SUPREME COURT OF QUEENSLAND

CITATION:	*Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42
PARTIES:	**COUNCIL OF THE QUEENSLAND LAW SOCIETY INCORPORATED** (complainant/appellant) **v** **MARK ROBERT WAKELING** (practitioner/respondent)
FILE NO/S:	Appeal No 8391 of 2003 Solicitors' Complaints Tribunal Charge No 110
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application - Civil
ORIGINATING COURT:	Solicitors' Complaints Tribunal
DELIVERED ON:	27 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2004
JUDGES:	de Jersey CJ and Davies and Williams JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In respect of charge four, the respondent is found guilty of professional misconduct, as particularized** **2. The penalty imposed by the Solicitors' Complaints Tribunal is set aside** **3. The name of the respondent is to be removed from the roll of solicitors** **4. The respondent is to pay the appellant's costs of the appeal to be assessed**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMOVAL OF NAME FROM ROLL PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – GROUNDS FOR DISCIPLINARY ORDERS – MISLEADING COURT AND PERVERTING COURSE OF JUSTICE – IMPROPER DEALING WITH MONEY, SECURTIES OR PROPERTY – GENERALLY – STATUTORY REQUIREMENTS AS TO ACCOUNTS

AND TRUST MONEY

PROFESSIONS AND TRADES – LAWYERS – ACCOUNTS AND TRUST MONEY – STATUTORY PROVISIONS – TRUST ACCOUNTS – RIGHT OF APPROPRIATION – where Solicitors' Complaints Tribunal made findings of professional misconduct against the respondent – appeal by Council of the Queensland Law Society - where respondent guilty of misleading the Court – where respondent guilty of fraudulent and dishonest misappropriation of client's money – where respondent guilty of unauthorised withdrawals from his trust account – whether respondent was guilty of professional misconduct – whether respondent's name should be struck from the roll

Trust Accounts Act 1973 (Qld), s 8
Queensland Law Society Rules, r 86

Attorney-General v Bax [1998] QCA 89; Appeal No 7423 of 1887, 12 May 1998; [1999] 2 Qd R 9, referred to
Barristers' Board v Young [2001] QCA 556; Appeal No 8646 of 2001, 7 December 2001, considered
Council of the Queensland Law Society v Lowes [2003] QCA 201; Appeal No 7951 of 2002, 23 May 2003, considered*Fox v Percy* [2003] HCA 22; (2003) 197 ALR 201, considered
Law Society of New South Wales v Moulton [1981] 2 NSWLR 736, considered
Mellifont v Queensland Law Society Incorporated [1981] Qd R 17, cited

COUNSEL: M J Burns for the appellant
N M Cooke QC, with P B O'Neill, for the respondent

SOLICITORS: Clayton Utz for the appellant
Lake Lawyers for the respondent

[1] **de JERSEY CJ**: The Solicitors' Complaints Tribunal on 26 August 2003 made findings of professional misconduct against the respondent, and suspended him from practice for two years. Other orders included that for five years after recommencing practice, the respondent practise only as an employee or in a partnership, that he not apply for a practising certificate unless first providing a certificate from a psychiatrist approved by the Queensland Law Society certifying his fitness to practise, and that he complete a practice management course.

[2] The Council of the Queensland Law Society Inc appeals, seeking a finding that the respondent was guilty of professional misconduct on one count which was dismissed by the Tribunal, and an order that the respondent's name be struck from the roll.

Charges four, five, seven and 11(a)

[3] It is convenient to deal first with the charge dismissed (or not found established) by the Tribunal, which is charge four, and related charges. The terms of charge four follow:

"That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, during the period 14 November 2001 to 18 February 2002, he fraudulently misappropriated trust moneys in the sum of $14,280.99, or part thereof, the property of the estate of D M Lacey deceased, by paying the said sum from his trust account to general account and applying the same to his own use and benefit, in circumstances where the practitioner had no lawful entitlement to the said sum.

Particulars

(a) At all material times the practitioner acted for the executors of the estate of D M Lacey deceased.

(b) Between 14 November 2001 and 18 February 2002, the practitioner transferred estate funds totalling $14,280.99, as particularised hereunder, from his trust account to his general account for costs and outlays ("the said payments");

(i)	14 November 2001	$5,940.00
(ii)	19 November 2001	5,500.00
(iii)	18 February 2002	2,840.00
		$14,280.99

(c) At the time of each of the said payments:

(i) the executors had not authorised the payment, the practitioner had not rendered an account to the executors in respect of the payment and the practitioner had no other lawful entitlement to the payment; and

(ii) the payment (and the accumulative payments) grossly exceeded a reasonable charge to the estate, as at the time of such payment, for professional services then rendered by the practitioner on behalf of the estate.

(d) By the said payments, the practitioner fraudulently misappropriated trust moneys up to the sum of $14,280.99, mixed the same with his own moneys, and applied same to his own use and benefit.

(e) On 18 September 2002 the trust deficiency of $14,280.99 was restored by the practitioner:

(i) rendering a bill of costs to the executors of the estate in the sum of $10,039.02 for professional services rendered on behalf of the estate; and

(ii) refunding the sum of $4,242.08 from the general account to the credit of the estate trust ledger."

[4] The respondent admitted charge five, which in the alternative to four, alleged that by withdrawing the sums referred to in para (b) of charge four, and depositing them into his general account, "without authority, or any other lawful entitlement", and intermingling them with his own, the respondent breached trust and s 8 of the *Trust Accounts Act*. The appellant contends that the Tribunal should have found that the other element in charge four, fraudulent misappropriation, was established.

[5] Charge four concerned a deceased estate of modest proportion. The executors retained the respondent and entered into a written client agreement, under which the

respondent provided an estimate of total fees of between $2,700 and $5,700. The amount drawn, $14,280, vastly exceeded that estimate, and was agreed by the respondent in his evidence to have been "wildly out". There were no attendance notes or other records on the client file to support the amounts claimed, which the respondent conceded in his evidence were arrived at by "guesswork". On 7 October 2002 the respondent provided the executors with a trust account statement which understated two of the withdrawals and correspondingly substantially overstated the applicable balances. (Those discrepancies formed the subject of charge seven, which the respondent admitted, which alleged that the trust account statement was given recklessly.) The respondent swore to providing the executors with accounts on 10 November 2001 and 18 February 2002, which would have been unusual given the administration of the estate had not been completed by either of those dates, and the aggregate of the amounts of the accounts substantially exceeded the estimate under the client agreement. The first account, furthermore, claimed payment for outlays which had clearly not been incurred and for work not by then undertaken. The executors gave evidence denying receiving the accounts, and the respondent's counsel conceded that they had not. During the investigator Mr Hourigan's examination, the respondent did not produce the accounts, and subsequently claimed that they were probably with his bookkeeper Mr Thorne. Mr Thorne gave some evidence about locating accounts relating to the estate and delivering them to the respondent.

[6] The Tribunal expressed these reasons:

> "Charge 4 relates to an allegation of fraudulently misappropriating trust money in the sum of $14,280.99. The accountant, Mr Thorne, gave evidence. We find Mr Thorne to be a witness of credit. He deposes to the existence of the duplicate accounts at the time of his involvement in the practice. We cannot say when these duplicates came into existence. The practitioner says they were in existence at the time they are dated and that he believed that those accounts had been sent out.
>
> There is no clear evidence that the accounts were not in existence at that time. The fact that the practitioner thought they had been sent and in fact were not is not inherently incredible, given the state of his office practices at the time.
>
> The Tribunal cannot find on the Brigginshaw Test that the practitioner fraudulently misappropriated those trust funds."

[7] On any reasonable view, the collection of circumstances in the preceding paragraph but one warranted the view that the respondent made these transfers recklessly. But in my view, they plainly warranted the conclusion that the respondent thereby acted dishonestly. It was the only conclusion reasonably open. The Tribunal focused on the two accounts. One would entertain a strong suspicion that they did not exist at the relevant time. But that consideration aside, the other features collected above compel the conclusion that the respondent was acting dishonestly. As summarized by Mr Burns who appeared for the appellant:

> "…even if one accepts that the two accounts were not a fabrication, the transfers represented such gross overcharging in the context of a small estate that the Respondent could not in all conscience have

> considered himself entitled to the funds, and certainly not in the absence of any records to justify the many charges. The quantification of the charges bore no relationship to the work actually undertaken or to the terms of the Client Agreement. Moreover, the transfers took place without the knowledge or authority of the executors who were misled by the false Trust Account Statement and remained oblivious until the advent of the proceedings below."

[8] By concentrating on the issue of the two accounts – whether they existed and whether they were sent – the Tribunal may have lost sight of the broader question, which was whether the collection of many prima facie incriminating circumstances did not convincingly (*Brigginshaw*) exclude any view but that the respondent had acted dishonestly in this matter. The Tribunal's expression of reasons is scant and rather cryptic, and leaves the reader with no conviction that the broader question was properly addressed. In those circumstances I have no difficulty substituting my view on this charge for the view reached by the Tribunal.

[9] In *Lowes* [2003] QCA 201, reference was made to the analysis by the High Court in *Fox v Percy* [2003] HCA 22, para 29 of the proper approach of an appellate court engaged upon a rehearing:

> "In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must "not shrink from giving effect to" its own conclusion. Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, or by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process."

[10] The Tribunal erred in not finding charge four to have been established: its approach was "contrary to compelling inferences". I would order that in respect of that charge, the respondent be found to have been guilty of professional misconduct resting in fraudulent misappropriation, as particularized.

[11] The respondent admitted charge 11(a), which alleged that by overdrawing his trust account by $1,166 on 18 September 2002 in respect of this matter, the respondent breached the *Trust Accounts Act* 1973.

Charge one

[12] The respondent admitted charge one, which alleged that he was guilty of professional misconduct by engaging in conduct which misled or was likely to

mislead the Supreme Court or a registrar of the court. He acted for a Mrs Phillips in her application for probate of a will dated 29 January 1997. The respondent prepared and caused the filing of an affidavit by Mrs Phillips deposing that the deceased's last will was dated 29 January 1997, the will in relation to which probate was sought. At that time, the respondent knew that the deceased had executed a new will on 13 December 2000, that there was an issue about her testamentary capacity, and that a contest would ensue as to the validity of the wills. His explanation was that he was subjected to pressure from Mrs Phillips, that she flustered or overbore him. In breach of his duty, the respondent failed to have the court informed of the later will. Probate issued in relation to the earlier will.

[13] The Tribunal tended to minimize the significance of this serious dereliction. Their reasons, when dealing with the question of penalty, were as follows:

> "When we look at the practitioner's actions in misleading the court, we find the misconduct could only ever have had temporary effect. His acquiescence in the demands of his client in drawing and witnessing the misleading affidavit (and then filing the affidavit and failing to advise the court of the existence of the later will) could only ever have given the client temporary advantage. The practitioner knew of the involvement of the other solicitors and knew that his application for probate must come to their notice. The practitioner must have known, had he ever stopped to consider the consequences of his behaviour, that those solicitors would inevitably complain, the court would be appraised of the true position, and the complaint would result in the prosecution now before us. We cannot say that the practitioner's conduct was part of a considered plan to permanently hide from the court the true state of affairs."

[14] The prospect of detection did not in my view affect an assessment of the obvious seriousness of this conduct on the part of the respondent. In any case, whether the matter came to light depended on the preparedness of the client of the other solicitors to pursue the issue (in fact, the only difference between the two wills concerned the nomination of executor). But that aside, the significant point for the present is that the respondent was prepared to facilitate the misleading of the Supreme Court on an important matter, in order to obtain a grant of probate, which he succeeded in doing. It is by-the-way that the misleading may later have come to light.

Charges two and three

[15] While charge one fastens on the respondent's misleading the court, charge two was based on his preparation of the false affidavit and failure to take any steps "to put the matter right". This charge was found established.

[16] Charge three concerns a misrepresentation to the Queensland Law Society in response to its enquiry. The respondent asserted that a "diary note" provided to him by the other solicitors acknowledged that the testatrix lacked capacity at the time of the later will. The respondent effectively admitted the falsity of that representation, in that the diary note does not contain such an acknowledgement. The Tribunal did not however find that the respondent acted dishonestly in making that misrepresentation to the Society.

Charges eight and 10(a)

[17] The respondent admitted these charges, which concerned a conveyancing transaction in which he acted for the vendor. He was paid a deposit of $1,100 as stakeholder. The purchaser was to pay the vendor's legal costs fixed at the same amount. The respondent received the deposit monies on 14 September 2000. The contract was not due to settle until 31 October 2000. On 4 October 2000 the respondent issued a bill of costs and outlays for $1,100 and on the same day transferred that amount from the trust account into his general account in payment of his bill. The purchaser did not in the event pay the agreed legal costs, and the respondent allowed the transaction to proceed to completion in that state. There was accordingly a shortfall on completion of $1,100. On 19 June 2001 the investigator Mr Hourigan discovered that the respondent had short paid his vendor client $1,100 of the net proceeds of sale. The respondent informed Mr Hourigan that he would immediately deposit that amount into his trust account to the credit of his client, and seek to recover the shortfall from the purchaser. On 21 June 2001 the respondent did transfer $1,100 from his general account to the trust account, and on 4 July 2001 wrote to Mr Hourigan confirming that he had done so. However on the same day, he re-transferred that amount to his general account, a fact which remained unknown to the Society until a later examination in November 2002.

Charges nine and 10(b)

[18] The respondent admitted these charges. While acting for Mrs Phillips in the application for probate, the respondent also received instructions to act for her, together with two other persons, in relation to a contract for the sale of their land. He was appointed stakeholder for $10,000 deposit money. He received that sum on 18 June 2002 and deposited it into his trust account. Completion of the sale took place on 30 August 2002. Prior to completion, on 13 August 2002, the respondent transferred the whole of that amount to the credit of his general account. Mrs Phillips authorised him to do so, in the form of an unsecured loan for "general use" to be "repaid at a future date to be determined". The transfer occurred without the authority of the other two persons, or the authority of the purchaser under the contract. It emerges that the respondent required the funds urgently for the payment of commitments that day, and significantly, the person he turned to for assistance was the person he claimed had pressured him in relation to the application for probate. (Mr Burns submitted the respondent's claim to have been pressured did not sit comfortably with various letters to which he took us.) Even if authorised, such a borrowing contravened r 86 of the *Queensland Law Society Rules*. Because it was not properly authorised it also contravened the *Trust Accounts Act*. It actually amounted to a breach of fiduciary duty by the respondent (*Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736, 739-40).

Charge 10(c)

[19] The respondent contested this charge which alleged actual dishonesty. He acted for Ms Anderson in the sale of her property. On 6 July 2001 he received and banked into his trust account the proceeds of sale, $58,799.38. On 18 July 2001 he disbursed the whole sum to Ms Anderson and the solicitors for her former partner (the matter occurred in the context of a family law property settlement) save for $3,030 which he transferred to his general account, purportedly in payment of "costs and outlays". Mr Hourigan was unable to locate any bill of costs or trust account authority such as may have authorised the transfer. In his affidavit, the respondent swore that he prepared an account dated 14 June 2001, in the total

amount of $3,050. He purported to exhibit a copy of that account. For various reasons the account was plainly not genuine. In his evidence before the Tribunal, the respondent denied transferring the funds fraudulently, suggesting instead that the bill was simply inaccurate. Under cross-examination, he was forced to concede that the account could not have been in existence on the date it bore. The Tribunal held that "The practitioner cannot have believed when he took the money that he had a present entitlement to it."

Charges 10(d) and (e)

[20] The respondent admitted these charges: he withdrew $41.89 from his trust account in breach of the *Trust Accounts Act*, and on another occasion $1,939.05, similarly in breach.

Charge 11(b)

[21] This charge, which the respondent admitted, concerned his failure from February 1999 to maintain a trust account deposit book.

Summary of charges

[22] In summary, the respondent committed the serious ethical offence of deliberately misleading the Supreme Court in relation to the probate application (and misled the Queensland Law Society in relation to that matter as well), he was guilty of the fraudulent misappropriation of $14,280 of his client's money, in another instance he dishonestly appropriated $3,030 of client's money, he committed two instances of misappropriating deposit monies of which he was a stakeholder ($10,000, $1,100), he made two unauthorised withdrawals from his trust account ($41.89, $1,939), and he overdrew the trust account ($1,166).

Penalty

[23] The Tribunal observed that even on the charges it found established, which did not include charge four, striking off would normally follow. I have referred already to what was said about the misleading of the court. As to the trust account issues, the Tribunal said:

> "Although we do not in any way minimise the seriousness of his behaviour, the practitioner's misconduct in relation to his trust account reflects a similar lack of awareness of the consequences of his actions. These offences occurred in the context of an accounting system that had broken down, compounded by clumsy attempts to reconstruct documentation that should have been, but was not, in existence when it ought to have been, coupled with denials to the Law Society as to the true state of affairs. There is nothing he has done of any substance that he could not have achieved lawfully, had he applied himself properly."

That again substantially understated the significance of this misconduct, including, as it did, fraudulent misappropriations.

[24] We were referred to *Bax* [1999] 2 Qd R 9, 20 where Pincus JA said:

> "A momentary or at least temporary lapse from proper standards of honest behaviour is one thing; persistence in such conduct over a substantial period is another…

> It is not, in my opinion, every proved act of dishonesty on the part of a practitioner which justifies a substantial penalty; dishonesty, like other forms of misbehaviour, has grades of seriousness."

In this case, the multiple breaches, summarized in para [22] above, occurred over a period of two years, and the instances of established dishonest misappropriation of clients' funds and the misleading of the court warrant the epithet serious.

[25] At the relevant time, the respondent was suffering considerable emotional trauma. On the evidence of the psychiatrist Dr Curtis, although he was in satisfactory condition by the time of the hearing before the Tribunal (when Dr Curtis saw him), at the time he committed these ethical breaches the respondent would likely have been suffering depression, the result of a combination of circumstances which clearly would have been distressing. But it was accepted that that would not have deprived him of the capacity to appreciate the wrongness of the course he chose to follow. My view is that those circumstances personal to the respondent, disturbing though they are, cannot distract the court from the imposition of the sanction of striking off if otherwise appropriate, having regard to the relevant objective, which is protection of the public.

[26] In *Young* [2001] QCA 556, observation was made on the significance of such medical evidence, and favourable reference material:

> "The references and the psychiatric report suggest that the respondent is well thought of by friends and workmates and has innate qualities upon which she could build if the predicted outcome of treatment occurs. As against this, the respondent demonstrated before the Shepherdson Inquiry, conduct of a kind that is the antithesis of what the authorities … require of a Barrister. There is authority that it is the intrinsic character of the person under inquiry that should be the focal point. In *Re Bell* (Full Court; Motion 622 of 1991, 6 December 1991, unreported), Williams J said that what is in issue is the person's intrinsic character, not necessarily his or her good fame either within the profession or the community at large."

[27] The court cannot hold out, as fit to practise, a person who has trespassed to this extent beyond the boundary of ethical probity. The respondent's consciously misleading the court in the probate application of itself probably warranted his being struck off. Adding in the other breaches, encompassing both dishonesty and recklessness, the case for striking off is seen to be compelling. That no client ended up out of pocket is of no or little relevance (*Moulton*, 740; *Mellifont v The Queensland Law Society Inc* [1981] Qd R 17, 28-9). While in light of the respondent's personal circumstances then and now, the result will, for him and his family, regrettably be hard and sad, this court, protecting the public, cannot at this stage confidently present the respondent as someone on whom the client and the court may rely for undoubted honesty, independent judgment and the efficient disposition of his work; and the court could not now be confident that after a two year suspension, that position would obtain.

Orders

[28] I would order:

1. that in respect of charge four, the respondent is found guilty of professional misconduct, as particularized;
2. that the penalty imposed by the Solicitors' Complaints Tribunal be set aside;
3. that the name of the respondent be removed from the roll of solicitors;
4. that the respondent pay the appellant's costs of the appeal to be assessed.

[29] **DAVIES JA:** I agree with the orders proposed by the Chief Justice and with his reaons for those orders.

[30] **WILLIAMS JA:** I will not repeat unnecessarily matters of fact and legal issues adequately detailed in the reasons for judgment of the Chief Justice which I have had the advantage of reading. I agree with him that in the circumstances the appeal should be allowed and the name of the respondent removed from the roll of solicitors. Because of the significance of that order it is desirable that I articulate briefly my reasons for concluding that the penalty imposed by the Solicitors' Complaints Tribunal, essentially suspension from practice for two years, was inadequate and inappropriate.

[31] The respondent admitted he was guilty of professional misconduct as alleged in charges 1, 3(a), (b), (c) and (d), 5, 7, 9, 10(a), (b), (d), (e) and 11 as set out in the Notice of Charge. The Tribunal found him guilty of charge 3(e) on the basis that the relevant representation to the appellant was made recklessly and not knowingly, as well as on charges 2 and 10(c). Significantly all counts in charge 10 alleged actual dishonesty, and the Tribunal found that with respect to 10(c) the respondent dishonestly withdrew the sum of $3,030 from his trust account without having any lawful entitlement thereto.

[32] Some further brief reference is needed to the conduct alleged in the more serious of those charges. Charge one alleged the respondent was guilty of professional misconduct in that he misled the Supreme Court with respect to an application for probate. At all times he knew of the existence of a will executed later in point of time than the one in his possession. Despite that, he made no reference to that later document in the application for probate. It is clear from the material that his motivation in doing so was to save the expense of contesting the testator's capacity at the time the later document was executed. Specifically the respondent prepared the affidavit of the applicant executor and witnessed it.

[33] To my mind the respondent's conduct amounted to gross dereliction of the duty he owed to the Supreme Court as a solicitor. He deliberately misled the court and thereby through deception obtained an order for probate. He sought to convince the Tribunal he was overborne by his client, but contemporaneous documents do not support that.

[34] I cannot accept the Tribunal's observation in its reasons that the misconduct "could only ever have had temporary effect". Once the order for probate was obtained immediate steps could have been taken which could have had significant impact (at least in theory) on rights dependent upon the validity of the later Will.

[35] That conduct to my mind was so serious that, without more, striking off was an appropriate penalty. Courts must be able to rely on the honesty of officers of the court in making orders having serious legal consequences. Any solicitor who

actively deceives the court into making an order thereby puts at risk the right to practise as such.

[36] As already noted all counts in charge 10, as admitted and as found by the Tribunal to be proved, involved actual dishonesty. As particularised there were five separate acts of dishonesty involving improper dealings with trust account monies. The offences occurred over a period of time: September 2000 ($1,100), June 2002 ($10,000), July 2001 ($3,030), May 2002 ($353.22) and July 2002 ($1,939.05). The only one of those charges not admitted was that of July 2001, but, as already noted, the Tribunal found the respondent guilty with respect thereto.

[37] The finding of dishonesty on five occasions, involving the sums of monies indicated in the charges, would again, in my view, ordinarily call for striking off in the absence of strong mitigating factors.

[38] That leaves for consideration charge four which was the subject of evidence before the Tribunal resulting in it stating that it could not find "on the Brigginshaw Test that the practitioner fraudulently misappropriated those trust funds". In broad terms the allegation in the charge was that the practitioner fraudulently misappropriated trust monies up to the sum of $14,280.99, mixed the same with his own monies, and applied the monies to his own use and benefit.

[39] Charge four relates to the respondent's acting for the executors of the Estate of DM Lacey, deceased. Mrs Lacey died on 8 September 2001 and her son and daughter were appointed executors of her will. They entered into a Client Agreement with the respondent on 25 September 2001 in which an estimate of total fees of between $2,700 and $5,700 was made. The Agreement provided the basis upon which the respondent was entitled to charge for his professional work in the administration of the Estate.

[40] On or about 12 November 2001 the respondent received by cheque from Mandeebie Nursing Home a refund of the deceased's accommodation bond in the sum of $17,690.61. That was the first asset of the Estate he got in. The Trust Account statement shows that on the following day, 13 November, the sum of $5,940 was paid from the Trust Account to Wakeling Lawyers for professional costs and outlays. That was followed by a further transfer on 19 November of $5,500, and a further transfer on 18 February 2002 of $2,840.99, each again being for professional costs and outlays. A bill of costs subsequently prepared on 18 September 2002 showed that as at 14 November 2001 the solicitors were only entitled to about $2,700 for costs and outlays to that date and the firm was only entitled to a total of $10,039 for costs and outlays for the administration of the whole Estate.

[41] The respondent claimed to have prepared a statement of professional costs on 10 November 2001 (a Saturday) claiming $10,000 for professional costs and outlays totalling $1,440, and another account on 18 February 2002 claiming $2582.71 for professional costs and outlays of $258.27. The respondent gave evidence he believed each had been submitted to the executors, but they each denied receiving such accounts. The documents exhibited to the affidavit of the respondent as the accounts could not have been in existence as at 10 November 2001 and 18 February 2002 because they contained a reference to a solicitor who was not employed by the firm until much later. It was ultimately conceded on behalf of the respondent before

the Tribunal that the accounts dated 10 November 2001 and 18 February 2002 were not received by the executors, though he maintained they were drawn up on those dates. In his affidavit the respondent contended that when the appellants investigation was conducted the accounts were with a Mr Thorne who was employed as a bookkeeper by Wakeling Lawyers on or about June 2002. According to Thorne he did locate three accounts in the Billings Book for the Lacey Estate hearing dates 10 November 2001, 18 February 2002 and 18 September 2002. According to his evidence documents were produced by computer printout being an account dated 10 November 2001 for $11,440 and an account dated 18 February 2002 for $2,840.99.

[42] It may well be that the document bearing the name of a solicitor only employed subsequently to those dates was a result of using later letterhead when making a printout from the computer.

[43] It appears that the Tribunal was not satisfied that charge four was made out because it could not be satisfied as to the date on which those accounts were prepared, even though there was a clear acknowledgment that they had not been sent to the executors. That does not, to my mind, overcome the clear fact that the respondent transferred to his general account $5,940 on 14 November when work to that value (together with outlays as alleged) had not been carried out. On the evidence there was clearly no proper authorisation or justification for transferring additional sums of $5,500 on 19 November 2001 and $2,840.99 on 18 February 2002. The evidence clearly established that the executors had not authorised the payments, the practitioner had not rendered accounts to the executors, and further the payments grossly exceeded a reasonable charge to the estate, as at the time of such payment, for professional services then rendered. Notwithstanding the concerns of the Tribunal as to what accounts may have been in existence at the material time, on the whole of the evidence the charge of fraudulent misappropriation of trust monies in the sum of $14,280.99 was clearly made out.

[44] That means that there is added to the other charges a further count of dishonesty involving a substantial sum of clients' money.

[45] Without significant mitigating factors the appropriate penalty for the numerous offences of dishonesty would be striking off.

[46] The respondent led evidence before the Tribunal that over the relevant period he was suffering considerable emotional trauma which had resulted in his accounting system and office procedures becoming chaotic. It was submitted on behalf of the respondent that most, if not all, of the charges should be regarded as the consequence of gross errors of judgment largely brought about by the stressors then impacting on the respondent.

[47] Whilst one can sympathise with the respondent in view of the problems he experienced in his personal life, such factors are not sufficient to absolve him from the consequences of his dishonesty. He was not deprived of the capacity to understand that he was acting dishonestly and the mitigating considerations do not, in my opinion, absolve him from the ordinary consequences of his dishonest behaviour.

[48] Given the totality of his dishonesty the case for striking off is, as the Chief Justice has said, compelling.

[49] In the circumstances I agree with the reasoning of the Chief Justice and with the orders proposed by him.