same conclusion reached by the Tribunal. Mr Berger's name must be removed from the roll.

Conclusion and orders

380. I propose the following orders:
. (1) Appeal dismissed.
. (2) Mr Berger to pay the costs of the Law Society of the appeal.
381. **SIMPSON AJA**: I agree with the orders proposed by Payne JA, and, subject to one relatively minor reservation, with his Honour's reasons. My reservation concerns certain conclusions drawn by Payne JA that are favourable to the appellant. These are conclusions that, in some respects, findings that Mr Berger knew that his conduct was dishonest and/or illegal ought to be set aside, on the basis that (as I understand his Honour's reasons) no clear allegation of dishonesty or illegality was made in the Law Society's complaint. I take by way of example the payment of $20,000 made by the appellant out of Ms Domabyl's estate to his son-in-law, Evan Penn, in order to discharge a personal debt to Mr Penn: [274]-[282].
382. The Law Society set out in some detail the way in which it put its case in relation to this payment. That included assertions that the relevant legislation required the funds to be held in a trust account to be operated exclusively for Ms Domabyl's estate, that the appellant was in breach of that legislated requirement, that the payment caused a deficiency in the trust account and that the appellant had no authority (after Ms Domabyl's death) to act under the Power of Attorney that she had given him, and no authority to act as executor pending a grant of probate.
383. In my opinion it is clearly implicit that the Law Society was asserting illegality and dishonesty to the knowledge of the appellant. The appellant could have been under no illusion that, by alleging that he unlawfully and dishonestly paid the sum of money to his son-in-law in discharge of a personal debt, the Law Society was alleging that he did so knowing of the illegality and dishonesty.
384. The appellant's responses to the Law Society's pleading are, on this question, immaterial. The Tribunal accepted the Law Society's case as pleaded. In my opinion it was open to the Tribunal to reach the conclusion that the payment was illegal and dishonest and that the appellant was aware of those circumstances. I would not set aside the findings that the appellant knew that the payment was illegal and dishonest.
385. There are other instances of similar conclusions. Since the view I take could not enhance the appellant's position, and merely strengthens the case for the findings of professional misconduct, and the findings that the appellant is permanently unfit to practice, it is not productive to explore other instances.

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[1] Section 309 was relevantly amended by the Legal Profession Amendment Act 2006 (NSW) (No 116) at Sch 2 [97] which stated "Section 309 (1) (b) (iii) Omit "within 30 days".", Sch 2 [98] which stated "Section 309 (1) (c) Omit "it is not reasonably practicable to estimate the total legal costs". Insert instead "that is not reasonably practicable"."

[2] Section 311 was relevantly amended by the Legal Profession Amendment Act 2006 (NSW) (No 116) at Sch 2 [102] which stated "Omit section 311 (2). Insert instead: (2) Disclosure under section 310 (1) must be made in writing before, or as soon as practicable after, the other law practice is retained. (3) Disclosure made to a person before the law practice is retained in a matter is taken to be disclosure to the person as a client for the purposes of sections 309 and 310."

[3] Section 312 was relevantly amended by the Legal Profession Amendment Act 2006 (NSW) (No 116) at Sch 2 [103] which stated "Insert "(exclusive of GST)" after "$750" wherever occurring in section 312(1) and (2)."

[4] Section 316 was relevantly amended by the Legal Profession Amendment Act 2006 (NSW) (No 116) at Sch 2 [111] which stated "Omit the section. Insert instead: 316 Ongoing obligation to disclose A law practice must, in writing, disclose to a client any substantial change to anything included in a disclosure already made under this Division as soon as is reasonably practicable after the law practice becomes aware of that change."

[5] Section 317 was relevantly amended by the Legal Profession Amendment Act 2006 (NSW) (No 116) at Sch 2 [112] which stated "Omit the section. Insert instead: 317 Effect of failure to disclose (1) Postponement of payment of legal costs until assessed If a law practice does not disclose to a client or an associated third party payer anything required by this Division to be disclosed, the client or associated third party payer (as the case may be) need not pay the legal costs unless they have been assessed under Division 11. Note. Under section 369, the costs of an assessment in these circumstances are generally payable by the law practice. (2) Bar on recovering proceedings until legal costs assessed A law practice that does not disclose to a client or an associated third party payer anything required by this Division to be disclosed may not maintain proceedings against the client or associated third party payer (as the case may be) for the recovery of legal costs unless the costs have been assessed under Division 11. (3) Setting costs agreement aside If a law practice does not disclose to a client or an associated third party payer anything required by this Division to be disclosed and the client or associated third party payer has entered into a costs agreement with the law practice, the client or associated third party payer may also apply under section 328 for the costs agreement to be set aside. (4) Reduction of legal costs on assessment If a law practice does not disclose to a client or an associated third party payer anything required by this Division to be disclosed, then, on an assessment of the relevant legal costs, the amount of the costs may be reduced by an amount considered by the costs assessor to be proportionate to the seriousness of the failure to disclose."