LEGAL PROFESSION DISCIPLINARY TRIBUNAL

CITATION: *Legal Profession Board of Tasmania v Green (No. 2)* [2022] TASLPDT 2

PARTIES:	LEGAL PROFESSION BOARD OF TASMANIA v JOHN MARTIN GREEN
DELIVERED ON:	18 February 2022
DELIVERED AT:	Hobart
HEARING DATE:	On the Papers
THE TRIBUNAL:	P. L. Jackson SC (Chairman) K. Mooney SC J. Cranston

REPRESENTATION:

Counsel:
- Applicant: A. Darcey
- Respondent: T. J Williams

Solicitors:
- Applicant: HWL Ebsworth
- Respondent: T. J. Williams

Decision Number: [2022] TASLPDT 2
Number of paragraphs: 104

REASONS FOR DECISION 18 February 2022

THE PROCEEDING

1. The Legal Profession Board of Tasmania (**Applicant**) made application to the Tribunal pursuant to s. 464(1) of the *Legal Profession Act 2007* (**the Act**) for the hearing and determination of a complaint made to the Board against the Respondent (**Complaint**).

   The Complaint was made to the Applicant by a solicitor who practises in the United Kingdom, Duncan Charles Pringle Rabagliati (**Complainant)**.

2. The Application sought a determination that the conduct complained of amounts to professional misconduct or alternatively unsatisfactory professional conduct, and sought the following orders:

(a) An order pursuant to s. 471(e) of the Ac t that the Respondent is reprimanded.

(b) An order that the Respondent undertake a twelve-month period of practice under supervision pursuant to Section 473(g) of the Act, particulars of which are specified in the Application but are no longer relevant.

(c) An order that the Respondent's trust and estate files be subject to periodic inspection by a Supervisor appointed for the purposes of the previous order following completion of the period of supervision.

(d) An order that the costs of and incidental to the appointment of the supervisor, the specified period of supervision and the periodic inspection are to be met by the Respondent as they are incurred.

(e) A compensation order pursuant to Section 473(b) of the Act, the particulars of which are no longer relevant.

(f) An order pursuant to s. 481 of the Act that the Respondent pay the Applicant's costs of and incidental to the Application as agreed or as taxed in accordance with the *Supreme Court Rules 2000*.

3. After protracted negotiations the parties requested that the Tribunal determine the Application without conducting a hearing in relation to the Complaint and, in part, by making orders by consent of the parties pursuant to s. 479 of the Act.

   However, not all matters in issue on the Application have been agreed between the parties so the Tribunal has the task of determining those issues in order to reach a final determination of the matter.

   In short, therefore, so far as there are matters that remain in dispute, and so far as the Tribunal is to decide whether to make orders pursuant to s. 479 of the Act and, if not, what orders are to be made, the Tribunal is asked to determine those matters, and the final disposition of the Application, 'on the papers'.

4. The materials on which the Tribunal has been asked to determine the Application consist of the following:

   (a) The Application dated 21 June 2019, with attached particulars specifying 4 separate matters of complaint (**Application**).

   (b) An undated Statement of Agreed Facts and Documents, lodged with the Tribunal on 3 August 2020 (**Statement of Agreed Facts**), together with all of the **Agreed Documents**.[1]

   (c) An undated statement of issues that are not agreed and are to be determined by the Tribunal, settled between the parties and also lodged with the Tribunal on 3 August 2020 (**Statement of Issues**).

   (d) An affidavit affirmed by the Complainant on 27 April 2021.

(e) An affidavit affirmed by Mr. Peter Manser on 29 April 2021.

(f) Submissions made in writing by counsel for the Respondent dated 24 July 2020 **(Respondent's Submissions**.

(g) Submissions made in writing by counsel for the Applicant dated 17 March 2021 (**Applicant's Submissions**) .

(h) An undated and unsigned document filed by the parties entitled Written Instrument and purporting to be a written instrument of consent for the purposes of s. 479 of the Act.

5. Whilst the parties' agreement as to the determination and orders they ask the Tribunal to make extends in part to the question of costs, there is not full agreement as to what order should be made as to costs.

The Tribunal understands that lack of full agreement as to what order should be made as to costs is the reason it has been presented with an unsigned document that is not, strictly speaking, a written instrument of consent for the purposes of s. 479 of the Act (par. 4(h) above).

However, to the extent that document unambiguously seeks consent orders, and the parties' agreement to those orders in those terms is plainly confirmed by the written submissions made on behalf of each party, the Tribunal is prepared to accept that its jurisdiction to come to a determination whether to make the orders that are sought by consent of the parties under s. 479 is enlivened by that document. We will refer to it as the **Instrument of Consent**.

6. The Tribunal sought additional submissions on the question of costs and received further submissions from the Applicant dated 15 September 2021 and from the Respondent dated 16 September 2021.

In those submissions, the Respondent has not sought to argue that there should be no order for costs but seeks to limit the scope of that order.

THE ALLEGATIONS

7. The Application raised 4 separate allegations. Two of those are not pursued by the applicant, leaving allegations numbered 2 and 3 in the Application.[2]

On 26 March 2021 the Tribunal made an order by consent of the parties amending the terms in which the allegation numbered 3 was expressed. There is no need to set out the amended allegation here because a subsequent amendment was made to that allegation with the result that the remaining allegations come down to the following:

Allegation 2 is that the Respondent failed to comply with rule 794(2) of the *Supreme Court Rules 2000* (**Rules of Court)** in respect of money paid into Court by the Respondent on 2 August 2012 pursuant to s. 48 of the *Trustee Act 1898*.

Allegation 3 (as the result of the amendments made to it) is that over the period from 11 July 2012 to 23 March 2016 the Respondent communicated recklessly with the Complainant in a manner likely to mislead the Complainant to believe that the Respondent had control of the funds and was working to distribute the funds to the beneficiaries when this was not in fact true.

8. To the extent that it might be relevant to the Respondent's argument as to costs, we note at this point that we take the view that the Applicant did not require leave of the Tribunal, or the consent of the Respondent, to abandon those allegations it chose not to pursue; and we also note that, as might be expected, abandonment of allegations 1 and 4 was not challenged by the Respondent.

   On the plain words of s. s. 469 of the Act, we do not consider that leave is required to abandon discrete allegations, as opposed to circumstances in which an applicant wishes to terminate the entire proceedings.

THE ORDERS NOW SOUGHT BY CONSENT

9. In the Instrument of Consent, the parties have asked the Tribunal to determine by consent that the Respondent's conduct complained of constitutes unsatisfactory professional conduct.

   Leaving aside the question of costs, the only order that is sought by consent of the parties consequent upon that determination is an order that the Respondent is reprimanded.

BACKGROUND FACTS

10. The Tribunal accepts the Statement of Agreed Facts, so far as it goes, as a fair and reasonable summary of the general background to both allegations and some relevant facts established by the evidence, which comprises the agreed documents and the affidavits of the Complainant and Mr. Manser.

    Whilst the general background involves a complex history of family relationships, deceased estates, and trusts, the Tribunal makes no findings contrary to the Statement of Agreed Facts concerning the general background to the matter so it is only necessary at this point to record the bare facts necessary to an understanding of allegations 2 and 3.

    More detailed background will be covered with the evidence concerning the specific allegations.

11. At all times relevant to the allegations the Complainant was a Consultant Solicitor engaged by Gregsons Solicitors in the United Kingdom. He commenced private practice as a solicitor in 1969 and his engagement as a Consultant with Gregsons commenced in 2005.

    From 1973 he acted generally for members of a family with the surname Heaton-Armstrong, representing the interests of clients who at various times acquired entitlements to benefits from various family estates and trusts.

12. At all times relevant to the allegations the Respondent was an Australian Legal Practitioner practising as a principal of the Launceston firm Ritchie & Parker Alfred Green & Co (**RPAG**).

13. In or about 1974 RPAG completed the administration of three estates, and the distribution of assets of those estates, linked to the Heaton Armstrong family.

    Those estates are referred to in the Statement of Agreed Facts as RS Scott Estate, AF Scott estate and Tulloch Settlement Trust. It is apparent that the position was much more complicated than that but for present purposes it is convenient to simply refer to all entities covered by those descriptions collectively as the **Scott & Tulloch Estates**.

14 At a time that is now unknown RPAG also completed the administration and distribution of the estate of William Heaton Armstrong (**WHA Estate**).

15. When administration of the Scott & Tulloch Estates was completed in 1974, final accounts were prepared and forwarded to the residuary beneficiaries; deeds of release were signed; funds were retained in RPAG's trust account for the payment of RPAG's professional costs (accounts of which had yet to be prepared) and those retained funds were invested.

    However, for reasons that are not disclosed by any evidence, RPAG did not finalise the preparation of accounts. Income on the invested funds accumulated, with the result that the funds retained from the Scott & Tulloch Estates, whilst invested, lay dormant in RPAG's trust account ledger and increased in value over ensuing years.

16. Again, when administration of the WHA Estate was completed final accounts were prepared and forwarded to the residuary beneficiaries; deeds of release were signed; funds were retained for the payment of RPAG's professional costs (accounts of which had yet to be prepared) and those retained funds were invested.

    However, again for reasons that are not disclosed by any evidence, RPAG did not finalise the preparation of accounts. Income on the invested funds accumulated, with the result that the funds retained from the WHA Estate also, whilst invested, lay dormant in RPAG's trust account ledger and increased in value over ensuing years.

17. The result was that by December 2011 RPAG was in possession of accumulated monies to which various clients of the Complainant were entitled.

18. That came to light as the result of the Law Society's appointment of Mr. Manser, pursuant to s. 260 of the Act, as an investigator of the affairs of RPAG, in particular its trust account and client monies held on investment.

    In short, Mr. Manser's investigation relevantly disclosed the following trust money[3] amounts held in trust by RPAG to the credit of various estate and trust interests relevant to allegations 2 and 3, described as follows:

(a) estate of RS Scott - $5,750.98;

(b) estate of RS Scott (Tulloch Trust) - $4,441.51

(c) estate of T E Heaton Captain S Tulloch Trust No 1 - $2,987.74

(d) estate of RS Scott T E Heaton Armstrong Trust No 2 - $2,229.13

(e) TMR Heaton Armstrong Marriage Trust - $5,068.18

(the **Trust Money**).

19. Mr. Manser recommended that the Respondent take steps to identify the persons entitled to the Trust Money and that resulted in a course of correspondence between the Respondent and the Complainant that commenced in December 2011.

    That course of correspondence ultimately led to the payment of the Trust Money into Court on 2 August 2012. It is that payment into Court to which Allegation 2 relates.

20. The course of correspondence between the Respondent and the Complainant continued after 2 August 2012 and gives rise to Allegation 3. However, some of the evidence concerning communications preceding 2 August 2012 will also be relevant to Allegation 3.

ALLEGATION 2

Background and Evidence

21. The Complainant says in his affidavit (at pars. 7, 9 and 10) that:

    "*On 16th December 2011 Mr John Martin Green (Mr Green) first wrote to me in relation to funds owed to the estate of TMR Heaton Armstrong.*

    ....

    I was attempting to locate the relevant family members who may have been entitled to the funds.
    Mr Green and I remained in communication from December 2011."

22. In an email to the Applicant dated 19 April 2017 (AD60) the Complainant explained in more detail than appears in his affidavit the history of his engagement with RPAG and what followed the initial contact from the Respondent in December 2011, as follows:

    "*By way of history, I have acted for the Heaton-Armstrong family since the early 1970s and during the 70s and 80s have been in correspondence with Messrs Ritchie Parker, Alfred Green & Co ("RPAGC") regarding family Trusts administered by that firm. Since 1990, I have moved my practice on three*

occasions, and since 2005, I have been with Gregsons, solicitors. Whilst some Deeds and old files remain in my possession, others have remained stored (or destroyed) with previous firms.

On 16th December 2011, I received email notification from JG informing me in general terms that dormant funds held by RPAGC were due to the Estate of Michael [TMR] Heaton Armstrong's estate and Marriage Settlement Trust.

On 17th Jan 2012 I replied with Information about the estate, copy will, and confirming that no Probate had been obtained in view of the small size of the Estate. I suggested that the simplest course of action would be to "pay to Mrs [Hazel] Heaton-Armstrong [Michael's widow] to close the matter".

On 19th Jan 2012, JG said he would" follow up".

On 22nd March 2012, JG wrote two letters; the first setting out the formal position, the second explaining that the money held by RPAGC arose because when the Trusts had been wound up in 1974, RPAGC had reserved money for costs but never delivered a bill !!. The letter proposed that RPAGC retained 75% of the dormant funds and distributed the balance.

On 10th May and 6th June 2012, RPAGC sent reminders which I acknowledged on 6th June. [after 40 years, and having only some remaining papers, as well as having to locate each of the children of Mr and Mrs Heaton-Armstrong].

By 6th July 2012, I was making progress with the family and told RPAGC so."

23. It appears the Complainant gave that information to the Respondent by email dated 7 July 2012 because he went on to explain in his email to the Applicant dated 19 April 2017 that on 11 July 2012 he received an email from the Respondent, which is actually a letter that is AD19. The first three paragraphs of the letter are presently relevant and are as follows:

Thank you for your email of the 7 July 2012, unfortunately we are no nearer to receiving the necessary information and instructions to pay out the funds in hand to the various entities.

We are under substantial external pressure to complete these matter [sic] and pay out funds in hand.

We therefore wish to advise that unless all matters are resolved and funds paid out by 1 August 2012 we will pay the money to the Supreme Court of Tasmania. To obtain the money your clients will have to make an application to the Court and this will incur additional costs.

24. The reference in that letter to "substantial external pressure" is to a direction given to him by Mr. Manser.

As a result of his reports of his investigations of the affairs of RPAG, on 28 June 2012, Mr. Manser was appointed by the Law Society under s. 525 of the Act as a

supervisor of trust money of RPAG for the period from 4 July 2012 to 31 August 2012 (AD12).

In his affidavit, Mr. Manser says:

"*I ..... agree with the statement made by Mr Green [in a letter to the Applicant] about the Firm having no option to pay the funds into Court. Mr Green received a direction from me as Supervisor of the Firm's trust account that was compulsory in the circumstances and in my view it would have been an offence to disobey.*"

Whether or not it is correct to say that failure to make the payment into Court directed by Mr. Manser would have constituted an offence under s. 565 of the Act (which may be doubted), we accept that when the Respondent sent the letter dated 11 July 2012 to the Complainant, he was acting on a direction from Mr. Manser with which he believed he was bound to comply.

25. The precise sequence of events thereafter is difficult to determine from the somewhat confused presentation of the agreed documents. However, since there was no challenge to it, we accept as accurate in terms of timing and sequence the timeline set out in the Complainant's affidavit at pars. 11 - 17. Hence, based on the Complainant's affidavit and what we are able to discern from the agreed documents, we make the following findings, in which all references to communications are, unless otherwise specified, to email or emailed letters as attachments, with formal parts omitted where they are quoted.

26. The Complainant responded on 11 July 2012 (AD21/61) to say:

    It has been agreed in principle that all the Heaton-Armstrong Settlement and Estate funds be paid to Mrs Hazel Heaton-Armstrong.

    I am awaiting confirmation from the last few family members.

    I assume that all you require Is a formal instruction from my firm to this effect?

    I also assume that Mrs Adam or her daughter have given you separate Instructions in respect of the sums due to Mrs adam [sic]?

    It is plain that in that email the Complainant was responding to the letter of 11 July, but he gave no explicit acknowledgment of the time limit imposed in the letter. We find that he cannot have been unaware of it. He does not suggest otherwise in his affidavit (par. 11).

27. The Respondent replied on 18 July (AD23/65-67), setting out what he termed "minimum requirements" for payment of the Trust Money to "appropriate Beneficiaries, Executors or Trustees", and invited comment from the Complainant.

28. The Complainant replied in turn on 27 July (AD26/70) as follows:

    Thank you for your letter of 18th July

I have made considerable progress, and am now in touch by email with all the six Heaton-Armstrong children, although It would be premature to say that they are all In agreement ......

I am carrying out this work entirely without remuneration as I cannot see that I have any official position or prospect of remuneration.

I can conclude it but ***I wish to have your written assurance that no money will be paid into court until I conclude this or inform you in whole or in part that I cannot reach a conclusion.*** *I do not wish to see my benificent [sic] time wasted!!*

Alternatively I am happy to forward to you all the contact details, emails, and answers of which I am currently aware, to your letter of 18th July, and for you to progress matters from there*.*

Your urgent reply will be appreciated.

[Emphasis added]

29. The next communication from the Respondent to the Complainant by email dated 30 July (AD27/71) is in some respects obscure and not entirely responsive, but the specifically relevant parts of it are as follows:

    Following our annual external examination on behalf of our law society ***I am under strong external pressure to distribute the moneys*** *that had been invested by the firm for a considerable period.*

    ....

    We can finish up the matter *If you and we [sic] will contact the family. Could you please advise the family that we may charge them for the time we spend.*

    In the absence of additional information it is likely that *the time table as to payment into court will be adhered to.* [Emphasis added]

30. We interpret the second of those paragraphs in the Respondent's email of 30 July as an offer to "finish up the matter", that is, attend to distribution of the Trust Money, in response to the Complainant's suggestion that he send the Respondent all information then available to him and that the Respondent then "progress matters", subject to the second sentence in that paragraph as to charging.

    We take the view that each of the emphasised passages in those quoted paragraphs from the communication of 30 July might reasonably have been supposed by the Complainant to have at least left open the possibility that if he were to send the required information, rather than the Trust Money being paid into Court, the Respondent would attend to finalisation of the distribution of the Trust Money to those entitled to it.

That said, we accept that "the time table" [*sic*] could only have been understood by the Complainant to refer to that which was imposed in the emailed letter to him dated 11 July; and that even if this communication of 30 July softened a little the earlier statement that "*we will pay the money to the Supreme Court of Tasmania*", it still unambiguously asserted that adherence to the timetable was "likely".

31 Without any further communication to the Complainant, on 2 August, the Respondent paid the Trust Money into Court.

The Basis for Allegation 2

32. There were three separate payments into Court to the total of the Trust Money. It is clear that each of the allegations pursued against the Respondent relates to all three payments.

    There is no suggestion that any of the three payments were not properly made pursuant to s. 48 of the Trustee Act, at the time they were made.

    In all but one respect, there is no suggestion that any of the three payments into Court was not made in accordance with r. 794 of the Rules of Court, or was not permitted by the Trustee Act.

    In short, there is no allegation of misconduct concerning the fact of payment of the Trust Money into Court, or any procedural aspect of it, or the timing of that step taken by the Respondent.

33. However, allegation 2 is that in respect of each payment the Respondent failed to comply with rule 794(2) of the Rules of Court, which provides:

    > *If a trustee makes a payment into Court in accordance with subrule (1), the trustee is to give notice by post of that payment to each person who appears from the affidavit to be interested in, or entitled to, the money or securities paid into Court.*

34. It is not contended for the Respondent that notice under r. 794(2) was not required in respect of any of the payments into Court.

35. The parties chose to proceed with the Respondent first making his submissions in respect of the allegations, with the Applicant responding to those submissions. It is convenient to address the submissions in the same order.

Respondent's Submissions

36. The Respondent concedes that he did not give notice of the payment into Court in accordance with r. 794(2), but says that "the extent of persons who should have been notified is not agreed (to any extent that it is relevant)".[4]

    Through the submissions of counsel (Par. 35), the Respondent says (presumably directed to mitigation rather than exoneration) that:

(a) He is a conveyancing solicitor to whom the Rules of the Supreme Court "would be foreign territory";

(b) In making the payments into Court he was subject to the supervision of Mr. Manser who had directed that he make those payments; and

(c) He gave clear notice to the Complainant that the money would be paid into Court unless further information requested by the Respondent was provided within a strict timetable (which it was not).

The essence of those submissions is in par. (a). Paragraphs (b) and (c) merely add colour to the claim that the Respondent was ignorant of the statutory requirement in r. 794(2), as asserted in par. (a), as the basis for his conduct.

37. The Tribunal notes again that it was asked to determine the Application on the papers, and to make certain consent orders, without conducting a hearing.

    The parties at all times relevant to the proceedings have been represented by senior and competent counsel (in the case of the Applicant, for most of the proceedings by Senior Counsel) and must be taken to have known that s. 479 gives the Tribunal a discretion not to make the consent orders that were sought.

    The Respondent chose not to give any evidence.

    It follows that we have no evidence at all as to what the Respondent's state of mind was at the relevant time concerning r. 794(2).

38. The only evidence that anyone other than the Respondent participated in the preparation of the documentation necessary to make the payments into Court, or otherwise participated in the formal process of completing the payment into Court, is at AD24, where he says in an email to Mr. Manser dated 25 July 2012 that three draft affidavits (clearly those were drafts of the affidavits eventually filed with the payments into Court) had been "reviewed and amended by Hugh" (no doubt a reference to another principal of RPAG, Mr. Hugh Targett). The inference must be that the drafts were prepared by the Respondent.

    The affidavits in each case comply with the express requirements of r. 794(1) and they each include wording that is taken directly from r. 794(1). It has not been suggested that the Court rejected the proffered payment into Court or any supporting documentation by reason of any departure from prescribed formality.

    The only reasonable inference is that the correct procedures were followed, and the correct documentation was presented to the Supreme Court Registry.

    It is also reasonable to infer that the Respondent prepared the affidavits by reference to r. 794(1) and that absent some familiarity with the rule the Respondent could not have done that or achieved compliance with all that was required.

39. Some evidence that he was aware that what he was doing was governed by r. 794 of the Rules of Court is to be found in an email that he sent to the Supreme Court Registry (Mr. Brendan McManus) dated 6 September 2016 in which he refers to Mr. Manser advising him that the solution to clearing dormant trust account balances "*was to pay the funds to court pursuant to S 48 Trustees [sic] Act and Rule 794 of the Supreme Court Rules"* (AD63/140).

    In the circumstances we are not prepared to accept the first of the Respondent's submissions (par. [36](a) above) so far as it seeks to justify failure to comply on the basis of complete ignorance of the Rules of Court, in particular, r. 794.

40. As to the second of the Respondent's submissions (par. [36](b) above) we have already accepted that when the Respondent sent the letter dated 11 July 2012 to the Complainant, he was acting in the genuine belief that he was obliged to comply with a direction from Mr. Manser to pay the Trust Money into Court.

    That does not mitigate his failure to give notice of the payments into Court in accordance with r. 794(2).

41. The third submission (par. [36](c) above) references the letter dated 11 July 2012 (AD19) but the submission is only sound if regard is had to the combination of that communication and the email dated 30 July (AD27).

    We accept that by the combination of those two communications, the Complainant was undeniably on notice that unless he provided to the Respondent by 1 August 2012 sufficient information to enable payment of the Trust Money to the persons entitled to it, then it was likely the money would be paid into Court immediately thereafter.

    Again, however, that does not substantially mitigate this allegation.

42. Even if we were to accept that the Respondent had no awareness of r. 794(2) and that it did not occur to him that there might be some requirement to give notice to someone in terms of that rule, that lack of awareness either generally or by failure to acquire it by reasonable enquiry, having regard to his awareness of the potential consequences of payment into Court for those entitled to the Trust Money revealed by his correspondence with the Complainant, means that a finding of unsatisfactory professional conduct would be appropriate even without the Respondent's consent to it.

    In our view, where the only substantial explanation for failure to give notice in accordance with s. 794(2) offered by a practitioner who has chosen to engage in work that necessitates compliance with r. 794 for the purposes of s. 48 of the Trustee Act is ignorance of the requirement, that explanation involves conduct that engages the definition of unsatisfactory professional conduct in s. 420 of the Act, so far as it is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner.

In other words, a member of the public would in these circumstances have been entitled to expect that a reasonably competent practitioner, acting with appropriate diligence, being subjected to a requirement to make payment into Court in accordance with s. 48 of the *Trustee Act* would have familiarised himself with the requirements of the Rules of Court, to which reference is directly made in s. 48.

The case sought to be made on behalf of the Respondent necessarily involves acceptance of the proposition that the Rules of Court remained "foreign territory" to him, resulting in non-compliance with their requirements in connection with the payment into Court, precisely because took no steps at all to identify what those requirements might be.

Applicant's Submissions

43. In answer (it seems) to a proposition at par. 4(b) in the Statement of Issues that "*the extent of persons who should have been notified is not agreed (to any extent that it is relevant)*" (par. [36] above), the Applicant makes the point that the Respondent did not give notice in accordance with rule 794(2) of the Rules to any person.[5]

    That is undoubtedly correct.

44. When r. 794(2) speaks of the requirement to give notice "*to each person who appears from the affidavit to be interested in, or entitled to, the money or securities paid into Court*", it is referring to the affidavit that is required by r. 794(1) and specifically to the requirement in r. 794(1)(b) that the affidavit is to set out: "*to the best of the knowledge and belief of the trustee, the name and address of each person interested in, or entitled to, the money ...*".

    The gravamen of the allegation is that persons to whom notice ought to have been given were identified or identifiable from the affidavits that were lodged with the Trust Money.

    We accept that the affidavits in this case substantially complied with r. 794(1)(b) so far as it was possible to do so at the stage at which the affidavits were lodged with the Court along with the Trust Money.[6] The Respondent gave no notice of the payment in to Court to any person identified in the affidavits as a person he said he believed was still living.
    The Respondent also identified his belief, consistent with all evidence of lengthy correspondence with the Complainant, in the Complainant's role as solicitor for all identified persons, that is, as "*currently the solicitor for the Heaton-Armstrong family*". Nonetheless, he addressed no notice of the payment into Court to the Complainant in that capacity.

    At the very least, formal notice of the payments into Court could and should have been given to the Complainant.

45. We are prepared to accept that a finding of unsatisfactory professional conduct is appropriate in respect of Allegation 2. On no reasonable view does the conduct complained of in this allegation rise to the level of professional misconduct.

However, the two allegations are linked as part of the one continuing course of communications and conduct and should not be considered in isolation. We will therefore have more to say about the appropriateness of characterising as unsatisfactory professional conduct the whole of the conduct involved in the two allegations that now comprise the Complaint.

ALLEGATION 3

Background and Evidence

46. The course of correspondence between the Respondent and the Complainant continued after 2 August 2012.

    It is clear from the evidence that from the Complainant's point of view, that was on the basis of a belief that the Trust Money was still with RPAG and he was working toward accumulating and providing to RPAG all of the information necessary to enable payment of the Trust Money by RPAG to those who were entitled to it.

    The Complainant's lack of awareness that the Trust Money had been paid into Court was, as this allegation asserts, the result of him being misled into that state of mind by the Respondent.

    That state of mind was not initially induced by anything that the Respondent communicated to the Respondent but by silence. Very quickly, however, that state of mind was fostered both by continuing non-disclosure of the fact the money had been paid into Court and by the express terms of the Respondent's communications to the Complainant.

47. The real thrust of the allegation is that commencing from 11 July 2012 the Respondent communicated with the Complainant concerning the Trust Money in a manner that was likely to mislead the Complainant into believing that the Trust Money was still under the Respondent's control, and with reckless disregard for the likelihood that would be the result of his communications to the Complainant.

48. In our view, there is nothing about any communication prior to the first communication after the payment of the Trust Money into Court that could conceivably fall within this allegation.
    Whilst it is clear that the Complainant held out to the Respondent the hope, if not an expectation, that payment into Court might be avoided if he were permitted to continue his pursuit of all the required information and instructions from and concerning potential beneficiaries of the Trust Money, there is nothing in any of the correspondence from the Respondent up to 2 August 2012 that could objectively be characterised as likely to mislead in that way.

49. However, the allegation is clearly proved in respect of the Respondent's course of communication with the Complainant after 2 August.

    That conclusion is confirmed by chronologically mapping those communications, but beginning by way of background with the exchanges of 27 July (AD26/70) and 30 July 2012 (AD27/71), discussed at pars. [28] and [29] above.

The particularly significant parts of those two communications are as follows:

(a) 27 July, Complainant to Respondent:

..... I wish to have your written assurance that no money will be paid into court until I conclude this or inform you in whole or in part that I cannot reach a conclusion. ......

(b) 30 July, Respondent to Complainant:

In the absence of additional information it is likely that the time table as to payment into court will be adhered to.

We repeat our observations at par. [30] above as to our interpretation of the Respondent's email to the Complainant dated 30 July, so far as it referred to a timetable set by the earlier letter dated 11 July (AD19 - par. [23] above).

50. In light of the emailed letter from the Respondent to the Complainant dated 30 July, it is odd that the Respondent did not give the Complainant any notice, formally or informally, that the Trust Money had been paid into Court.

    Again, the Respondent has not provided any evidence of why that was not done. At most, he seems to rely on an assertion he has made to the Applicant a number of times in this context that he was told by Mr. Manser that once the money was paid to the Court his responsibilities were at an end (e.g., AD59/124; AD61/132; AD65/146).

    Mr. Manser rejects that assertion and says he does not believe that he would have left the Respondent with that impression (Manser Affidavit, pars. 23, 27). Mr. Manser has not been cross examined and we accept what he says as the more likely position.

51. So far as this proposition has been advanced more than once to the Applicant by the Respondent to justify his failure to give notice under r. 794 of the Rules of Court, we repeat what we said at pars. [38] and [39] above about his apparent awareness at the time he made the payments into Court that he was doing so pursuant to s. 48 of the *Trustee Act* and in accordance with r. 794 of the Rules of Court because that is what Mr. Manser had told him; and the fact that the affidavits he prepared reflect direct attention to r. 794(1) in some of the wording.

52. In any event, his first opportunity to tell the Complainant what he had done came quickly after 2 August.

    On 4 August the Complainant sent an email to the Respondent as follows (AD32/83):

    I note what you say.
    I'm just taking a pragmatic view that I need to finish this myself.
    I am awaiting the remaining info to answer all your queries in the 18 July letter.

It is clear that was a response to the sentence in the Respondent's email to the Complainant dated 30 July in which the Respondent offered that RPAG could "finish up the matter". The Complainant's response of 4 August must have immediately triggered a recognition on the part of the Respondent that the Complainant was not aware that the money was now in Court, and a need to tell him that.

But he did not tell the Complainant that, and on the evidence placed before the Tribunal, there was no reply at all by the Respondent to the Complainant's email of 4 August.

53. On 29 August 2012 the Complainant emailed a letter of that date to the Respondent (AD33/87-88) that commences by referring to the Respondent's emails to him dated 18 July and 30 July.

    The information contained in that letter was the kind of information the Respondent had been seeking prior to payment of the Trust Money into Court. It is apparent that when he sent that letter the Complainant was not aware that the money had been paid into Court and the only reasonable interpretation of it is that he was providing information that he supposed would enable the Respondent to make progress in identifying entitlements to the Trust Money and avoiding the need to pay into Court.

    We conclude that so much must have been very clear to the Respondent when he received that letter, if he gave it any attention.

    But there was no response to that letter.

54. By email dated 24 September 2012 (AD34) the Complainant noted that he had received no response to his emailed letter dated 29 August and sought one.

    Again, there was no reply from the Respondent.

55. In an email dated 9 October 2012 the Complainant again sought a response and in terms that on the face of it reflect lack of any awareness that the Trust Money had been paid into Court said: "*... could you just send me an email to confirm ... that this matter is still extant?*" (AD35).

    On the same day the Respondent finally replied by email: "*Email has been received & I will bring this closer to the top*" (AD35).

    Despite that assurance, by the end of 2012 there had been no further communication at all and, specifically, the Respondent had given no indication to the Complainant that the money was now in Court.

    Further, although he consistently claimed in his later communications to the Applicant that as far as he was concerned at the relevant time his and RPAG's responsibilities and obligations in connection with the Trust Money were at an end, he did not even communicate that view to the Complainant.

56. On any reasonably objective view, an email to the Respondent dated 5 February 2013 from the Complainant made it clear yet again that the Complainant was unaware that the Trust Money had been paid into Court. That email is as follows:

    Another 3 months have passed, and I am being pressed by the family for their money.
    Can I assume that you have everything you need? or are there further details or documents that you require?
    Being purely pragmatic, would it not be easier for you, on the basis that I can get instructions from all the late Michael Heaton-Armstrong's family and make an agreed distribution, if you sent Gregsons the money in hand and accepted my receipt, and closed the file for good?

    It might reasonably have been expected that would have triggered a prompt response correcting the obvious impression that the money was still under the control of the Respondent and/or RPAG, and perhaps stating that RPAG's responsibilities and obligations in connection with the Trust Money came to an end with payment of the Trust Money into Court. But that did not happen. There was no reply.

57. By email to the Respondent dated 21 March 2013 (AD37) the Complainant observed:

    The family continue to chase [the unfortunate] me!", and enquired: "*Can I report any progress?*

    The reply from the Respondent by email dated 24 March (AD37) was:

    My apologies for not replying earlier, I have been particlulary [sic] business [sic] I will check with my staff & get back to you

    Again, we emphasise that the Respondent has chosen not to give any evidence and to request that the Tribunal not conduct a hearing other than 'on the papers', so we are left to draw whatever inferences we determine are reasonably open to us on the evidence the parties have agreed we are to have regard to.
    In our view, the only inference reasonably open is that the Respondent's email to the Complainant dated 24 March 2013 was deliberately evasive, and in the result, misleading.

    The Trust Money had been paid into Court only just short of eight months earlier. Albeit that communications between the Respondent and the Complainant had been sporadic during that period, it is inconceivable that upon receipt of the Complainant's emails of 5 February and then 21 March the Respondent would not have recalled that the money that was the subject of those emails had been paid into Court (without any need to "*check with ... staff*"), or that it would not have been immediately apparent to the Respondent that the Complainant was not aware of that.

58. By email to the Respondent dated 8 June 2013 (AD38) the Complainant enquired of the Respondent:

A further 3 months have passed; have your staff made any progress?

That email attracted no response.

59. By email to the Respondent dated 11 September 2013 (AD39) the Complainant said:

    The Heaton-Armstrong family are really becoming rather agitated.
    Even if just for my sake, could your staff PLEASE conclude this matter.
    Surely your Courts or Professional body must be enquiring why this is not yet resolved ?
    I do hope for a comprehensive response very soon.

    The reply by email dated 20 September offered no more than:

    Just catching up with a back lodge [sic] of emails
    I will follow up ASAP

60. What can only be characterised up to this point as contemptuous disregard for the Complainant's enquiries and, through the Complainant, the Complainant's clients' interests, continued into 2014 and then into 2015.

    Further emails from the Complainant to the Respondent dated 27 March 2014 (AD40) and 14 August 2015 (AD41) went unanswered and finally, on 24 November 2015 the Complainant sent a letter of complaint to the Applicant (AD42).

61. Communication of that letter of complaint by the Applicant to the Respondent resulted in an undertaking given by the Respondent to the Applicant (through its Chief Executive Officer) on 24 February 2016 that he would, within one week after giving that undertaking, write to the Complainant "*with a view to resolving the matter*" (AD43).

    That undertaking was not complied with until the Respondent was reminded of it by letter to him from the Applicant's CEO dated 11 March 2016 (AD43).

    By letter to the Complainant dated 23 March 2016 (AD44) the Respondent informed the Complainant for the first time that the Trust Money had been paid into Court on 2 August 2014.

62. It is of concern that the letter dated 23 March 2016 offered no explanation, or justification, or apology for the delay in providing that information. In fact, the opening paragraphs of the letter are expressed in terms that impliedly and somewhat dismissively assert that no explanation or justification, and no apology, was necessary.

    The letter is quite short and it is enlightening to set it out in full because it is precisely demonstrative of what should have been communicated to the Complainant, at the latest in our view, in response to the email the Complainant sent to the Respondent on 4 August 2012 (AD32/83; par. [52] above):

We are aware that you have lodged a complaint with the Tasmanian Legal Profession Board and ***after consultation with Frank Ederle the Chief Executive Officer I have decided to write to you****.*

By our firm's letter of 11 July 2012 we advised that unless all matters were resolved by 1 August 2012 then funds would be paid to the Supreme Court.

As this had not occurred on instructions from the Firm's Trust Account Supervisor the moneys were paid to the Supreme Court the [sic] 2 August 2012. This was outside the firm's control.

Enclosed are the supporting affidavits lodged with the court.

The Estate has the option of applying to the Court to obtain payment of the funds to them.

Alternatively, rather than having to go through this expense our firm is prepared to facilitate the return of the funds to this firm and subject to us being satisfied as to the identity of the persons entitled to the funds we can then distribute the funds.

The return of the funds is subject to the courts agreement.

We would be pleased to receive your response .

If you require any additional information please contact the writer. [Emphasis added]

In our view, the emphasised passage in the first paragraph, when read together with the two paragraphs that follow, misrepresents the letter as having sprung from a magnanimous decision by the Respondent to do something that, by reason of the Complainant’s failure to fulfil some obligation, the Respondent should not otherwise have been under any obligation to do, rather than from the undertaking he gave to the Applicant on 24 February 2016.

63. In the course of the investigation of the Complaint the Respondent provided to the Applicant only a cursory explanation for his failure to inform the Complainant of the payments into Court before writing to him on 23 March 2016. In a letter to the Applicant dated 28 May 2018 (AD65) he said (AD65/146):

With hindsight it was regrettable that I did not reply to Duncan Rabagliati's email. As previously stated I was (perhaps mistakenly) relying on Mr Mansers' [sic] advice that the payment into Court was the end of the firms responsibility.

The first sentence does no more than express objective rather than subjective regret (not remorse) for the failure, but only with the benefit of hindsight, in the context of the Respondent dealing with the Complaint concerning his conduct. No such regret or remorse was expressed in the letter he sent to the Complainant dated 23 March 2016.

The second sentence provides no credible explanation whatsoever for failure to inform the Complainant that the Trust Money had been paid into Court as soon as practicable after that was done. For reasons similar to those discussed in par. [42] above, it is of concern that in offering that explanation to the Applicant the Respondent appears to have demonstrated no insight at all into what his (and so far as is relevant, his firm's) responsibility was.

Simple professional comity as between practitioners acting in the common interests of the Complainant's clients and in the case of the Respondent in the administration of trust monies, should have prompted the Respondent to give the relevant information to the Complainant at the latest on or very soon after 4 August when it should have been apparent to him that the Complainant was proceeding on an understanding that the money was still under the control of the Respondent and/or RPAG; and certainly at any one of many other points in the subsequent course of communications between them.

If the Respondent's failure to provide the information to the Complainant prior to 23 March 2016 was the result of him neither perceiving some obligation at that level, nor of him taking no steps to inform himself of any more formal obligation such as that imposed by r. 794(2), that lack of awareness of some continuing responsibility again means that a finding of unsatisfactory professional conduct would be appropriate even without the Respondent's consent to it.

64. However, the question for the Tribunal is whether it is prepared to make the determination the parties have asked it to make by consent, characterising this conduct as unsatisfactory professional conduct, or whether it considers that the proper determination is that it constitutes professional misconduct.

Statement Of Issues in respect of Allegation 3

65. This allegation is dealt with in Part B.3 of the Statement of Issues, pars. 5 and 6.

Relevantly, it is there said (somewhat by way of understatement) that the Respondent concedes his failure to respond "adequately" to correspondence between 29 August 2012 and about March 2016, involving unacceptable delays in his communications with the Complainant, and that such communications as there were from him should have been clearer including provision of the information that the Trust Money had been paid into court.

However, it is said that the Respondent does not concede that such conduct amounted to a misleading representation, either knowingly or recklessly, to the Complainant that he was working towards distributing the funds to the beneficiaries.

That does not address the allegation so far as it alleges as a fact that the misleading effect of his conduct extended to inducing in the Complainant a belief that the Trust Money was still under the Respondent's control. We take it that so much is therefore conceded by the Respondent but even if it was not, that is a finding we make, for the reasons expressed in the paragraphs above in which the

evidence of the course of communication between the Respondent and the Complainant is examined.

Respondent's Submissions

66. We can deal briefly with the Respondent's submissions, which substantially adopt and expand upon the effect of the arguments advanced by the Respondent to the Applicant in the course of the Applicant's investigation of the Complaint.

    In our view, neither the fact that the Respondent was warned that it was likely the Trust Money would be paid into Court absent the provision of further relevant information by the Complainant within a stipulated time, nor the fact that the payments into Court were made at the direction of Mr. Manser (Submissions, par. 37), is relevant to this allegation.

    Nor is it relevant that when further information was provided by the Complainant by email sent to the Respondent on 29 August 2012 (AD33/87-91), that information was not sufficient to establish relevant entitlement to any of the Trust Money (Submissions, par. 38). As we have already explained at par. [53] above, on any reasonably objective view of that letter, it should have immediately alerted the Respondent to the fact that the Complainant supposed that the Trust Money was still under the control of the Respondent/RPAG and that he was working cooperatively with the Respondent to establish entitlements to distribution of that money.

67. The relevance in the context of this allegation of what was said, and perhaps more to the point what was not said, in the Respondent's letter to the Complainant dated 23 March 2016 has been discussed at par. [62] above.

    Nothing that is said about that letter at pars. 46-50 of the Respondent's Submissions is relevant to this allegation.

    Those paragraphs canvass the alternatives offered in the letter as possible ways of getting the money back from the Court, and offer the nebulous conclusion that the Respondent's expressed belief in the possibility of RPAG being able to "facilitate" the return of the money from the Court means that throughout the period of more than 3½ years of his failure to communicate in substance with the Complainant was misinformed by a genuine belief that getting the money back from the Court would be easily achieved.

    Whatever might otherwise be the merit of that proposition, it neither explains nor mitigates the failure to communicate to the Complainant the fact that the money was now in Court and therefore no longer under the control of the Respondent or RPAG, and that the Respondent and RPAG were no longer taking any steps directed to working towards distributing the money to beneficiaries.

68. We reject the submission (Respondent's Submissions, par. 51) that:

    > *The absence of substantive communication from Mr Green between 29 August 2012 and 23 March 2016 is such that there is nothing that could constitute*

knowing or reckless communication likely to mislead. It was simply a failure to provide a substantive response.

It is plain that the Complainant was misled.

In our view, it is also plain that the course of communications that emanated from the Respondent, when read together with what was coming to him from the Complainant, as well as the communications that passed between them prior to 2 August 2012, and in the overarching context of what it was all about, was objectively very likely to mislead the Complainant in the ways it is alleged he was misled.

Further, in all of those circumstances, whatever might have been the Respondent's actual state of mind, he should have known that both what he said and what he did not say in his communications was likely to mislead the Complainant.

We find that the Respondent did communicate with the Complainant with reckless disregard for what should have been obvious to him from the Complainant's communications, that is, that the Complainant was being misled into believing that the Respondent had control of the funds and was working to distribute the funds to the beneficiaries when the Respondent knew that was not in fact the case.

The compelling conclusion is that the Respondent must have come to know at some early point in his communications with the Complainant after 2 August 2012 that the latter was not aware that the Trust Money had been paid into Court and was proceeding as before to work towards establishing entitlements to distribution of that money by the Respondent and/or RPAG, acting on the belief that the money was still with the Respondent and RPAG.

In our view, no other conclusion is reasonably open on all of the evidence but even if we are wrong as to that, it is plain that the Respondent conducted himself in his continuing, albeit sporadic and largely non-responsive, communications with the Complainant between 2 August 2012 and 26 March 2016 with reckless disregard for the plain indications that the Complainant was proceeding under the misapprehensions that are referred to in the complaint.

Applicant's Submissions

69. It is sufficient to observe that in reaching the conclusions that we have in the preceding paragraphs we have substantially accepted the arguments advanced by the Applicant at pars. 31-37 of the Applicant's Submissions.

    We have largely already outlined the gravamen of those submissions in discussion of the Respondent's submissions and there is no need to repeat them.

CHARACTERISATION OF THE RESPONDENT'S CONDUCT

70. We are prepared to make the determination the parties have asked us to make that the Respondent is guilty only of unsatisfactory professional conduct.

71. That characterisation would unquestionably be appropriate if Allegation 2 was the only matter to be determined on the Application. We are satisfied that the conduct complained of in that allegation fell short of the standard of competence and diligence that a member of the public would have been entitled to expect of a reasonably competent Australian legal practitioner in the circumstances of this matter, that being the straightforward definition of unsatisfactory professional conduct to be found in s. 420 of the Act.

72. It is with some hesitation, however, that we have come to the conclusion that it is also appropriate to apply that characterisation to the conduct complained of in Allegation 3, as sufficient recognition of the seriousness of the misconduct involved in that allegation, and therefore, having regard to the fact that the two allegations are really part of the same uninterrupted course of conduct, to the overall course of conduct covered by the two allegations.

73. Section 421(1) of the Act provides the following statutory definition of professional misconduct:

    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.

    Whilst we would have difficulty fitting the conduct complained of in Allegation 3 into either of the paragraphs in that definition, and in particular not into paragraph (b), the definition does not exclude the concept of professional misconduct developed over many years by the common law.

74. There are a number of statements of what constitutes professional misconduct in the common law sense. The most recent in this jurisdiction since the commencement of the Act appears to be in *Legal Profession Board of Tasmania v Kitto* [2019] TASSC 39 at [22], where Blow CJ referred to the relevant conduct in that case as:

    "*..... a clear case of professional misconduct ..... in the common law sense, in that [the practitioner] behaved in ways which would reasonably be regarded as disgraceful and dishonourable by legal practitioners of good repute and competence.*"

    His Honour thus adopted an earlier statement (cited by him at [12]) of the common law concept of professional misconduct before the commencement of the Act by Crawford J (as his Honour then was) in *Law Society of Tasmania v Turner* [2001] TASSC 129, 11 Tas R 1 at [44] and [45].

At [45] in *Law Society of Tasmania v Turner* Crawford J made the point that whilst regard may be had to evidence of what some reputable practitioners might think, it is for the relevant tribunal to consider the appropriateness of the conduct by reference not only to what a reputable practitioner might think, but what a reputable and competent practitioner might reasonably think.

75. As with "professional misconduct" the definition of "unsatisfactory professional conduct" is not exhaustive.

Although dealing with the definition of "unprofessional conduct" in the *Legal Profession Act 1993*, s. 56,[7] a distinction that Underwood CJ drew in *A Legal Practitioner v. Law Society of Tasmania* [2005] TASSC 28; (2005) 13 Tas R 448 between that definition and the definition in the same Act of "professional misconduct" is still relevant.

His Honour explained (at [17] and [21]) that professional misconduct involves conduct that falls so far short of the standards of hypothetical practitioners of good repute and competency that it has "*the flavour of being disgraceful or dishonourable*", or is "*stamped with the requisite degree of turpitude or shamefulness*" to justify that characterisation, whilst conduct that does not fall so far short of such standards as to attract those epithets, that is, conduct that does not carry with it the necessary attributes of dishonour or disgracefulness, or the necessary degree of turpitude or shamefulness, should be correctly characterised as unprofessional conduct (or, now, unsatisfactory unprofessional conduct).

76. His Honour concluded (at [21]): "*It is a question of degree*".

Leading to the same conclusion, in considering the "competence and diligence" aspects of the present statutory definition of unsatisfactory professional conduct, the *NSW Solicitors' Manual* (Riley) explains at [33,040.10] that:

> *These standards are not to be determined by reference to lawyers who are without fault, but of the reasonably competent lawyer. As such, the standard of reasonableness invoked by the definition aims to distinguish between conduct that falls within a tolerable range of human error and bad professional work which falls below reasonable standards of competence and diligence. Thus the answer to the question whether particular conduct constitutes unsatisfactory professional conduct is likely to depend on the measure or degree of the default.*[8]

77. *A Legal Practitioner v. Law Society of Tasmania* was a case that involved a finding of professional misconduct by the Disciplinary Tribunal established under the 1993 Act in respect of conduct that involved serious neglect and undue delay, which persisted over a period of just short of 18 months and deprived the client of the right to pursue proceedings in the Administrative Appeal Tribunal that he would have taken but for the conduct.

Underwood CJ held (at [21]) that whilst the Tribunal correctly found that the conduct involved "*wanton disregard of the client's instructions and a consistent failure to communicate with th[e] client*", it was "*not stamped with the requisite*

degree of turpitude or shamefulness that was necessary before it could be correctly characterised as professional misconduct".

78. We have come to the conclusion that whilst there might well be reasonable practitioners of good repute and competence who might think that the Respondent's conduct in this case crossed the line from unsatisfactory professional conduct to professional misconduct, in all the circumstances a finding of unsatisfactory professional conduct is the more appropriate outcome despite the duration of the conduct.

    Having said that, we consider that the conduct falls at the upper end of the range of seriousness for such conduct. It comes close to professional misconduct but does not reach the requisite degree of turpitude or shamefulness necessary for it to be correctly characterised as professional misconduct in the common law sense, and it does not meet the requirements of the statutory definition.

    For the sake of completeness, we note that whilst we have given close attention to paragraph (a) of the statutory definition of professional misconduct, we do not think that the course of conduct engaged in over a little more than 3½ years from August 2012 to march 2016 involving a single matter, and dealings with the one person, and a single narrow point of non-communication, qualifies as "*substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence*" of the kind contemplated by that part of the definition.

79. In coming to those conclusions we have had regard to the joint position taken by the parties in the Instrument of Consent at pars. 4 and 5.[9] We do not take issue in general terms with what is said in those paragraphs. However, that is qualified by two considerations already canvassed earlier in these reasons, that is:

    (a) What we have said about the extent of the lack of diligence that in our view necessarily attends acceptance of the proposition that the Respondent's non-awareness of the requirements of r. 794(2) of the Rules of Court was the result of unfamiliarity with the Rules of Court; and

    (b) Whilst we have stopped short of a finding that the Respondent set out to deliberately mislead the Complainant, we have made explicit findings at pars. [53], [55], [56], [57] (that there was deliberate evasion of the need to explain the position), [60] (that the Respondent exhibited contemptuous disregard for the Complainant's enquiries and, through the Complainant, the Complainant's clients' interests), and [62] (as to the tenor of the letter in which the critical information was finally provided) that come close to a finding to that effect.

80. We have not had regard to the argument at par. 75 of the Respondent's Submissions to the effect that it is relevant to characterisation of the conduct that the Complainant was not a client of the Respondent.

    In the particular circumstances, that is of no consequence to the degree to which the Respondent fell short of the standard of conduct established by the definition in s. 420 of the Act of what constitutes unsatisfactory professional conduct, just as it is of no consequence to an assessment of whether the conduct in question had

reached the requisite degree of turpitude or shamefulness necessary for it to be correctly characterised as professional misconduct.

81. We have also had no regard to the propositions advanced at pars. 77 and 78 of the Respondent's submissions that he was not responsible for the delay in distributing the original trusts, and was not responsible (to the extent that is correct, which is somewhat limited) for the decision to pay the monies into Court.

    As to the latter, we have accepted that when the Respondent sent the letter dated 11 July 2012 to the Complainant, he was acting on a direction from Mr. Manser with which he believed he was bound to comply (pars. [24], [40] above). However, the extent to which that to any degree justifies his conduct, which is highly limited anyway, is tempered by the fact that the evidence does not disclose that he ever drew to Mr. Manser's attention the communications he received from the Complainant in July 2012 and sought, on the basis of those communications, any relief from compliance with the direction to pay the money in pending further information from the Complainant.

82. Unhelpfully, the Applicant made no submissions to justify its agreement in pars. 4 and 5 of the Instrument of Consent to the characterisation of the conduct.

DETERMINATION AND ORDERS

83. We determine that the whole of the conduct complained of in Allegations 2 and 3 constitutes unsatisfactory professional conduct.

84. We are prepared to make, by consent of the parties, an order reprimanding the respondent.

85. The Respondent submits that a reprimand is sufficient. The Applicant essentially agrees.

    The Applicant sought orders involving supervised practice and compensation but does not pursue the application for those orders and we see no need to make any orders of that kind.

86. We are not prepared to accept that an order reprimanding the Respondent is sufficient having regard to all of the circumstances canvassed in detail in the preceding reasons.

    In determining what orders are appropriate we take into account our conclusions as to the proper characterisation of the conduct and of its level of seriousness within the parameters of the definition of unsatisfactory professional conduct, discussed at pars. [78] and [79] above, and the preceding paragraphs [70]-[77].

    Our findings have fallen just short of a finding of professional misconduct.

87. We adopt the statement by Cosgrove J in *Dickens v Law Society* Tas. Unrep. A42/1981 at pp. 15-16 as to the character of the power given to a tribunal such as this one to make orders disciplining legal practitioners. The short point that his

Honour made at p. 15) is that such powers "*are entirely protective in character and no element of punishment is involved*", but he continued:

> "*But to say that is merely to say that the powers are to be exercised for the purpose of, and in a manner seen to be likely to achieve, the maintenance of that high standard of conduct within the profession which will continue its good reputation, and so protect, not only the future of the profession, but also protect its clients from harm. With this object in mind, the Committee is required to look to the future. Even if the practitioner's misconduct be relatively slight, he may yet be struck off, if his capacities and attitude have been revealed to be such that his continuance in practice constitutes a threat to the profession. On the other hand, conduct which is itself more grave in nature, may not warrant striking off, if it is seen as a temporary and explicable departure from the practitioner's own high standards. The Committee's task is to uphold the dignity and standards of the profession. To enable them to do so, they have been given powers to fine, to order payment of costs, to suspend, and to strike off. The exercise of any of these powers inevitably involves a deprivation of one kind or another to the practitioner. But the deprivation is merely part of the exercise of the discipline of the profession. There is in it no retributive element, no intention to express outrage, as there sometimes is in sentences for crime. The order which the Committee is called upon to make is that order which, in its opinion, is necessary, and no more than is necessary, to maintain professional discipline and high standards of conduct. It is not entirely incorrect to describe such an order as punishment, and that term is often used ...... But it is punishment of a special kind, for a special purpose*." [Citations omitted]

88. The Respondent was admitted to practice on 25 June 1979. It appears he has practised ever since in Tasmania and we are told that he was a partner of RPAG for many years before 2012 and he remains a principal of the firm.

    The Register of Disciplinary Action kept and published by the Applicant pursuant to s. 497 of the Act at https://www.lpbt.com.au/register-search/ discloses this to be the Respondent's third disciplinary prosecution.

    On 2 April 2015 the Applicant found the Respondent guilty of unsatisfactory professional conduct, admonished him and ordered that he pay costs of $5,000.00 to the Applicant. The published reasons for that decision disclose that the conduct that was the subject of the complaint all pre-dated the conduct that was the subject of these proceedings, although the Applicant's determination came during the course of the conduct that is the basis for these proceedings. We give little weight to that previous finding since the matters of the complaint bear little similarity to those involved in this matter.

    On 9 February 2021 this Tribunal (as presently constituted) found the Respondent guilty of unsatisfactory professional conduct, ordered that he be reprimanded, and ordered him to pay the costs of the Applicant in the amount of $5,000.00.[10] Whilst some of the conduct that was the subject of those proceedings bears some remote similarity to the conduct that is the subject of these proceedings, all of that conduct post-dated the conduct that is the subject of these proceedings. Again, therefore, we give that previous finding little weight.

89. Nevertheless, we cannot entirely disregard the fact that the unsatisfactory professional conduct on this occasion did not occur within a professional career otherwise unblemished by conduct that has failed to meet the standard of conduct set by the definition in s. 420 of the Act and on this occasion, on our findings, it came close to being characterised as professional misconduct.

    Although Cosgrove J did not refer explicitly in *Dickens v Law Society* to "deterrence" as a function of the disciplinary powers conferred on the Tribunal by the Act, it is said that those powers "*exist only for the purpose of deterring practitioners from engaging in inappropriate conduct, and thereby protecting the public*".[11]

    We take the view that to merely impose on this occasion yet another reprimand can surely have little if any additional deterrent effect in that sense, and it would pay insufficient regard to the importance of the paramount public protective element of the disciplinary jurisdiction.

    Accordingly, a further order is necessary to reflect the gravity of the finding we have made as to the seriousness of the degree to which the Respondent's conduct on this occasion fell short of the standard against which his conduct was to be measured under s. 420 of the Act and the need to serve the purposes of the disciplinary powers identified by Cosgrove J in *Dickens*, focused upon addressing the need "*to uphold the dignity and standards of the profession*" by way of deterrence from future misconduct.

90. We consider that of the options available to the Tribunal under Division 3 of Part 4.7 of the Act, only a fine (s. 473(a)) is appropriate.

    We must ensure that any fine that we impose is "*no greater than is necessary to maintain professional discipline and high standards of conduct within the legal profession*".[12]

    We should take into account any order that we make that will require the Respondent to also pay costs.

91. We are told it is expected that if the Respondent is ordered to pay costs, the Board will claim costs in the order of $31,000.00 or thereabouts. We are also informed that the Respondent will have to pay any costs and fine personally, without indemnity from his practice. That means that a costs order will impose on the Respondent a substantial financial burden which we take into account and to the likely amount of which, even factoring in the possibility of some disallowance on taxation, we give significant weight.

    We are also told that the Respondent's own costs will be in the order of $10,000.00 (for which he will also be personally responsible), which means that the Respondent already faces a financial burden as the result of the proceeding that may exceed $40,000.00 before any fine is added to that burden.

92. We are told that the costs referred to at pars. [15] and [16] above, in respect of which the Trust Money was initially retained by RPAG as security, have still not been billed or recovered and it follows that to some small degree the Respondent might be taken to have relinquished some personal entitlement in that money.

93. Nothing has been put to us to suggest that, even taking into account the likely costs liability, the Respondent will not have the capacity to pay a fine within the limit set by s. 476(1)(a) of the Act, currently $17,300.00. We record that having been specifically afforded an opportunity to provide information and/or make submissions on this point, the Respondent elected not to do so.

    It has not been submitted that any order should be made under s. 476(3) of the Act, to mitigate the impact of any fine that is imposed or for any other purpose.

94 The Applicant has submitted that the fine should be at a level that recognises both the general and specific (personal) deterrent purpose of the jurisdiction and reflects some correlation with the fact that the Tribunal has stopped just short of a finding of professional misconduct. We accept that submission.

95. Having regard to all of those matters, and to all of the circumstances out of which the Complaint arose, we consider that a fine of $5,000.00 is appropriate.

COSTS

96. Paragraph 10 in the Instrument of Consent essentially repeats paragraph 4(f) in the Application and relevantly reads as follows:

    > *It is agreed that ….. pursuant to section 481 of the Act, the Respondent is to pay the Applicant's costs of and incidental to the Application as agreed or taxed in accordance with the Rules …..*

    The reference to "the Rules" is to the Rules of Court.

97. The Applicant in its submissions as to costs maintains its application for an order in those terms.

    It submits that upon a finding of unsatisfactory professional conduct the Tribunal is bound by s. 481(1) of the Act to make an order in those terms, and it is therefore bound to make that order in this case if it decides to make the determination sought by consent of the parties that the Respondent is guilty of unsatisfactory professional conduct.

    Subsection 481(1) provides:

    > *The Tribunal must make orders requiring an Australian legal practitioner whom it has found guilty of unsatisfactory professional conduct or professional misconduct to pay costs (including costs of the Board and the complainant), unless the Tribunal is satisfied that exceptional circumstances exist.*

It follows that the Tribunal is not bound to make an order in those terms if it is satisfied that "*exceptional circumstances exist*".

The Applicant makes no submissions on that point. That is because the Respondent accepts that there are no exceptional circumstances and that an order must be made under s. 481(1) requiring that the Respondent pay costs.

98. But the Respondent says in its brief written submissions as to costs:

> *The Tribunal has no inherent jurisdiction. It's power to make a costs order is limited to those given by statute. Section 481 covers only two outcomes being where there has been either a guilty finding or a not guilty finding.*
>
> *A withdrawn allegation falls within neither outcome.*
>
> *If contrary to the foregoing, the Tribunal has jurisdiction, then it could only be that a withdrawn allegation is equated to a finding of not guilty. If so, Section 481 insofar as it relates to a not guilty finding requires a finding that the sole or principal reason the proceedings were instituted was a failure to cooperate with the Board or there is some other reason warranting the making of the order. Neither condition is satisfied.*

99. Those submissions advert to the discretion conferred on the Tribunal by subsection 481(2), which provides:

> *The Tribunal may make orders requiring an Australian legal practitioner whom it has not found guilty of unsatisfactory professional conduct or professional misconduct to pay costs (including costs of the Board and the complainant), if the Tribunal is satisfied that –*
>
> *(a) the sole or principal reason why the proceedings were instituted in the Tribunal was a failure of the Australian legal practitioner to cooperate with the Board or prescribed authority; or*
>
> *(b) there is some other reason warranting the making of an order in the particular circumstances.*

100. In short, therefore, the Respondent seeks to limit the costs order mandated by s. 481(1) to costs incurred in prosecuting allegations 2 and 3 in the Application.

What it says, in effect, is that a decision made in the course of proceedings not to pursue a particular allegation removes the need for any finding in respect of that allegation and in the absence of any finding that the practitioner who is subject to the proceedings is either guilty or not guilty of unsatisfactory professional conduct or professional misconduct in respect of the conduct that is the subject of the abandoned allegation, neither subsection 481(1) nor 481(2) (nor, presumably, s. 481(3)) has any work to do.

Strictly speaking, the Respondent's argument does not involve consent to an order limited to costs of particular issues rather than the whole costs of the proceeding or the general costs of the proceeding.[13]

101. The Applicant in this case has been ultimately successful in the proceeding but has neither succeeded nor failed on the allegations that it chose not to pursue. It has neither succeeded nor failed on any particular issue arising in respect of any of the original allegations.

Rather, it has succeeded on the Application by obtaining one of two determinations that it sought from the Tribunal in the alternative, by virtue of which the Respondent will be found guilty of the lesser charge of unsatisfactory professional conduct, a finding to which he consented.

102. Subsection 481(1) is not concerned with discrete allegations or issues.

It embodies the general principle that 'costs follow the event' which in turn means that the party who on the whole succeeds in the proceeding receives the general costs of the proceeding.

In the case of s. 481(1), the word 'event' is not to be approached 'distributively', giving it a meaning that refers to the event of each allegation of misconduct contained in the application by which proceedings in the Tribunal are commenced.[14]

All that is required to trigger the requirement that the Tribunal must make an order for costs under s. 481(1) (in the absence of it being satisfied that exceptional circumstances exist) is a finding that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct.

Once that requirement is satisfied, the Tribunal then has a discretion to shape the order according to the criteria referred to in subsections (5) and (6), but not otherwise.

103. Subsection 5(b) arguably might provide a potential avenue for limiting a costs order to particular allegations, but we do not believe that is what is intended by, or included in, the words "*the basis on which the amount is to be determined*".

That phrase relates to determination of the amount of the costs that are to be paid where the order itself does not specify an amount.

The word "costs" where it appears in s. 481 takes its conventional meaning and in the absence of some other descriptor of the basis on which costs are to be taxed or assessed, means party and party costs.[15]

In the context of the conventional meaning of "costs", reference to the "basis" on which an amount of costs is to be determined is to one of the bases on which taxation (or assessment) is to be conducted and which determines the extent to which a costs order is to provide indemnity.[16]

In our view, the discretion given to the Tribunal by s. 481(5)(b) is to order that the amount of the costs that are to be paid be determined on one of those bases, that is, on a 'party and party' basis,[17] 'solicitor and client' basis[18] or 'indemnity' basis[19].

Neither party in this case has suggested that costs should be ordered otherwise than on a party and party basis and neither party sought any order specifying terms on which costs are to be paid.

104. In our view, the Respondent not having sought to argue that there are any exceptional circumstances that should displace the costs order mandated by s. 481 (1), the appropriate order in this case is that the costs the Respondent is to pay are the costs of and incidental to the proceedings commenced by the Application and that those are to be taxed and paid on a party and party basis.

It is appropriate that those costs be taxed in accordance with the Rules of Court and there will be an order to that effect pursuant to s. 481(7) of the Act.

ORDERS:

The orders of the Tribunal are:

(a) That the Respondent be reprimanded.

(b) That the Respondent is to pay a fine in the amount of $5,000.00, such fine to be paid on or before 31 March 2022.

(c) That the Respondent pay the Applicant's costs of and incidental to the Application, those costs to be taxed in accordance with the *Supreme Court Rules 2000*.

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1 The agreed documents are numbered and paginated. We have adopted that method of identification abbreviated to **AD[Doc. No.]/[page No.]** - e.g., AD70/5

2 To maintain consistency with all the materials that are before the Tribunal, we will retain that numbering.

3 Using the term "trust money" as defined in s. 231(1) of the Act.

4 Statement of Issues, par. 4.

5 Applicant's Submissions, par. 19.

6 The three affidavits are AD28, AD29 and AD30.

7 Paragraph (a) of which was in terms similar to the present definition of unsatisfactory professional conduct in s. 420 of the Act, that is:

(a) professional conduct that falls short of a standard of conduct that a member of the public is entitled to expect of a practitioner of good repute and competency

8 Updated November 2017 by Prof. Gino Dal Pont LLD

9 Paragraph 4 merely jointly concedes that the conduct complained of in the two allegations satisfies the definition of unsatisfactory professional conduct in s. 420 of the Act. paragraph 5 says:

The conduct does not justify a finding that Mr Green is not a fit and proper person to engage in legal practice. It falls short of Professional Misconduct within the meaning of section 421 of the Act because:

(a) The Respondent's lack of compliance with rule 794(2) of the Rules arose as the Respondent was not aware of it. It is noted that the rule is not usually encountered within the Respondent's area of practice.
(b) The Respondent's delay and inadequacy of response in his correspondence with the Complainant was not consequent upon a desire by the Respondent to deliberately mislead the Complainant.

[10] *Legal Profession Board of Tasmania v Green* [2021] TASLPDT 3

[11] *Legal Profession Board of Tasmania v Kitto* [2019] TASSC 39 at [23]

[12] *Legal Profession Board of Tasmania v Kitto* [2019] TASSC 39 at [23]

[13] The distinctions between those orders are explained by Professor Dal Pont in G E Dal Pont: *Law of Costs*, 4th edition, par. 1.22, p. 11.

[14] *Law of Costs*, 4th edition, par. 8.2, p. 209

[15] *Legal Profession Board of Tasmania v DEF* [2015] TASSC 40

[16] *Law of Costs*, 4th edition, par. 16.1, p. 556

[17] *Law of Costs*, 4th edition, pars. 16.14 - 16.7, pp. 564 - 566

[18] *Law of Costs*, 4th edition, pars. 16.18 - 16.22, pp. 566

[19] *Law of Costs*, 4th edition, pars. 16.23 - 16.29, pp. 569 - 572